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 & HARRIS, P.A.,

Respondent.
_____/

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

# BRIEF OF RESPONDENT/CROSS-PETITIONER, BOWMAR INSTRUMENT CORPORATION

HALL, O'BRIEN AND COHEN, P.A.
1428 Brickell Avenue
Eighth Floor
Miami, FL 33131

By: ANDREW C. HALL
RICHARD O'BRIEN

Attorneys for Respondent/Cross Petitioner

KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street
24th Floor
Philadelphia, PA 19107

By: HAROLD E. KOHN
DIANNE M. NAST
STANLEY M. SHUR

Attorneys for Respondent/Cross Petitioner

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# I.

## STATEMENT OF FACTS

### A. INTRODUCTION

Respondent/Cross-Petitioner Bowmar Instrument Corporation ("Bowmar") respectfully submits this statement of facts because Petitioner's Opening Brief is not accurate in all respects as to the points in contention.

In 1984, a law firm Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. ("Arky, Freed") filed suit to recover attorneys' fees and expenses in the amount of $98,492. The jury found that Arky had charged in excess of its normal hourly rates and reduced Arky's fees to $51,500, the amount which Bowmar's experts concluded was proper. The jury further awarded Bowmar $500,000 resulting from Arky's professional negligence in its representation of Bowmar in Fidelity Electronics, Ltd. v. Bowmar Instrument Corp., Case No. 81-5965 CA 25 (Circuit Court of the Eleventh Judicial District, in and for Dade County) ("Bowmar-Fidelity litigation"). (R. 510). The trial court deducted the $51,500. amount from the professional negligence judgment, thus resulting in a final judgment in Bowmar's favor of $448,500.

Bowmar proved at trial that it had instructed Arky, Freed to investigate and prepare a defense "cover" to

Fidelity's breach of contract claim and that Arky, Freed was negligent because it failed to present this defense. The case also resulted in a jury verdict for Arky, Freed on its claim for certain counsel fees.

On December 8, 1987, the District Court of Appeal for the Third District reversed the judgment entered in Bowmar's favor on the jury verdict and remanded the cause for a new trial and permitted Bowmar to amend its counterclaim. Bowmar contends, in its cross-appeal, that the District Court erred in its reversal, and that reinstatement of the jury verdict is warranted under the facts of this case and Florida law.

Arky, Freed filed a Petition for Review with the Third District Court of Appeal on January 7, 1988 and Bowmar cross-petitioned for review. As a result, the appeals were consolidated before this Court on January 15, 1988.

Although Arky, Freed has raised arguments on other issues which Bowmar will also address, the only issues which are squarely before this Court are (1) whether Arky, Freed had adequate notice of the alleged cause of action in the trial court and, if the pleadings were not sufficient, (2) whether Bowmar is entitled to a new trial because of its reasonable reliance on the trial court's ruling that Bowmar's counterclaim give adequate notice to Arky, Freed of the claims asserted.

The three other issues pressed by Arky, Freed are the availability of the cover defense, the related claim of the trial court's error in denying Arky, Freed's proffered instructions on that issue, and objections to certain statements made in summation by Bowmar's trial counsel.

## B. FACTUAL BACKGROUND

### 1. The Pleadings and Discovery

Bowmar's counterclaim against Arky, Freed alleged professional negligence on the part of Arky, Freed in its representation of Bowmar in the Bowmar-Fidelity litigation, particularly in its preparation for trial. Specific allegations of negligence were asserted in the counterclaim including, for example, the failure to conduct discovery in a proper fashion so as "to determine the existence of certain meritorious defenses ...." (R. 12-58), and "by failure to take necessary depositions . . . ." (R. 12-58). This is precisely the case that was tried. Failure to develop a meritorious defense is cover. The continuity of Bowmar's legal theories is apparent throughout the litigation. That the counterclaim pleadings sufficiently alleged sufficient facts is aptly demonstrated by an Arky, Freed's own interrogatories which are specifically directed to the Complaint and in fact focus on the specific

allegations of Bowmar's counterclaim. For example, Interrogatory Number 1 (c) asks what meritorious defenses would have been disclosed by a properly supervised examination of documents. In response to this interrogatory, in November, 1985, three months before trial, Bowmar listed two meritorious defenses, the first one of which stated:

> Fidelity had the ability to mitigate damages by ordering comparable parts from other manufacturers of the same, but failed to do so. (Emphasis supplied). (Appendix 1).

Petitioner's Interrogatory Number 2, tracked paragraph 14 of the Counterclaim, asking how proper coordination of the defense by Arky, Freed would have developed information favorable to Bowmar. The Interrogatory reads as follows:

> If discovery had been actively coordinated and taken in a proper manner, Plaintiff would have been able to demonstrate before the jury that the loss by Fidelity was occasioned by its overexpansion of its business in light of a declining market and further that alternative sources of supply were always available to Fidelity so that it was not damaged. (Emphasis supplied). (Appendix 1).[1]

1 Arky, Freed would like to ignore Bowmar's November, 1985 answers to interrogatories, quoted in part above, because when the answers were served, they were signed by counsel and not be an officer of Bowmar. However, a

It is also worth underscoring, that Arky, Freed opposed a Bowmar application for continuance, stating that it, Arky, Freed, was ready for trial, including presumably ready to defend with respect to the specific mitigation-cover issue which was spelled out in Bowmar's November, 1985 answers to interrogatories. (R. 117-120).

A subsequent key event in discovery further underscored the specific negligent conduct Bowmar intended to prove at trial. Robert Jeffrey Asti, Esquire, Arky, Freed's lead trial counsel in the Bowmar-Fidelity litigation, was deposed on January 3, 1986, well before the trial date. Most of his deposition centered on the cover defense. It was unmistakably clear that the heart of the professional negligence counterclaim being pressed by Bowmar was the failure of Arky, Freed to adequately investigate and present the mitigation-cover defense in the Bowmar-Fidelity litigation. (A copy of the transcript of the Asti deposition is submitted herewith by Bowmar as Appendix .

On February 21, 1986 a hearing was held on a motion for continuance filed by Arky, Freed on February

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Footnote 1 Continued)

verification was provided well prior to trial. This could not have affected Arky, Freed's preparation for trial, unless it was placing great hope in defending the case on a tenuous technicality.

10, 1986. Arky, Freed did not specify why it needed the continuance. In fact, Arky, Freed did not point to a single witness it needed to interview; nor did it say it needed time to prepare any study; nor did it identify a single deposition that needed to be taken or documents that needed to be examined. In short, Arky, Freed did not point out anything remaining to be done. Bowmar opposed the motion pointing out that Arky, Freed had previously opposed Bowmar's motions for continuances claiming Arky, Freed was ready for trial, and therefore Arky should be ready to stand by that assertion. Bowmar also sharply contested Arky, Freed's assertion that a new claim, cover, had been raised at the last moment by Bowmar. The trial court agreed with Bowmar and denied Arky, Freed's motion for a continuance. (R. 482-497).[2]

In the Arky, Freed-Bowmar trial all three expert witnesses, including one called by Arky, Freed, testified that a lawyer who has been asked and agreed to investigate a defense at the request of his client has a duty to do so,

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2 Arky, Freed claims that it had considered the cover-mitigation defense in preparing for trial in the Bowmar-Fidelity matter and had decided not to use the defense. Certainly then if the defense was properly examined before it was cast aside, Arky, Freed was well-positioned, at any time, to explain why there was no malpractice in its failure to present the cover defense requested by the client, in the Bowmar-Fidelity trial.

and that duty is breached when the attorney fails or refuses to follow that client's instructions. (T. 312-324, 322-324, 630-638, 758-761). Petitioner alludes to the expert and fact testimony on this aspect of the professional negligence claim in its statement of the case, but would have the Court believe the facts are unsettled as to the directives of the client and the conduct of counsel, Arky, Freed. Petitioner's Brief at 12.

The evidence is overwhelming that throughout that pretrial period in the underlying breach of contract suit, the need to defend based on Fidelity's failure to mitigate-cover was repeatedly raised by Bowmar in various meetings and communications between Bowmar and its counsel, Arky, Freed.[3] It is equally clear that Arky, Freed was

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3 Evidence reflecting these directives included a memorandum by Bowmar's President, Charles S. Krakauer, for his meeting in January, 1983 with Arky, Freed's lead attorney. The memorandum, which was given to Arky, Freed at the time, included suggestions for discovery:

> If there is any possibility that Fidelity would have been able to cover and did not that should be a major focus of discovery. (T. 153-154) (emphasis added).

Again, on February 11, 1983, Krakauer wrote to Arky, Freed about Krakauer's investigation of possible sources of cover that may have been available to Fidelity:

> It is my very strong conviction after my technical review, that Texas Instruments, among others, could easily have supplied keyboards of their

aware of Bowmar's desires to develop this defense.[4]

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(Footnote 3 Continued)

> manufacture which would have been direct replacements for the keyboards supplied by Bowmar. . . .
>
> Other potential keyboard sources which might have provided for Fidelity in the relevant time frame would be such companies as Wild Rover, K-B Denver and Colorado Instruments. If advisable, I could pursue other potential keyboard manufacturers which would have directly replaced the Bowmar keyboards.

(T. 153-154). (Emphasis added).

And, on June 30, 1983, Bowmar's general counsel wrote to a member of Arky, Freed's trial team, as follows:

> One interrogatory, regarding Fidelity's order for plastic housings from other vendors, has touched upon the issue of whether Fidelity could have mitigated its damages but failed to do so. However, this area has not been fully explored.
>
> With respect to mitigation opportunities before and during production of the games, we must learn whether and when Fidelity explored or contacted any alternative vendors to Bowmar. The names of all potential alternative vendors, and the date when all such options would have been foreclosed. (T. 163-170). (Emphasis added.)

4 Questioned at trial as to his response to the memorandum Krakauer brought to the January, 1983 meeting, an Arky, Freed attorney stated that "I told Mr. Krakauer that we would look into that and develop that issue." (T. 155). (Emphasis added). After further communication from its client, Arky, Freed wrote back to Bowmar discussing the costs of developing the cover issue:

Arky, Freed failed to follow Bowmar's instructions to develop the cover defense.[5]

2. The Underlying Litigation

To understand the signifance of the cover defense, it is necessary to state briefly the factual background in the underlying breach of contract suit.

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(Footnote 4 Continued)

> If we also retain an expert to testify as to the "cover" issue, as you suggest, that is to say an expert as to the availability of printed circuit boards and keyboards equivalent to those we were to produce, or, testimony from a manufacturer of a similar board, the estimate as to costs of such testimony would be an additional $2,000 to $5,000.

(T. 163-164). (Emphasis added). A later memorandum by Arky, Freed on its July 19, 1983 telephone conference with a Bowmar attorney, Michael Hirschfeld, reflected the value which Bowmar continued to emphasize to Arky, Freed of conducting adequate discovery:

> Hirschfeld authorized us to do all discovery necessary to prepare the case the way Krakauer thinks it should be prepared to go to trial, including all collateral issues. Hirschfeld said he would take full responsibility for this and he would rather face Krakauer to justify the expense and err on the side of conservation than to have Krakauer questioning whether or not the attorneys had done enough to prepare the case for trial. (T. 180-183).

5. The Arky, Freed attorney in charge of preparing the Bowmar-Fidelity litigation admitted in his testimony in the trial in the instant case that:

In early 1979 Bowmar agreed to supply to Fidelity certain component parts including printed circuit boards, domes and key buttons for electronic chess games and bridge games to be assembled and marketed by Fidelity. (T. 130-132). The agreement set out a series of delivery dates for various orders to be delivered by Bowmar to Fidelity; key early target dates were May 15, 1979, and July 1, 1979. (T. 136-137, T. 140, 368-369).

Bowmar experienced difficulties with its Hong Kong-based subcontractor from the outset, causing it to fall

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(Footnote 5 Continued)

(1) no expert with knowledge of industry custom and practice was hired on the cover issue (T. 183-184);

(2) he did not think that he ever called Colorado Instruments (T. 158):

(3) he did not think that he ever called Wild Rover (T. 159);

(4) he may have tried to contact Texas Instruments but was unsuccessful and he did not continued any such efforts (T. 159);

(5) he did not think that he ever called K-B Denver (T. 158-159):

(6) no depositions were taken to learn the availability of replacement keyboards and key buttons (T. 184);

(7) Arky, Freed conducted no study to show how cover by Fidelity would have reduced the damages recoverable against Bowmar (T. 290).

behind in its promised deliveries. (T. 137, 200-202, 925-926, 1013-1015). At an emergency meeting on July 11, 1979 between Bowmar and Fidelity, the Fidelity representative asserted that Bowmar was in breach of contract, (T. 142-143), but it was agreed that Bowmar would have new target dates for delivering the components, to Fidelity, of August 1 and August 15. (T. 936-937). Continuing problems in obtaining key buttons from its subcontractor prevented Bowmar from meeting its delivery requirements until October, 1979 (T. 984-985, 1022-1023). Nonetheless in the face of this continuing delay, Fidelity still did not seek a supplier other than Bowmar. (T. 319-320).

At the Arky, Freed-Bowmar trial, the question of how during the summer of 1979 Fidelity could have mitigated damages, by way of cover, was developed by expert testimony. Undisputed evidence demonstrated that industry practice called for Fidelity to adopt one of the several available cover options. (T. 363-389), but that Fidelity did nothing and allowed its avoidable damages to accumulate (T. 318-320). An electronics industry expert testified that industry custom in situations similar to that of Fidelity's in 1979, called for the buyer (Fidelity) to order production of two molds ("tools") for the key buttons to provide a second source of supply (T. 359-360, 371-372), and that it

was not the custom for the supplier (Bowmar) to provide such a second source. (T. 360).

Even after the critical delivery period arrived in the summer of 1979 with Fidelity not having in place an available second source, the expert testified that there were still three reasonable paths open to Fidelity. The first choice would be to end its dealing with Bowmar, finding another supplier entirely.[6]

A second option for Fidelity would be to obtain direct control of the supply of key buttons by moving its tool from the Hong Kong subcontractor to another (T. 407). Testimony was presented that this option was commonly followed in the industry in situations similar to that faced by Fidelity. (T. 365-367). It is also apparent, which Arky, Freed does not point out, that Fidelity, not

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6 Petitioner inaccurately quotes Bowmar's cover expert as testifying that there were only a "handful" of manufacturers to substitute for Bowmar. Petitioner's Brief at 10-11. The record shows that Bowmar's expert stated that "there were adequate facilities available across the country" (T. 383), and again, that "plastic houses across the country . . . could have mdae those buttons." (T. 401).

Petitioner also suggests, in its in its Brief at 11, that Fidelity was hampered from pursuing cover options because Bowmar owned a patent on "clickers," which fit under the keys. However, Bowmar's expert also stated that substitute products were available in place of Bowmar's clickers. (T. 354-356). This evidence belies Arky, Freed's urging that cover was only available to Fidelity by retrieving its tool. Petitioner's Brief at 11.

Bowmar, owned the tool, and it was Fidelity which had the option to move it.

A third option was for Fidelity to second source, that is, prepare a second tool and place it with another supplier as a back-up when Bowmar's delivery problems continued. (T. 371, 374).

The evidence developed in the Bowmar-Arky, Freed trial also showed that timely reasonable cover activity by Fidelity would have limited its damages to $176,000 (if a cover option had been undertaken by early August 1979), or, no more than $500,000 if begun one month later (beginning of September, 1979), and could have cut its damages by more than $500,000 had it began at an even later date. (T. 448-457, 475-476). The Fidelity-Bowmar jury, however, never heard any evidence about cover because Arky, Freed refused to present it. (T. 847). As a result, Fidelity was awarded a $1,000,000 verdict on its damage claim against Bowmar.

3. The Jury Instructions

Petitioner also argues that the trial court's refusal to deliver its proposed jury instructions on an exception to the general rule on mitigation defense requires the granting of a new trial. In response, it should first be noted that the insruction which was given was the one proposed by Arky, Freed. (T. 1243). The two later sought proposed instructions were contrary to Florida law and were

submitted on the morning of the charge conference, after the deadline for submitting proposed charges.[7] (T. 1239).

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7. The two proposed instructions which Petitioner urges should have been read by the Court, are 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.

(R. 258-96).

> 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).

The trial court's instruction on this issue was as follows:

> In your deliberations, you should take into account the following definition of the term cover and the following statement of the general rule as to the mitigation of damages:
>
> Cover is the making in good faith and without unreasonable delay any reasonable purchase or contract to purchase goods in substitution for those due from a seller. An injured party in a breach of contract action is under a duty to mitigate damages. The party in breach has the burden of proving that the damages could have been mitigated. The injured party is entitled to recover as consequential damages for breach of contract only those damages which could not reasonably be prevented by cover or otherwise. Consequential damages resulting from the

4. The Closing Argument

The final issue raised by Petitioner is that two statements made in summation by Bowmar's counsel were prejudicial and require a new trial. The first one reads:

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

As that was being uttered, Arky, Freed's counsel objected and the objection was sustained, with an immediate curative instruction from the Court that "[w]e are not arguing punitive damages of punishment." (T. 1293).

The second disputed remark was a statement that if one hundred lawyers at Arky, Freed worked the following Saturday, it "will pay up $800,000." The objection to this statement was overruled. The court viewed the comment to the jury to be taken from "inferences from the evidence." (T. 1324).

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(Footnote 7 Continued)

> seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

(T. 1333-1334).

The jury decided that Arky, Freed's representation of Bowmar in the Fidelity litigation constituted professional negligence causing damages of $500,000 -- the lesser of two damage estimates provided by expert testimony -- and that Bowmar owed the law firm $51,000 for fees, a finding of overcharges by Arky, Freed of nearly 100%. The net judgment entered for Bowmar was $448,500. (T. 1348-49).

## II.

## ISSUES ON APPEAL

A. Whether the trial court was correct in its ruling that Bowmar had properly pled its professional negligence claim against Arky, Freed. It so, then no decisional conflict exists and the judgment of the trial court should be reinstated.

B. Whether, if it is determined that Bowmar did not adequately plead its claim of professional negligence, Bowmar reasonably relied on the trial court's ruling in proceeding to trial on its counterclaim. And thus the District Court of Appeal correctly denied Arky, Freed's Motion for a Directed Verdict.

C. Whether the trial court was correct in denying Arky, Freed's motion for a continuance when Arky, Freed knew or should have known of the claim against it and

after Arky, Freed on several occasions, with knowledge of the nature of the claim against it, had stated that it was ready for trial.

D. Whether the trial court was correct in rejecting Arky, Freed's assertion that as a matter of law, the mitigation-cover defense was not available to Bowmar in the Bowmar-Fidelity lawsuit.

E. Whether the trial court was correct in refusing to give two jury instructions on mitigation proposed by Arky, Freed which were contrary to the law as set forth in Fla. Stat. 672.2-715(2)(a) and which were also delivered to the trial court out of time.

F. Whether the trial court was correct in refusing to grant either a motion for mistrial or one for a new trial based on remarks in closing argument made by Bowmar's attorney.

## III.

## SUMMARY OF ARGUMENT

ISSUE A. The claim by Arky, Freed that it was not properly notified of Bowmar's claims in this matter is without merit, and the trial court's judgment should be reinstated. Arky Freed was clearly on notice of the claim being asserted against it by Bowmar. Bowmar in its

counterclaim pled professional negligence, including failure "to determine the existence of certain meritorious defenses . . . ." (R. 12-58). Furthermore, in November, 1985, in response to Arky, Freed's interrogatories derived from specific allegations of the counterclaim, Bowmar, providing information about specific defense Arky failed to pursue -- namely, cover. This was exactly the case tried to the jury in February, 1986. Thereafter, on January 3, 1986, Bowmar deposed Robert Jeffrey Asti, Arky, Freed's lead attorney in the Bowmar-Fidelity litigation. The one hour and forty five minute deposition of Asti centered on Arky, Freed's failure to develop and assert the mitigation-cover defense in the underlying case.

ISSUE B. Accordingly, Bowmar relied upon the trial court's ruling that its pleadings were sufficient, before proceeding to trial on its counterclaim. Arky's attempt to supplant the District Court's reasonable reliance ruling with the "invited error" doctrine is inapplicable here as a matter of law and is not based on any fact in the record or anywhere in these proceedings. If the Court determines that Bowmar did not adequately plead its claim of professional negligence it should affirm the District Court of Appeal's decision to remand the case with directions that Bowmar be permitted to amend its counterclaim.

ISSUE C. Arky's contention that the trial court

abused its discretion by denying Arky Freed a continuance 12 days prior to trial is without merit. Arky, Freed was unmistakably aware of the nature of Bowmar's claim against it. In fact, even after Bowmar answered interrogatories further developing its precise claim as to cover in November, 1985, and even after the deposition of Arky's lead trial counsel on January 3, 1986, a deposition focusing almost entirely on cover, Arky Freed opposed a Bowmar motion for a continuance, stating that Arky, Freed was ready for trial. Thereafter, Arky, Freed never stated or suggested that there was one single undertaking which it needed to complete -- not one deposition to take, document to inspect, or interrogatory to be answered.

Indeed, it is apparent from the way Arky, Freed proceeded in this litigation that it never sought at any time to take meaningful factual discovery, after Bowmar answered Arky's Interrogatories in November, 1985. For example, through the entire months of November and December, 1985, January and half of February, 1986, not a single deposition was taken by Arky. And in fact, the only fact witnesses Arky ever sought to depose was Charles Krakauer, a deposition taken on February 19, 1986. Arky should not benefit from its failure to properly prepare its case, by a contrived claim of surprise on the eve of trial.

ISSUE D. Arky, Freed is wrong in its argument

that as a matter of law it was entitled to a directed verdict on Bowmar's counterclaim because the cover-mitigation defense was not available to Bowmar. This assertion ignores the expert testimony on established practice in the industry as well as the facts described above which show that this case involved a question of routine cover, that is, a buyer's purchase of substitute goods. Industry custom called for the buyer to pursue alternative sources under the circumstances Fidelity faced, and Fidelity had reasonable cover options available to it including: (1) finding another supplier, (2) or removing its tool from the Hong Kong subcontractor, (3) or preparing a second tool and obtaining an alternative supplier ("second sourcing" as it is known in the industry) -- or some combination of those options. Arky, Freed's narrow and strained portrayal of the industry realities is simply inaccurate.

ISSUE E. Arky Freed was not entitled to have its two requested instructions given concerning the exception to the general mitigation rule. The instructions about which Arky now complains were inapplicable as a matter of law to the instant case and were irrelevant for the reasons set forth under ISSUE B above. Second, the record shows that the two proposed instructions were submitted to the Court and to opposing counsel out of time. And in fact, the

instruction given the jury by the trial court was the exact instruction initially requested by Arky, Freed the very day before the case was given to the jury.

ISSUE F. Neither of the remarks in closing about which Arky, Freed complains even remotely justifies reversal of the judgment entered on the jury's verdict in this case. The message remark was never even finished. The Court interrupted the statement and indicated in the presence of the jury that it was not relevant. At that time, Arky, Freed sought no further curative instruction from the judge other than that already delivered by the trial court.

The income projection statement, suggesting that Arky, Freed could earn $800,000 on one working day, was based on information about Arky, Freed's hourly billing rates which was in evidence. Petitioner cannot show that this statement had any prejudicial effect on the jury. The judge who presided over the trial certainly saw no such effect. In fact, the jury awarded the lesser amount of damages of the two alternative amounts presented by Bowmar's proof in the trial. Thus it is clear that the remark did not cause the jury to award an unduly large amount to Bowmar.

## IV.

## LEGAL ARGUMENT

### A. THE TRIAL COURT PROPERLY DENIED ARKY, FREED'S MOTION FOR DIRECTED VERDICT, SINCE BOWMAR'S CLAIM OF PROFESSIONAL NEGLIGENCE WAS PROPERLY PLED; THEREFORE, NO DECISIONAL CONFLICT EXISTS AND THE JUDGMENT ENTERED ON BOWMAR'S COUNTERCLAIM SHOULD BE REINSTATED.

In the trial of this case, the jury determined that Arky, Freed was negligent in failing to develop a mitigation-cover defense, a defense it was repeatedly instructed by Bowmar to develop. The jury further found that because of that negligence, Bowmar was forced to pay a greater damage judgment to Fidelity than it would have had to pay had the cover defense been pursued and presented at trial. Arky, Freed argues that that claim was not alleged in Bowmar's counterclaim, and therefore Petitioner should have been entitled to a directed verdict. The facts, however, are clearly to the contrary. Professional negligence was pled and, at trial, professional negligence was proved.

As Arky recognizes, Florida is a "notice pleading" jurisdiction. Under Florida Rules of Civil Procedure, a counterclaimant (as Bowmar was in the court below) need only make a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Rule

1.110(b), Fla. R. Civ. P. As numerous cases interpreting this requirement have explained, where the pleading informs the defendant -- or, in this case, the counterclaim defendant -- of the cause of action against him, it is sufficient. See, e.g., Rothman v. Gold Master Corp., 287 So. 2d 735 (Fla. 3d DCA 1974); Wiggins v. State Farm Ins. Co., 446 So. 2d 184 (Fla. 2nd DCA 1984); Wells v. Brown, 303 So. 2d 395 (Fla. 2d DCA 1974). Compare Rule 1.120, Fla. R. Civ. P. (requiring allegations of fraud and mistake to be pled with particularity).

This common sense view was explained by the court in Smith v. Mogelvang, 432 So. 2d 119, 123 (Fla. 2d DCA 1983):

> [T]he positions of parties in a suit need not in all circumstances be rigidly established by the pleadings. There is a limit, which cannot be precisely delineated (thus there is substantial appellate court reliance upon trial court discretion), beyond which parties may not depart from their pleadings.

As stated above, Bowmar's counterclaim specifically pled the exact theory on which Bowmar went to trial. For example, paragraph 13 states:

> Throughout the course of the litigation, Counter Defendant failed to properly render the requisite care in order to adequately prepare these cases for trial. . . . 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.

(R. 12-58). And further, paragraph 19 states:

> . . . Counter Defendant ARKY, FREED negligently breached its duty to Counter Plaintiff BOWMAR INSTRUMENT CORPORATION by failing to:
>
> a. Use due care in the vigorous prosecution 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. . . .

(R. 12-58). The counterclaim, filed before any discovery ws taken, was intended to, and did, put Petitioner on notice of the cause of action asserted: professional negligence with respect to Arky, Freed's representation of Bowmar, including failure to determine meritorious defenses -- exactly what was presented to the jury.

Cases string-cited by Petitioner, in which parties were not permitted to go forward on unpled claims, arise from circumstances quite different from those presented here. In some of these cases, for example, the plaintiff sought at trial an entirely different remedy from the one

sought in the pleadings.[8]

Other cases cited by Arky turned on the parties having changed their legal theory at trial. For example, alleging breach of contract but seeking at trial to prove negligence.[9]

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8 See, e.g., Dysart v. Hunt, 383 So. 2d 259 (Fla. 3rd DCA 1980) (complaint only sought return of property; at trial plaintiff sought detention damages); Cortina v. Cortina, 98 So. 2d 324 (Fla. 1957) (ex-husband in complaint sought to enforce visitation rights; at hearing child support obligations dissolved); Baring Industries, Inc. v. Rayglo, Inc., 303 So. 2d 625 (Fla. 1974) (in breach of contract action, complaint did not request consequential damages, but such damages asserted at trial); Hernandez v. Hernandez, 444 So. 2d 35 (Fla. 3rd DCA 1983) (no prayer in complaint for life insurance coverage or education of child, yet such claims asserted at trial); Griffin v. Griffin, 463 So. 2d 569 (Fla. 1st DCA 1985).

9. See, e.g., Citizens National Bank of Orlando v. Youngblood, 296 So. 2d 92 (Fla. 4th DCA 1974) (complaint alleged breach of contract; at trial, plaintiff sought to prove negligence in performance of contract); Kuehne & Nagel, Inc. v. Lewis Marine Supply, 365 So. 2d 205 (Fla. 3rd DCA 1978) (same); Dean v. U.S. Home Corp., 485 So. 2d 438 (Fla. 2d DCA 1986) (complaint sought indemnification; at close of trial, plaintiff sought contribution); Wassil v. Gilmour; 465 So. 566 (Fla. 3rd DCA 1985) (complaint alleged breach of time-barred contract; at trial plaintiff sued upon different, later contract); Designers Tile Int'l Corp. v. Capital C Corp., 489 So. 2d 204 (Fla. 3rd DCA 1987) (complaint alleged negligent hiring; at close of trial, plaintiff alleged vicarious liability for acts of hired subcontractor).

Nor do the other cases offered by Arky offer any guidance here. In Smith v. Mogelvang, 432 So. 2d 119 (Fla. 2d DCA 1983), plaintiff, in his amended complaint narrowed his allegations yet, at trial, proceeded on the allegations of the original complaint. The dismissal in Dillard Smith Const. Co. v. Greene, 337 So. 2d 841 (Fla. 1st DCA 1976), turned on substantive grounds rather than pleading deficiences, and Reddish v. Smith, 468 So. 2d 929 (Fla. 1985), alleged violations of a statute without ever identifying the statute.

Kartikus v. Demos, 214 So. 2d 86 (Fla. 3rd DCA 1968), cited by Arky, is likewise unpersuasive. Kartikus states the obvious requirement that in a professional negligence claim, plaintiff must allege more than just a bare legal conclusion of negligence. Bowmar's counterclaim did specify how Arky, Freed was negligent, including Arky's failure to conduct proper discovery and failure to develop meritorious defenses.

It is respectfully submitted that the trial court, familiar with the entire proceeding since its inception was correct, and the District Court erred on this issue of the adequacy of Bowmar's pleading. Apparently the District Court was persuaded, at least partly, by Arky, Freed's repeated but inaccurate assertions of being "ambushed 12 days before trial," a characterization it repeats throughout

the opening brief before this Court no less than six times. The facts reveal to the contrary. Accordingly, it is therefore submitted that the trial court's ruling was correct on the adequacy of Bowmar's counterclaim. Therefore, if the trial court's ruling is affirmed, there is no question as to the adequacy of the pleading, thus eliminating any question of decisional conflict between the District Courts.

### B. THE DISTRICT COURT OF APPEALS CORRECTLY DENIED ARKY, FREED'S MOTION FOR DIRECTED VERDICT BECAUSE BOWMAR REASONABLY RELIED ON THE TRIAL COURT'S RULING IN PROCEEDING TO TRIAL ON ITS COUNTERCLAIM.

If this Court affirms the District Court's decision with respect to the pleading issue, the Court is urged to also affirm the District Court's holding that Bowmar reasonably relied upon the trial court's ruling when it proceeded to trial without amending its pleadings. 12 F.L.W. at 2751-52.

In its argument seeking reversal of the trial court's finding on the adequacy of the pleadings, Arky, Freed relies principally on Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981). But, as the District Court carefully observed, Dober is different than the instant case and must be distinguished from it. Here, unlike Dober, Bowmar proceeded to trial on its pleadings as they were, relying on

the trial court's ruling as to their sufficiency.

As the District Court states:

> By contrast, in Dober, the trial court did not validate the claimant's position but instead ruled with the defendants that the claim was filed beyond the applicable limitations period. That ruling rather than lulling the claimants into a state of well-being, should have produced the opposite result of impelling the claimants to reply to the statute of limitations defense and plead their avoidance of it. Dober, then, is not a reliance case and is therefore inapposite.

12 F.L.W. at 1251 (emphasis by the Court).

Despite the District Court's clear explanation of the differences between Dober and the present case, Arky, Freed incorrectly describes the differences as procedural namely, the difference between a summary judgment motion and a motion for a directed verdict. Petitioner's Brief at 27. Arky, Freed reinforces this misconception by its repeated characterization of Bowmar's position in proceeding to trial on its pleadings as an erroneous election, unaffected by the pretrial ruling, and therefore not in reliance on the ruling. This description ignores the reality which was accurately described by the District Court namely, if the trial court had ruled that Bowmar's pleadings did not sufficiently encompass the allegations it sought to prove, Bowmar could have moved to amend its pleadings. A curative amendment would have left no room for a claim of variance

between the pleadings and proof and there would be no possibility of a directed verdict on that basis. 12 F.L.W. at 1252.

Apparently in recognition that the instant facts do not accord with Dober, or with various other irrelevant hypotheticals which it concedes would not alter the District Court's analysis, Arky, Freed attempts to overcome the District Court's holding by introducing in this case for the first time the doctrine of "invited error," an argument not raised in the District Court. But Arky, Freed is unable to find any authority to apply the doctrine to this case. Its string cites on "invited error" are undeveloped. Arky, Freed also inaccurately "quotes" from the District Court opinion. On no less than five occasions, Arky, Freed "quotes" the District Court's finding as one of "good faith reliance on invited error." This "quote" nowhere appears in the appellate opinion. The words "invited error" never appear in any context in the opinion appealed from.

The reason for Arky, Freed's inaccurate use of quotation regarding "invited error," and for the absence of any genuine case development on this issue is clear when one looks at what "invited error" is. "Invited error" involves: (1) a party's request for particular relief from the trial court; (2) the trial court's granting of the requested relief; the same party later challenging as error the very

relief it requested below. "Invited error occurs when a rule of law is contended for by a party in the trial court who alleges on appeal that the rule was erroneous." Growers Marketing Service, Inc. v. Conner, 249 So. 2d 486, 487 (Fla. 2d DCA 1971) (emphasis added), affirmed, 261 So. 2d 171 (Fla. 1972); accord, Sonson v. Nelson, 357 So. 2d 747, 748 (Fla. 3rd DCA 1978); Behar v. Southeast Banks Trust Co., N.A., 374 So. 2d 572, 574 (Fla. 3rd DCA 1979), cert. denied, 379 So. 2d 202 (Fla. 1980).

The unvarying definition of the doctrine of invited error, as demonstrated in numerous cases, includes the notion that one cannot complain on appeal against a ruling contended for, or contributed to below. The circumstance which Arky, Freed would have this Court describe as Bowmar's "invited error" is certainly not invited error and in fact involves a ruling which Bowmar has not attacked on appeal, but, in fact, maintains ought to be rehabilitated by this Court as correct. The only invited error here is Arky, Freed's invited error with respect to the jury instructions, which is dismissed below.

Not only is Arky, Freed wrong in raising this issue, and in seeking to impute it into the District Court's analysis, Arky, Freed is also clearly wrong in characterizing the District Court's analysis as "invention." That court reasoned that:

> "[t]he cases are legion in which the appellate courts, noting the manifest injustice of penalizing a party for its good faith reliance on a trial court's later found-to-be erroneous ruling, have given the litigants a second chance or, more accurately, a first chance under the now-corrected ruling." 12 F.L.W. at 1251.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ARKY, FREED'S MOTION FOR A CONTINUANCE

As noted before, Petitioner repeatedly invokes the incantation of having been "ambushed" 12 days before trial. As already demonstrated, this claim is not supported by the facts. The professional negligence claim was unquestionably and specifically alleged in the counterclaim. It was further identified in Bowmar's answers to interrogatories in November, 1985, interrogatories Arky, Freed propounded which tracked the allegations of the counterclaim. The January 3, 1986 deposition of Mr. Asti provided yet another layer about the mitigation-cover issue which was clearly to be the principal element of Bowmar's professional negligence claim at trial.

Before filing its February 1985 motion for a continuance, Arky had stated that it was ready for trial. This readiness was announced after it received Bowmar's Counterclaim and its Answers to Interrogatories in November, 1985. And, as stated above, from the filing of the counterclaim in May, 1985 until Arky filed its Motion for a

Continuance, Arky never sought to depose one single witness as to the allegations of the counterclaim. In fact, its Motion for a Continuance did not request a single iota of discovery which it needed or wanted to take. The only fact witness it every deposed was Charles Krakauer, and that was not until February 19, 1986. Accordingly, the trial court had a reasonable basis in exercising its discretion to deny the continuance.

Whether or not to grant a motion for a continuance is within the sound discretion of the trial court. Carpenter v. Carpenter, 451 So. 2d 914 (Fla. 1st DCA 1984); Ford v. Ford, 8 So. 2d 495 (Fla. 1942). Such a decision will not be disturbed absent a showing of gross and flagrant abuse. Kasper Instruments v. Maurice, 394 So. 2d 1125 (Fla. 4th DCA 1981). There can be no doubt that under this standard of review, and given the facts in this case, there was no abuse of discretion in the trial court's rejection of Arky, Freed's request for a continuance.

Arky unavailingly presents as case authority a number of cases regarding the granting of a continuance, as if the result could be persuasive without acknowledging the bases for the rulings. The cases cited all reveal compelling circumstances which are clearly absent here, and which underscore how reasonable was the ruling of the trial court here. In Thompson v. General Motors Corp., 439 So. 2d

1012 (Fla. 2d DCA 1983), plaintiff's counsel suffered severe heart problems shortly before trial and could not proceed, and alternate counsel could not be obtained. In Diaz v. Diaz, 258 So. 2d 37 (Fla. 3rd DCA 1972), counsel suddenly became ill the day before trial. In Outdoor Resorts of Orlando v. Hotz Mgt. Co., 483 So. 2d 2 (Fla. 2d DCA 1985), the key defense witness became ill just prior to trial. Similarly, in Estate of Rutherford, 304 So. 2d 517 (Fla. 4th DCA 1974), appellant should have been granted a continuance due to her inability, despite conscientious efforts, to obtain Florida counsel prior to the scheduled hearing. In Silverman v. Millner, 514 So. 2d 77 (Fla 3rd DCA 1987) it was an abuse of discretion to deny a continuance when the employer/defendant suffered a stroke the day before the trial was to begin.

A distinctive set of facts also obtained in Carpenter v. Carpenter, supra, where it was held to be an abuse of discretion to deny a continuance when a new expert was identified one working day prior to trial. Unlike that genuinely sudden surprise, in the present case, Bowmar identified all experts who were to testify at trial almost one month before trial, and all were in fact deposed by Arky, Freed's counsel. (R. 133).

Realizing it has no basis to claim that the denied continuance request constituted an abuse of discretion,

Petitioner also claims that under Florida Rule of Civil Procedure 1.440 the trial court was required to grant a continuance because Arky, Freed had only 12 days' "notice" of Bowmar's trial strategy. Even if Arky, Freed's time calculation were accurate -- which it is not -- Arky, Freed's interpretation of Rule 1.440 is incorrect, because "notice" under that Rule has an entirely different meaning than that to which Arky refers.

Rule 1.440 states that an action is "at issue" 20 days after the last "pleading" is served or after disposition of the last motion directed to a pleading. Once an action is "at issue," any party may file a "notice" for trial. Thereafter, a trial date is set by the court at least 30 days after the "notice." Clearly, the Rule was complied with. On July 10, 1985, following service of the last "pleading" (Petitioner's answer to the counterclaim), the trial court set trial for October 21, 1985. There were no outstanding motions on the pleadings at that time. Hence, the 30-day rule was more than met.[9]

9. The cases construing Rule 1.440 on which Petitioner relies all involve violations of the Rule, and of course no such violation is present here. See Bennett v. Continental Chemicals Co., 492 So. 2d 724 (Fla. 1st DCA 1986), (Rule 1.440 violated because the trial date was never set by court order and because the case was not "at issue," as motions on the pleadings were outstanding and an answer (a "pleading") had yet to be filed); Heritage Casket & Vault Ind. v. Sunshine Bank, 428 So. 2d 341 (Fla. 1st DCA 1983), (trial court never

For all the reasons stated above, Bowmar submits that the trial court's decision concerning the continuance neither constituted an abuse of discretion nor a violation of Rule 1.440.

D. AS A MATTER OF LAW, THE MITIGATION-COVER DEFENSE WAS AVAILABLE TO BOWMAR IN THE UNDERLYING BOWMAR-FIDELITY LITIGATION AND THEREFORE ARKY, FREED WAS NOT ENTITLED TO A DIRECTED VERDICT ON BOWMAR'S COUNTERCLAIM.

The cover-mitigation defense was clearly available to Bowmar in the underlying litigation. In its effort to apply the exception to the general rule on a buyer's obligation to cover, Arky, Freed inaccurately portrays the circumstances confronting Fidelity in 1979, and ignores the expert testimony on custom and established practice in the industry.

The fact is that the underlying breach of contract litigation involved a question of routine cover: the requirement that a buyer purchase substitute

(Footnote 9 Continued)

ordered a trial date, there was no evidence appellant ever received the "notice" sent by Respondents; and even if appellant did receive notice, it would have been only 7 days before trial violative of the 30-day rule). See also Leeds v. C.C. Chemical Corp., 280 So. 2d 718 (Fla. 3rd DCA 1973) (motions outstanding): Young v. Young, 431 So. 2d 233 (Fla. 1st DCA 1983) (notice sent only 17 days before hearing).

goods in order to mitigate damages incurred by a seller's breach of contract. The exception urged by Arky, Freed is applicable only when both buyer and seller both have an equal opportunity to cover. That did not exist here. It could not, because Fidelity owned the tool. The expert testimony showed that industry custom called for Fidelity (which owned the tool) to pursue alternative sources including (1) finding another supplier, or (2) removing its tool from the Hong Kong subcontractor, or (3) preparing a second tool and providing itself an alternative supplier -- or some combination of those options.

Florida applies "black-letter contract law," whereby a party is not entitled to recover damages that such party could reasonably have avoided. Thomas v. Western World Insurance Co., 343 So. 2d 1298, 1303 (Fla. 2nd DCA 1977). "Cover" is defined in Section 672.2-712(1), Fla. Stat. (1985), as the "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." "Good faith", as it is used in the definition of "cover," is defined in Section 672.2-103(1)(b), Fla. Stat. (1985), to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The sections quoted above provide that in case of a breach by a seller, the aggrieved buyer is obligated to make

whatever substitute purchases would be viewed as reasonable and appropriate in the industry. If the buyer fails to do so, it loses the right to recover that portion of its consequential damages which could have been avoided by reasonable action. Section 672.2-715(2), Fla. Stat. (1985).

Arky, Freed concedes that "a buyer has an obligation to attempt to 'cover' by purchasing substitute goods elsewhere, and thereby mitigate damages -- and that the damages owed by the breaching seller will be determined accordingly." Petitioner's Brief at 35.

The well-established doctrine of mitigation-cover is one of flexibility and common sense, relying considerably upon the facts of the particular case. As the Supreme Court observed in State ex rel. Dreskell v. City of Miami, 13 So. 2d 707, 709 (1943):

> The principle of 'avoidable consequences' upon which the reduction of damages rule is grounded is not confined entirely to the narrow limits suggested by the appellant. It finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized . . . It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff.

Because it is fact sensitive, the mitigation-cover issue usually presents a factual question for jury determination. See, e.g., Owens v. Clough Corp., 491 F.2d

101, 104 (5th Cir. 1974), and Transammonia Export Corporation v. Conserv, Inc., 554 F.2d 719 (5th Cir. 1977) (applying Florida law).

Regarding the appropriateness of the cover issue as a jury question, the Court in Mason Distributors, Inc. v. Encapulations, Inc., 484 So. 2d 1275, 1276 (Fla. 3rd DCA 1986) (per curiam), recently took the same position as had previously been taken in Transammonia, explaining:

> "What are a reasonable time and effort to 'cover' following an anticipatory breach of contract are questions of fact, and as such, any findings as in regards to the facts will not be set aside unless clearly erroneous."

The exception to the general mitigation rule, which Arky, Freed urges as a basis for its argument that Fidelity was not obligated to mitigate in the Bowmar-Fidelity transaction is expressed in Dobbs, HANDBOOK ON THE LAW OF REMEDIES (1973) at 186:

> Where both the plaintiff and the defendant have equal opportunity to reduce the damages by the same act or expenditure, and it is equally reasonable to expect the defendant to minimize damages, the defendant will not be heard to say that the plaintiff should have minimized, and the plaintiff's award will not be reduced on account of damages the defendant could have avoided as easily as the plaintiff.

Arky, Freed argues that the Bowmar-Fidelity circumstances encompassed such a special case because

"cover" required Fidelity to retrieve its "tool" from Hong Kong and place it with another supplier. Ignoring the testimony of the expert on industry practice to the contrary, Arky further argues that, Bowmar should have placed Fidelity's tool with another supplier.

Arky cites four cases in support of its contention that the mitigation requirement was precluded as a matter of law in the Bowmar-Fidelity transaction. But none of the cases supports Arky's position.

First, Arky, Freed cites Shea-S&M Ball v. Massman-Kiewit-Early, 606 F.2d 1245 (D.C. Cir. 1979). Shea involved a breach of contract for the construction of a dike. This case was not decided under the Uniform Commercial Code. Shea, therefore, cannot alter the law under Section 672.2-715(2)(a), Fla. Stat. (1985), which bars recovery of consequential damages available by cover.

Another important distinction between the instant case and Shea is that there is no mention of any custom which would require the aggrieved plaintiff to construct the dike which defendant had failed to build. By contrast, in the present case, uncontroverted expert testimony was presented that standard trade custom and called for Fidelity (the buyer) to cover by procuring an alternative source of supply, even if this required that Fidelity reclaim its "tool" from Hong Kong.

The second case cited by Arky, Freed on the mitigation-cover issue, S.J. Groves & Sons v. Warner Co., is equally inapplicable, 576 F.2d 524 (3rd Cir. 1978). In S.J. Groves, the court emphasized that defendant was not entitled to reduce its liability on the basis of mitigation because it had breached the contract in bad faith. 576 F.2d at 530. By contrast, there is no suggestion of any "bad faith" issue on the record in the present case. In fact, the testimony was clearly to the contrary. Further, unlike the Bowmar-Fidelity transaction, there was no industry custom in S.J. Groves which required the plaintiff to mitigate. And finally, there was no evidence in S.J. Groves, that industry custom would have required mitigation of damages -- very different than in the Fidelity-Bowmar case.

McCarty v. United States, 185 F.2d 520 (5th Cir. 1950), is also inapplicable to the instant case. It was decided long before adoption of the Uniform Commercial Code. Additionally, while the Court in McCarty does state in dictum the exception to the duty to mitigate rule that Arky, Freed would apply here, it found in McCarty that, unlike here, the aggrieved plaintiff had taken reasonable steps to mitigate.

The final case cited by Arky is Toyota Industrial Trucks v. Citizens National Bank, 611 F.2d 465 (3rd Cir. 1979), a case involving letters of credit and commercial

relations of a truck distributorship. This case is also inapposite. First, the governing law in Toyota is found in Article Five of the U.C.C., which, unlike Article Two, provides "no explicit duty to mitigate damages." 611 F.2d at 470. Second, the court reasoned that defendant bank, unlike the plaintiff, had a security interest which encompassed the trucks and other collateral. Id., at 411. Here, the facts are to the contrary. Fidelity owned the "tool." It was not equally accessible to Bowmar.

The reality facing Fidelity and Bowmar in 1979 cannot be wished away by Arky, Freed. Recasting the facts will not overcome the evidence on the record regarding the nature of cover that was reasonably available to Fidelity that summer.

### E. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE EQUAL OPPORTUNITY TO PERFORM EXCEPTION TO THE GENERAL MITIGATION-COVER RULE.

Petitioner has not disputed the fact that the two instructions which it complains about in this appeal were delivered to the Court out of time.

But even if the proposed instructions had been timely, they were an incorrect statement of the law. As discussed in Section D, the Bowmar-Fidelity facts do not fit into the exception to the general mitigation-cover rule

which the two proposed instructions would have presented to the jury. The jury was therefore properly instructed on the mitigation-cover question.

The mitigation-cover instructions which were given by the Court, and about which Arky now complains, were requested by Arky on this very issue.

In connection with Arky, Freed's complaint regarding the jury instructions, the doctrine of invited error, raised here by Arky, should be revisited. Because the instructions which were given were exactly those proposed by Arky, Freed, it cannot now complain that error occurred in the trial court's instructions. A party who submits a proposed jury instruction which is adopted by the trial court and given to the jury may not be heard to urge error on appeal. Glabvo Dredging Contracotrs v. Brown, 374 So. 2d 607, 608 (Fla. 3rd DCA 1979); accord, Schaffer v. Pulido, 492 So. 2d, 1157-58 (Fla. 3rd DCA 1986); County of Volusia v. Niles, 445 So. 2d 1043, 1048 (Fla. 5th DCA 1984); Roe v. Henderson, 139 Fla. 386, 190 So. 618 (1939).

F. BOWMAR'S CLOSING ARGUMENT DID NOT WARRANT A NEW TRIAL.

Arky asserts that two remarks of Bowmar's counsel during closing argument were sufficiently prejudicial and improper to warrant a new trial. Again, the case law does not support Petitioner's contention.

As a general rule, courts are reluctant to set aside a verdict because of improper jury argument. Pitts v. State, 307 So. 2d 473 (Fla. 1st DCA 1975). During summations, emotional expressions are not unusual, and ought to be permitted if not so inflammatory as to distract a jury from the issues of the case. Metropolitan Dade County v. Dillon, 305 So. 2d 36 (Fla. 3rd DCA 1974).

1. The "Send A Message" Remark

Arky contends that Bowmar's counsel's uncompleted statement that the jury should "send a message" was so prejudicial as to require a new trial.

Yet surely no harm occurred. Even before the statement was completed, the trial court sustained its objection to this remark, stating: "We are not arguing punitive damages or punishment." The Court's curative statement and the relatively mild nature of the never-completed remark distinguishes the case from those in which a new trial was ordered.

The cases show that, even in the criminal context, "send a message" remarks, even completed ones, have been held harmless. See e.g., Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984). In Boatwright, conviction was affirmed although the prosecutor made three statements which the trial court found were not improper. By contrast, in Perdomo v. State, 439 So. 2d 314 (Fla. 3rd DCA 1983), a new

trial was ordered where no curative instruction was given and where the remarks were particularly inflammatory.

An even higher threshold of tolerance obtains, in civil cases, where a new trial will be ordered only where the remarks are especially strong and where they contain what amounts to an improper demand for punitive damages. See, e.g., S.H. Inv. & Devel. Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986) (new trial ordered); School Board of Palm Beach v. Taylor, 365 So. 2d 1044 (Fla. 4th DCA 1978) (new trial ordered); Erie Ins. Co. v. Bushy, 394 So. 2d 228 (Fla. 5th DCA 1981). In this case it should be emphasized that (1) the court below expressly stated that punitive damages were not at issue, (2) nor is there anything in counsel's remark which can be construed as a demand for punitive damages.

Reference to a case decided not long ago by this Court demonstrates that the uncompleted "send a message" remark made by Bowmar's attorney is not remotely a ground for reversal. In Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3rd DCA 1985), plaintiff's counsel started a "send a message" statement in his closing which was interrupted by an objection. The objection was overruled and the attorney restated and completed his comments:

> Send a message to Cincinnati, Ohio, to Eagle-Picher Industries, that

> people in Dade County, Florida, do not believe that this is the right way to treat other human beings.

481 So. 2d at 530.

Despite the nature of the remark, and despite the fact the remark was completed, and that the objection to the remark was overruled, this Court concluded that the remark provided no basis for reversal. 481 So. 2d at 519, n. 1. Given this comparison, then, clearly, if the remarks of plaintiff's counsel in Eagle-Picher did not justify reveral, neither does the remark of Bowmar's attorney in the present case. See also Brumage v. Plummer, 502 So. 2d 966 (Fla. 3rd DCA 1987).

2. Arky, Freed's Income Production

Arky next argues that Bowmar's counsel's statements concerning Arky's projected one day income were prejudicial as to justify a reversal. This contention also is incorrect. The arithmetical error was one the jury could easily correct, and apparently did correct. As the court stated, Bowmar's attorney was fairly "arguing inferences from the evidence". Arky's hourly rates and its billing practices were in evidence prior to closing argument. These facts were directly at issue because of the law firm's complaint for unpaid counsel fees. There was substantial testimony regarding the structure of the Arky, Freed firm

and its billing rates and practices. Accordingly, the jury knew Arky, Freed's billing rates and practices and would necessarily be drawing inferences from the evidence, except as instructed not to.[10]

For example, in Borden, Inc. v. Young, 479 So. 2d 850 (Fla. 3rd DCA 1985), the Court described the closing argument of plaintiff's counsel as follows:

> [He] asserted his personal knowledge of nefarious activities supposedly engaged in by the large corporate defendant which were not only not in evidence but did not in fact exist
> . . . .

479 So. 2d at 851.[11]

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10. Skislak v. Wilson, 472 So. 2d 776 (Fla. 3rd DCA 1985), Pierce v. Smith, 301 So. 2d 805 (Fla. 2d DCA 1974), and Baggett v. Davis, 169 S. 372 (Fla. 1936) (all cases where the jury was told the defendant was insured, and therefore presumably that he would not be personally liable for the judgment, thus encouraging large awards). By contrast, the statement complained of here had nothing to do with insurance coverage nor does it suggest anyone other than defendant would pay the judgment.

11. Given as an example of the highly objectionable remarks of plaintiff's attorney in Borden was the following:

> Borden, you know with all your resources and all your assets and everything that you got -- you have tried to destroy this family, you have put resources behind him

Unlike Borden, the subjects referred to by Bowmar's attorney in summation were all put in evidence at the trial. These included substantial testimony concerning the structure of Arky, Freed and its earnings.

An example of prejudicial remarks requiring a new trial is reported in Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), a criminal case, where a new trial was ordered because of the prosecutor's obvious attempts to inflame the jury, by appeal to its biases and prejudices. There, the prosecutor made a number of references to the wealth of the defendant and her family, and suggested that "the rich get preferential treatment," alluding to the case of Patty Hearst. These references, were not remotely based

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(Footnote 11 Continued)

> in cases that are slightly unreal. They have done things that you can't possibly imagine and Eddie is supposed to be able to go in and counteract this type of resources. It's absolutely and totally impossible. They say, but don't hold it against us. Don't hold it against Elsie.
>
> Well, I got to tell you something. Elsie isn't the sweet little cow you see on the milk can. Obviously, Elsie is a great big corporation and they are there to do one thing, lay it off on somebody else to take care of this man and this lady for the rest of their lives . . . .

479 So. 2d at 851, n. 4.

on any of the evidence admitted at trial. The prosecution also appealed to the rural prejudices of the jury, arguing that the defendant was "thumbing her nose" at "small Martin County." In addition, the prosecutor, besides personally endorsing the state's evidence, made personal attacks on defendant's counsel, and commented -- in clear disregard of the settled law -- on the defendant's failure to testify. There is obviously a substantial basis for the court's decision to order a new trial in Ryan. The prosecution's multifarious misconduct in Ryan is contrasted with the harmlessness of the remarks of Bowmar's counsel at issue here.

Other cases cited by Petitioner are also inapposite. See Eastern S.S. Lines v. Martial, 380 So. 2d 1070 (Fla. 3rd DCA 1980) (counsel made emotional appeal referring to a family tragedy unrelated to the litigation); Aetna Cas. & Surety Co. v. Kaufman, 463 So. 2d 521 (Fla. 3rd DCA 1985) (defense counsel stated that the damages sought would make plaintiff rich and serve no other purpose); Russell v. Guider, 362 So. 2d 55 (Fla. 4th DCA 1978) (defense counsel blamed increase in insurance rates on juries who award damages; new trial not ordered; Russell, Inc. v. Trento, 445 So. 2d 390 (Fla. 3rd DCA 1984) (plaintiff's counsel requested that jury put a value on human life; such a finding not relevant to claim sued upon);

Bloch v. Addis, 493 So. 2d 539 (Fla. 3rd DCA 1986) (numerous remarks with no curative instructions).

In this case, there is no claim that the damages awarded were excessive. Therefore, Petitioner, which concedes that the damages awarded are supported by the evidence, cannot show any prejudicial harm. In fact, the jury did not award to Bowmar the maximum damages supported by Bowmar's proof. This case is a truly proper one for the application of the general rule that counsel will be "accorded a wide latitude in making arguments to the jury, and unless their remarks are highly prejudicial and inflammatory, counsel's statements made to the jury will not serve as a basis for reversing a judgment." Metropolitan Dade County v. Dillon, 305 So. 2d 36, 40 (Fla. 3rd DCA 1974) (emphasis supplied), cert. denied 317 So. 2d 442 (Fla. 1975).

## V.

## CONCLUSION

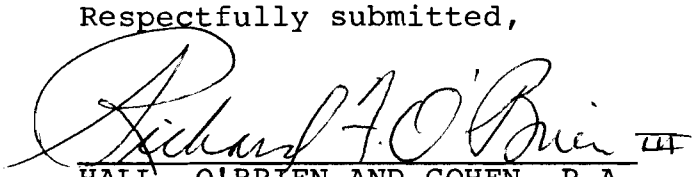
It is respectfully submitted that there was no reversible error committed in the trial of Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., No. 86-1319 and No. 86-2200. Therefore the ruling of the District Court should be reversed and the final judgment entered by the trial court should be

VI.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Appellate Brief and Appendix was mailed this 21st day of March, 1988, to: Joel D. Eaton, Esquire, Podhurst, Orseck, Parks, Josefsberg, Easton, Meadow & Olin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

Respectfully submitted,



HALL, O'BRIEN AND COHEN, P.A.
1438 Brickell Avenue
Eighth Floor
Miami, FL 33131

By: ANDREW C. HALL
RICHARD O'BRIEN

KOHN, SAVETT, KLEIN & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107

By: HAROLD E. KOHN
DIANNE M. NAST
STANLEY M. SHUR

Attorneys For
Respondent/Cross-Petitioner