IN THE SUPREME COURT OF FLORIDA

ARKY, FREED, STEARNS, WATSON,
GREER, WEAVER & HARRIS, P.A.,

Petitioner,

vs. CASE NO. 71,719

BOWMAR INSTRUMENT CORPORATION,
an Indiana corporation,

Respondent.
_____/

BOWMAR INSTRUMENT CORPORATION,
an Indiana corporation,

Petitioner,

vs. CASE NO. 71,720

ARKY, FREED, STEARNS, WATSON
GREER, WEAVER AND HARRIS, P.A.,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER/CROSS-RESPONDENT, ARKY, FREED, STEARNS, WATSON, GREER, WEAVER AND HARRIS, P.A.

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I.
STATEMENT OF THE CASE AND FACTS

This is a proceeding to review the Third District's decision in *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 12 FLW 2750 (Fla. 3rd DCA Dec. 11, 1987), in which the Court certified a conflict between decisions. Unfortunately, the District Court resolved only one of the issues which had been presented to it on appeal, and did not reach four others. Ideally, we would prefer not to trouble the Court with argument upon the issues which the District Court did not reach. Our opponent has cross-petitioned, however, and since this Court now has jurisdiction over the entire case, it has become necessary for us to protect all our positions here in the event of an adverse decision on the single issue decided by the District Court. We will therefore begin from scratch, as if this were an original appellate proceeding, and present all the issues which were the subject of our initial appeal to the District Court.

This proceeding arises out of an action for legal malpractice, and challenges the validity of a final judgment in the amount of $448,500.00 entered in favor of Bowmar Instrument Corporation (hereinafter Bowmar), against the law firm of Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. (hereinafter Arky Freed) (R. 510).[1/] The relevant factual background begins in 1979, when Bowmar entered into various contracts with Fidelity Electronics Ltd., Inc. (hereinafter Fidelity) to manufacture and provide it with keys and keyboards for various computerized chess and bridge games which Fidelity was manufacturing and marketing (T. 127-36). Although Bowmar ultimately delivered the components which it had agreed to provide, the deliveries were considerably late, and Fidelity failed to pay for some of them (T. 136-43, 708, 937-45, 1000-24, 1040).

Bowmar hired Arky Freed to bring suit against Fidelity to recover approximately

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1/ R.: Record on appeal.
SR.: Supplemental Record on Appeal (consisting of transcript attached to "Motion to Supplement Record on Appeal" filed in District Court on April 10, 1987).
T.: Separately paginated transcript of trial testimony.

$127,000.00, and suit was filed against Fidelity in the United States District Court for the Middle District of Florida (T. 46-63, 81, 108-16). Fidelity counterclaimed against Bowmar, seeking damages for breach of contract and fraud (T. 63, 108-16). Fidelity thereafter filed a similar suit against Bowmar in the Circuit Court in Dade County, and joined an employee of Bowmar, Joe Walker, as a defendant (T. 108-16). The Dade County suit was tried first; Fidelity prevailed on its breach of contract claim; Bowmar and Walker prevailed on the fraud claim; and judgment was entered in Fidelity's favor in the amount of $1,000,000.00 (T. 189, 260).[2/] Bowmar thereafter declined to pay Arky Freed approximately $100,000.00 of the amount which it had been billed for legal services (T. 64-69, 100-01, 120, 545).

On December 5, 1984, Arky Freed filed suit against Bowmar to recover its unpaid bills (R. 1). Bowmar counterclaimed on May 29, 1985, alleging that Arky Freed had been negligent in its representation of Bowmar in the underlying action in several particulars, and that its negligence had caused damages in excess of $1,000,000.00 (R. 12). The relevant allegations of Bowmar's counterclaim read as follows:[3/]

> COUNT I
> Negligence
>
> 10. Plaintiff realleges paragraph 1 thru 8 above [introductory allegations] as if fully set forth herein.
>
> 11. Despite the pendency of the aforesaid described federal action which required a Counterclaim to be filed as a compulsory

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[2/] The substance of that litigation is summarized by the opening statements and closing arguments of counsel delivered in that case, which were read into evidence at the trial of the instant case (T. 878-95, 1097-1222).

[3/] The Court need not concern itself with digesting the specifics of the allegations which follow, because all of them were ultimately abandoned by Bowmar--and a different theory of liability not alleged in the counterclaim was ultimately relied upon at trial. It is necessary to quote the allegations of the counterclaim here, however, because some of the issues on appeal will turn upon the *absence* of that different theory from the counterclaim, and the prejudice which that omission caused Arky Freed in preparing for trial and defending against the counterclaim. Since Arky Freed was initially left in the dark concerning the nature of the claim upon which Bowmar ultimately prevailed at trial, we will leave the Court in the dark for the moment as well.

Counterclaim pursuant to Rule 13, FRCP, Fidelity Electronics Limited, Inc., also filed a second action against Counter Plaintiff, BOWMAR INSTRUMENT CORPORATION and JOE A. WALKER, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, General Jurisdiction Division Case No. 81-5965. A copy of that complaint is attached hereto and incorporated herein as Exhibit C. In the second action, Fidelity Electronics Ltd., Inc. sought to recover monetary damages based upon the same claims which were the subject of its April 10, 1981 federal Counterclaim which has been previously described.

12. Because of the complexity of the procedural and substantive issues which were presented by reason of the two complaints and the Counterclaim which have been described above, Counter Plaintiff Bowmar Instrument Corporation required the services of a highly experienced commercial trial lawyer in order to adequately represent its interest. When Counter Plaintiff retained Counter Defendant as its counsel, Counter Defendant represented that its trial attorneys were primarily involved with commercial litigation and had the expertise to handle the issues involved in the Bowmar-Fidelity disputes. Notwithstanding the foregoing, Counter Defendant assigned, as lead-counsel, one of its employed junior level attorneys, ROBERT ASTI, an attorney who did not have sufficient prior commercial litigation experience to adequately represent Bowmar Instrument Corporation's interest in that litigation or to supervise the other professionals working on that matter.

13. Throughout the course of the litigation, Counter Defendant failed to properly render the requisite care in order to adequately prepare these cases for trial. For example, Counter Defendant caused one of his para-legals to review documents produced by Fidelity Electronics Ltd., Inc., a critical matter in commercial litigation during which substantial information is normally elicited regarding the merits of the dispute. However, Counter Defendant failed to provide that para-legal witn any instructions or directions as to what to look for in connection with the examination of the produced documents. As a consequence thereof, the crucial task of reviewing Fidelity's files in order to determine the existence of certain meritorious defenses to Fidelity's Counter-claim and complaint and to establish liability as to Counter Plaintiff's complaint was not adequately handled.

14. In addition to the foregoing, at that time, Fidelity Electronics Ltd., Inc. was involved in legal actions with two other companies, ZILOG and COMMODORE which were similar to those asserted by BOWMAR. Counter Defendant negligently failed to examine study or otherwise coordinate the efforts of those two disputes so as to develop information which would be favorable to Counter Plaintiff.

15. Counter Defendant negligently failed to be adequately prepared for trial. Specifically certain important depositions were delayed and were not scheduled until shortly prior to the

trial thereby prevented [sic] proper analysis and follow up of information revealed at those depositions. Moreover, Counter Defendant used the services of other law firms to assist it in connection with the taking of depositions despite the fact that other law firms were unfamiliar with the details of the case and were not provided with adequate information to prepare for those depositions. As a result, certain deposition testimony which was taken failed to reveal necessary and fundamental information which was then and there in existence which would have demonstrated that the Counterclaim and complaint filed by Fidelity Electronics Ltd., Inc., was without merit.

16. Moreover, Counter Defendant negligently failed to adequately determine what the precise source of Fidelity Electronics Ltd., Inc.'s financial problems were. That information would have fully demonstrated the fact that Fidelity's damages were not caused by late delivery or other alleged misconduct of Bowmar Instrument Corporation but rather because of excess inventory purchased by Fidelity together with a downturn in the demand for Fidelity's products. Moreover, during the course of a subsequent Chapter 11 proceeding filed by Fidelity Electronics Ltd., Inc., this information was revealed and if it had been discovered earlier, would have provided material probative information which would have furnished a substantial defense to Fidelity's claims.

17. Counter Defendant negligently failed to vigorously prosecute the case which was brought by it in the United States District Court for the Middle District of Tampa and instead allowed the subsequently filed state case to proceed through trial and verdict. At that trial, Counter Defendant negligently failed to represent Counter Plaintiff's interests which resulted in a verdict and judgment against Counter Plaintiff in excess of $1,000,000.00. That judgment has subsequently been affirmed on appeal.

18. Counter Defendant ARKY, FREED owed a legal duty to its client, Counter Plaintiff BOWMAR INSTRUMENT CORPORATION to use the requisite degree of skill and care reasonably necessary for expert attorneys practicing law in the type of matters handled by the Counter Defendant ARKY FREED.

19. As described in paragraph 10-15 above, Counter Defendant ARKY, FREED negligently breached its duty to Counter Plaintiff BOWMAR INSTRUMENT CORPORATION by failing to:

a. Use due care in the vigorous prosection of Counter Plaintiff's interest in both actions.

b. By failing to take necessary depositions sufficiently in advance of trial in order to be properly prepared to present defenses to the Fidelity Electronics Ltd. case.

c. By failing to conduct adequate discovery which would have demonstrated that Fidelity had similar claims against other entities which it was unsuccessful in prosecuting.

d. By failing to conduct discovery which would have indicated that the problems that Fidelity Electronics Ltd., Inc., was having and which was the alleged subject of its damages were not true but rather due to business problems of an over expansion.

e. By failing to obtain an order dismissing the State Court action against Counter Plaintiff by reasons [sic] of the abstention doctrine and by reason of the fact the the [sic] State Court [sic] was in the nature of compulsory counterclaim pursuant to Rule 13, Federal [sic] of Civil Procedure.

f. By failing to properly explore with Sears Roebuck and Company the damage claims made by Fidelity Electronics Ltd., Inc.

g. By failing to adequately supervise the actions of trial counsel and by failing to see to it that the [sic] sufficiently experienced commercial trial lawyer was assigned to handle and manage the matter of this litigation.

20. As a proximate result of the aforesaid described negligence, Counter Plaintiff BOWMAR INSTRUMENT CORPORATION has suffered damages in excess of $1,000,000.00.

WHEREFORE, BOWMAR INSTRUMENT CORPORATION prays for a judgment in its favor in an amount in excess of $1,000,000.00 together with interest, costs and such other and further relief as this Courts [sic] deems proper. Counter Plaintiff demands trial by jury of all issues triable as a matter of right by jury.

COUNT II

21. Counter Plaintiff realleges and incorporates herein the allegations of paragraph 1-8 and 10-18.

22. As part of its agreement to represent Counter Plaintiff, Counter Defendant contractually obligated itself to use all due care required of an expert commercial trial lawyer in connection with the Fidelity litigation.

23. Counter Plaintiff performed all conditions precedent to its contract.

> 24. As described above, Counter Defendant breached its contract with Counter Plaintiff by failing to use proper care which caused Plaintiff's damages in excess of $1,000,000.00.

(R. 14-18).

Shortly after this counterclaim was filed and answered, on July 10, 1985, the trial court set the case for trial on October 21, 1985 (R. 62). Arky Freed thereafter served a number of interrogatories upon Bowmar which went unanswered (R. 71, 72). Arky Freed moved to compel answers to its interrogatories, and Bowmar responded with objections and a motion for extension (R. 91, 93, 95). Thereafter, Arky Freed filed its pretrial catalog, and Bowmar followed with a pretrial catalog which was essentially a mirror image of Arky Freed's catalog, and which contained no expert witnesses (R. 98, 103). On October 7, 1985, Bowmar moved for a continuance on the ground that discovery was not complete (R. 106). The motion for continuance and the motion to compel were heard at the same time. The trial court granted the motion for continuance; reset the trial date to December 16, 1985; and ordered Bowmar to comply with Arky Freed's discovery requests by October 17, 1986 (R. 113). Bowmar responded to the discovery requests in November with unsworn answers to interrogatories which indicated that it did "not have experts at this time".[4/]

Still not ready for trial, on November 27, 1985, Bowmar moved for another continuance on the ground that discovery was not complete (R. 121). The motion was granted, and the trial was reset to February 10, 1986 (R. 123). Arky Freed served an additional set of expert witness interrogatories on December 5, 1985 (R. 125). Bowmar once again failed to respond, and on January 22, 1986, Arky Freed moved to compel answers to the expert witness interrogatories (R. 131). On January 31, 1986, Bowmar filed an amendment to its pretrial catalog, in which it listed (for the first time ever in the litigation) the names of

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[4/] These responses are not in the record on appeal, as presently constituted. They are not critical to the issues on appeal, however. In addition, we doubt that Bowmar will challenge the accuracy of our statement. If it does, we will supplement the record as necessary.

two expert witnesses (R. 133). On February 4 and February 6, 1986, the trial court entered orders compelling Bowmar to provide answers to the expert witness interrogatories no later than 5:00 p.m. on February 12, 1986 (R. 135, 138). The trial was thereafter rescheduled (apparently informally, or perhaps at the calendar call, since the record does not contain a formal order to that effect) to February 24, 1986 (R. 488).

On February 7, 1986, Bowmar filed its third motion for continuance on the ground that discovery was not complete (R. 169). On February 10, 1986, Arky Freed also filed a motion for continuance, in which it pointed out that the names of Bowmar's experts had only recently been disclosed, and that there was simply insufficient time remaining before trial for Arky Freed to conduct proper discovery of the recently-disclosed expert witnesses (R. 175). On February 12, 1986--12 days before the scheduled trial date--Bowmar *finally* filed answers to the long-overdue expert witness interrogatories (R. 178, 187, 193, 201, 210). The answers to interrogatories (and the depositions of Bowmar's experts taken thereafter) disclosed (again, for the very first time in the litigation) that Bowmar intended at trial to prove none of the allegations of its complaint--but intended to prove, instead, that Arky Freed had negligently failed to present a "cover" defense in the underlying action, notwithstanding the express instruction of its client that it do so--i. e., that Arky Freed had both ignored Bowmar's express directions and negligently failed to prove that Fidelity could and should have mitigated its damages, by obtaining from another source the component parts which Bowmar had been unable to provide in a timely fashion.

Arky Freed's motion for continuance was heard on February 21, 1986, the last working day prior to the scheduled commencement of trial (R. 482-97). Counsel for Arky Freed contended that, after Bowmar had dragged its feet throughout the litigation by providing hardly any discovery at all on the liability issues, Arky Freed had been ambushed by an unpled claim 12 days before trial--and that it could not possibly defend against the new claim properly on such short notice (R. 483-86). Notwithstanding that Bowmar had also filed a motion for continuance two weeks earlier, and apparently intent upon capitalizing

on the advantageous position into which it had maneuvered itself on the eve of trial, Bowmar opposed Arky Freed's motion for continuance--arguing that Arky Freed had opposed Bowmar's prior requests for continuance on the ground that it was ready for trial, and that it therefore could not now contend that it was not ready for trial (R. 487-90). Arky Freed responded with the obvious observation that it had previously been ready to try the claims alleged in the complaint, and that the only reason it was not now ready for trial was that its prior preparation had been rendered irrelevant--and that it was now required to prepare for trial of a claim injected into the proceeding for the first time only 12 days before trial (R. 491-93). Without explanation, the trial court denied the motion for continuance (R. 493).

Trial commenced the following Monday. At the outset of trial, counsel for Arky Freed moved the trial court to prohibit any testimony on the issue injected into the case 12 days earlier, because Bowmar had not pled the claim in its counterclaim (SR. 4-6). Bowmar responded that the particular factual allegations in its counterclaim were merely "illustrative examples" of the general allegation in paragraph 13, that Arky Freed "failed to adequately prepare the case for trial"--and that this general allegation was sufficient to put Arky Freed on notice of Bowmar's claim that it had instructed Arky Freed to present a "cover" defense and that Arky Freed had negligently failed to do so (SR. 6-7).[5/] The trial

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[5/] Bowmar also argued that it had put Arky Freed on notice of the claim in the unsworn answers to interrogatories which it had informally delivered in November, 1985 (SR. 6-7). Those answers to interrogatories are not in the record on appeal, as presently constituted, although they were purportedly attached to and filed with Bowmar's post-trial memorandum of law (R. 402, 409). We therefore informally supplemented the record in the District Court by including a copy of the answers in the appendix to our initial brief. Bowmar accepted this supplementation without objection. If formal supplementation of the record is either desired or requested, we will be happy to file the original with this Court.

Bowmar's reference was to the answers which it provided to questions which asked for elaboration upon the specific claims made in the counterclaim. The answers stated, in effect, that Arky Freed was negligent in failing to discern from the discovery obtained in the underlying litigation that Fidelity had the ability to mitigate damages by ordering comparable parts from other manufacturers.

In our judgment--and since one of Bowmar's expert witnesses conceded at trial that the discovery provided in the underlying litigation did not provide any information from which Arky Freed could even possibly have determined if Fidelity had the ability to miti-

court initially stated that it would deny the motion "at this time . . . and I would handle it on a question-by-question basis" (SR. 8). Arky Freed insisted on a ruling, however--contending that, if the trial court were going to allow Bowmar to present evidence in support of its unpled claim, Arky Freed was not prepared to defend and needed a continuance (SR. 10). Thus pressed, the trial court ruled that Bowmar's claim was embraced within the "general complaint raised by the defendant in the counterclaim"; that it would be tried; "and if that then prompts a motion for continuance, it is denied" (SR. 10-11).

Arky Freed's counsel thereafter made his opening statement, which was followed by Bowmar's counsel's opening statement (T. 1-28). Bowmar's opening statement revealed that it intended to prove only one claim of malpractice--that Bowmar had instructed Arky Freed to present a "cover" defense at the trial of the underlying litigation; that Arky Freed had negligently failed to do so; that a proper "cover" defense would have limited Fidelity's damages (and therefore the judgment against Bowmar) to approximately $170,000.00; and that Bowmar had therefore been damaged in the amount of approximately $830,000.00 by Arky Freed's failure to present the "cover" defense (T. 28-43). Thereafter, Arky Freed presented its case on the claim alleged in its complaint--that Bowmar owed it approximately $100,000.00 for legal services (T. 46-120). When Arky Freed rested, Bowmar asked if it could make a motion for directed verdict (T. 121). The trial court indicated that it did not want to hear argument; that it would consider that the motion had been timely made; that it would reserve ruling on the motion; and that "[a]ll the records are perfected" (T. 121).

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gate damages (R. 643), which was the obvious simple response to the claim asserted in the answers to interrogatories--the answers did not provide fair notice of the entirely different claim ultimately contained in the February 12 answers to expert interrogatories, the claim that Bowmar had instructed Arky Freed to present a "cover" defense, and that Arky Freed had negligently failed to do so. More importantly, while the answers may have muted a claim of surprise if Bowmar had asked for leave to amend its counterclaim, they certainly did not cure the fact that Bowmar's counterclaim contained no such claim, a point which we will explain at an appropriate place in the argument section of the brief.

Thereafter, Bowmar presented its case on the malpractice claim.[6/] The evidence revealed that Fidelity had originally ordered and paid for a "tool" to be built by Bowmar, which was a multi-cavity mold into which plastic was to be injected to make the key tops for the keys which went into the keyboards which Bowmar was to provide for Fidelity's computer games (T. 132-36, 979-80, 1030-34).[7/] Bowmar had the tool constructed and sent it to Hong Kong, where the keys were to be made by a subcontractor (T. 927-28, 979-80, 1072, 1081). The evidence is undisputed that Bowmar's inability to provide Fidelity with finished keyboards on time was caused primarily by the Hong Kong subcontractor's failure to deliver the key tops on time (T. 363, 370, 685-86, 1074-82, 1102-04).

Reduced to its essentials, it was Bowmar's position at the trial of the instant case that Fidelity could have and should have mitigated the damages caused by Bowmar's late deliveries by retrieving the "tool" from the subcontractor; shipping it to another electronic component manufacturer; having the "tool" adapted to the new manufacturer's equipment; and having the necessary key tops and keyboards produced thereafter by someone else in time to avoid most of its damages (T. 364-77, 432-56, 590-92).[8/] According to Bowmar's "cover" expert, there were a handful of competing manufacturers in the United States to which Fidelity could have turned to salvage the situation caused by Bowmar's breach (T. 372-73, 401). The evidence was both undisputed and conceded by Bowmar's own witnesses, however, that Bowmar could have done precisely the same thing--complied with the delivery dates on most of Fidelity's purchase orders by retrieving the "tool" from its

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[6/] There is no need for us to collect all of the evidence supporting Bowmar's verdict here, because we do not challenge the sufficiency of the evidence to support that verdict--except (in Issue B) on one narrow ground which depends upon only a handful of facts. We will therefore limit the statement of the facts which follows accordingly.

[7/] The key tops were not easily replaceable, garden-variety letters and numerals; they were specially designed graphic symbols for the chess and bridge games (R. 132).

[8/] Incidentally, Bowmar's "cover" expert testified that his first contact with the case was January 30, 1986 (T. 386)--which explains why this theory of liability was not disclosed to Arky Freed until the February 12 answers to interrogatories were served, 12 days before trial.

subcontractor and giving the job of manufacturing the key tops to someone else (T. 395-98, 400-01, 667-68, 686, 710-13).

Without the "tool", Fidelity could not have obtained the particular key tops which it desired, and for which it had contracted, from any other source; neither could it have obtained the "clickers" (devices which went under the keys) for which it had contracted from any other source, because Bowmar had a patent on the design (T. 359-60, 519-20). In fact, Fidelity had earlier been obtaining the parts from a source in Hong Kong, but Bowmar put a stop to that by threatening Fidelity with patent litigation--which is how Bowmar obtained Fidelity's business (T. 191-96, 586-87, 898-902, 913, 1035). Bowmar then turned around and, without advising Fidelity, gave the business of maufacturing the keys back to the same company in Hong Kong which had originally been supplying keys to Fidelity (T. 586-87, 927-27, 1036). Bowmar's explanation for this at trial was that it could license its patent to anyone it chose (T. 588).

The manner in which Bowmar obtained Fidelity's business is not particularly important to the issues on appeal, but this evidence does make one critical point: there were no "substitute" key tops available elsewhere, and Fidelity could therefore only "cover" its particular needs by retrieving its "tool", which is exactly what Bowmar could have done to comply with its contractual obligations to Fidelity. The point was also nicely made by one of Bowmar's own experts, who testified that Bowmar could not have found an alternative source for the keys because there was only one "tool" (T. 359-60). And, although the evidence reflected that Fidelity could have replaced the "clickers" to be supplied by Bowmar with comparable, non-infringing devices (T. 129-30, 523)--the fact remains that, because of Bowmar's patent, Fidelity could not find the particular "clickers" for which it had contracted anywhere else.

In addition to this evidence concerning how "cover" could have been effected, Bowmar presented evidence that it had instructed Arky Freed to investigate, pursue, and present these facts in the form of a "cover" defense at the trial of the underlying case (T.

482-89, 538-44). Expert testimony was presented to the effect that Arky Freed had been negligent in disregarding its client's instructions and in failing to present the "cover" defense, and that Bowmar had been damaged as a result (T. 301-23, 631-44). At the close of Bowmar's case, Arky Freed asked for leave to make a motion for directed verdict; once again, the trial court refused to hear argument, stating that "I'm just going to reserve for you" (T. 723).

In response to Bowmar's case, Arky Freed presented evidence that Bowmar had never instructed it to present a "cover" defense, but had only suggested it as one area which Arky Freed might want to investigate (T. 152-60, 255-62, 806-07). Arky Freed's witnesses also testified that they had looked into the defense and made a conscious judgment that it should not be presented--and that Bowmar had been advised of this decision and had acceded to it before trial (T. 160-90, 255). The reason given for this decision was that, in order to prove that Fidelity should have dropped Bowmar, retrieved its "tool", and obtained the key tops and keyboards from a second source, Bowmar would have had to prove that Fidelity should have disbelieved Mr. Walker's repeated representations that the keyboards would be delivered on time--which would, in effect, have proven Fidelity's alternative claim that Bowmar and Mr. Walker had defrauded it by making representations which they knew to be false, and thereby exposed Bowmar to both compensatory and punitive damages (T. 172-86, 203-18, 279-89, 790-803).

There was also testimony to the effect that it was Bowmar's obligation to "cover" when its supplier was the problem, not Fidelity's--and that it would have been ludicrous to have presented the "cover" defense suggested by Bowmar, because Bowmar could have "covered" for Fidelity just as easily as Fidelity could have "covered" for itself (T. 292-93, 803). Additional testimony was presented that Arky Freed's handling of the underlying litigation was not negligent--although one of Arky Freed's experts acknowledged that a "cover" defense should have been presented if the client had, in fact, insisted upon it (T. 728-45, 758, 804-06). At the close of all the evidence, Bowmar attempted to renew its

motion for directed verdict (T. 1227). The Court once again cut off counsel, and announced: "Everybody has made timely motions for directed verdict at the appropriate time and hour, and the Court reserves on these" (*Id.*). Arky Freed's counsel thereafter obtained an acknowledgment from the trial court that Arky Freed's motion for directed verdict on Bowmar's counterclaim was to be treated the same way (*Id.*).

The charge conference was conducted the next morning (T. 1234-51). Because the evidence reflected without dispute that Bowmar could have "covered" just as easily as Fidelity by retrieving the "tool" from Hong Kong and giving the job of manufacturing the key tops to someone else, Arky Freed requested two jury instructions which would have informed the jury that no viable "cover" defense could have been presented on those facts in the underlying litigation. The requested instructions were as follows:

> Where both the plaintiff and the defendant have an equal opportunity to reduce the damages by the same act and it is equally reasonable to expect a defendant to minimize damages, the defendant is in no position to contend that a plaintiff failed to mitigate.
>
> The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance.

(R. 258-96; Plaintiff's Requested Instruction nos. 20 & 21). Although the trial court agreed that these instructions correctly stated the law, it ruled that the proposed instructions could be argued to the jury by counsel, but that they would not be given in the court's charge (T. 1240-50).

Bowmar's closing argument, like its opening statement, asserted only one claim--that Bowmar had insisted that Arky Freed present a "cover" defense, and that it had negligently failed to do so (T. 1275-94, 1319-27). During the course of that closing argument, Bowmar's counsel made two statements of which we intend to complain. The first statement was the following:

> Remember one thing, please. Sometimes we have to send a message, and the message in this case is to all the lawyers who represent clients in American courtrooms--

(T. 1293). Arky Freed's counsel immediately objected; the objection was sustained, and the trial court told the jury, "We are not arguing punitive damages or punishment" (T. 1293). Counsel thereafter sought leave to approach the bench to make a motion for mistrial, to which the trial court responded, "You can do it after the argument, Counsel. I'll reserve." (*Id.*).

Subsequently, Bowmar's counsel made the following statement:

> Now it's interesting that what we are talking about here is $800,000. Arky, Freed, Stearns, Watson & Greer has a lot of lawyers, a hundred lawyers, and at their rates that means the firm, if they work this Saturday, at $80 an hour, will pay up $800,000.

(T. 1324). Arky Freed's immediate objection to this statement was overruled, with the comment that counsel was properly "arguing inferences from the evidence" (*Id.*).[9/] The trial court thereafter instructed the jury; entertained Arky Freed's reserved motion for mistrial, which was directed to both of the comments quoted above; and reserved ruling on the motion (T. 1346-47). The jury thereafter returned a verdict finding that Bowmar owed

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9/ Arky Freed's objection to this statement did not articulate any grounds for the objection. The reason for this is that, at the outset of trial, the trial court prohibited counsel from articulating grounds for objections, unless it asked for the ground:

> . . . [S]o there won't be any misunderstanding, throughout the case I would like to control the trial, not the lawyers.
>
> Sometimes we have a tendency to fuss back and forth between ourselves, and just so no feelings are hurt, your communications among yourselves are outside, and the jurors are here of course inside the trial.
>
> Otherwise when an objection is raised you simply say object. If I need to know the basis of your objection, I'll ask you what your basis is and if I need argument from the other side, I would ask for the argument.
>
> Otherwise there is no prompting me as to what you think I should do or why you're defending the position that you are on, and please don't make your objections speaking.

(SR. 8-9). The failure to specify the ground of the objection at the time it was made is therefore of no moment here. *See* footnote 11, *infra*.

Arky Freed $51,500.00 in attorney's fees; that Arky Freed had been negligent in its handling of the underlying litigation; and that Arky Freed's negligence had caused Bowmar damages in the amount of $500,000.00 (T. 1348-49; R. 297).[10/] A final judgment was subsequently entered in Bowmar's favor in the amount of $448,500.00 (R. 510).

Bowmar filed no post-trial motions. Arky Freed filed timely post-trial motions for directed verdict, mistrial, and new trial (R. 327, 355). The renewed motion for directed verdict sought a judgment in Arky Freed's favor on Bowmar's counterclaim on several grounds, two of which will be advanced here as issues on appeal--(1) that Bowmar was not entitled to recover because it proved none of the allegations of its counterclaim, but proved only an unpled claim; and (2) that, as a matter of law, no "cover" defense was available to Bowmar in the underlying litigation, because Bowmar could have "covered" for Fidelity just as easily as Fidelity could have "covered" for itself (and in precisely the same fashion), so Arky Freed could not have committed malpractice in failing to present such a defense.[11/] The motion for mistrial and motion for new trial also re-raised the remaining

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[10/] The award to Bowmar does not represent a compromise of the $800,000.00 which it sought. It was a permissible award based on a finding supported by the evidence, that it would have taken Fidelity approximately one month longer to "cover" than Bowmar's best version of the facts (T. 466-71). The award to Arky Freed is also supported by one version of the evidence (T. 426-27).

[11/] As should be apparent from our prior descriptions of the motions for directed verdict made during the course of trial, this post-trial motion was the first opportunity which the trial court gave Arky Freed to specify the grounds of the various motions for directed verdict which it had attempted to make at trial.

Since the trial court prohibited specification during trial and required that specification be delayed until after trial, Arky Freed simply had no choice in the matter--and its failure to make more specific motions during the trial therefore cannot support a "waiver" argument by Bowmar here. *See Thomas v. State*, 419 So.2d 634 (Fla. 1982); *Cason v. Smith*, 365 So.2d 1042 (Fla. 3rd DCA 1978); *Musachia v. Terry*, 140 So.2d 605 (Fla. 3rd DCA 1962); *Spencer v. Devine*, 364 So.2d 22 (Fla. 1st DCA 1978).

Put another way, Arky Freed was required to obey the trial court's orders, not risk contempt by insisting upon the right to specify during trial, and its compliance with the trial court's order and specification at first opportunity properly preserved its position for appellate review. *See Rubin v. State*, 490 So.2d 1001 (Fla. 3rd DCA), *review denied*, 501 So.2d 1283 (Fla. 1986); *Ward v. State*, 354 So.2d 438 (Fla. 3rd DCA 1978). Incidentally, Bowmar conceded below that our positions were properly preserved for appellate review, and it would therefore be inappropriate for it to contend to the contrary here.

issues which we intend to advance on appeal. Arky Freed's post-trial motions were ultimately denied (R. 475, 476).

Arky Freed appealed the final judgment to the District Court of Appeal, Third District (R. 477). Subsequently, the trial court entered a cost judgment against Arky Freed in the amount of $21,291.25 (R. 511a). Arky Freed also appealed the cost judgment (R. 568). The two appeals were subsequently consolidated for all appellate purposes. Of the five issues which Arky Freed raised on appeal, the District Court addressed only one. It agreed with us that Bowmar proved none of the allegations of its counterclaim, and that its judgment therefore could not stand. However, it disagreed with us that the appropriate remedy for this failure of proof was judgment in our favor on the counterclaim; it held instead that Bowmar should be given leave to amend its counterclaim on remand and retry the case. It acknowledged that the latter holding was in conflict with several other decisions on the point.

Rather than rule upon our second and third issues on appeal--which asserted that no "cover" defense was available to Bowmar in the underlying litigation (1) as a matter of law, or at least (2) as a matter of fact--it authorized us to reraise those contentions in the trial court after Bowmar amended its counterclaim. Its determination to order a new trial effectively mooted our fourth and fifth issues on appeal. As we noted at the outset, however, it will be necessary for us to reargue all five issues on appeal here in order to protect our positions in the event of an adverse decision on the single issue decided by the District Court.

II.
ISSUES ON APPEAL

A. WHETHER THE TRIAL COURT ERRED IN DENYING ARKY FREED'S MOTION FOR DIRECTED VERDICT ON BOWMAR'S COUNTERCLAIM, ON THE GROUND ASSERTED THEREIN THAT BOWMAR HAD PROVED NONE OF THE ALLEGATIONS OF ITS COUNTERCLAIM, BUT HAD PROVED ONLY AN UNPLED CLAIM.

B. WHETHER THE TRIAL COURT ERRED IN DENYING ARKY FREED'S MOTION FOR DIRECTED VERDICT ON BOW-

MAR'S COUNTERCLAIM, ON THE GROUND ASSERTED THEREIN THAT, AS A MATTER OF LAW, NO "COVER" DEFENSE WAS AVAILABLE TO BOWMAR IN THE UNDERLYING LITIGATION, SO ARKY FREED COULD NOT HAVE COMMITTED MALPRACTICE IN FAILING TO PRESENT SUCH A DEFENSE.

C. IF ARKY FREED WERE NOT ENTITLED TO A DIRECTED VERDICT IN ITS FAVOR UNDER ISSUE B BECAUSE A JURY QUESTION WAS PRESENTED ON THE VIABILITY OF THE "COVER" DEFENSE UPON WHICH BOWMAR'S CLAIM OF MALPRACTICE WAS BOTTOMED, WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LAW GOVERNING THAT DEFENSE.

D. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ARKY FREED'S MOTION FOR A CONTINUANCE OF THE TRIAL TO ENABLE IT TO PREPARE AN ADEQUATE DEFENSE TO THE CLAIM WHICH BOWMAR FIRST ASSERTED IN THE LITIGATION ONLY 12 DAYS BEFORE TRIAL.

E. WHETHER THE TRIAL COURT ERRED (OR ABUSED ITS DISCRETION) IN DENYING ARKY FREED'S MOTIONS FOR MISTRIAL AND NEW TRIAL FOR THE IMPROPER CLOSING ARGUMENT OF BOWMAR'S COUNSEL.

III.
SUMMARY OF THE ARGUMENT

ISSUE A. Bowmar did not prove any of the claims alleged in its counterclaim. The single claim which was tried, and upon which Bowmar ultimately prevailed at trial, was outside the issues framed by the pleadings--and the general allegation of mere "negligence", stripped of the specifics which followed it, was simply insufficient to support the particular claim upon which Bowmar staked its case. The unsworn answers to interrogatories served in November did not put Arky Freed on notice of the claim ultimately tried, and even if they had, the fact remains that the answers to interrogatories did not cure the deficiency in Bowmar's counterclaim in any respect. The claim upon which Bowmar ultimately prevailed was also not tried by implied consent--and because it is thoroughly settled that a judgment cannot be bottomed solely upon an unpled claim, absent trial of the claim by consent, Arky Freed was entitled to a directed verdict and judgment in its favor on Bowmar's otherwise unproven counterclaim.

The District Court's conclusion that a judgment in Arky Freed's favor would be

inappropriate, and that Bowmar should be allowed to amend its counterclaim on remand and begin the entire case all over again at step one was, in our judgment, erroneous. In the name of the "'finality' concept in our system of justice", this Court clearly put a stop to that once-accepted practice in *Dober v. Worrell*, 401 So.2d 1322, 1324 (Fla. 1981). Although there are minor procedural differences between that case and this case, the reason for this Court's change of position in the summary judgment context in *Dober* applies with equal force to the directed verdict context presented here. In addition, of course, there are hundreds of decisions bottomed upon the "concept of finality" in which the courts of this State have held that litigants are entitled to only one trial (and one appeal), and that they must get all their ducks in a row before that trial results in judgment--not the least of which are the numerous decisions which hold that a litigant may not obtain relief on appeal from an error which he has affirmatively invited below.

In this case, the new trial on amended pleadings which the District Court granted to Bowmar was ordered *solely* because of an error which Bowmar affirmatively invited below--a result which the "invited error" doctrine clearly should have prevented. In addition, the District Court's analysis of the problem clearly went astray when it concluded that Bowmar *relied* on an erroneous ruling and should therefore be relieved of the error. The fact is that Bowmar did *not* rely on any erroneous ruling of the trial court, nor did it change its position in any way to its detriment because of the trial court's error, as the District Court appears to have concluded. Instead, Bowmar elected its position at the outset, at a time when it had a clear choice between proceeding legally or erroneously, and *then* obtained a ruling from the trial court which simply validated the erroneous course it elected. That is "invited error", not "detrimental reliance upon error", and the "invited error" doctrine therefore should have controlled the outcome in this case. Finally, as we shall demonstrate in our argument, the decisions upon which the District Court fashioned Bowmar's escape from the error it invited simply do not support the exception to the "invited error" doctrine invented by the District Court in this case.

ISSUE B. Even if the claim upon which Bowmar ultimately prevailed at trial had been pled in its counterclaim, Arky Freed was still entitled to a directed verdict and judgment in its favor on the claim. It was entitled to judgment because the "cover" defense which Bowmar insisted that Arky Freed negligently failed to prove in the underlying case was not a legally valid defense. The defense was not valid because a "cover" defense is not available (both as a matter of common sense and as a matter of law) where it is bottomed solely upon a contention (as it was here) that the non-breaching party should have "covered", not by purchasing readily available substitute goods in the market, but by performing the breaching party's unique obligations under the contract. Since the "cover" defense upon which Arky Freed's malpractice depended was no defense at all, Arky Freed could not have been negligent in failing to present it, nor could its failure to present it have caused Bowmar any damages. Arky Freed was therefore entitled to judgment in its favor as a matter of law, even if Bowmar's counterclaim had contained the claim upon which it ultimately prevailed.

ISSUE C. If our argument on the law governing Issue B is correct, but we are in error on the facts--i.e., if there was evidence in the record from which the jury might have made the permissible finding that Fidelity could have "covered" in some manner other than merely performing Bowmar's side of the bargain, and that a directed verdict was thereby precluded--the fact remains that there was also a substantial amount of evidence in the record from which the jury could have concluded that Fidelity should have "covered" by performing Bowmar's obligations under the contract. Some method of sorting the first, permissible finding from the second, impermissible finding was therefore clearly necessary. Arky Freed proposed two jury instructions which would have served that function, but they were denied. The jury was therefore given no guidance on this critical issue, and was permitted to bottom its verdict upon the second, impermissible finding as a result. Since the evidence supported the rejected instructions, and since the instructions were required in order to reach a correct result in the case, it was reversible error to

refuse to give them under settled principles of Florida law. At the very least, therefore, a new trial is required.

ISSUE D. Additionally, as our statement of the case and facts clearly reflects, Arky Freed was ambushed twelve days before trial by a previously unpled, complex claim of malpractice in failing to present a complicated "cover" defense in the underlying case. Testimony at trial of the instant case, from the mouths of Bowmar's own experts, established that no competent attorney could possibly have prepared a "cover" defense in the underlying case in less than a month or two, and since the ability or inability to prove that defense in the underlying case was part and parcel of Bowmar's claim of negligence in failing to prove it, it undeniably follows that twelve days was not enough time for Arky Freed to prepare an adequate defense to the claim first asserted against it on the eve of trial. Because Rule 1.440, Fla. R. Civ. P., requires at least 30 days' notice of the trial of a claim, and then only after it is "at issue", the trial court's denial of a continuance in this case was a violation of Arky Freed's constitutional right of due process. Alternatively, and given the two prior continuances granted to Bowmar and the absence of any prejudice to Bowmar in continuing the trial, if the trial court had any discretion in the matter that discretion was clearly exercised arbitrarily, and therefore abused. A new trial is required for this reason as well.

ISSUE E. Finally, we believe that the trial court abused its discretion in denying Arky Freed's motion for mistrial, directed to Bowmar's "send a message" argument. The law is thoroughly settled that such an argument is both improper and prejudicial. Second, we believe that the trial court committed reversible error in overruling Arky Freed's objection to Bowmar's argument that Arky Freed could easily pay an $800,000.00 judgment against it simply by working on one Saturday. This argument was irrelevant to any issue in the case, and it was made for the sole (and clearly impermissible) purpose of encouraging the jury to return a substantial verdict for a reason which had no relevance whatsoever to the amount of damages which Bowmar had sustained. The law is also thoroughly settled

that comments upon the economic positions of the parties and the ability of a defendant to pay a judgment is improper and prejudicial. In sum, Arky Freed is entitled to judgment in its favor--but if it is not, a new trial of Bowmar's counterclaim is clearly in order.

IV.
ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING ARKY FREED'S MOTION FOR DIRECTED VERDICT ON BOWMAR'S COUNTERCLAIM, ON THE GROUND ASSERTED THEREIN THAT BOWMAR HAD PROVED NONE OF THE ALLEGATIONS OF ITS COUNTERCLAIM, BUT HAD PROVED ONLY AN UNPLED CLAIM.

Our initial contention is simply this: Bowmar did not prove any of the factual allegations contained in its counterclaim, but proved only a claim which was not pled in its counterclaim--and Arky Freed was therefore entitled to a directed verdict and a judgment in its favor on the counterclaim. Although the contention is simple, the argument will have to be somewhat more elaborate.

First, we refer the Court back to the allegations of Bowmar's counterclaim, which we were forced to quote at length (at pages 2-6, *supra*) for reasons which should now be obvious. The counterclaim contains a number of allegations concerning various specific acts and omissions on the part of Arky Freed which Bowmar claimed were negligent. Because professional negligence resulting in an adverse outcome at a prior trial was in issue, expert opinion testimony on each of these specific claims was required. *See Willage v. Law Offices of Wallace & Breslow, P.A.*, 415 So.2d 767 (Fla. 3rd DCA 1982). None was offered. It is therefore simply beyond debate here that Bowmar did not present a prima facie case on any of the claims specifically alleged in its counterclaim--and we doubt that Bowmar will even contest the point here, since it did not contest it below.

The next question--and it is, of course, the pivotal question here--is whether the claim which *was* ultimately proven to the jury's satisfaction by expert opinion testimony (the claim that Arky Freed ignored its client's instructions and negligently failed to present a "cover" defense in the underlying litigation) was embraced by the more general

allegation which Bowmar isolated from the specifics of its counterclaim, and upon which it bottomed its right to proceed to trial--the claim that Arky Freed "failed to properly render the requisite care in order to adequately prepare these cases for trial".[12/] In our judgment, this general allegation, deprived of the specific facts which followed it, is merely a naked legal conclusion, supported by no operative facts; it therefore stated no legally cognizable claim at all; and it just as surely provided no legal predicate for trial of the claim which ultimately resulted in judgment against Arky Freed.

It is certainly true, as Bowmar will point out, that the old rules of pleading have been replaced by a more liberal philosophy, and that "notice pleading" is now all that is required. Nevertheless, even under the most relaxed view of the requirements of "notice pleading", it is still necessary to plead more than naked legal conclusions. Operative facts must still be alleged, facts which are sufficient to put the opposing party on notice of what he must defend against. And, by any measure which can be brought to bear upon the conclusory general allegation of mere negligence upon which Bowmar staked its claim below, that allegation was clearly insufficient to state any claim at all, much less the specific claim upon which Bowmar prevailed at trial.[13/]

The cases so holding are legion. *See, e. g., Kislak v. Kreedian*, 95 So.2d 510 (Fla. 1957); *Reddish v. Smith*, 468 So.2d 929 (Fla. 1985); *Drew v. Knowles*, 511 So.2d 393 (Fla. 2nd DCA 1987); *Griffin v. Griffin*, 463 So.2d 569 (Fla. 1st DCA 1985); *Parker v. Gordon*, 442 So.2d 273 (Fla. 4th DCA 1983); *Smith v. Mogelvang*, 432 So.2d 119 (Fla. 2nd DCA

[12/] The quoted allegation is taken from paragraph 13 of the counterclaim. There are other general allegations of this nature in the counterclaim which introduce other specific claims, but they are essentially the same as the one quoted above. We have selected the allegation in paragraph 13 because that is the one upon which Bowmar relied at the outset of trial.

[13/] That conclusion would seem to be an especially compelling one in the circumstances presented here, where the counterclaim went out of its way to allege multiple claims with great specificity--a tactic which would lead most reasonable persons to conclude that no additional specific claims were lurking behind the introductory general allegations. *See Smith v. Mogelvang*, 432 So.2d 119 (Fla. 2nd DCA 1983).

1983); *Dillard Smith Construction Co. v. Greene*, 337 So.2d 841 (Fla. 1st DCA 1976); *Citizens National Bank of Orlando v. Youngblood*, 296 So.2d 92 (Fla. 4th DCA 1974). *See generally*, *Dyson v. Dyson*, 483 So.2d 546 (Fla. 1st DCA 1986); 40 Fla. Jur.2d, *Pleadings*, §§2, 32-33 (and decisions cited therein).

Although these decisions fully support the general proposition for which they are advanced, they are much less important here than a single, prior decision of the Third District--because that Court has squarely decided the precise issue presented here. In *Kartikes v. Demos*, 214 So.2d 86 (Fla. 3rd DCA 1968), an appellant in a legal malpractice case made precisely the same contention which Bowmar made below--that it was sufficient for it to plead nothing more than mere "negligence", and that its counterclaim for legal malpractice need be no more specific than that (SR. 6). The Court squarely rejected that contention as follows:

> We expressly reject appellants' proposition that the allegations of a complaint against an attorney for malpractice need contain only legal conclusions rather than ultimate facts, as in certain types of automobile negligence actions. . . .

214 So.2d at 87. *See Smith v. Mogelvang, supra.* We therefore take it to be established here that Bowmar's counterclaim did not allege the claim upon which it ultimately prevailed at trial.

It is no answer to that omission, as Bowmar contended below, that Bowmar advised Arky Freed of a similar claim in unsworn answers to interrogatories served in November. As we have already explained in footnote 5, *supra*, those answers were given to explain the *specific* allegations of the counterclaim; they stated only that Arky Freed should have discerned the availability of a "cover" defense from the discovery materials obtained from Fidelity; and they therefore clearly did not put Arky Freed on notice of the quite different claim asserted at trial. That point is not really all that important, however, because even if the answers to the interrogatories had stated the specific claim ultimately tried, the fact remains that the claim was not pled in the counterclaim--and the law is settled that only claims framed by the pleadings can be tried, not claims asserted in discovery:

> The science of pleading is considerably less exacting and much simpler than in the days when Professor Crandall taught the intricacies of Stephen's Rules of Pleading. Nevertheless, pleadings under present rules are intended to serve the same purpose. This purpose is to "* * * present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial." . . . The objective sought in the present rules is to reach issues of law and fact in one affirmative and one defensive pleading. . . .
>
> This purpose will not be served nor this objective achieved if operative issues, as distinguished from evidential issues, are allowed to be created outside the pleadings in depositions, admissions, affidavits, and the like, which may be filed in a cause. If this were allowed neither the parties nor the court would be able to say with certainty what the triable issues in a cause are.

Hart Properties, Inc. v. Slack, 159 So.2d 236, 239 (Fla. 1963).[14/] In short, Bowmar's unsworn answers to interrogatories are irrelevant here, and cannot change the fact that its counterclaim did not allege the claim upon which it ultimately prevailed at trial.

The next question is whether Bowmar could nevertheless recover judgment on its unpled claim.[15/] The answer to that question is also thoroughly settled. Where the evidence adduced at trial does not prove the claim or claims alleged in the pleadings, but proves only an unpled claim, the claimant cannot recover a judgment in its favor on the unpled claim. *Freshwater v. Vetter*, 511 So.2d 1114 (Fla. 2nd DCA 1987); *Designers Tile International Corp. v. Capitol C Corp.*, 499 So.2d 4 (Fla. 3rd DCA), *review denied*, 508 So.2d 13 (Fla. 1987); *Dean Co. v. U.S. Home Corp., Inc.*, 485 So.2d 438 (Fla. 2nd DCA 1986); *Citizens National Bank of Orlando v. Youngblood*, 296 So.2d 92 (Fla. 4th DCA 1974). *See Cortina v. Cortina*, 98 So.2d 334 (Fla. 1957); *Baring Industries, Inc. v. Rayglo*,

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[14/] If the answers to the interrogatories had stated the claim ultimately tried, they might have had some relevance in a *different* context--because they would have muted any claim of surprise if Bowmar had sought leave to amend its counterclaim. *See Smith v. Mogelvang, supra.* Bowmar never sought leave to amend, however; it argued only that its answers to the interrogatories cured the deficiency in its pleadings--and *Hart Properties* squarely disposes of that contention adversely to Bowmar.

[15/] Bowmar could not and did not contend below that the unpled issue was "tried by the express or implied consent of the parties", and that its judgment was therefore protected by Rule 1.190(b), Fla. R. Civ. P.--so we need not devote any argument to that non-issue here.

Inc., 303 So.2d 625 (Fla. 1974); *Bilow v. Benoit*, 13 FLW 406 (Fla. 5th DCA Feb. 10, 1988); *Association Financial Services, Inc. v. Lewis*, 12 FLW 2740 (Fla. 5th DCA Dec. 3, 1987), *as amended on rehearing*, 13 FLW 287 (Fla. 5th DCA Jan. 28, 1988); *Wassil v. Gilmour*, 465 So.2d 566 (Fla. 3rd DCA 1985); *Hernandez v. Hernandez*, 444 So.2d 35 (Fla. 3rd DCA 1983), *review denied*, 451 So.2d 848 (Fla. 1984); *Dysart v. Hunt*, 383 So.2d 259 (Fla. 3rd DCA), *review denied*, 392 So.2d 1373 (Fla. 1980); *Mansell v. Foss*, 343 So.2d 910 (Fla. 3rd DCA 1977); *Tucker v. Daugherty*, 122 So.2d 230 (Fla. 2nd DCA), *cert. denied*, 125 So.2d 878 (Fla. 1960); *Edwards v. Young*, 107 So.2d 244 (Fla. 2nd DCA 1958), *dismissed*, 112 So.2d 9 (Fla. 1959). *Cf. Kuehne & Nagel, Inc. v. Lewis Marine Supply, Inc.*, 365 So.2d 204 (Fla. 3rd DCA 1978).

Thus far, we have said nothing with which the District Court disagreed. It is at this point in our argument, however, that the District Court balked, and declined to provide us with the relief we had requested--entry of judgment in our favor on Bowmar's unproven counterclaim. Instead, it held (1) that the trial court did not err in denying our motion for directed verdict (notwithstanding that Bowmar had proved none of the allegations of its counterclaim), because it had previously committed error (at Bowmar's insistence) in concluding that the counterclaim sufficiently alleged the claim which was ultimately tried; (2) that, instead of a directed verdict and judgment on the alleged but unproven claims, the proper course was to conclude that those claims "are now deemed abandoned" (12 FLW at 2752 n. 9); and (3) that Bowmar should be allowed to amend its counterclaim on remand and put us through an entire retrial of its 23rd-hour claim simply because, in its zeal to force us to trial on that claim with only 12 days' notice and without adequate preparation, it had affirmatively invited the trial court to commit legal error in furtherance of that impermissible end.[16/]

[16/] Curiously, Bowmar had not requested that relief in its brief in the District Court. In fact, the issue which we must now address was only tangentially adverted to in a single footnote in our initial brief (at p. 30, n. 15), to which Bowmar did not even respond. This is therefore the first opportunity we have had to argue the point of whether Bowmar should have been given leave to amend on remand.

As the District Court's opinion reflects, this result is not clearly ordained in the decisional law. In fact, it is contrary to a number of recent decisions on the point, in which several courts (including the Third District itself) have held that a defendant who moves for a directed verdict in his favor on the ground that the plaintiff has failed to prove the allegations in his complaint is entitled to a directed verdict and judgment in his favor, notwithstanding that the plaintiff may have proved another, but unpled claim. *E. g., Freshwater v. Vetter, supra; Designers Tile International Corp. v. Capitol C Corp., supra; Dean Co. v. U.S. Home Corp., Inc., supra; Citizen's National Bank of Orlando v. Youngblood, supra.* In a subsequent decision in one of those cases, the Second District also squarely held that it is error to allow an amendment of the pleadings on remand to assert the previously unpled claim--that nothing less than a judgment in the defendant's favor is required. *The Dean Co. v. U.S. Home Corp., Inc.* 13 FLW 118 (Fla. 2nd DCA Dec. 30, 1987). In short, the conflict which the District Court acknowledged is real.

There are also a handful of earlier decisions which reach a conclusion similar to that reached by the District Court in this case, and which hold either expressly or implicitly that a plaintiff who proves only an unpled claim at trial should be given a fresh start by leave to amend on remand, and be allowed to litigate the case all over again through another full-blown trial. *E. g., Baring Industries, Inc. v. Rayglo, Inc., supra; Tucker v. Daugherty, supra; Edwards v. Young, supra.*

We suggested to the District Court (in the single footnote which precipitated this further round of review (*see* footnote 16 *supra*), and we suggest to this Court as well, that the difference between these two lines of clearly inconsistent cases is this Court's intervening decision in *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981). In that case, as in the instant case, the District Court had concluded that a defendant was entitled to prevail on the issues framed by the plaintiff's pleadings, but it remanded the case to allow the plaintiff to amend his pleadings to allege an affirmative defense which he had known about in time to allege, but which he had not alleged prior to the entry of judgment. This Court

acknowledged that some of its prior decisions allowed such a result, but it receded from them for the following, strongly-stated reason:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.

401 So.2d at 1324.

To be sure, there are procedural differences between *Dober* and the instant case, as the District Court explained in its careful attempt to distinguish it. In our judgment, however, those procedural distinctions are really distinctions without a difference, because this Court's conclusion in *Dober* was not motivated by the procedural posture of the case. It was clearly motivated instead by a strong public policy consideration which this Court described as the "'finality' concept in our system of justice". In our judgment, that concept applies with equal force to the slightly different procedural posture in which the same issue has arisen here, because there should be just as much interest in "finality" where a directed verdict is in issue as where a summary judgment is in issue. In fact, with the substitution of a mere two words, this Court's holding in *Dober* probably amounts to the very best argument we can make in support of our position here:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate [directed verdict] procedure.

401 So.2d at 1324. Unless this Court is prepared to hold that there is such a substantial difference between "summary judgment procedure" and "directed verdict procedure" that two completely contrary rules are justified with respect to each, we think the slightly amended passage quoted above is the only permissible resolution of the conflict which this Court has been asked to resolve.

Dober, of course, is not the only case in which this Court has held, in effect, that cases should be tried only once (with one appeal as a matter of right) and that litigants must get all their ducks in a row before judgment is entered--because the "'finality' concept in our system of justice" simply will not permit multiple "bites at the apple". There are literally hundreds of decisions on the books in which this concept has been enforced in numerous different procedural contexts. For example, if a plaintiff fails to present a prima facie case supporting the claims he has pled and the defendant moves for a directed verdict, the defendant is entitled to a directed verdict and judgment in his favor--and no appellate court has ever held that a judgment entered by a trial court in response to such a motion should be reversed to allow the plaintiff an additional attempt on remand to present additional evidence.

Similarly, when a litigant fails to make an appropriate objection or raise an appropriate defense or request appropriate relief before judgment is entered, the decisional law uniformly holds that (absent fundamental error) the litigant has waived the point and is not entitled to a remand for a second opportunity to raise it. Conversely, when a litigant affirmatively "invites" an error before judgment is entered, the decisional law uniformly holds that the litigant cannot assert a contrary position thereafter and is not entitled to a remand for an opportunity to undo the error he invited. There are probably dozens of other examples which could be mustered here, but we will not collect them all, because they will only make the same point already made by the handful of examples set out above--and the point is relatively simple: the "'finality' concept in our system of justice" simply demands that cases be framed, developed, and tried (and appealed) only once--not over and over again until each has been concluded to absolute perfection.

The District Court would probably have no quarrel with the examples we collected above, of course, because it purported to find something different in this case--something which it thought would justify an exception to the general rule: Bowmar's so-called "good faith reliance" on the trial court's erroneous ruling concerning the sufficiency of the

allegations of its counterclaim.[17/] It would appear that there is little in Florida's jurisprudence to support such an exception, since the District Court relied almost exclusively on federal cases (which, incidentally, as we shall demonstrate in a moment, arise in a context which simply does not implicate the "concept of finality", and which are therefore inapposite to the particular problem presented here). In fact, we think that Florida's general "one bite at the apple" rule clearly applies to all cases, including those in which a litigant has affirmatively invited an error and then "relied" on that error until the conclusion of the case.

For example, if a plaintiff fails to present a prima facie case supporting the claims he has pled, the defendant moves for a directed verdict, and the trial court erroneously denies the motion, the plaintiff may justifiably rely on this ruling and withhold additional evidence he might have presented to cure the defects in his initial presentation. When the defendant appeals from a subsequently entered adverse judgment, however, the appellate courts of this State will uniformly rule that the defendant was entitled to the directed verdict which he sought, and order entry of judgment in the defendant's favor. They will not remand the case to give the plaintiff a second opportunity to prove a prima facie case. Similarly, when a litigant affirmatively invites an error upon which he relies thereafter, but then loses the case anyway, the appellate courts of this State will uniformly rule that the litigant cannot obtain a second opportunity to prevail because of the error which it invited. *See, e. g., Omni-Vest, Inc. v. Reichhold Chemicals, Inc.*, 352 So.2d 53 (Fla. 1977); *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977); *Marks v. Fields*, 36 So.2d 612 (Fla. 1948); *Roe v. Henderson*, 139 Fla. 386, 190 So. 618 (1939); *County of Volusia v. Niles*, 445

[17/] We seriously question whether Bowmar's position was taken in "good faith". It appears clear to us at least that Bowmar discovered that it had a lawsuit only on the eve of trial; that it knew that we were totally unprepared to defend it; and that its position concerning the adequacy of its counterclaim was advanced, not because there was any legitimate legal argument supporting it, but solely in an effort to force us to trial without adequate preparation. We do not believe the issue presented here turns on "good faith" or "bad faith", however, so we will not quarrel extensively with this bone which the District Court threw Bowmar's way in its opinion.

So.2d 1043 (Fla. 5th DCA 1984). *See generally*, 3 Fla. Jur.2d, *Appellate Review*, §294 (and numerous decisions cited therein).

In the instant case, we think the concept of "invited error" is a far more appropriate concept to apply than the "good faith reliance on invited error" concept which the District Court appears to have invented. Arky Freed clearly put Bowmar on notice that its counterclaim was legally insufficient to support the only claim which Bowmar intended to try, and that notice was given in ample time for Bowmar to do something about it. At that point, Bowmar had an election to make. It could either (1) acknowledge the deficiency, request leave to amend, and consent to a continuance in the interest of fairness, which is what the law required of it, or (2) it could choose to stand on the allegations of its counterclaim as sufficient and proceed to capitalize upon Arky Freed's lack of preparation, but at the risk that it may have affirmatively invited the trial court to commit error. This was clearly an *election*, however--an election between alternative courses of action, one legally correct and one legally erroneous.

Unfortunately, the District Court failed to perceive this critical fact. What the District Court held was that, after Bowmar elected to adopt the legally erroneous course and affirmatively invited the trial court to err in approving that course, it could then rely on that ruling to avoid the fact that it did not initially elect the legally correct course. Most respectfully, that makes no sense to us. Bowmar's election to urge that its counterclaim was sufficient to support going forward occurred *before* the trial court ruled that the counterclaim was sufficient to support going forward. It is therefore simply impossible that Bowmar could have relied on the ruling in making the election, because one cannot rely on what has not yet occurred. And once the election was made, of course, Bowmar had affirmatively invited the error upon which the District Court later let it off the hook and gave it a second bite at the apple. That also makes no sense to us, unless the "concept of finality" is to give way here to a new rule allowing multiple bites at the apple merely because a litigant has purposefully elected a legally erroneous course of action.

We have additional problems with the District Court's ruling. When we moved for a directed verdict on the ground that Bowmar had proven none of the allegations of its counterclaim, we were entitled to a yes or no answer--because nothing in the law allows an answer in between, like the non-answer given by the District Court: ". . . the claims contained in [Bowmar's] counterclaim which it failed to prove . . . are now deemed abandoned". 12 FLW at 2752 n. 9. In effect, of course, this non-answer amounts to a "yes" answer to our motion for directed verdict. But to the District Court, the trial court's "no" answer was also correct, because it had previously erred in concluding that Bowmar's counterclaim was legally sufficient to support the claim ultimately proven at trial. However, that error (which is the only ruling upon which the District Court rested its conclusion that a remand for amended pleadings was in order) was *affirmatively invited* by Bowmar. Bowmar has therefore been granted a new trial solely because of an error which it affirmatively invited--which is contrary to the "invited error" doctrine, as well as the "'finality' concept in our system of justice" from which that doctrine derives, in every respect.

It is also worth reminding the Court of what it observed in *Dober v. Worrell, supra*--that litigation is burdensome and expensive. Arky Freed has spent enormous sums of money defending this case through a full-blown trial, a full appeal, and an additional proceeding in this Court. It has established at considerable expense that the legal position which it took on the issue under consideration here was correct. It was Bowmar which invited the trial court's error. Yet, because Arky Freed was correct and Bowmar was wrong, Arky Freed must now spend an additional enormous sum of money to defend the case through a second full-blown trial and perhaps an additional appeal. If there is any teeth at all in this Court's decision in *Dober*, we respectfully submit that it should be enforced in the similar procedural context presented here, and that the Court should hold that Bowmar had its day in court, and that it cannot rely upon an error which it affirmatively invited to start all over again at Arky Freed's considerable expense--a holding

which, as we have previously suggested, can be made simply by changing two small words in the strong paragraph in which this Court put an end to multiple bites at the apple in the context of summary judgments.

A final word or two is in order concerning the decisions upon which the District Court relied in fashioning its "good faith reliance on invited error" exception to the general rule. With one exception which we will discuss in a moment, all of the decisions are federal decisions involving an entirely different problem than the one under discussion here. Each of them deals with application of the "unique circumstances" doctrine, which allows a federal appellate court to entertain an untimely appeal where the appellant has relied upon an erroneous ruling of a trial court concerning the time in which the appeal must be taken. Those cases are inapposite to the problem presented here because they simply do not implicate the "'finality' concept in our system of justice". That concept recognizes that every litigant is entitled to one trial, and, as a matter of right, one appeal. When the rules are bent between trial and appeal to allow an untimely appeal, no duplication of the "one trial, one appeal" concept is involved. In contrast, the District Court's decision in the instant case allows the proceedings to begin all over again at square one, *after* the one trial and one appeal which our system of justice contemplates. Put another way, the District Court's decision allows two trials and two appeals as a matter of right simply because a litigant affirmatively invited error during the one trial which the system allowed him. We do not believe the federal courts would extend their "unique circumstances" doctrine that far, and we encourage the Court to reject its extension to the altogether different problem presented in this case.

The single Florida decision upon which the District Court relied in its decision also provides no support for its "good faith reliance on invited error" exception to the general rule. In *Florida Air Conditioners, Inc. v. Colonial Supply Co.*, 390 So.2d 174 (Fla. 5th DCA 1980), the plaintiffs' *initial complaint* alleged a cause of action against individual partners, and asserted two legal theories for recovery--a common law theory, and a statutory codi-

fication of the common law. The defendants moved to dismiss a portion of the claim, contending that the statutory theory was unavailable to the plaintiffs. The trial court denied the motion. The case was thereafter tried. Although the same facts supported both theories of recovery, the plaintiffs rested their case on the statutory theory and abandoned their common law theory. A verdict was returned for the plaintiffs. The defendants appealed, and were successful in contending that the statutory theory was unavailable to the plaintiffs, and that their motion to dismiss that aspect of the claim should have been granted. On remand, the plaintiffs attempted to revive their previously pled common law theory, but were denied leave to do so. The plaintiffs appealed and the District Court held that, because the claim had been originally pled and was no different in substance than the statutory claim previously tried (since the statute was merely a codification of the common law to begin with), the plaintiffs should have been allowed to revive their previously abandoned claim.

There are several important distinctions between that case and this case. In *Florida Air Conditioners*, the plaintiffs' initial pleadings had contained the claim which the plaintiffs sought to revive on remand. In this case, Bowmar's counterclaim did not contain the claim which the District Court has now allowed it to *add* to its counterclaim on remand. In *Florida Air Conditioners*, the claim sought to be revived was the same in substance as the claim previously tried, and merely had a different name--"common law" as opposed to "statutory". In this case, the claim which the District Court has allowed to be added on remand is an entirely new claim which was most definitely *not* asserted in Bowmar's initial counterclaim. And finally, the plaintiffs in *Florida Air Conditioners* made an election *after* the trial court ruled in their favor on the statutory claim, in reliance upon the propriety of that ruling. In this case, Bowmar's election between amending its counterclaim before trial or standing upon its allegations was made *before* the trial court ruled that the election it made was the correct one--so, as we have previously pointed out, it was simply impossible that Bowmar *relied* on any ruling of the trial court in electing to proceed on an

erroneous course in this case.[18/] *Florida Air Conditioners* therefore provides no justification for the District Court's otherwise unprecedented "good faith reliance upon invited error" exception to the general rule--a general rule which has long been thought to be required by the "'finality' concept of our system of justice".

We rest our case. We respectfully submit that the claim with which Arky Freed was ambushed 12 days before trial, and upon which Bowmar ultimately prevailed at trial, was outside the issues made by the pleadings. Bowmar proved none of the claims alleged in its counterclaim, and Arky Freed was therefore entitled to a directed verdict and a judgment in its favor on the counterclaim. Bowmar made its election with its eyes wide open and affirmatively invited the error upon which the District Court fashioned its right to start all over again, at our considerable expense. We respectfully submit that the "invited error" doctrine, which derives from the well-settled "'finality' concept in our system of justice" should have controlled the outcome in this case, and that the District Court's invention of a new "good faith reliance on invited error" exception to the general rule should be disapproved as entirely inimical to that well-settled concept.

B. THE TRIAL COURT ERRED IN DENYING ARKY FREED'S MOTION FOR A DIRECTED VERDICT ON BOWMAR'S COUNTERCLAIM, ON THE GROUND ASSERTED THEREIN THAT, AS A MATTER OF LAW, NO "COVER" DEFENSE WAS AVAILABLE TO BOWMAR IN THE UNDERLYING LITIGATION, SO ARKY FREED COULD NOT HAVE COMMITTED MALPRACTICE IN FAILING TO PRESENT SUCH A DEFENSE.

Next, even if the claim upon which Bowmar ultimately prevailed at trial had been pled in its counterclaim, Arky Freed was still entitled to a directed verdict and judgment

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[18/] It is for this reason that the District Court inappropriately quoted *Florida Air Conditioners* for the "proposition that parties who have 'changed their position relying on the erroneous ruling of the trial court should be returned to their position before such ruling'". 12 FLW at 2751. In *Florida Air Conditioners*, the plaintiffs did change their position in reliance upon a prior erroneous ruling. In this case, however, Bowmar first elected its position and then obtained the trial court's erroneous approval of it. Therefore, to return Bowmar to the position it was in before the trial court ruled is to return it only to the erroneous position it initially elected, which does not wipe the slate clean of the position (as it did in *Florida Air Conditioners*).

in its favor on the claim.[19/] It was entitled to judgment because the "cover" defense which Bowmar insisted that Arky Freed negligently failed to prove in the underlying case was not a legally valid defense, and it would therefore have availed Bowmar nothing. If we are correct on that point, then Arky Freed was entitled to judgment because it is a simple matter of common sense that an attorney cannot be found liable for malpractice for failing to assert a defense which would have been insufficient, as a matter of law, to affect the result. *See Hatcher v. Roberts*, 478 So.2d 1083 (Fla. 1st DCA 1985), *review denied*, 488 So.2d 68 (Fla. 1986). In our judgment, that conclusion is beyond debate, and Bowmar will not contest it. It remains for us to demonstrate the predicate--that the "cover" defense insisted upon by Bowmar was not a viable defense to Fidelity's breach of contract action.

There is no question but that, after a breach of contract by a seller, a buyer has an obligation to attempt to "cover" by purchasing substitute goods elsewhere, and thereby mitigate his damages--and that the damages owed by the breaching seller will be determined accordingly. Sections 672.711 & 672.712, Fla. Stat. (1985). *See Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719 (5th Cir. 1977) (ammonia); *Mason Distributors, Inc. v. Encapsulations, Inc.*, 484 So.2d 1275 (Fla. 3rd DCA 1986) (vitamins). This obligation depends upon the availability of substitute goods, however, and it does not extend as far as Bowmar attempted to extend it in the instant case--to impose a requirement upon the buyer (Fidelity) to perform the contractual obligations of the seller (Bowmar), as a condition to recovering damages for the seller's breach. We think we can demonstrate that in two ways--as a matter of common sense and as a matter of law.

We remind the Court of three things: (1) there was only one "tool" in existence which

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19/ The District Court did not reach this contention, but authorized us to raise it on remand after Bowmar's counterclaim is amended. If this Court approves the District Court's resolution of the first issue, that option is available to it as well. If the Court is inclined to agree with us on this second issue, however, a ruling on it would obviate the need for further expensive and protracted proceedings, so we would appreciate it if the Court would address the issue.

could manufacture the key tops which Fidelity did not receive on time; (2) the "tool" was in the possession of a party with whom Bowmar had subcontracted, and only Bowmar was therefore in a position to retrieve the tool (or at least Bowmar's permission was required for retrieval of the "tool" by Fidelity); and (3) Bowmar had a patent on the "clickers". This is therefore not a case like *Transammonia Export* or *Mason Distributors*, in which the buyer could readily turn elsewhere and obtain exactly the same product (ammonia, vitamins) which the seller had agreed to, but failed to provide. The only way Fidelity could have "covered" on the facts in this case was to do what Bowmar's experts testified should have been done--retrieve the "tool" from Bowmar's subcontractor in Hong Kong, and ship it to another component parts manufacturer who could meet its delivery requirements for the key tops (and use Bowmar's patented "clickers", or find an alternative, non-infringing "clicker"), and then have Bowmar or someone else assemble the finished keyboards. These same experts conceded, however, that Bowmar could have done precisely the same thing in order to comply with its own contractual obligations to Fidelity. Moreover, since the "tool" was in the possession of Bowmar's sub-contractor, Fidelity could not simply have "retrieved" it--and its "retrieval" would therefore have been far simpler for Bowmar than for Fidelity.[20/]

20/ Bowmar also argued below that a "cover" defense was available on the facts in the underlying litigation based upon Fidelity's failure "to commission the production of two molds for the key buttons . . . , with the two tools to be placed with different producers, so as to guarantee an alternative source of supply" (appellee's brief, p. 8)--which, according to the expert hired by Bowmar on the eve of trial, was an "industry custom". Since we did not have time to investigate the "industry custom" in this area, that testimony went undisputed. It is simply irrelevant to the issue presented here, however, because "cover" does not depend upon "industry custom"; it is a legal defense, defined by statute--and it is narrowly defined as follows:

> *After a breach* within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

Section 672.712(1), Fla. Stat. (1985) (emphasis supplied).

The important point, of course, is in the emphasized words. The legal duty to "cover" arises only *after a breach* by the seller, and it is limited to the purchase of sub-

In effect, then, Bowmar's proposed "cover" defense was not that Fidelity could have "covered" in the conventional sense by purchasing substitute goods, but that Fidelity could have "covered" by performing Bowmar's obligations under the contract--and that proposition, in our judgment, stands the law of contracts on its head. Surely, it cannot be a defense to a breach of contract action that the non-breaching party is obliged to perform the contractual obligations of the breaching party, else he cannot recover damages for the breach--because that shifts the obligation to perform to the party who contracted for the other party's performance, and thereby completely nullifies the contract. If contracts are to have any legal effect at all, they must be enforceable to some extent--and we respectfully submit that, as a simple matter of common sense, no "cover" defense should be available when it is bottomed solely upon a contention that the non-breaching party should have performed the breaching party's obligations under the contract.

We need not rely entirely on common sense, however, because our point has been established as a matter of law. We consider *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1249-50 (D.C. Cir. 1979), to be fairly representative:

> The trial court granted Shea only a small portion of its damages, despite the fact that it found that MKE had breached its duties under the contract. The district court concluded that Shea had

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stitute goods. It does not require a buyer to double his initial cost and enter into an alternative backup contract with another supplier *before a breach* by the primary seller, in anticipation of the possibility of such a brief. On the facts in the underlying case, and given the 20-20 hindsight which those facts allow, it may well have been a prudent course for Fidelity to have commissioned a second "tool" and to have had an alternative supplier standing in the wings to "cover" in the event that Bowmar failed to live up to its contractual obligations (although the 1,000 pound tool cost $25,000.00, and took 10-12 weeks to make--T. 200, 980, 1032-33)--but, "industry custom" notwithstanding, Fidelity had no *legal* duty to "cover" in that anticipatory manner. It was entitled to assume that Bowmar would honor its contractual obligations, and its legal duty was limited to purchasing substitute goods (if available) *after* Bowmar breached the contract--nothing more. In short, Bowmar's theory of anticipatory "second sourcing" provided no legitimate legal basis for a "cover" defense in the underlying litigation. Clearly, Fidelity's legal duty to "cover" after Bowmar breached its contract could have been effected by Fidelity in only one way on the facts in this case--by retrieving the "tool" from Bowmar's subcontractor in Hong Kong, and proceeding from there to perform Bowmar's contractual obligations itself.

> not properly mitigated its damages by failing to build a dike at or near the interface. . . .
>
> Although the law does not permit an injured party to stand idly by, accumulating damages, when certain obvious, reasonable steps, if taken, would have greatly reduced the damages, the law does not penalize the nonbreaching party in the type of situation that is before this court.
>
> > "Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act and it is equally reasonable to expect the defendant to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate. Nor will the award be reduced on account of damages the defendant could have avoided as easily as the plaintiff. *See* Dobbs, Handbook on the Law of Remedies §3.7 at 186 (1973). The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance. *See Parker v. Harris Pine Mills*, 206 Or. 187, 291 P.2d 709 (1955)."
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> *S. J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 530 (3d Cir. 1978). *Accord, McCarty v. United States*, 185 F.2d 520 (5th Cir. 1950); *Unverzagt v. Young Builders, Inc.*, 252 La. 1091, 215 So.2d 823 (1968); *Parker v. Harris Pine Mills*, 206 Or. 187, 291 P.2d 709 (1955); 22 Am.Jur.2d Damages §37 (1965); 25 C.J.S. Damages §34 (1966). MKE breached its contract by allowing surface water to run off its jobsite onto Shea's jobsite. Pursuant to its contract with WMATA, MKE had the primary responsibility for controlling its water runoff and had the same opportunity as Shea to build a dike that would have prevented the damages. MKE also had knowledge of the consequences of nonperformance. Therefore, the doctrine of mitigation of damages is not applicable. . . .

Although there would ordinarily be no need to repeat the citations contained in the foregoing passage, two of those cases deserve to be highlighted here. First, the Court will find *S. J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3rd Cir. 1978), to be particularly instructive here, because it applies the rule stated above to facts similar to those in the instant case, involving use of a subcontractor as a source of the goods which the seller was supposed to provide to the buyer. The Court will also find *McCarty v. United States*, 185 F.2d 520, 522 (5th Cir. 1950), instructive, because it states the rule as succinctly as it can be stated, and in line with our reliance upon common sense, as follows:

> . . . Where the party, whose duty it is primarily to perform a contract, has equal opportunity for performance, and equal knowledge of the consequences of nonperformance, he cannot, while the contract is subsisting and in force, be heard to say that plaintiff might have performed for him.

Finally, we note that *S. J. Groves* and *Shea-S&M Ball* were more recently followed in *Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank of Evans City*, 611 F.2d 465 (3rd Cir. 1979). The Court will find additional state court decisions on the point collected in 25 C.J.S., *Damages*, §34 (1966) (and pocket part).

We have been unable to find any Florida decisions on the point, but we submit that the law of contracts is almost universally the same in all jurisdictions--especially where a provision of the Uniform Commercial Code is in issue, as it is here--and that the principle of the cases cited above clearly should be adopted as the law in Florida as well. *See* §671.102(2)(c), Fla. Stat. (1985) ("Underlying purposes and policies of this code are: . . . (c) To make uniform the law among the various jurisdictions."). If that step is taken, then Bowmar did not have a viable "cover" defense to present in Fidelity's breach of contract action, and Arky Freed therefore could not have committed malpractice in failing to present such a defense. We respectfully submit once again that, even if Bowmar's counterclaim had articulated the claim upon which it ultimately prevailed at trial, Arky Freed would nevertheless have been entitled to a directed verdict on the claim and a judgment in its favor.

C. IF ARKY FREED WERE NOT ENTITLED TO A DIRECTED VERDICT IN ITS FAVOR UNDER ISSUE B BECAUSE A JURY QUESTION WAS PRESENTED ON THE VIABILITY OF THE "COVER" DEFENSE UPON WHICH BOWMAR'S CLAIM OF MALPRACTICE WAS BOTTOMED, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LAW GOVERNING THAT DEFENSE.

If we are successful on either of the foregoing issues (or if the Court has concluded that the District Court correctly ordered a new trial on amended pleadings and properly declined to decide the second issue), the Court need not reach the remaining issues on appeal. However, in the event the Court has found neither a reason for judgment nor a

reason for a new trial in the first two issues, there are additional reasons why Arky Freed is entitled, at the very least, to a new trial. The first reason is a derivative of, and an alternative to Issue B. If the Court has determined that our argument under Issue B was wrong on the law, this issue can be skipped--because it depends upon the same law we argued in that issue. However, if the Court has determined that our argument under Issue B was correct on the law, but wrong on the facts--i. e., that there was evidence in the record from which the jury might have made the permissible finding that Fidelity could have "covered" in some manner other than merely performing Bowmar's side of the bargain--then this third issue will have to be decided.

Assuming *arguendo* that there was evidence in the record from which the jury might have made the permissible finding that Fidelity could have "covered" in some manner other than merely performing Bowmar's contract for it, and that a directed verdict was thereby precluded, the fact remains that there was also a substantial amount of evidence in the record from which the jury could have concluded that Fidelity should have "covered" by retrieving the "tool" from Hong Kong, shipping it to someone else, and thereafter performing Bowmar's side of the bargain itself. Indeed, that was the very heart of Bowmar's case. Some method of sorting the first, permissible finding from the second, impermissible finding was therefore clearly necessary. It was to that end that Arky Freed proposed two jury instructions (quoted at page 13, *supra*) which would have informed the jury that the second finding was impermissible.

Unfortunately, the trial court refused to give these instructions, and instructed the jury instead only that Fidelity had a legal duty to "cover" (R. 1333-34). Without the qualification requested by Arky Freed, the jury was therefore permitted to return a verdict of malpractice against Arky Freed upon either the first, permissible finding or the second, impermissible finding--a result which was clearly unfair to Arky Freed from any angle from which it can be viewed. We therefore believe that the proposed instructions should have been given, and that the trial court committed reversible error in refusing them.

The law is thoroughly settled in Florida that a party is entitled to have the jury instructed on all issues and theories of his claim or defense, if the evidence supports the issue or theory, and that the failure to do so (unless cured by the instructions read as a whole) is reversible error. *See, e. g., Seaboard Coast Line Railroad Co. v. Addison*, 502 So.2d 1241 (Fla. 1987); *Morganstine v. Rosomoff*, 407 So.2d 941 (Fla. 3rd DCA 1982); *Menard v. O'Malley*, 327 So.2d 905 (Fla. 3rd DCA 1976); *Ryder Truck Rental, Inc. v. Johnson*, 466 So.2d 1240 (Fla. 1st DCA 1985); *Thursby v. Reynolds Metals Co.*, 466 So.2d 245 (Fla. 1st DCA 1984), *review denied*, 466 So.2d 245 (Fla. 1985); *Wilson v. Florida Air Lines, Inc.*, 449 So.2d 881 (Fla. 2nd DCA), *review denied*, 456 So.2d 1181 (Fla. 1984); *City of Tamarac v. Garchar*, 398 So.2d 889 (Fla. 4th DCA 1981) (en banc).

If the law we have argued under Issue B is the law of Florida, then Arky Freed was undeniably entitled to an instruction on that law--to prevent the jury from returning a verdict of malpractice against it, bottomed upon a finding contrary to that law. And since the instructions, as given, allowed that impermissible result, the trial court's refusal to give the qualifying instructions was clearly prejudicial.[21/] We respectfully submit that, if a directed verdict is not in order here, Arky Freed is entitled at the very least to a new trial--at which the jury will be properly instructed on the law defining the permissible boundaries of the "cover" defense which could have legitimately been presented in the underlying case, because that is the only kind of defense which Arky Freed could even arguably have been negligent in failing to present.

21/ The prejudice was not cured by the trial court's ruling that the proposed instructions could be argued to the jury--a ruling which the trial court apparently thought would suffice to get the law to the jury in lieu of the instructions. Although this appears to be a common practice, it is not a proper practice. The jury was instructed in this case (as all juries are instructed--*see* Fla. Std. Jury Instn. (Civ.) 1.1) that argument of counsel is neither evidence nor the law, and that the law would be given by the court in its charge (T. 1254-57). The jury was therefore instructed, in effect, to disregard the law which the trial court told counsel he should argue to the jury in lieu of receiving instructions upon it. In view of this standard preliminary charge, we must continue to insist that the law belongs in the instructions, not in counsel's argument.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ARKY FREED'S MOTION FOR A CONTINUANCE OF THE TRIAL TO ENABLE IT TO PREPARE AN ADEQUATE DEFENSE TO THE CLAIM WHICH BOWMAR FIRST ASSERTED IN THE LITIGATION ONLY 12 DAYS BEFORE TRIAL.

We also believe that the trial court abused its discretion in denying Arky Freed's motion for continuance to enable it to prepare an adequate defense to the claim which Bowmar first asserted in the litigation only 12 days before trial. The facts upon which this belief are based are not complicated. Bowmar's counterclaim did not allege the claim upon which it proceeded to trial. Bowmar did not respond to Arky Freed's initial interrogatories. Bowmar obtained a continuance until December 16, 1985, to enable *it* to prepare for trial. Bowmar informally advised Arky Freed in unsworn answers to interrogatories in November that it did "not have experts at this time". Bowmar obtained a continuance until February 24, 1986, to give it more time in which to prepare for trial. Bowmar finally engaged an expert to support the theory which it ultimately advanced at trial (in lieu of the claims pled in its counterclaim) on January 30, 1986. *See* footnote 8, *supra*. On January 31, 1986, Bowmar disclosed the names of its expert witnesses (but not the substance of their opinions) for the first time ever in the litigation. On February 7, *Bowmar* moved for a continuance, asserting that *it* was not ready for trial.

Arky Freed followed suit three days later, requesting additional time to conduct discovery of the experts first named ten days earlier. On February 12, 1986--12 days before the scheduled trial date--Bowmar finally filed answers to the long-overdue expert witness interrogatories. These answers (and subsequent depositions) disclosed (again, for the very first time in the litigation) that Bowmar intended at trial to prove none of the allegations of the counterclaim which Arky Freed had prepared to defend--but that it intended to prove, instead, an entirely different, unpled claim involving a complex issue of legal malpractice in failing to present a "cover" defense in complicated commercial litigation of international scope involving procurement of alternative component parts for two different types of computer games.

Thus ambushed, Arky Freed urged its pending motion for continance on the additional ground that it could not possibly prepare an adequate defense to the newly raised claim in the limited time remaining before trial. In response, Bowmar did not contend that it would be prejudiced by an additional continuance (and it was hardly in a position to do so, since it had obtained two prior continuances itself, and since its third motion for continuance was pending before the Court). Bowmar's only position was that Arky Freed had previously announced that it was ready for trial, and that it therefore could not properly contend otherwise at this juncture of the proceeding.

All of the foregoing facts appear in one form or another in our statement of the case and facts. There is an additional fact relevant to this issue, however, which we have saved for this point in the brief to make perfectly clear what should have been at least presumptively clear from the foregoing facts--that it was simply impossible for anyone to prepare to defend against Bowmar's 23rd-hour claim in the 12 days remaining before trial. That fact came from two of Bowmar's own expert witnesses at trial. When questioned as to how long it would have taken Arky Freed to prepare an adequate "cover" defense for presentation at trial of the underlying case, the witnesses testified (between the two of them) that the need to procure experts to testify concerning the availability of alternative components and suppliers, accountants to compute damages, and the like, would have presented an "insurmountable burden" to Arky Freed if the decision had been made to present such a defense within a week before trial (R. 507-08, 643-44).

These witnesses further testified that preparation of such a defense would have required at least a month or two and that the only solution available to Arky Freed if it had seen the need to prepare such a defense a week before trial was to move for a continuance of the trial (*Id.*). That, of course, is precisely the position in which Bowmar had placed Arky Freed in the instant case by ambushing it 12 days before trial with a claim of negligence in failing to present a "cover" defense--a claim which could not properly be defended without spending the month or two necessary to determine if the "cover" defense

itself could have been developed and proved in the underlying litigation.

On 12 days notice, Arky Freed was able to obtain an expert attorney to give opinion testimony on the negligence issue--but his opinion was necessarily limited to the propriety of Arky Freed's decision that presentation of a "cover" defense in the underlying case would have been fatal to Bowmar, because it would have proved Fidelity's alternative fraud claim. Arky Freed was also able to present expert testimony concerning the "ludicrous" nature of presenting a "cover" defense in the underlying litigation, where the evidence would have demonstrated that Bowmar could itself have "covered" in precisely the same fashion in which it would have been claiming that Fidelity should have "covered". But, as the testimony of Bowmar's own experts established at trial of the instant case, 12 days was simply not enough time to investigate the details of Bowmar's claim that a successful "cover" defense could have been presented in the underlying case, or to obtain experts who could have disproven Bowmar's "cover" expert's claim that Fidelity could have "covered", or to obtain and educate an accountant to compute the damages which Bowmar would have avoided under the various factual scenarios of "cover" to be provided by the "cover" expert. In the instant case, the testimony of Bowmar's "cover" expert and accountant therefore went essentially unrebutted. Arky Freed's counsel did the best he could under the circumstances, but it is obvious from the jury's verdict that, given his handicap, his best efforts were not enough.

On the foregoing facts, we are of the firm and unshakable belief that Arky Freed was ambushed by a claim entirely too complex to defend against adequately on a mere 12-days' notice, and that the trial court's insistence upon proceeding to trial of that newly-raised claim was a flagrant abuse of discretion--especially since it had earlier granted Bowmar two continuances notwithstanding that Bowmar had consistently failed to provide Arky Freed with hardly any discovery at all, and even more especially since Bowmar would not have been prejudiced in the slightest if Arky Freed had been given a month or two to prepare a defense to the complex claim sprung upon it on the eve of trial. Indeed, we are

not even certain that the ruling was a discretionary one.

Rule 1.440, Fla. R. Civ. P., provides that an action cannot even be noticed for trial until 20 days after it is "at issue", and that no trial can be scheduled until at least 30 days have expired from the date of service of the notice. *See Bennett v. Continental Chemicals, Inc.*, 492 So.2d 724 (Fla. 1st DCA 1986) (en banc); *Leeds v. C. C. Chemical Corp.*, 280 So.2d 718 (Fla. 3rd DCA 1973). In the instant case, Bowmar's newly-raised claim was clearly not "at issue" because Arky Freed did not even have time to file an Answer to it, and it was tried on a mere 12 days' notice. On those facts, it was an outright violation of Arky Freed's constitutional right of due process to require it to proceed to trial--and the trial court's "discretion" in the matter would seem to be irrelevant. *See Heritage Casket & Vault Ind., Inc. v. Sunshine Bank*, 428 So.2d 341 (Fla. 1st DCA 1983).

But even if we assume that the refusal to continue the trial was a matter within the trial court's discretion, on the facts in this case it is perfectly obvious that the refusal was totally arbitrary in every respect (or based solely on the *legally erroneous* conclusion that Bowmar's counterclaim sufficiently pled the claim), and we therefore see no need to belabor the point. The Court will find all the authority it needs to support a reversal and a remand for a new trial in the following decisions, which have found abuses of discretion in denying continuances in various circumstances far less egregious than those presented here: *Carpenter v. Carpenter*, 451 So.2d 914 (Fla. 1st DCA 1984); *Thompson v. General Motors Corp., Inc.*, 439 So.2d 1012 (Fla. 2nd DCA 1983); *Young v. Young*, 431 So.2d 233 (Fla. 1st DCA 1983); *Stanley v. Bellis*, 311 So.2d 393 (Fla. 4th DCA 1975). *See Crown Life Insurance Co. v. McBride*, 517 So.2d 660 (Fla. 1987); *Ford v. Ford*, 150 Fla. 717, 8 So.2d 495 (1942); *Diaz v. Diaz*, 258 So.2d 37 (Fla. 3rd DCA 1972); *Silverman v. Millner*, 514 So.2d 77 (Fla. 3rd DCA 1987); *Outdoor Resorts at Orlando, Inc. v. Hotz Management Co., Inc.*, 483 So.2d 2 (Fla. 2nd DCA 1985); *In re Estate of Rutherfurd*, 304 So.2d 517 (Fla. 4th DCA 1974).

E. THE TRIAL COURT ERRED (OR ABUSED ITS DISCRETION) IN DENYING ARKY FREED'S MOTIONS FOR MISTRIAL AND NEW TRIAL FOR THE IMPROPER CLOSING ARGUMENT OF BOWMAR'S COUNSEL.

Finally, we also believe that Arky Freed is entitled to a new trial for the improper comments of Bowmar's counsel during closing argument. Arky Freed's objection to the first comment--that the jury should "send a message . . . to all the lawyers who represent clients in American courtrooms"--was initially sustained, so the question presented here is whether the trial court abused its discretion thereafter in denying Arky Freed's follow-up motion for mistrial. Arky Freed's objection to the second comment--that Arky Freed had 100 lawyers who could earn enough to pay an $800,000.00 judgment by working on only one Saturday--was overruled, so the question presented here is whether the trial court committed reversible error in overruling the objection. As a practical matter, of course, the two statements were cumulative, so they cannot be considered separately--and since they were both clearly improper, the only fair solution is a new trial.

At this point in time, there can be no question that a "send a message" argument is improper--in both criminal and civil cases. *E. g.*, *Brumage v. Plummer*, 502 So.2d 966 (Fla. 3rd DCA), *review denied*, 513 So.2d 1062 (Fla. 1987) (civil; "send a message" argument unprofessional and prejudicial, but not *fundamental* error); *Perdomo v. State*, 439 So.2d 314 (Fla. 3rd DCA 1983) (criminal); *Hines v. State*, 425 So.2d 589 (Fla. 3rd DCA 1982), *review denied*, 430 So.2d 452 (Fla. 1983) (criminal); *Boatwright v. State*, 452 So.2d 666 (Fla. 4th DCA 1984) (criminal); *Erie Insurance Co. v. Bushy*, 394 So.2d 228 (Fla. 5th DCA 1981) (civil); *School Board of Palm Beach County, Inc. v. Taylor*, 365 So.2d 1044 (Fla. 4th DCA 1978) (civil). *See S. H. Investment & Development Corp. v. Kincaid*, 495 So.2d 768 (Fla. 5th DCA 1986), *review denied*, 504 So.2d 767 (Fla. 1987) (exhortation to speak as conscience of the community in a voice so loud it will reach non-defendant corporations as far as New York City improper).

The second comment was also improper in several respects. First, there was no evidence in the case that Arky Freed had 100 lawyers; the very largest number that the

evidence would have supported was 52 lawyers (T. 125). Second, counsel's arithmetic was in error by a factor of 10; 100 lawyers, each working a 10-hour Saturday at $80.00 per hour, could earn only $80,000.00--not $800,000.00--and that assumes that all its bills would have been paid, which is a dubious assumption given the facts of the instant case. The comment was therefore unsupported by the evidence, and a misstatement of fact to boot--and it was therefore doubly improper. *See, e. g., Bloch v. Addis*, 493 So.2d 539 (Fla. 3rd DCA 1986); *Russel, Inc. v. Trento*, 445 So.2d 390 (Fla. 3rd DCA 1984); *Eastern Steamship Lines, Inc. v. Martial*, 380 So.2d 1070 (Fla. 3rd DCA), *cert. denied*, 388 So.2d 1115 (Fla. 1980).

More importantly, of course, Arky Freed's ability to pay a judgment of $800,000.00 against it was clearly irrelevant to *any* issue in the case--and the comment was undeniably made for the sole (and clearly impermissible) purpose of encouraging the jury to return a substantial verdict for a reason which had no relevance whatsoever to the amount of damages which Bowmar had sustained. We take it to be too obvious to require extensive argument that comments upon the economic capabilities of the parties--especially the ease with which a defendant might be able to pay a judgment against it--have no place in a tort action. *See, e. g., Baggett v. Davis*, 124 Fla. 701, 169 So. 372 (1936); *Bloch v. Addis, supra, Skislak v. Wilson*, 472 So.2d 776 (Fla. 3rd DCA 1985); *Borden, Inc. v. Young*, 479 So.2d 850 (Fla. 3rd DCA 1985), *review denied*, 488 So.2d 832 (Fla. 1986); *Pierce v. Smith*, 301 So.2d 805 (Fla. 2nd DCA 1974), *cert. denied*, 315 So.2d 193 (Fla. 1975). *Cf. Aetna Casualty & Surety Co. v. Kaufman*, 463 So.2d 520 (Fla. 3rd DCA 1985); *Ryan v. State*, 457 So.2d 1084 (Fla. 4th DCA 1984), *review denied*, 462 So.2d 1108 (Fla. 1985); *Russell v. Guider*, 362 So.2d 55 (Fla. 4th DCA 1978), *cert. denied*, 368 So.2d 1373 (Fla. 1979).

The liability and damage issues in this case were bitterly contested (at least to the extent that Arky Freed was able to prepare for trial of them), and the cumulative effect of these two improper comments (especially when the trial court aggravated the impropriety of the second one by informing the jury that it was proper) may well have tipped the

scales of justice in this case. If the numerous recent appellate decisions which have attempted to curb these types of improprieties are to have any substance, or are to have any force in the future, the only acceptable solution to the prejudice caused by Bowmar's improper closing argument in this case is to afford Arky Freed the opportunity for another, hopefully fairer trial.

V.
CONCLUSION

It is respectfully submitted that the District Court correctly concluded that Bowmar's counterclaim was insufficient to state the claim which was ultimately tried, and that aspect of the District Court's opinion should be approved. However, it is further submitted that the District Court erred in concluding that the proper remedy for Bowmar's failure to prove the allegations of its counterclaim was leave to amend on remand and a new trial, instead of judgment in Arky Freed's favor--and that aspect of the District Court's opinion should be quashed. Additionally, as we have urged in Issue B, and irrespective of the outcome of Issue A, the Court should hold that the claim which was ultimately tried was insufficient to support a judgment in Bowmar' favor in any event, as a matter of law. The cause should therefore be remanded to the District Court with directions that Bowmar's final judgment be reversed, and that the trial court be instructed on remand to enter judgment against Bowmar on its counterclaim, and to enter judgment in Arky Freed's favor on its claim against Bowmar in the amount of $51,500.00, with interest from the date of the verdict. *See* Rule 9.340(c), Fla. R. App. P. If the final judgment is to be reversed, Bowmar's cost judgment must necessarily be reversed as well. Alternatively, and at the very least, either for the reasons stated in the District Court's decision or the three additional reasons urged herein, the District Court should instruct the trial court on remand to enter judgment on Arky Freed's claim against Bowmar as specified above, and to conduct a new trial of Bowmar's claim.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 23rd day of February, 1988, to: Andrew C. Hall, Esq., Hall, O'Brien & Robinson, P.A., 1428 Brickell Avenue, 8th Floor, Miami, Fla. 33131; and to Kohn, Savett, Klein & Graf, P.C., 1101 Market Street, 24th Floor, Philadelphia, Pa. 19107.

Respectfully submitted,

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