IN THE SUPREME COURT OF FLORIDA

ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS, P.A. Petitioner, vs. BOWMAR INSTRUMENT CORPORATION, an Indiana corporation, Respondent.	:	CASE NO. 71,719
BOWMAR INSTRUMENT CORPORATION, an Indiana corporation, Petitioner, vs. ARKY, FREED, STEARNS, WATSON GREER, WEAVER & HARRIS, P.A., Respondent	:	CASE NO. 71,720

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

CROSS-REPLY BRIEF OF RESPONDENT/CROSS PETITIONER BOWMAR INSTRUMENT CORPORATION

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I.

INTRODUCTION

In its reply brief, Arky Freed (hereafter "Arky") criticizes Bowmar for exercising its right to present a counter-statement of the facts. While Arky would prefer that those facts not be presented, they are nonetheless quite relevant to the matters in dispute, particularly with respect to Arky's claim of surprise.

As demonstrated in Bowmar's Answering Brief, at pages 3-4, Arky directly inquired of the facts alleged in Bowmar's counterclaim. Arky served interrogatories to its failure to determine meritorious defenses. Bowmar's interrogatory answers left no doubt that the failure to develop and prosecute the cover defense was a contention of the counterclaimant.

Regarding the January 3, 1986 deposition of Mr. Asti, Arky makes two arguments: 1) that the deposition of a non-party witness cannot inform a party regarding the nature of the case against it, and 2) that there is "no hint" in Asti's deposition that Arky failed to follow Bowmar's express directions to present a cover defense. Reply Brief at 5 n. 5. First, the fact that Asti was a non-party in the Bowmar-Arky-Freed case does not detract from the significance of his testimoy. In fact, the trial court referred to Asti as "almost a party" (T.223). Second,

Asti's testimony developed substantial information regarding the cover issue, and included direct reference to communications with Bowmar regarding development of the cover defense, and Bowmar's directives. See, e.g., Asti Deposition at 47-48, 52-53 (Transcript appended to Bowmar's Answering Brief).

Arky's statement of the case seeks to portray the cover issue as elaborate and many-layered. In fact, there is no mystery to the cover issue which would require a more exacting presentation in order to make Arky aware that the issue existed. Arky's intricate narrative cannot overcome the facts which defeat Arky's claim of surprise.

II.

THE COUNTERCLAIM WAS PLEADED ADEQUATELY

A. The Counterclaim Met the Standards of Fla.R.Civ.P. 1.10

Arky incorrectly claims that Bowmar has conceded that none of the factual allegations of the counterclaim was proved at trial. Reply Brief at 5. To the contrary, however, the evidence at trial proved the key allegations of the counterclaim. Arky consistently inaccurately represents Bowmar's statements and arguments (and also the opinion of the District Court, as discussed below), but also misconceives the role and requirements of pleading.

The requirement of pleading ultimate facts, under Fla.R.Civ.P. 1.10(b) does not demand syllogistic accuracy. 40 Fla. Jur.2d, Pleadings §9. The pleading rules are designed to avoid surprise.[1/] "The term 'ultimate facts' should not be interpreted in a technical, restrictive, and hairsplitting way." Waterman Memorial Hospital v. Rigdon, 32 Fla. Supp. 154, 160 (1969); 40 Fla. Jur. 2d, Pleadings §23.

The instant case is analogous to Woodham v. Moore, an action for negligence against plaintiffs' insurer. In Woodham the plaintiffs alleged that their insurer performed its duties negligently in providing insurance coverage. The District Court initially agreed with the defendant that the complaint failed to specify that the insurance agent negligently failed to advise plaintiffs of the availability of an alternate insurance plan. But on rehearing, the District Court found the allegations of the complaint sufficient to include the specific negligence theory at

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1. To the extent that this cross appeal argument contravenes Arky's position on the adequacy of the pleading, it also addresses Arky's argument that the trial court erred in denying Arky a continuance. This argument was addressed in Bowmar's Answering Brief at 31-35.

issue:

> We now hold that these allegations, while perhaps somewhat vague and imprecise, were sufficient to include a claim that the appellee agent negligently failed to advise appellants of their right to secure insurance outside of the assigned risk plan.

428 So.2d 280, 281 (Fla. 4th DCA 1983). See also, Cassady v. McKinney, 296 So.2d 94 (Fla. 2d DCA 1974), a case involving a successful challenge to a tax assessment, where the assessor contended on appeal that the proof did not coincide with the allegations. The District Court disagreed: "While the language of the complaint is somewhat ambiguous, we feel it sufficient, in light of the evidence and of Civil Procedure Rule 1.190(b), 30 F.S.A., to support the trial court's judgment." Id. at 96. The counterclaim here, particularly in light of Bowmar's explanatory interrogatory answers, was thus clearly adequate.

Arky's position would require a standard of pleading that greatly exceeds the rigor now reasonably required. Under modern pleading rules, necessary inferences and presumptions can be supplied. Arky would have the Court abandon this standard and revert to the strict common law fact pleading regime.

In the course of its arguments about the "complexity" of the cover issue, Arky states that "[o]ur complaint here is that we had no notice of the need to develop a defense to the much more complicated second step

of the claim -- whether Fidelity could have successfully 'covered' after Bowmar's breach." Reply Brief at 4-5, n.4. Arky cannot reasonably claim that Bowmar's allegation of Arky's failure to develop the cover defense does not necessarily include the failure to prosecute that claim in the Fidelity litigation. There obviously can be no legal malpractice without a showing of proximate causation. Mayo v. Engel, 733 F.2d 807, 811 (11th Cir.1984), citing Weiner v. Moreno, 271 So.2d 217, 219 (Fla. 3rd DCA 1973). Therefore, the claim that Arky negligently failed to develop the cover defense necessarily includes Arky's negligent failure to utilize the defense in the Bowmar-Fidelity trial. Because it is unnecessary to plead presumptions of law, inferences or facts necessarily implied from other stated allegations, see Adelman v. M. & S. Welding Shop, Inc., 105 So.2d 802, 804 (Fla. 3rd DCA 1958), 40 Fla. Jur.2d, Pleadings §24, Arky's "complaint" herein constitutes neither surprise nor inadequate pleading.[2/]

As discussed in Bowmar's Answering Brief, Arky claims to have considered and then discarded the cover issue in preparation for the Fidelity-Bowmar trial. In response

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2 Even if there is found to be a variance between the pleadings and the proof at trial, the judgment need not be disturbed. There is a line of uncontroverted cases which hold that failure to prove the cause stated in the complaint may not defeat recovery by the plaintiff, provided that the proofs actually made present a meritorious claim. Robbins v. Grace, 103 So.2d 658, 660 (Fla. 2d DCA 1958); Beefy Trail, Inc. v. Beefy King International, Inc., 267 So.2d 853, 857 (Fla.3rd DCA 1972);

to Arky's interrogatories which tracked the allegations of the counterclaim, Bowmar stated that Arky had failed to develop the mitigation-cover issue in the Fidelity litigation. On January 3, 1986, nearly two months before the trial, the deposition of Arky's former trial counsel, Mr. Asti, dwelt at length on the issue of the cover defense and the Fidelity case. Arky's claim of lack of notice requiring an amended counterclaim or a continuance is far-fetched coming after two periods of trial preparation with which to ready itself on this issue. One must conclude either that Arky failed to prepare the defenses in both cases, or that no amount of time or notice pleading will enable Arky to present a viable defense.[3/]

B. If The Counterclaim Was Not Sufficiently Pleaded, Bowmar Reasonably Relied On The Trial Court's Ruling To The Contrary and Should Be Permitted To Amend The Counterclaim On Remand.

There is no doubt that under Florida's liberal policy of allowing amendments to pleadings, Bowmar would

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Footnote 2 Continued

Miami Beach First National Bank v. Borbiro, 201 So.2d 571, 572 (Fla. 3rd DCA 1967); Batista v. Walter & Bernstein, 378 So.2d 1321, 1323 (Fla.3rd DCA 1980) (no abuse of discretion to admit evidence concerning theory not reflected in complaint).

3. It is worthy of note that, just as in its preparation and trial in the Bowmar-Fidelity litigation, Arky made no effort in its defense against Bowmar's counterclaim, to develop or introduce fact witnesses from Fidelity to rebut Bowmar's evidence on the availability of measures to cover, or mitigate Fidelity's damages.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Cross-Reply Brief was mailed this 9th day of May, 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,

C-Reply Br of Resp

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