IN THE SUPREME COURT
STATE OF FLORIDA

ALAN CHEEK,

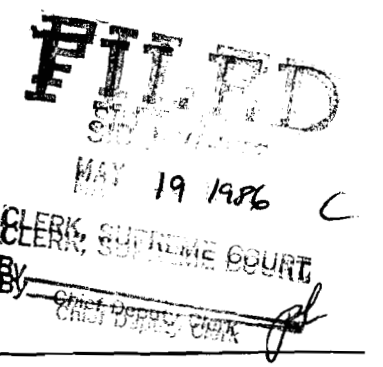
Petitioner,

vs.

DOCKET NO. 68,563

McGOWAN ELECTRIC SUPPLY COMPANY,

Respondent.



PETITIONER'S INITIAL BRIEF

M. Stephen Turner
CULPEPPER, PELHAM, TURNER
& MANNHEIMER
300 East Park Avenue
Post Office Drawer 11300
Tallahassee, FL 32302
904/681-6810

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner, Alan Cheek ("Cheek") was defendant below in an action at law brought by McGowan Electric Supply Company ("McGowan Electric") on a promissory note given by Cheek to pay the balance on a special account guaranteed by Cheek for materials used on his jobs by an electrical subcontractor named Thomas Cook. Cheek believed he owed the account balance when he gave the note as payment.

As the First District Court of Appeal noted in its first decision in this matter:

> The suit began as a common law action to collect an account stated which was evidenced by a promissory note. The defenses pleaded . . . were:
>
> (1) The promissory note was mistakenly given as payment of an account balance for which (Cheek) had no liability since charges to the account in excess of payments were not in compliance with the conditions and restrictions of the account or (Cheek's) guaranty;
>
> (2) (Cheek) should be discharged from liability because (McGowan Electric) knowingly (made) charges to the account which were not included in the guarantee of (Cheek).

Cheek v. McGowan Electric Supply Company, 404 So.2d 834, 835 (Fla. 1st DCA 1981). (Separate Appendix, A 1-4). The case had come on for trial and a jury was regularly impaneled, but after conclusion of all the evidence, the trial court had withdrawn the case from the jury and decided the issues non-jury. [A:2].

Cheek appealed that decision to the First District Court of Appeal, which reversed the trial court and remanded the cause for a jury trial on all issues. 404 So.2d at 837.

On remand, prior to the jury's deliberations, the trial court convened a conference to consider the appropriate jury charges and verdict form.

The special verdict form prepared by the Court [R:792-93; A:17-18] reflected the two separate defenses in parts "A" and "B" of question 1, requesting the jury to determine whether there were charges to the guaranty account:

> A) "Which were not within the contemplation of the agreement between the parties?" (first defense - improper charges)
>
> B) "Which McGowan Electric knew or should have known were improper?" (second defense - discharge)

An affirmative answer to part A was a finding in favor of the meaning of the guaranty agreement advanced by Cheek, that he was not responsible for charges unless the materials were used in his jobs. [A:8]. By finding for Cheek on this defense, the jury rejected McGowan Electric's suggested meaning that charges were improper only if McGowan knew or should have known that the materials were not going to Cheek's jobs. [A:10].

The jury was instructed to answer question 2 as to the dollar amount of improper charges if they answered "yes" to either question 1A or 1B or both. [R:861; A:5,11].

The jury was then told if they answered "yes" to question 1B that McGowan Electric knew about the improper charges (the discharge defense), they should answer questions 3 and 4 as to whether Cheek acted reasonably to avoid improper charges, and if not, what was the percentage of fault that should be assigned each party. [R:861-62; A:11-12].

On the face of the verdict form, the direction plainly appears that only if jury affirmatively answers question 1B (discharge defense) should they answer questions 3 and 4 relating to comparative fault. [R:358, A:6].

Likewise, the jury was instructed that Cheek's duty to use reasonable care related to McGowan Electric's duty to disclose debtor misconduct if the jury found for Cheek in answer to question 1B (discharge defense). The guaranty agreement did not require Cheek to monitor the account or impose any other duty on him regarding account activities; and the jury was not charged that Cheek had any duty of care in relation to question 1A (contract defense that Cheek did not owe improper charges beyond the terms of the guaranty). [R:855-58; A:7-9].

Because McGowan Electric had not pled or presented any matter of avoidance to Cheek's affirmative defenses, counsel sought definitive clarification from the trial court when it injected the issue of comparative fault with respect to the discharge defense. [R:783,788,796,802,805].

Cheek was first assured that any duty on Cheek to use reasonable care applied only to the creditor's failure to inform of the debtor's misconduct under the second (discharge) defense, and would have no effect on Cheek's first defense of entitlement to offset credit for all improper charges beyond the terms of his guaranty. [R:783-784]:

> MR. TURNER: What in the world is this? What are you charging? I don't follow this. This is under the misconduct?
>
> THE COURT: Yes.
>
> * * *
>
> MR. TURNER: The first thing that needs to be made clear is that this is separate from the other one. . . .
>
> THE COURT: I did that. The Defendant Cheek's next defense. Do you have any objection to that charge?" (e.s)

Then Cheek's counsel also clarified that the comparative fault verdict questions would not adversely affect a finding for Cheek of entitlement to an offset credit for improper charges not owed under the guaranty agreement under the first defense. [R:796-799]:

> MR. TURNER: Let me understand where we are coming from. There (are) two defenses. One defense is mistake. I don't have to prove the other defense at all. I just have--mistake is good or failure of consideration.

THE COURT: That is right. It has got one and two. You can answer yes or no on both of them.

MR. TURNER: Suppose the jury found on (the first affirmative defense) and they stated $15,000.

THE COURT: Then that is it.

MR. TURNER: Then we don't get into negligence or anything like that?

THE COURT: That is right.

MR. TURNER: Help me go through that....

THE COURT: All right. There are two issues in this case. . . . First, it is on the agreement, the meaning of the agreement. Were there charges made to the guaranty account guaranteed by the defendant Cheek which were not within the contemplation of the parties. In other words, if they find, as you assert, that they have to be used in the job, then they check yes. If they answer yes . . . then, we go to the next defense. . . . Then they are told that if the answer to (the second affirmative defense) is yes, then to answer the others. If the answer to (the second affirmative defense) is no, then just date and sign the verdict.

* * *

MR. TURNER: . . . You are saying if my interpretation is correct, then we don't need to get into fault-comparative fault. Is that what you are saying?

THE COURT: If they choose yours on your first ground, we don't get into any of that. They are instructed not to answer it.

Counsel next clarified that the jury could find for Cheek on both affirmative defenses, and that the trial court in such case would give effect to the discharge defense embodied in the Question B by subtracting the amount of improper charges from the total account charges to determine the amount actually owed under the guaranty, and discharge Cheek from liability for this amount to the extent he was not negligent. [R:803-806]:

MR. TURNER: Where are we if the jury checks (both affirmative defenses)?

THE COURT: All right.

MR. TURNER: Suppose the jury says, 'I think Mr. Cheek is right and I think both circumstances--'

THE COURT: On both grounds.

MR. TURNER: Yes, sir. Because that could happen, conceivably, the way I believe the evidence shows.

THE COURT: All right. If . . . they checked yes on both of them? All right. It says, please answer question number 2. . . . go to number 2, which is to state the amount. Then, it says, if you answered yes on (the second affirmative defense), answer the following. . . .

MR. TURNER: But now, . . . the second defense is totally pointless, because it doesn't address proper charges. . . The point of failure of the duty to disclose . . . is a discharge of any obligation that would otherwise be proper because it has increased the risk. * * * The point that I am having trouble with is that we are not asking the jury to determine the amount of proper charges that Alan would be relieved of.

THE COURT: Yes we are, yes we are. We are doing exactly that.

MR. TURNER: You are saying improper charges. You have only asked the jury to-- I see you are going to subtract. Now I am beginning to see where the Court is coming from.

THE COURT: When I interpret the verdict, I will subtract.

MR. TURNER: Okay.

THE COURT: If there is nothing to subtract, I won't subtract anything. If there is something to subtract, then I will subtract it." (e.s.)

Finally, counsel summarized these points step-by-step for the record through reference to the exact scenario that ultimately occurred, to wit: favorable jury findings on both affirmative defenses and a finding of comparative fault. The trial court explicitly confirmed that in such circumstances Cheek would not be responsible for any

improper charges and would be relieved of the remaining charges to the extent he was not negligent in failing to discover the misconduct. [R:806-807]:

> MR. TURNER: All right. Now, let me follow you, because . . . I want to follow it all the way through. Let's assume the jury finds half the charges are improper under defense 1. Then you are saying, okay, those get backed out because those are not within the terms of the guarantee.
>
> THE COURT: That is right.
>
> MR. TURNER: Now, we move to defense 2. If they find that each party was 50 percent responsible on a failure--duty of failure to inform, then the remainder of the charges would be split 50/50.
>
> THE COURT: Okay. Whatever percent.
>
> * * *
>
> MR. TURNER: So what you are saying is that if they find that there was a failure of duty to inform, then Mr. Cheek would be relieved of whatever percentage that he was not responsible for of any good charges?
>
> THE COURT: That is correct. (e.s.)

The jury found for Cheek on both defenses. [R:375; A:5]. It determined that $17,163.00 in materials not used for Cheek's jobs were improperly charged to the guaranty account; and having found in answer to question 1B that

McGowan Electric knew or should have known of the improper charge (without informing Cheek), also found Cheek 35% at fault in not acting reasonably to avoid the improper charges.

Despite these special verdict findings in favor of Cheek on both defenses, the trial court entered judgment in McGowan Electric's favor in the amount of $7,723.93 plus interest, for a total of $10,492.48. It computed this amount by subtracting from the $22,622.00 promissory note, 65% of the $17,163 improper charges or $11,155, 65% of the account finance charges or $1,240, and $3,000 in payments made by Cheek on the note. [R:398-399].

Thus, contrary to the pleadings, jury instructions, verdict form, and assurances made to counsel, the trial court gave effect to only 65% of the full credit due Cheek for improper account charges and gave no effect whatever to the partial credit due him against remaining unpaid charges under the discharge defense.

If full credit is given under the first defense for the improper charges not within the terms of the guaranty agreement, the result is that Cheek owes $549 plus interest, computed as follows:

$22,620	Promissory note to pay account balance.
-17,163	Improper charges found by the jury.
- 1,908	Finance charges in note.
$ 3,549	Amount due after full credit for improper charges (plus recomputed finance charges).
- 3,000	Credit for payments Cheek made on note.
$ 549	Amount due when first defense is properly applied plus interest.

When the discharge defense is effected, the result is that Cheek owes nothing, computed as follows:

$3,549	Account balance after full credit for improper charges.
x 65%	Discharge percentage.
$1,243	Amount owed when both defenses are correctly effected.
-3,000	Payments on note.
($1,757)	Refund due Cheek.

During the proceedings prior to the first (later reversed) trial, Cheek served an offer of judgment for $4,500 plus interest and costs at pretrial conference on March 19, 1980. [R:410]. On Monday, March 24, 1980, the date of discovery cutoff, ten days before trial, as set by pretrial order, Cheek hand-delivered an amended offer of judgment for $7,500 plus interest and costs. [R:411].

By post-judgment order, the trial court refused to give effect to either offer because they were not renewed for the second trial, and Cheek's motion to tax his costs and expert witness fees was denied. [R:427-28, 459-62; A:15-16]. The District Court later overruled the trial court's reasoning but upheld the result on the basis that the amended offer was untimely served.

In the same post-judgment order, the trial court denied McGowan Electric's claim for attorneys' fees because it failed to present evidence to the jury relevant to that issue, citing Newcombe v. South Florida Business Negotiators, Inc., 340 So.2d 1192 (Fla. 2nd DCA 1976). [R:427, 438-42; A:15]. Subsequently the trial court

reconsidered and receded from the earlier ruling that McGowan Electric had waived entitlement to attorneys' fees, relying on Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983), although noting direct conflict on the issue among the appellate courts of the state.

Cheek appealed and McGowan Electric cross-appealed. By opinion dated August 20, 1985, the First District affirmed the trial court's final judgment and its other post-judgment orders as to costs and attorneys' fees, and also affirmed the cross-appeal (thereby approving the jury finding on the meaning of the guaranty agreement and the amount of improper charges with respect thereto). Cheek v. McGowan Electric Supply Company, 483 So.2d 1373 (Fla. 1st DCA 1985), 10 FLW 2012. [A:19-22]. However, the opinion certified the following question as one of great public importance pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(v):

> Where attorneys' fees are pled in a successful suit for recovery pursuant to a promissory note, and the note provides that the maker shall pay 'reasonable attorneys' fees,' may the proof of such fees be presented for the first time after final judgment pursuant to a motion for attorneys' fees by the prevailing party?

On motions for rehearing and clarification [A:23-28], the First District, by opinion dated March 11, 1986, clarified certain misstatements in its opinion regarding Cheek's amended offer of judgment but adhered to its

decisions that Cheek's Amended Offer was not served more than 10 days prior to trial and was therefore ineffective under Fla. R. Civ. P. 1.442. The Court then certified four additional questions as follows:

> We do believe, however, that the issues affecting the validity of appellant's March 24 [amended] offer of judgment are of great public importance in view of the current legislative and judicial emphasis on use of the offer-of-judgment procedure as an effective means of settling disputes and reducing litigation, and therefore certify to the Supreme Court the following questions of great public importance:
>
> 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 pre-trial order that the discovery cut-off date shall be the ninth day before trial?
>
> 4. Whether an offer of judgment remains valid and outstanding after a new trial has been granted?

483 So.2d at 1378, 11 FLW 612 [A:29].

A notice for review was timely filed with this Court.

STATEMENT OF THE FACTS

Since the jury found for Cheek on both his defenses, he is entitled to a more complete view of the factual background of the controversy than presented in the opinion below.

McGowan Electric is an electrical materials supplier in Tallahassee. [R:684-685]. Cheek is a residential contractor who used one Thomas Cook as an electrical subcontractor on some projects. Cook likewise had regularly dealt with McGowan Electric for his supplies. [R:684-685]. A normal subcontractor relationship existed between Cheek and Cook, and this was known by McGowan Electric. [R:487].

In early 1977, Cook approached Cheek and informed him that McGowan Electric required extra collateral to enable him to continue working on Cheek's jobs. [R:619].

Cheek spoke by phone with McGowan Electric which apparently wanted Cheek to give an unconditional guaranty. [R:748-51]. But Cheek preferred to be responsible only for his job materials. [R:620, 655].

McGowan Electric's comptroller, Mr. Tatum, met with Cheek and agreed the guaranty was only for materials necessary for Cheek's jobs. [R:657,688].

McGowan Electric established a special guaranty account --"Alan Cheek jobs," which the company comptroller acknowledged was only for materials furnished to Cheek's jobs; no other charges were to be made. [R:496; Supp.R:20-25].

Cheek was not asked to provide a job list or anything else nor told anything else was necessary. [R:621-22, 662, 681-82]. Cheek assumed that McGowan Electric had done this many times before, had its own checks and balances, and would take whatever steps were necessary to administer the account and get with Cook for that purpose. [R:622, 654, 657].

Cheek did not request invoices because he could not read the electrical "lingo" and abbreviations used. [R:622]. McGowan Electric confirmed that general contractors who have account arrangements for electrical subcontractors usually never get invoices. [Supp. R.:45].

Cheek assumed that McGowan had set up similar accounts many times before and knew how to track materials into a job. [R:654, 672]. McGowan Electric admitted that the company had the capacity to determine which jobs materials went to, and could have followed Cook's purchases into the jobs he was working on. [R743-44].

However, the company admittedly did not monitor Cook's materials purchases and did not set up any monitoring procedures. [R:739]. Apparently, McGowan Electric decided to trust Cook to accurately report the purchases charged to the Cheek jobs special account.

McGowan Electric often just automatically charged materials to the Cheek jobs account without anything being said, and usually nothing would be identified when the materials were not going to Cheek's jobs. [R:503,739,744].

Large industrial wire, which could not be used for Cheek's residential jobs, was allowed by McGowan Electric to be charged to the Cheek jobs special account, as well as an excessive amount of commercial wire, only a few feet of which is needed for residences. [R:505, 601-02].

McGowan Electric knew that Cook had not lived up to the conditions of another special account; that he was $45,000 delinquent on his open account; and that except for one other job, he was not able to charge his non-Cheek job materials. [R:656, 685, 500-01, 496; Supp. R.:28-29, 36].

McGowan Electric also knew that Cook made a substantial charge to the Cheek jobs special account for non-Cheek materials and gave bad checks for a short period thereafter for attempted cash purchases. [R:757-58, 506; Supp.R.:40-45; PX6).

Yet McGowan Electric never apprised Cheek of even a suspicion of Cook's dishonesty. [R:632-33, 638-39, 775].

Several months into the special account, McGowan Electric called Cheek about the account balance, and Cheek would then ask Cook to make payments. [R:630-32]. Cook told Cheek that if joint checks were required, he could not make payroll and would go out of business. [R:678-79]. Cook promised that other monies were coming soon and he would pay the account then. [R:624-767].

Cheek was never informed of the amount of payments made on the account, and he believed that Cook was just not making payments. [R:630-33, 681-82].

Cheek was a one-man operation and had a lot of things going on, and he never suspected foul play. [R:663, 675-76]. Cheek agreed to "ride" with Cook a little longer, but he had no knowledge of any account irregularities. [R:631].

Cheek continued to pay Cook his job draws because he believed Cook was "down" and trusted him. [R:633]. But if he had known Cook was dishonest, Cheek would have closed the account and withheld any further draws and engaged a new subcontractor to avoid further charges. [R:628-39].

After the credit arrangement was terminated, Cheek gave a promissory note to McGowan Electric for the account balance believing that he was in fact obligated to pay that balance as guarantor. [R:645-49].

Later through expert analysis, Cheek determined that substantial improper charges had been made to the account for materials furnished to other jobs. [R:524-29; 582-85].

McGowan Electric acknowledged at trial that all improper charges should be backed out of the Cheek jobs special account even if the company was unaware of their impropriety when the charges were made. [R: 743, 756-57].

SUMMARY OF THE ARGUMENT

I.

As to the first certified question, attorneys' fees pursuant to contract are part of damages and must be presented to the jury as is required to enforce any other contract provision in an action at law.

The Second, Third, and Fifth District Courts of Appeal have squarely held that waiver occurs when a plaintiff does not present a claim for contract attorney's fees to the jury. The defendant's constitutional right to jury trial is abridged if a contract claim is not tried to the jury unless defendant stipulates to that procedure.

The First District erroneously followed dicta in Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983), which was a non-jury case where issues can be tried at separate times.

While better policy might be to try contract attorney's fees to the court after the jury has determined outcome, a defendant is entitled to have all contract claims presented to the jury as a matter of constitutional right. Any procedurally advantageous policy choice for non-jury cases must yield to this consideration.

II.

As to the remaining certified questions, Cheek's amended offer of judgment sufficiently complied with the direction in Rule 1.442 for service more than 10 days before trial begins. An over-technical construction should not be made to defeat a good faith offer.

The amended offer was served on Monday, March 24th, the same date as discovery cutoff set by the pretrial order, (which was the tenth day prior to scheduled trial), and immediately followed the taking of a party deposition the previous Friday, March 21st; hence, informed settlement upon completion of discovery was promoted.

The amended offer revised the initial offer of March 19th by increase of $3,000 based on information gained from intervening discovery; hence the amended offer relates back to service of the initial offer which was still outstanding.

The amended offer was hand-delivered and received by McGowan Electric at the same time as would an admittedly valid an offer served by mail the previous Friday or Saturday; hence McGowan Electric had the time envisioned by Rule 1.442 to consider the amended offer.

Finally, since the 11th day before trial fell on a weekend, pursuant to Rule 1.090a, the time for service was extended until the Monday on which the amended offer was hand-delivered; hence the amended offer was timely served beyond dispute.

The unaccepted offers of judgment remain operative throughout the case to control recovery of costs and fees even though a second trial occurs. This is consistent with and promotes the purpose of Rule 1.442 to encourage early settlement.

III.

This Court should also decide the merits of the case which is now before the Court with opportunity to correct the unjust result and confusion in the law created by the decision under review.

The jury finding for Cheek on his first defense was disregarded in contravention of the issues in the case. The jury adopted Cheek's meaning of the guaranty agreement, and found that Cheek did not owe for materials unless they were used on his jobs, and that there were $17,163 of improper charges. The District Court proceeded as if the jury adopted McGowan Electric's meaning of the guaranty agreement, or as if the agreement imposed a duty on Cheek to monitor the account when no such provision existed.

A guarantor's liability is measured by his contract. He is entitled to stand on the letter of his agreement and is protected by its condition on his obligation to pay.

Whether a guarantor exercises due diligence to learn of improper charges is unrelated to his contractual undertaking unless the agreement provides otherwise. A guarantor cannot

be made to partially owe for charges he does not agree to pay absent intentional waiver or ratification which were not involved in this case.

The District Court's misconception of these fundamental principles infects the whole opinion. If its reasoning were correct, a person must pay for an incorrect charge to his account to the extent he was not careful to discover the posting error.

In plain terms, a guarantor cannot be made to pay for charges he did not agree to pay because he did not know about them. The contrary holding below must be quashed.

The District Court also erred in not effecting the jury finding for Cheek on the discharge defense. A creditor owes a legal duty to inform the guarantor of account misconduct and to not deal with the debtor to the detriment of the guarantor. To take advantage of discharge from all account liability, the guarantor owes a corresponding legal duty to exercise care to discover the misconduct, as reflected by the jury instructions, verdict form and trial court assurances in this case. Accordingly, after credit for the full amount of improper charges, Cheek is discharged from 65% of remaining liability on his guaranty, as the extent he was at fault for not discovering the misconduct.

The result is that Cheek owes nothing and should be the prevailing party.

ISSUE I

MCGOWAN ELECTRIC'S FAILURE TO PRESENT ITS CLAIM FOR ATTORNEYS' FEES TO THE JURY PRECLUDES A POST-FINAL JUDGMENT AWARD OF THOSE FEES BY THE TRIAL COURT.

It has long been established in this state that, absent stipulation of the parties, "[i]n a jury trial a claim for attorneys' fees predicated upon a provision in the contract between the parties becomes an element of damages and must be determined by the jury." Lhamon v. Retail Development, Inc., 422 So.2d 993, 994 (Fla. 5th DCA 1982); Commodore Plaza at Century 21, etc. v. Cohen, 350 So.2d 502 (Fla. 3rd DCA 1977), appeal dismissed, 362 So.2d 1051 (1978); River Road Const. Co. v. Ring Power Corp., 454 So.2d 38, 41 (Fla. 1st DCA 1984).

As stated in Newcombe v. South Florida Business Negotiators, 340 So.2d 1192, 1193-94 (Fla. 2d DCA 1976):

> "Since many breach of contract actions are tried without a jury, there is a dearth of authority as to whether it is proper for the court to award attorney's fees following a jury verdict. The sole cases we have located on this point are 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), both of which hold that such fees must be awarded by the jury. We agree with the rationale of these cases by our sister court. In a jury trial, a claim for attorney's fees predicated on a provision in the contract between the parties becomes an element of damages and must be determined by the jury. Plaintiff in this case did not produce evidence on attorney's fees before the jury and, therefore, waived any entitlement for this element of damages." (e.s.)

Accord, Mystery Fun House, Inc. v. Magic World, Inc., 417 So.2d 785, 786 (Fla. 5th DCA 1982):

> "The trial court was correct in denying Magic World' s motion for attorneys' fees * * * Since Magic World did not present any evidence for the jury as to a reasonable attorneys' fees and did not request an instruction that the jury consider attorneys' fees as an element of damages, Magic World waived that issue. Where a jury fails to allow attorneys' fees, there is no authority for a trial judge to assess attorneys' fees over and above the jury verdict." (e.s.)

However, in Taggart Corp. v. Benzing, 434 So.2d (Fla. 4th DCA 1983), the Fourth District Court reached what at first blush appears to be an inconsistent result. The court concluded that attorneys' fees predicated upon a prevailing party provision in a contract may be awarded upon proof after final judgment: "To require each side to be put to the proof when both cannot prevail is a waste of time." 434 So.2d at 966. "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." Id.

However, Taggart was a specific performance action tried in equity and not before a jury, which lends support to the Fourth District's policy consideration. There is no harm in waiting until after judgment for the court in a non-jury case to decide contractual attorneys' fees along with taxable costs. The trial court has inherent

power to sever issues it decides as trier of fact. See Lutsch v. Smith, 397 So.2d 337 (Fla. 1st DCA 1981). Thus it is not necessary in a non-jury or equity case for the parties to agree that contractual attorneys' fees may be assessed by the Court after trial.

In this case, however, Cheek had a constitutional right to jury trial which he vindicated in the first appeal. The First District remanded the case back to the trial court with specific direction "to proceed with jury trial on all issues." [A:4]. If McGowan Electric wanted to recover attorneys' fees, it was obligated to present that issue to the jury.[1]

Any attorneys' fees sought to be recovered by McGowan Electric, in a very real sense, are "special damages to compensate for the wrong done." Glusman v. Lieberman, 285 So.2d 29, 31 (Fla. 1st DCA 1973). Entitlement to and the amount of such fees are an "essential element going to make up the ultimate verdict for." Id. Their determination cannot be taken from the jury due to notions of administrative convenience.

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[1]When a note provides for payment of all costs including attorneys' fees upon successful suit, such fees are part of damages to be determined by the jury. The court has no authority to assess them as statutory taxable costs. See Wallace v. Gage, 112 Fla. 730, 150 So. 799 (1933). Of course, once the jury is discharged, any claim for such contract fees is waived.

The Fourth District's rationale that the amount of attorneys' fees can be more easily decided after the outcome is known is inapplicable to jury-tried actions. After all, who is better situated to evaluate that outcome and decide the relative entitlement? The judge usually has, at best, a second-hand insight into how the jury rendered its verdict. The jury knows the factors making for its verdict, both equitable and evidentiary. The jury is well-suited to consider the "outcome" of the case because the jury has determined that outcome. See Solar Research Corp. v. Parker, 221 So.2d 138, 139, notes 3 & 4 (Fla. 1969), where this court rejected the First District's dicta that a jury cannot evaluate attorneys' fees.

Indeed, in this case, if the jury had been presented with deciding attorneys' fees for McGowan Electric, it is highly unlikely that much if any award would be made. Yet McGowan Electric, whose two attorneys had no burden of proof, seeks almost $30,000 in fees to be assessed by the Court.

In any event, the so-called policy consideration is academic anyway. It must yield to the right to jury trial conferred by the Constitution.

The holding of Taggart v. Benzing should be limited to non-jury actions, consistent with the recent decision of Naimoli v. Landis, 11 FLW 749 (Fla. 2nd DCA March 2, 1986), following Taggart in a non-jury context, without receding

from Newcombe v. South Fla. Bus. Negotiators, supra. Where jury trial attaches by right, this Court should reject the obiter dictum of Taggart Corporation v. Benzing and adhere to the view that, absent stipulation, an award of attorneys' fees based upon contract is an element of the damage to compensate a party for the alleged breach of that contract and must be determined by the jury or deemed waived. E.g., Lhamon v. Retail Development, Inc., supra (5th DCA); Commodore Plaza at Century 21, etc. v. Cohen, supra (3rd DCA); Newcombe v. Florida Business Negotiators, Inc., supra (2nd DCA).

Accordingly, the question certified in the August 20, 1985 Opinion of the First District should be answered in the negative, and the Opinion reversed for its contrary position.

ISSUE II

THE AMENDED OFFER OF JUDGMENT WAS TIMELY SERVED IN SUFFICIENT COMPLIANCE WITH RULE 1.442 AND WAS EFFECTIVE FOR THE REMAINDER OF THE CASE.

The District Court recognized that the certified issues pertaining to Cheek's amended offer of judgment would become moot if upon review, this Court modified the decision on the merits by allowing Cheek full credit for the improper account charges beyond the terms of the guaranty as discussed in Issue III. [A:20-21]. The original offer of $4,500 plus interest and costs was unquestionably in

compliance with Rule 1.442, and is in excess of any ultimate recovery when full credit is given.[2]

The District Court correctly held that the unaccepted original and amended offer of judgment continued effective for the second trial [A:21].

Rule 1.442 contains no requirement that an offer must be renewed if another trial is ordered. Nor does it specify that an offer must be addressed to the trial which resulted in the judgment for less than the offer. The rule simply looks to whether "the judgment finally obtained . . . is more favorable than the offer."

This express language leaves no doubt that renewed offers are not required. The rule is designed to induce a party to settle litigation and avoid the necessity of any trial. See Santiesteban v. McGrath, 320 So.2d 476 (Fla. 3rd DCA 1975). The party who refuses to accept a offer higher than the amount he finally recovers must bear the costs of litigation from the time those costs could have been avoided by settlement. If renewal of an offer were required for a

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[2]Under prevailing law in the First District, an offer of judgment was not required to specifically include attorneys' fees as part of the offer, since all costs could be contested upon settlement of the merits. Wisconsin Life Ins. Co. v. Sills, 368 So.2d 920, 922 (Fla. 1st DCA 1979). If attorneys' fees were damages, they were waived and therefore inconsequential; or alternatively, they were costs which the parties could allow the court to assess and were therefore covered by the offer. On the other hand, if attorneys' fees were taxable costs, the offer of judgment still provides for them to be paid. Thus, regardless of how attorneys' fees are characterized, specific reference to them is not material to the validity of the offer and amended offer.

second trial, the defendant would be unable to shift the burden of costs incurred during the period between the offer and the renewal.

In any event, Rule 1.442 uses language identical to Federal Rule 68, which was amended in 1968 to add the operative language about the judgment finally obtained being less favorable than the offer, and about subsequent offers not being precluded. As explained in 7 Moore's Federal Practice §68.06, these provisions were intended to make all unaccepted offers operative for as long as the case continued:

> "[A]s 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."

Accordingly, the last question certified by the First District in the Opinion on Rehearing [A:29] should be answered in the affirmative and the position of the First District in this regard be affirmed.

Amended Offer was timely served

Rule 1.442 states: "At any time more than ten days before the trial begins, a party defending a claim may serve an offer... ." Since the rule is designed to encourage settlement and protect the party who is willing to settle

from the burden of further costs, an "overly technical interpretation" should be avoided. See Tucker v. Shelby Mutual Ins. Co., 343 So.2d 1357, 1359 (Fla. 1st DCA).

The amended offer was served while the original offer was still outstanding and unaccepted. It immediately followed a party deposition and was clearly intended to revise the outstanding offer. Just as an amendment to a complaint relates back to filing of the original, so also should an amended offer relate back to the original to determine timeliness of service if no prejudice results.

The only purpose of requiring service more than ten days prior to trial is to prevent the offer from remaining open during trial thereby giving plaintiff an tactical advantage in deciding whether to accept after seeing how the case unfolds. See Greenwood v. Stevenson, 88 F.R.D. 225, 228-29 (D.R.I. 1980).

McGowan Electric was not prejudiced by the amended offer. Only it stood to gain a tactical advantage by extension of the response time one day into trial. In addition, McGowan Electric had ample time before trial began to evaluate the amended offer. It makes no sense that the validity of the offer should turn on whether the trial was continued for one day.

Moreover, the amended offer was hand-delivered on March 24th, the tenth day prior to beginning of the later aborted jury trial proceedings on April 3rd. Had the offer been

served by mail on the eleventh day, as Rule 1.442 permits (service being defined elsewhere in the rules as by mail or delivery), it would have arrived a day or two later than the day of actual receipt. Yet because the offer was hand-delivered, McGowan Electric actually received it sooner. Indeed, a concededly valid offer mailed the prior Friday, when McGowan Electric's party representative was deposed, would not have been received any sooner. Again, the substance of Rule 1.442 was sufficiently satisfied.

Still further, the tenth day before trial in this particular case coincided with date of discovery cutoff. Trawick Florida Practice & Procedure §25-15 notes that Rule 1.442 "can be effectively used after discovery has been completed when the costs of trial well be heavy." The rule is designed to give litigants an opportunity to make an informed judgment on the practicalities of settlement after discovery is completed. The offer here fulfilled that purpose. Cheek should not be prejudiced because under the calendar that year made it reasonable for the trial court to set discovery cutoff on the tenth day before trial, which was a Monday, instead of the normal ten days before trial, which would have fallen on Sunday.

Rule 1.442 should not be read hypertechnically. Only substantial compliance to foster the liberal purpose of promoting settlement is required. If the rule is read literally, an offer made one day prior to a trial whose commencement is continued for ten days would be effective

(since the trial did not begin until eleven days later). Yet the good faith offer here, in spite of the reasonableness of its timing under the circumstances, was held untimely by the decision below.

In any event, the amended offer strictly complies with the time prescribed for service when the time computation provisions of Fla. R. Civ. P. 1.090(a) are applied. That rule directs:

> "In computing any period of time prescribed...by these rules ... the last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday."

The period under scrutiny is from service of process until the eleventh day before trial. An offer of judgment may be served any time within that period. Where that eleventh day, however, is a Saturday, Sunday, or holiday, the time is extended to the next workday, in this case the following Monday, March 24, 1980, on which the amended offer was served by hand-delivery.

Finally, overriding policy considerations dictate that the amended offer should be operative. Regardless of technical niceties, after the facts were known, a good faith offer to fairly end the litigation was ignored by McGowan Electric.[3]

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[3]Cheek had made an even larger offer of settlement before the litigation ever commenced which was rejected outright. McGowan Electric instead chose to bring suit with the leverage of attorneys' fees provision of the note. See Motion to Supplement Motion for Rehearing filed in the First District on September 16, 1980. This Motion was denied by the Court as not authorized by the appellate rules.

In C.U. Associates, Inc. v. Aetna Casulty and Surety Co., 472 So.2d 1177 (Fla. 1985), this Court held that when a good faith settlement offer is made prior to trial for the same amount ultimately recovered before award of attorneys' fees, the Plaintiff is not a "prevailing party", and no attorneys' fees can be awarded. It makes no difference whether the settlement offer was not a formal offer judgment in compliance with Rule 1.442.

Hence, this Court has established judicial policy that all good-faith settlement offers should be given operative effect to deny later recovery of costs and attorneys' fees for a pyrrhic victory. In this way, the burden of fair dealing and good-faith negotiations does not lie only upon defendant. In laying down this policy, this Court held:

> "To award attorneys' fees and costs when any judgment is won, without reference to earlier, bona-fide good faith offers to settle the claim, allows the plaintiff a free throw of the dice in an attempt to squeeze the last penny out of the claim. In effect, the Third District's construction of the statute (authorizing fees) leaves the defendant ripe for extortion.
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> Thus where a bona-fide, good-faith settlement offer has been unequivocally refused, formal tender of the settlement amount is not required. (cite omitted). Nonetheless, the offering party bears the burden of proof in subsequent litigation that the offer was in fact made in good faith.* * * If, however, the bona-fide offer is proved, respondent shall not be entitled to attorneys' fees." 472 So.2d 1178-79.

Here, there is no question that prior to trial, Cheek made a bona-fide offer of settlement in excess of the judgment amount. Even if the amendment to his initial offer was not served in strict compliance with Rule 1.442, there were nine full days before trial began to consider and accept the offer.

In sum, on the date of pretrial conference, Cheek made an offer of judgment for $4,500 plus interest and costs, and six days later, on the date of discovery cutoff, Cheek hand-delivered an amended offer increasing the principal amount to $7,500. Cheek reasonably complied with the spirit and purpose of Rule 1.442. Having fairly attempted to settle, he should receive the benefits of the rule over McGowan Electric who was unwilling to settle.

Accordingly, the first three questions certified by the First District in the Opinion on Rehearing [A:29] should be answered in the affirmative; and if any of them is so answered, the contrary position of the First District should be reversed.

ISSUE III

THE DISTRICT COURT'S OPINION SHOULD BE QUASHED ON THE MERITS BECAUSE:

A. CHEEK WAS ENTITLED TO FULL CREDIT FOR THE IMPROPER CHARGES WHICH HE DID NOT OWE UNDER THE TERMS OF HIS GUARANTY.

B. CHEEK WAS ENTITLED TO DISCHARGE FROM THE REMAINING CHARGES BECAUSE THE CREDITOR KNEW OF THE DEBTOR'S MISCONDUCT BUT DID NOT INFORM CHEEK TO HIS DETRIMENT.

When payment is mistakenly made pursuant to a contract for which there is no enforceable obligation to make payment, recovery may be had or credit obtained. See Florida Statute §725.04; First State Bank of Ft. Meade v. Singletary, 169 So. 407, 408 (Fla. 1936).

Thus to the extent Cheek had no preexisting liability to McGowan Electric under the guaranty agreement, Cheek was entitled to defeat recovery of the payment note against McGowan Electric the original payee. See 4A Fla.Jur. Bills and Notes §158: "If a note is based on the mistake of the maker as to the existence of a debt due . . . , the note is not enforceable as between the maker and the payee."[4]

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[4]Also see e.g. Fairfax Nat'l Bank v. Burke, 176 P.2d 220(Okla. 1946): "If defendant in fact owed Plaintiff nothing at the time she executed the note in question and executed the same under the mistaken belief that she still owed the plaintiff a balance in that amount, she should not be required to pay same."

When a note given as payment is held by the original creditor, it is the same as cash payment, except that recovery for mistaken payment takes the form of a credit against the note instead of a cash refund.

Obviously, some error or lack of care is associated with any mistaken payment; but whether made by cash or note, recovery is not precluded on that account. See Maryland Casualty Co. v. Krasnek, 174 So.2d 541, 543 (Fla. 1965)(mistakes do not ordinarily result from the exercise of due care). Voluntary payment is not a defense under Florida law period. The creditor cannot retain monies he was not owed by labeling payment as careless.

The Record demonstrates that when Cheek gave the note he assumed honesty and believed he owed the account balance. Therefore, no issue existed as to Cheek's entitlement to go behind the payment note if he proved that the underlying debt was not owed in whole or part. This was recognized in both the first opinion of the District Court (A1-4) and by the trial court in the jury instructions and verdict form. The issues at trial decided by the jury dealt with what debt actually existed between the parties.

The inquiry at trial focused on the extent of Cheek's contractual liability under the terms of the guaranty (first defense), and whether he had been discharged from any actually existing liability by McGowan Electric's breach of

legal duty beyond the contract (second defense). As stated in Dorsey v. Maryland Nat'l Bank, 334 So.2d 273, 274 (Fla. 3rd DCA 1976):

> "The guarantor and the creditor are parties to contract of guaranty and consequently any rights of the guarantor as against the creditor are determined in the first instance by the terms of the guaranty contract. Beyond these rights, however, the law imposed on the creditor an obligation not to deal with the debtor or any security for the debt in such a manner as to harm the interest of the guarantor."

We will show that a basic infirmity in the District Court's decision is the failure to distinguish between these two distinct determinants of guarantor liability.

A. The Contract (improper charges) Defense

The extent of Cheek's liability on the guaranty account is measured by the conditions and restrictions of his guaranty agreement. A guarantor is bound to the extent indicated in his contractual undertaking and no further; he will not be liable unless the conditions defining the situation in which he agrees to pay have occurred. See 28 Fla. Jur.2d Guaranty §41; 38 Am.Jur.2d Guaranty §73-74; Stern's Law of Suretyship (5th Ed.) §4.2, p.61. The jury was so instructed in connection with Cheek's first defense.

The issue of whether there were charges that were beyond the terms of the guaranty agreement and thus not owed by Cheek was resolved by the jury under question 1A. The trial court instructed the jury that an affirmative answer to that question was a finding for Cheek that he was not

responsible for the charges for materials not used for his jobs.[5] The jury answered affirmatively for Cheek and found that there were $17,163 in improper charges. These findings have not been disturbed.

Accordingly, Cheek is entitled to recover (receive credit) for all improper charges. He did not agree to pay for those improper charges.

It is immaterial whether improper charges may have been avoided if the account had been set up a different way or if Cheek had tried to monitor the account himself. Although a guarantor of a master card account, for example, may have been able to discover that the debtor was charging more than his guaranty limit does not make the guarantor liable for the excess charges. A guarantor relies on restrictions and conditions of the guaranty to limit his responsibility, and he is entitled to stand on those contractual terms.[6]

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[5]By virtue of established mechanic's lien law concepts, a supplier must traditionally show that materials supplied to a subcontractor were incorporated into the job to require the owner/contractor to pay for them. The essence of Cheek's guaranty was to reverse this burden. [R:671-72]. Instead of McGowan proving incorporation or use of the materials in Cheek's jobs, the burden shifted to Cheek to negate incorporation or use if he contested any presumptively correct charges. Cheek met that burden, and any inability to rebut was due to McGowan Electric's failure as creditor to establish any verification procedures. [R:555].

[6]See and Compare Aetna Casualty and Surety Co. v. Monsanto Co., 11 FLW 979, 980 (Fla. 1st DCA April 28, 1986) (absent contractual condition requiring inspection, a buyer is not prevented from recovery under the contract by what he could or should have discovered before use). Also see Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983), cited by the District Court in note 7, (there is no negligent breach of contract because the parties bargain to allocate their own risks).

Confusion of the District Court

The District Court somehow became confused enough to recite that the determinative issue under the contract defense was whether Cheek paid for goods he knew or should have known were improper charges at the time of payment.

We have already demonstrated that the time of payment had nothing to do with this case and that negligence has nothing to do with a guarantor's contractual liability. We will now attempt to unravel the assemblage of noted sources that apparently confused the District Court.

1. Waiver and estoppel

The District Court relied on Ruwitch v. First Nat'l Bank of Miami, 291 So.2d 650 (Fla. 3rd DCA 1974), where a corporate officer forged guaranties of other officers with larger limits. However, subsequently, those officers knowing of the prior forgeries, nonetheless gave a higher guaranty, thereby waiving any fraud defense and becoming liable on their new guaranty agreement. As to their claim of misrepresentation because they were not told the right amount of existing charges when they gave the new guaranty, the Third District held this information was equally available to them as corporate officers. This claim, however, had nothing to do with their contractual liability, but rather was analogous to the second defense in this case on the issue of breach of legal duty, for which the trial court instituted on equal fault.

The District Court also cited a line of cases in note 4 of the opinion dealing with renewal of a note as estopping challenge of the prior note (usually prior knowledge existed). This is because a maker's renewal serves to reaffirm his own liquidated debt. In this case, however, Cheek did not participate in the underlying account transactions, and the payment note was not a renewal. Only if Cheek had renewed that payment note could this defense arguably apply.

Obviously, if a guarantor knows of and authorizes excess or improper charges, he may ratify them or be estopped from denying liability. These are contract avoidances. See 22 Fla.Jur.2nd Estoppel and Waiver §41-42. However, none of these contract defenses was pled as avoidances or proved in this case.[7]

2. Apportionment of fault

In note 7 of its opinion, the District Court again relies on cases wholly unrelated to this case. In Print Pack, Inc. v. Container Technologies, 464 N.E.2d 298 (Ill. App. 2nd 1984), the court only awarded 30% of the contract

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[7]General carelessness is not sufficient to work estoppel, and it is not sufficient that negligence only contributes to the result. There must be a breach of duty owed to the person claiming estoppel, and negligence cannot be the approximate cause of fraudulent wrong doing of a third person. Also, neglect may not be asserted as estoppel where full disclosure and circumstances effecting the contract has not been made by the other party. See generally, 28 Am.Jur.2d Estoppel and Waiver §61.

price to the seller because 70% of the product was defective. The seller's damages were limited by his own failure to comply with the contract conditions.

In Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983) damages were reduced for failure to mitigate where the plaintiff actively compounded his own damages upon learning of them. Mitigation was not an issue in this case and is not applicable. The improper charges were not damages to Cheek. He had no responsibility for them, and was not aware of them in any event.

In Bildon Farms, Inc. v. Ward County Water Imp., 415 So. 890 (Tex. 1967), plaintiff recovered inseparable damages caused by breach of contractual duties of both plaintiff and defendant to the extent the damages were caused by defendant. Again, in this case, there was no contractual duty on Cheek's part and no damages were caused. The issue is simply whether Cheek is obligated to pay under the terms of his agreement.

Similarly in Jimani Corp. v. S.L.T. Warehouse Co., 409 So.2d 496 (Fla. 1st DCA 1982), the various parties breached their contractual duties causing inseparable damage, which is not involved here.

3. Interrelating first and second defenses

In note 3 of the opinion, the District Court quotes portions of the jury instructions applicable only to the discharge defense, as if they were applicable to determining Cheek's contractual liability.

Note 5 of the opinion quotes from Lewinson v. Frumkes, 64 So.2d 321 (Fla. 1952) dealing with negligence as defeating the defense of fraud.

It is obvious that the District Court transposed to the contract defense, Cheek's corresponding legal duty of care applicable in the context of McGowan Electric's legal duty to inform of debtor misconduct. To the extent Cheek could have discovered wrongdoing, he may not be prejudiced with respect to his actual liability, and his discharge be reduced to that extent. But this is not the equivalent of ratification of improper charges, for which no liability exists under the guaranty agreement. These improper charges are not Cheek's responsibility and cannot be made his responsibility absent knowledgeable waiver or ratification, not involved here.

At instruction conference, the trial court recognized that comparative fault could not enlarge Cheek's obligation under the guaranty. The due care/percentage of fault instruction was given only in the context of the discharge defense, not the improper charges contract defense. Repeated assurances were given that these matters would not apply against the improper charges that the jury found under question 1A were not within the terms of the guaranty.

Even the verdict form refuted any connection of comparative fault with the contract defense embodied in question 1A. Only if the jury found under question 1B (the second defense) that McGowan Electric knew of Cook's

misconduct was the jury to proceed with the remaining questions dealing with comparative negligence.

Stated differently, if the jury had found for Cheek only on question 1A, but not found for Cheek on question 1B as to McGowan Electric's knowledge, Cheek would have received full credit for the improper charges. In this circumstance, the jury would not have answered the comparative fault questions 3 and 4, and there would be no such findings to misapply.

Yet because the jury found McGowan Electric more culpable, Cheek has received less benefit.

In short, the final judgment and the opinion of the District Court, punish Cheek because McGowan Electric knew about the improper charges. This absurd result is an obvious misapplication of the verdict and the law.

B. The Discharge (breach of legal duty) Defense.

The District Court erred in rejecting as insufficient Cheek's discharge defense embodied in verdict questions 1B, 3 and 4. The jury found that McGowan Electric had actual or constructive knowledge of the improper charges by the account debtor and was 65% responsible for Cheek failing to discover the problem (and thus be on guard to factor out improper charges and minimize any further loss for unpaid proper charges).

We agree that a creditor does not have to inform a guarantor of normal charges, even when the guarantor is

unaware that the creditor continues to rely on the guaranty, as in Bryant v. Food Mach. and Chem. Corp., 130 So.2d 132 (Fla. 3d DCA 1961).

We also agree that a guarantor is not discharged "merely" because charges exceed a stated monetary limit in the guaranty, in Wishart v. Gates Rubber Sales Co., 163 So.2d 503 (Fla. 3rd DCA 1964).

In this case, however, there was fraudulent conduct with respect to the account. Fraud obviously does not occur when an account debtor charges beyond a guarantor's dollar limit because there is a definite stated ceiling on the guarantor's liability.

But where the conditions and restrictions of the account and guaranty are dependent upon extraneous facts that must be honestly recorded as between creditor and debtor, recordation of improper charges as proper is fraud on the guarantor who unwittingly pays the account without knowledge of any wrongdoing.

The District Court's first Opinion in this case, based on the same trial evidence, found Cheek's discharge defense viable. That decision correctly recognized as applicable to this case the principle the guarantor is discharged from all liability under the guaranty when the creditor has knowledge that the debtor is making fraudulent charges not included within the guaranty [A:2]. See 38 Am.Jur.2d Guaranty §59:

> "While the creditor or obligee is held to be entitled to recover where the evidence shows that he and the defendant

> guarantor were equally ignorant of the debtor's wrongdoing, (a) different conclusion follows from proof of the fact that the plaintiff creditor had knowledge of the debtor's misconduct. The creditor is shown by this fact to have no better right or standing than the debtor, and hence, not to be entitled to recover on the contract of guaranty. Knowledge on the part of the creditor as to the imposition practiced on the guarantor may be imputed from his knowledge of other facts." (e.s.)

See also 28 Fla.Jur.2d Guaranty §43 (any fraud on part of creditor touching the guaranty contract annuls it); and Id. §47 (creditor owes guarantor a continuous duty of good faith in dealing with the obligation, and concealment of material facts effects a discharge of the guarantor from liability on the contract).

Indeed, the jury instructions given by the trial court recognize the applicability of the discharge defense and correctly delineate the creditor's obligation to inform of account misconduct by the debtor.

In holding that a creditor's knowledge of misconduct does not discharge the guarantor, the District Court ignored its own decision in Schaeffer v. Gilmer, 353 So.2d 847, 851 (Fla. 1st DCA 1977):

> "The law imposes on a creditor an obligation not to deal with the debtor or the security in such a manner as to harm the interest of the guarantors."

While Schaeffer indicates that a creditor need not obtain information from others about the debtor's activities (unless prescribed by contract), still the creditor cannot

deal directly with the debtor to perpetuate wrongdoing with respect to the account to the detriment of the guarantor.

In this case, Cheek lost opportunity to take steps to minimize guarantor liability.[8] If Cheek had been made aware of Cook's dishonesty, he would not have "ridden" him. He would have withheld draw monies and applied them to the account so there would have been no unpaid charges for materials that went to his jobs.[9]

While McGowan Electric called Cheek about the account balance, Cheek was never informed about the payments made by Cook, or of the circumstances known to McGowan that Cook was being dishonest. From Cheek's viewpoint, the account balance was building because Cook was not making payments. Without knowing that Cook was dishonest, Cheek was willing to allow Cook to continue charging on the assurance that monies were expected shortly to pay the account. When that did not materialize, Cheek paid the account without knowing of the fraud.

While Cheek could have been more careful to monitor Cook's charges, the jury found he was less at fault in

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[8]Indeed, the expense in this litigation to ferret out the improper charges, and the inability to receive full credit for those improper charges after two trials and two appeals are detriment that discharge rectifies.

[9]For example, some $5,200 in proper charges could have been paid for if Cheek had been informed about Cook's dishonesty after McGowan Electric unquestionably had actual knowledge of Cook's wrongdoing. This amount more than exceeds the unpaid account balance remaining after full credit is given for improper charges. [R:582-83].

discovering the improper charges than McGowan Electric, presumably because he was not dealing directly with the debtor in regard to the account and lacked sufficient information at the time to realize any wrongdoing.

If there had been equal opportunity for knowledge of the wrongdoing, the creditor would prevail on the discharge defense. The jury was so instructed, [A:10]. Perhaps the trial court inquired as to percentages of fault for this reason. But since the jury found Cheek was less knowledgeable and less able to avoid the charges than McGowan Electric, the discharge was not defeated and should have been extended completely, or at least to the extent Cheek was not at fault.

The trial court, of course, assured counsel at charge conference, that if the jury found for Cheek on the discharge defense, the amount to be discharged would be determined by subtracting the amount of improper charges from the total account charges and applying the comparative fault percentage to the difference.

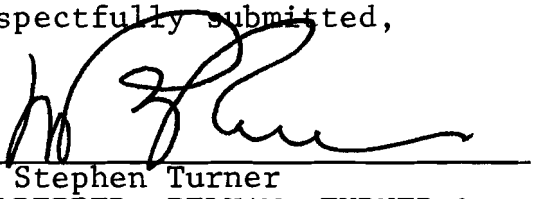
As a practical matter, it is unconsequential whether the discharge is total or partial, because the result here is not changed. After contractual liability is reduced for the improper charges under the first defense, Cheek is discharged to a greater extent than the minimal remaining liability.

Cheek was therefore the prevailing party entitled to judgment, and the District Court Opinion should be quashed in its entirety.

CONCLUSION

For the foregoing reasons, the Opinion of the First District should be quashed in whole or substantial part. Petitioner should prevail completely or to a greater extent on the merits, and recover his post-offer costs, and not pay attorneys' fees to Respondent.

Respectfully submitted,

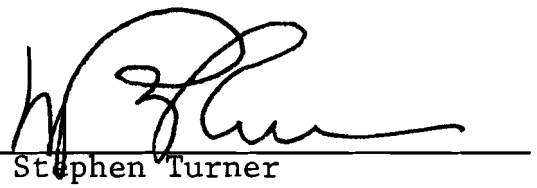


M. Stephen Turner
CULPEPPER, PELHAM, TURNER & MANNHEIMER
300 East Park Avenue
Post Office Drawer 11300
Tallahassee, FL 32302
904/681-6810

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to WILLIAM C. OWEN, ESQ., P.O. Drawer 190, Tallahassee, FL 32302; by U. S. Mail this 19th day of May, 1986.



M. Stephen Turner