IN THE SUPREME COURT OF FLORIDA

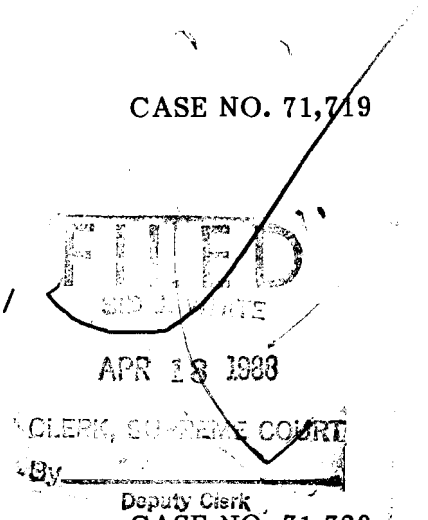
ARKY, FREED, STEARNS, WATSON,
GREER, WEAVER & HARRIS, P.A.,

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

**REPLY 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

Bowmar's restatement of the case and facts is somewhat argumentative, and it is highly repetitive of our initial statement of the case and facts.[1/] These types of breaches of the rules of appellate procedure are not uncommon, however, and we are inclined to overlook them in favor of focusing on the merits here. There are other aspects of Bowmar's restatement which deserve a pointed response, however, and we will therefore digress here briefly (and somewhat argumentatively) before reaching the merits of the issues.

In its restatement of the case, Bowmar painstakingly collects all of the evidence supporting the verdict which it received on the unpled claim with which it ambushed Arky Freed 12 days before trial. The recitation was entirely unnecessary, because we never challenged the sufficiency of the evidence to support the jury's verdict (except, in Issue B, on one narrow legal ground which depends upon only a handful of facts already collected in our initial brief). Fairly read, our initial brief concedes that Bowmar's judgment is supported by the evidence, and therefore subject to affirmance, *if* the trial court did not commit any of the five errors which we claim it committed. It is those five "*if*'s" which are in issue here, *not* the sufficiency of the evidence to support the verdict--so Bowmar's lengthy restatement of the evidence supporting the verdict can comfortably be disregarded here.

Because Bowmar's restatement is repetitive and largely superfluous, we are tempted

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1/ Rule 9.210(c) proscribes repetition, and limits a respondent's statement of the case and facts to areas of disagreement. The only real "disagreement" we can find in Bowmar's restatement is its quarrel (in footnote 6) with our assertion that Bowmar's expert testified that there were a "handful" of competing manufacturers through which Fidelity could have "covered" after Bowmar's breach. According to Bowmar, the expert testified that other sources were available "across the country". It is true that this is what Bowmar's expert said, but when asked to name those sources he could name only *one* (T. 372-73, 401). We think we fairly capsulized this peculiar, self-contradictory testimony by giving Bowmar the benefit of the doubt in asserting that there were a "handful" of sources available. Of course, the point has absolutely nothing to do with any of the issues on appeal.

Bowmar also suggests (in the same footnote) that we were in error in stating that cover could have been effected only by retrieval of the "tool", since substitutes were available for Bowmar's patented "clickers". Bowmar has forgotten the facts. The "clickers" were only a sub-part of the assembly for which Fidelity contracted; the assembly also required the key tops to be made by the "tool". Finding a substitute for the "clickers" would therefore have availed Fidelity nothing; retrieval of the "tool" would still have been required to effect cover.

simply to ignore it, and proceed to the merits of the issues on appeal. We are constrained to make a few brief observations about it here, however, which may be generally instructive to those issues. First, we think it is worth reminding the Court of our primary complaint here--that Bowmar proved none of the allegations of its counterclaim, and that its judgment rests exclusively upon a claim which was never pled in the litigation. In that regard, the complicated and extensive set of facts stated in Bowmar's brief should be compared to the operative facts alleged in Bowmar's counterclaim (which is quoted at pages 2-6 of our initial brief). When that comparison is made, we think it will be abundantly clear that there is nothing in the counterclaim which could even arguably have put us on notice of the facts which Bowmar has attempted to shove down our throat here. Of course, it was that same set of complicated, unpled facts which were shoved down our throat at trial on 12 days notice (by "experts" hired only days earlier), so the Court should now have no difficulty understanding why we are complaining here.

The apparent one-sidedness of the evidence recited in Bowmar's brief is instructive here for another reason. The obvious purpose of the recitation (beyond mere distraction from the issues), of course, was to convince this Court that the evidence at trial was so one-sided and overwhelming that the Court should disregard the errors of which we complain here as essentially harmless.[2/] That is a legitimate tactic in a case where the opposing party has had notice of the claim and an opportunity to prepare and present a defense to it. It is not a legitimate tactic, however, where the evidence is one-sided because no opportunity was given to the opposing party to prepare and present the other side of the claim.

[2/] To that end, Bowmar has suggested that even Arky Freed's expert agreed that Arky Freed committed malpractice in failing to present a "cover" defense in the underlying litigation. That is not an accurate representation of the expert's testimony. The expert testified in no uncertain terms that a "cover" defense would have been entirely inappropriate, and that Arky Freed was not negligent in failing to present such a defense in the underlying litigation (T. 728-48). The expert also testified that the documents upon which Bowmar based its claim that it had *directed* Arky Freed to present the "cover" defense contained no such directive (T. 749-51). It was only on cross-examination, when asked to *assume* that Bowmar *had* in fact directed Arky Freed to present a "cover" defense, that the expert testified that it is negligent to disregard a client's specific instruction without advising him of the reason for doing so and obtaining his consent (T. 754-58). That is a point to which we are prepared to stipulate--and it is hardly a concession that Arky Freed was negligent in its handling of the underlying litigation.

The instant case is the latter case, of course. The reason the evidence on the complex "cover" defense issue was one-sided was that Arky Freed was given only 12 days notice of the need to prepare a defense to it (as we will explain in more detail in a moment), and it was impossible to prepare a defense in that time. We assure the Court that had we been put on notice of the claim by a proper pleading, as the rules of procedure required, the evidence presented at trial would have been considerably less one-sided than it now appears. In short, the one-sidedness of the evidence recited in Bowmar's brief does not support a "harmless error" argument here. It proves exactly the opposite--that we were severely prejudiced by the ambush which Bowmar sprung upon us 12 days before trial.

One final irony deserves to be mentioned. If, as Bowmar claims, the evidence was so one-sided and so overwhelming that Arky Freed was negligent in disregarding Bowmar's express instructions to present a "cover" defense, one would have thought that such a contention would have been the central focus of Bowmar's counterclaim. There is no mention of it in the counterclaim, however--not even a hint. Bowmar more or less concedes this point, and attempts to avoid it by arguing that the deficiency in its counterclaim was corrected by the unsworn, unsigned answers to interrogatories which it grudgingly provided in November.[3/] Of course, the ultimate issues to be tried must be framed by the pleadings, not slipped to a litigant in casual discovery, so Bowmar's informal answers to interrogatories are really irrelevant to the primary issue on appeal. We are compelled to address Bowmar's contention briefly, however, because it involves a deceptive bit of sleight-of-hand which cannot go unexposed here.

As we went to some pains to demonstrate in our initial brief, the claim raised in the answers to expert interrogatories served 12 days before trial (and tried 12 days thereafter) was *considerably different* than the claim advanced in the November answers to interrogatories. The claim advanced in the November answers to interrogatories was (1) that Arky Freed should have discovered the availability of a "cover" defense in the documents pro-

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3/ Incidentally, Bowmar is in error in asserting that these answers were signed by counsel. They were unsigned by anyone, as an examination of Bowmar's appendix will readily reveal.

vided by Fidelity in the underlying litigation, or by studying two other lawsuits in which Fidelity was involved with Zilog and Commodore, and (2) that such a defense, once discovered, could have been successfully maintained in the underlying litigation. We were prepared to try that claim (whether pled or not) because we knew that it was impossible for Bowmar to prove the first step of it (which, of course, was later conclusively demonstrated by Bowmar's failure to offer any evidence in support of it at trial, and by the admissions of its own witnesses that the documents produced by Fidelity did not disclose such a defense). And because the first step of *that* claim was impossible to prove, there was no need whatsoever for us to investigate the electronics industry, hire any experts, or develop any of the facts underlying the viability of a "cover" defense in order to defend the second step of the claim.

As noted previously, however, the claim raised 12 days before trial was considerably different. *This* claim was (1) that Arky Freed had *negligently failed to follow Bowmar's express instructions to present a "cover" defense*, and (2) that such a defense could have been successfully maintained. Unlike the earlier claim, Bowmar *was* prepared to (and did) present evidence supporting the first step of this claim (and the second step as well). Although we were prepared to (and did) present evidence controverting Bowmar's factual position on the first step of this claim (and a portion of the second step, with our evidence that presentation of a "cover" defense would have fatally reinforced Fidelity's separate fraud claim), that was clearly not enough. Once we knew that Bowmar could present a prima facie case on *both* steps of its claim, it became necessary for us to prepare a defense to the major part of the second step of this claim (Fidelity's ability to "cover" after Bowmar's breach). As we explained in considerable detail in our initial brief (and as Bowmar's own witnesses conceded at trial) 12 days was simply not enough time to prepare that complicated aspect of the defense.[4/]

[4/] Once it is recognized that Bowmar's claim contained multiple steps, the fallacy of its additional argument here--that, having considered and rejected a "cover" defense in the underlying litigation, Arky Freed was in an ideal position to explain why it was not negligent in rejecting its use--is easily revealed. This evidence goes to the first step of the claim (and a portion of the second), and we *did* adequately present this evidence at trial. Our

It simply will not do for Bowmar to lump these two quite different claims together and treat them as if they were the same, by pretending that there was only a single "mitigation-cover defense issue" being pursued in this case. The claim first asserted 12 days before trial (and ultimately tried) was *considerably* different than any claim previously asserted in the litigation--either in the pleadings or in the discovery--and Arky Freed was undeniably ambushed by it, as the District Court correctly held.[5/] We think most reasonable persons would agree that Bowmar's midnight-hour claim was an afterthought--created on the eve of trial when it became apparent to Bowmar that it could prove none of the claims asserted in its counterclaim--which brings us back to what we said before. The evidence was one-sided only because the claim was a surprise, to which no significant contrary evidence could be developed or presented. The evidence which Bowmar has shoved down our throat again here should therefore be disregarded as entirely irrelevant to the issues on appeal--to which we now turn.

II.
ARGUMENT

A. THE SUFFICIENCY OF THE COUNTERCLAIM.

In our initial brief, we pointed out that Bowmar did not prove any of the *factual* allegations contained in its counterclaim. In response, Bowmar has more or less conceded the point. We also argued that the charge of which Arky Freed was ultimately convicted at trial--that *it ignored Bowmar's express instructions to present a "cover" defense* which would have successfully reduced the judgment against it--was not pled in the counterclaim. Bowmar concedes that the specifics of this claim were not pled, and it concedes

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complaint here is that we had no notice of the need to develop a defense to the much more complicated aspect of the second step of the claim--whether Fidelity could have successfully "covered" after Bowmar's breach.

[5/] Bowmar also claims that we were put on additional notice of the claim by the questions asked in the January deposition of Mr. Asti. In our judgment, there is no need to dignify this assertion with any response in the text, because no sensible court could hold that a litigant should ascertain the nature of the claims asserted against him (omitted from the pleadings) from questions asked at a discovery deposition of a non-party witness. It is worth noting, however, that there is no hint in Mr. Asti's deposition of the first step of Bowmar's midnight-hour claim--that Arky Freed failed to follow the express directions of its client to present a cover defense.

that Florida law required that it plead not merely legal conclusions, but a "statement of the ultimate facts" entitling it to relief. Rule 1.110(b), Fla. R. Civ. P.

Bowmar argues, however, that it satisfied this requirement by alleging (in paragraphs 13 and 19 of the counterclaim) that Arky Freed (1) "failed to properly render the requisite care in order to adequately prepare these cases for trial" by entrusting to a negligently supervised paralegal the "crucial task of reviewing Fidelity's files in order to determine the existence of certain meritorious defenses";[6/] and (2) "negligently breached its duty to [Bowmar] by failing to use due care", and by "failing to take necessary depositions sufficiently in advance of trial in order to be properly prepared to present defenses" in the underlying litigation. Most respectfully, if those allegations amount to an allegation that Arky Freed *negligently ignored the express directions of its client that it present a cover defense*, then the fabled naked emperor really *is* wearing a new set of clothes. The District Court was not fooled by Bowmar's insistence that this latter claim is the same claim alleged in paragraphs 13 and 19 of its counterclaim, and we are confident that this Court cannot be fooled either, so we will turn to Bowmar's remaining arguments.

A question which remains is whether Bowmar could nevertheless recover judgment on its unpled claim. As the decisions cited at pages 24-25 of our initial brief make clear, it could not. Bowmar attempts to distinguish these decisions on the grounds that some of them involved the pursuit at trial of different remedies than initially prayed for in the pleadings, and some of them involved the assertion at trial of different theories of recovery than initially alleged in the pleadings. We do not dispute that those minor distinctions exist in some of the decisions, but they are clearly distinctions without a difference. All of the decisions upon which we relied stand for the thoroughly-settled general proposition that a party cannot recover on a claim not asserted in its pleadings--and unless this Court is prepared to overrule that long line of authority and hold that pleadings no longer have any

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[6/] Bowmar has only half-quoted this paragraph in its brief (at pages 23-24) by quoting only its generalities; and it has used an ellipsis to omit the specifics of it, which charged Arky Freed with negligent supervision of its paralegal. In our judgment, an ellipsis is poor compliance with counsel's duty to be forthright with the Court.

real function in litigation, we submit that the District Court was eminently correct in concluding that Bowmar's judgment was not supported by its pleadings and therefore could not stand.

On the final sub-issue presented here--whether the District Court should have held that Arky Freed was entitled to a directed verdict on the counterclaim, or whether it properly relieved Bowmar of the error it induced and appropriately authorized it to begin anew on amended pleadings--we rely on our initial argument. To Bowmar's contention that it "relied" on the trial court's erroneous ruling concerning the sufficiency of its pleadings by not moving to amend, we say so what. It was Bowmar which first insisted to the trial court that its pleadings were adequate and did not need to be amended, so the erroneous ruling was clearly "invited". And, of course, if the trial court had ruled correctly and an amendment had been sought as a result, a continuance would clearly have been required to enable Arky Freed to prepare a defense to the new claim. The fact that the case went to trial thereafter on an unpled claim, without amendment, was an error which Bowmar actively solicited from the trial court--and the error was therefore clearly a paradigm of "invited error".

Bowmar also asserts that we have raised the invited error doctrine for the first time here, as if that might somehow preclude us from challenging the District Court's resolution of this sub-issue. We remind the Court that we insisted upon our entitlement to a directed verdict in the District Court--and only mentioned the alternative ultimately adopted by the District Court in a footnote, in which we argued that the alternative was impermissible after *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981). Bowmar did not quarrel with our requested disposition in its brief, so the subject was not mentioned in our reply brief. The District Court's elaborate opinion contains the very first argument advanced on Bowmar's behalf on this sub-issue, so we can hardly be faulted for raising the doctrine of invited error for the first time here. Clearly, the propriety of the District Court's disposition of the case is squarely in issue here, and we should not be precluded from arguing the impropriety of that disposition just because Bowmar never took issue with us on the point below, but the District Court ruled against us anyway. If anyone should be precluded from arguing a

position here, it should be Bowmar.[7/]

Finally, Bowmar argues that our reliance upon the doctrine of invited error is inappropriate here, because the doctrine comes into play only when a party challenges an erroneous ruling on appeal which it invited below, in an effort to obtain some relief from it. Bowmar insists that it is we who are challenging the erroneous ruling here, not it--that it is defending that ruling here, insisting that it was correct. Of course, on the threshold question of whether Bowmar's counterclaim pled the claim which was ultimately tried, Bowmar is correct that its *defense* of the trial court's ruling is not precluded by the doctrine of invited error. But that is not the issue upon which we have invoked the doctrine. It is Bowmar's *alternative* position against which we have invoked the doctrine--its position that, *if* the trial court erred (at Bowmar's invitation) as we contend, then *it* is entitled to relief from that error because it relied upon it--and the relief should be in the form of leave to avoid the position it took below by allowing it to amend its pleadings, notwithstanding that it refused to do so when the sufficiency of its pleadings was initially challenged before trial.

Once the threshold question is answered adversely to Bowmar, and the question becomes whether the District Court should have ordered the entry of judgment in Arky Freed's favor or only a reversal with leave to Bowmar to amend its counterclaim, it is *Bowmar* who is relying on the erroneous ruling it so adamantly insisted upon below, and it is *Bowmar* who is attempting to obtain relief from that erroneous ruling in the form of a "second bite at the apple". That, of course, is exactly the situation which Bowmar has described as appropriate for invocation of the doctrine of invited error, so we think that Bowmar has unwittingly conceded the correctness of our position here. Most respectfully, the invited error doctrine squarely precludes Bowmar from obtaining relief from the error it affirmatively invited below in the form of an opportunity to start all over again at square one; and unless this Court has determined to retreat from its insistence in *Dober v. Worrell*

[7/] To Bowmar's claim that we "inaccurately" quoted the District Court by attributing the phrase "good faith reliance on invited error" to its opinion, we plead not guilty. We were not quoting the District Court. The phrase was our own shorthand summary of the District Court's holding, nothing more, and we never suggested anything to the contrary.

that cases be litigated from start to finish only once (rather than over and over again until tried to perfection), we submit that the District Court's disposition of our appeal was erroneous--for all the reasons set forth in our initial brief.

B. THE LEGAL VIABILITY OF THE "COVER" DEFENSE.

Bowmar has conceded that the exception to the general "cover" rule upon which we relied is well recognized in the law. It has attempted to distinguish some of the decisions upon which we relied by asserting that they did not arise in the context of application of the UCC--but the attempt is only half clever. Some of the decisions involve application of the general principles of the law of contracts, rather than specific provisions of the UCC, to be sure--but some of the decisions involve specific application of the UCC. The distinction which Bowmar attempts to draw here between general principles of the law of contracts and the UCC is therefore illusory. The law upon which we relied clearly governs the instant case, and Bowmar's only legitimate quarrel can be over application of that law to the facts of this case.

With respect to the facts, Bowmar has asserted two positions.[8/] First, it argues that Fidelity could have covered, according to the "industry custom" to which its expert testified (which we were not prepared to controvert) by "second sourcing"--i.e., anticipating Bowmar's breach by having a second "tool" constructed and strategically placed *before* the breach, in case Bowmar breached its contract. We have already responded to this argument in footnote 20 of our initial brief, so there is no need to argue the point further. We simply remind the Court that the legal duty to "cover" does not arise until *after* a breach, so it is simply impossible that Fidelity had any legal duty to "cover" before the breach by entering into an expensive, redundant, backup contract with someone else, to fulfill Bowmar's contractual obligations in the event Bowmar later breached its contract. If a breach of con-

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8/ Actually, it has asserted three. One of its assertions is unsupported by the record, however--its assertion that Fidelity could simply have found another supplier after Bowmar's breach. Because the "tool" required to make the key tops took 10-12 weeks to make, no one testified that Fidelity could have reasonably covered by making a new "tool" after the breach and finding a new supplier (which is why there are no record references for this assertion in Bowmar's brief). We will therefore limit our discussion in the text to the two positions which find some arguable support in the record.

tract can be avoided, in the name of "cover", on the ground that the non-breaching party did not have a duplicate contract with another--which is exactly what Bowmar is arguing here--then contracts are meaningless.

Clearly, Fidelity's legal duty to "cover" *after* Bowmar breached its contract could have been effected in only one way on the facts in this case--by retrieving the "tool" from Bowmar's subcontractor in Hong Kong, and shipping it to another component parts manufacturer who could meet its delivery requirements for the key tops (and using Bowmar's patented "clickers", or finding an alternative, non-infringing "clicker"), and then by having Bowmar or someone else assemble the finished keyboards. And this is the second position upon which Bowmar has staked its claim that Arky Freed could have proven a viable "cover" defense in the underlying litigation. Bowmar points out that title to the "tool" was in Fidelity's name, and posits that Fidelity was therefore in a better position than Bowmar to retrieve the tool. The contention is silly, for two reasons. First, the tool was in the possession of Bowmar's Hong Kong supplier by virtue of its contract with *Bowmar*. Clearly, only Bowmar was in a position to tell that supplier to ignore its contractual obligations to Bowmar and turn the "tool" over to Fidelity.

More importantly, as we noted in our initial brief, the evidence from Bowmar's own experts is *undisputed* that Bowmar could have done precisely the same thing which it now says here only Fidelity could have done, in order to comply with its own contractual obligations to Fidelity. Since the exception to the general "cover" rule upon which we rely depends only upon "equal opportunity for performance", this evidentiary concession by Bowmar--that *it* could have retrieved the "tool" equally as well as Fidelity--not only precludes Bowmar from arguing to the contrary here, but is also absolutely dispositive of the correctness of our contention that the exception to the general rule fits the facts in this case like a glove.

Most respectfully, as the exception to the rule makes clear, no "cover" defense is available when it is bottomed solely upon a contention that the non-breaching party should have performed all of the breaching party's obligations under the contract. The purpose of the exception is to preserve the law of contracts--because any other conclusion simply

nullifies that substantial body of law, and the commercial utility of contracts as well. We therefore 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. We stand on our initial argument.

C. THE REJECTED INSTRUCTIONS.

On this issue, Bowmar argues three things: (1) that the two rejected instructions explaining the exception to the general rule of "cover" "were delivered to the Court out of time"; (2) that "they were an incorrect statement of the law"; and (3) that "the mitigation-cover instructions which were given by the Court, and about which Arky now complains, were *requested* by Arky on this very issue" (respondent's brief, pp. 41-42). We disagree with all three contentions (and we note that the third fails to recognize the distinction between the instruction which was given, which stated the *general* rule, and the instructions which were rejected, which stated the *exception* to that general rule).

The proposed instructions were indisputably "delivered to the Court" in a timely fashion. Rule 1.470(b), Fla. R. Civ. P., provides that written requests for jury instructions should be filed at or before the close of the evidence, and that a charge conference should be conducted thereafter. The plain and unambiguous purpose of this rule is simply to ensure that instructions are filed in time for the charge conference at which they will be considered. In this case, the parties rested their cases on Friday evening (T. 1227). Motions for directed verdict were briefly renewed and denied, and counsel were instructed to appear on Monday morning for the charge conference (T. 1227-31). On Monday morning--after a short discussion concerning the admissibility of a document upon which ruling had been reserved, and *before* the charge conference began--the instructions in issue here were filed and proposed to the trial court (T. 1234-39).

The trial court did express its feeling that "[i]t's a little late. I asked for charges the morning of trial", but it did not refuse to consider them for that reason--and it could not properly have done so, of course, without violating Rule 1.470(b) (T. 1239-40). Instead, the trial court proceeded with the charge conference; considered the proposed instructions on

their merits; and apparently agreed that they properly stated the law, because it ruled that "I think they are argument, and they can be argued by counsel" (T. 1240-50). However, it declined to read the instructions to the jury (T. 1250). Clearly, proposed instructions which are filed (as Rule 1.470(b) requires) after the parties have rested and before the charge conference has begun are "timely", as the trial court itself ultimately recognized by considering the proposed instructions on their merits.[9/] Bowmar's contention to the contrary is just as clearly without merit.

We see no need to debate Bowmar's second contention--that the proposed instructions did not correctly state the law--because we have already demonstrated in Issue B that they do correctly state the law. The only arguable position Bowmar may have had here is that a jury could have found the exception to the general rule covered by the instructions to be inapplicable on the facts, but that is not a legitimate reason for refusing to instruct the jury on the law. As we demonstrated in our initial brief, at least one version of the evidence clearly fit within the exception--and the existence of that version of the evidence simply *required* that the instructions be given.

Bowmar also contends that the trial court gave other instructions on the general rule of "cover" proposed by Arky Freed, and suggests that this therefore rendered the rejection of the proposed charges governing the exception to the general rule "invited error". This contention is neither accurate nor sensible. It is inaccurate because the instruction governing the general rule on "cover" was not given as either party initially proposed; it was an amalgamation of several proposals arrived at by negotiation at the charge conference, with which both parties were dissatisfied (T. 1243-49). The contention is insensible because, where a both a general rule and an exception to it exist, the jury must be instructed on *both*. *Morganstine v. Rosomoff*, 407 So.2d 941 (Fla. 3rd DCA 1981). Put another way, by requesting instructions on both a general rule and its exception, a litigant hardly "invites" the error of instructing only on the general rule and refusing to instruct on the exception.

9/ *See Preston v. State*, 41 Fla. 627, 26 So. 736 (1899) (correct charge to the jury is far too important ever to justify erroneous charge on the sole ground that proposed correct charge may have been technically untimely).

Most respectfully, it simply cannot be proper to omit half of a required instruction, simply because the other half of the required instruction is given, and Bowmar's third contention simply makes no sense. We stand on our initial argument.

D. THE DENIAL OF A CONTINUANCE.

In our initial brief, we argued 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 by denying our motions for continuance was a flagrant abuse of discretion. Bowmar's response to this argument is, to be charitable, little more than misdirection and consequent obfuscation.[10/] It contends that we were on early notice of the claim set forth (for the first time, we contend) in the answers to expert interrogatories served 12 days before trial, because (what it has called) the "mitigation-cover defense issue" was disclosed at least conclusorily in its counterclaim--and more specifically in the unsigned November answers to interrogatories, and in the questions asked of Mr. Asti in his January deposition. There are several things wrong with this contention.

First, the only claims which we could properly have been required to try were the claims alleged in the counterclaim. As we thought we had made clear in our argument under Issue A, claims raised in discovery materials do not become triable issues if they are not raised in the pleadings. *See* (once again) *Hart Properties, Inc. v. Slack*, 159 So.2d 236 (Fla. 1963). There was therefore no reason whatsoever for us to prepare to try anything other than the claims alleged in the counterclaim, whether other claims were disclosed in discovery or not. More importantly, the specific claim with which we were ambushed 12 days prior to trial was neither pled in the counterclaim nor disclosed in the discovery. And if we have not convinced the Court of that by this point, we would be wasting its time to argue the point further.

Bowmar also attempts to finesse our reliance upon the 30-day requirement of Rule

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[10/] Bowmar's contention that we stated no reasons for the continuances which we twice requested on the eve of trial is flatly contradicted by the record, and therefore egregiously wrong. *See* R. 482-97; SR. 1-11.

1.440, by arguing that the pleadings were "at issue" way back in July, 1985, when the case was first set for trial--and "[h]ence, the 30-day rule was more than met" (respondent's brief, p. 34). This contention is both desperate and silly, of course, because the claim which was ultimately tried was not alleged in those pleadings. It was sprung upon Arky Freed 12 days before trial without any support whatsoever in the pleadings. It is therefore simply impossible that the claim upon which Bowmar ultimately prevailed at trial was *ever* "at issue" in this case, and the 30-day rule was therefore plainly *not* met. We rely on our initial argument.

E. THE CLOSING ARGUMENT.

On the merits of our contention concerning Bowmar's "send a message" argument, we acknowledge the apparent tension between *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. 3rd DCA 1985), *review denied*, 492 So.2d 1331 (Fla. 1986), and the remaining decisions cited at page 46 of our initial brief (although it is not altogether clear from the two opinions in *Eagle-Picher* whether a proper objection was actually made to the comment disposed of in footnote 1 of the majority opinion). We simply submit that the substantial weight of authority is clearly to the contrary.[11/] Any other conclusion, we think, amounts to a legal sanction of improper "send a message" arguments.

With respect to the "ability to pay" argument, we disagree that there was any evidence supporting counsel's argument that Arky Freed had 100 lawyers. Bowmar says, "[t]here was substantial testimony regarding the structure of the Arky, Freed firm and its billing rates and practices" (respondent's brief, p. 45-46). Bowmar fails to give any record reference for its assertion that Arky Freed had 100 lawyers, however, because there is no such evidence in the record. It is also irrelevant that the jury may have been able to detect and correct counsel's egregious arithmetical mistake, because the jury's mathematical ability cannot cure the impropriety of the initial statement itself. It is also irrelevant that

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11/ Bowmar is simply wrong in suggesting that *Brumage v. Plummer*, 502 So.2d 966 (Fla. 3rd DCA), *review denied*, 513 So.2d 1062 (Fla. 1987), supports its position here. *Brumage* would support a position of no *fundamental* error, but it clearly requires a conclusion of *reversible* error where a proper objection and motion for mistrial are made, as they were in this case.

Arky Freed's unpaid bill was in issue on the main claim, because the "ability to pay" argument was not directed to that issue; it was directed solely to the apparent ease with which Arky Freed could pay a substantial judgment entered against it on Bowmar's *counterclaim*--an argument which we continue to insist is absolutely improper.

Finally, the fact that we have not separately challenged the amount of the verdict as "excessive" (because we could not, since it is supported by at least one version of the evidence), should have no bearing on the propriety of the arguments themselves. The improper arguments may well have influenced the jury adversely on the liability issue, and they may also have inflated the amount which the jury might otherwise have awarded. After all, the $500,000.00 awarded to Bowmar is hardly a nominal sum. Clearly, the propriety of the arguments must be judged without reference to such an extraneous factor. *See Tito v. Potashnick*, 488 So.2d 100 (Fla. 4th DCA), *review denied*, 494 So.2d 1152 (Fla. 1986). We rely on our initial argument.

III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 14th day of April, 1988, to: Andrew C. Hall, Esq., Hall, O'Brien & Robinson, P.A., 1428 Brickell Avenue, 8th Floor, Miami, Fla.; and to Kohn, Savett, Klein & Graf, P.C., 1101 Market Street, 24th Floor, Philadelphia, Pa. 19107.

Respectfully submitted,

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