IN THE SUPREME COURT
STATE OF FLORIDA
CASE NO.: 72, 357

W. W. GAY MECHANICAL CONTRACTOR, INC., a Florida corporation,

Plaintiff/Petitioner,

vs.

WHARFSIDE TWO, LTD., and CHANEN CONSTRUCTION COMPANY, INC.

Defendants/Respondents.

On Discretionary Review from the District Court of Appeal, First District, State of Florida.
DCA-1 NOS.: BQ-394 & BQ-397

ANSWER BRIEF OF RESPONDENT, CHANEN CONSTRUCTION COMPANY, INC., ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the parties will be referred to as follows: Petitioner, W. W. Gay Mechanical Contractor, Inc., will be referred to as "Gay", Respondent, Wharfside Two, Ltd., will be referred to as "Wharfside", and Respondent, Chanen Construction Company, Inc., will be referred to as "Chanen".

References to the Record on Appeal in the First District Court of Appeal cases number BQ, 394 and BQ, 397 will be by the symbol "R", followed by the page number; references to the trial transcript will be the symbol "T", followed by the page number. References to exhibits introduced by Gay will be by the symbol "GX", followed by the exhibit number, to exhibits introduced by Wharfside by "WX", followed by the exhibit number, and to exhibits introduced by Chanen by "CX", followed by the exhibit number.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Despite the bulk of the Record, the length of the trial transcript, and the number of parties involved, this case essentially revolves around two problems with the domestic water supply system of the Sheraton At St. Johns Place, Jacksonville, Florida (hereinafter, "the Hotel"): an odor in the water and corrosion to the pipes. These two problems, in turn, arise out of the construction of the domestic water supply system for the Hotel, which opened for business on October 6, 1980. (T:119-120).

The Hotel is owned by Wharfside. (T:119-120). The general contractor for its construction was Chanen. (GX:6). The subcontractor for the domestic water supply system was Gay. (GX:1). In putting the domestic water pipes together, Gay used a pipe dope[1] manufactured by Rectorseal Corporation.[2] (T:119-120). As set forth below, the litigation which eventually ensued involved numerous claims back and forth among the various parties. It was the jury's attempt to resolve those disputes by its verdict (R:458-460), and the Final Judgment entered thereon

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[1] Pipe dope is essentially, a substance used to lubricate the threads of pipes when joining them, which thereafter hardens and helps prevent leaks at the pipe joints.

[2] Rectorseal Corporation is a former party to this litigation but is no longer involved in the case. (T:1323).

(R:537-540), which formed the subject matter of the appeal to the District Court of Appeal, First District, State of Florida.

Chanen recognizes the well-settled rule that all facts and reasonable inferences must be considered, for appellate purposes, in the light most favorable to the jury verdict. Regrettably, the present verdict, due to the jury's failure to follow the trial court's instructions, cannot be squared with <u>any</u> legally permissible view of the evidence, thereby making it impossible to state the facts in such a way as to support this particular verdict. Accordingly, we will attempt to set forth all the relevant facts, disputed and otherwise, noting those instances in which material disputes exist.

The bids Wharfside received for construction of the Hotel exceeded the total that Wharfside had intended to spend on the project. (T:155-156, 708-709). Accordingly, Wharfside solicited suggestions from potential subcontractors, including Gay, on ways in which money could be saved. (T: 156,708-709). Gay submitted a suggestion, intra alia, to change the Hotel's domestic water supply system from copper pipes to galvanized steel pipes. (T:156-158, 708-709, 796-797). Wharfside submitted this suggestion to its architects and engineers (T:158, 797-798, 799), who agreed to the change, subject to Gay providing a water treatment system to protect the pipes. (T:158-159, 711, 797-798). Gay agreed to this (T:160, 1192-1193), and recommended a

polyphosphate system. (T:160, 798-799, 951, 1193, 1461). When the contract was awarded to Gay, its responsibilities included providing a polyphospate water treatment system. (T:1461).

In constructing the domestic water supply system for the Hotel, Gay used galvanized pipes in conjunction with brass valves.[3] (T:161,638-639). Brass is composed of between sixty-five and eighty percent copper. (T:948-949, 1500). The witnesses unanimously agreed that if copper is to be joined to galvanized piping, it is necessary to use a dielectric coupling[4] between the two. (T:620, 646, 902, 948-949, 1014, 1375, 1378, 1420, 1487, 1540). The witnesses unanimously agreed that galvanized pipe and brass are dissimilar metals (T:639, 901, 1420, 1501, 1540, 1551), and that a dielectric coupling should be used between dissimilar metals. (T:656, 902, 1420, 1496). However, that apparent unanimity turns into a factual conflict when the questioning is focused on whether a dielectric coupling is necessary between galvanized pipes and brass valves, with some witnesses testifing

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[3] The plans and specifications were silent as to the metal to be used in the valves. (T:730, 901, 949; WX:21; WX:22).

[4] In essence, a dielectric coupling is a short section of a nonconducting material (T:645); it is used to prevent the setting up of an electric current which will otherwise occur when dissimilar metals such as galvanized pipe and copper are placed in connection with each other in a fluid medium (such as the water in the pipe). (T:587, 606).

that such couplings are necessary (T:608, 646, 655-656, 659-660, 886-887) and other witnesses testifing that they are not. (T:902, 1374-1375, 1412, 1489-1490, 1535).

The function of a dielectric coupling is to prevent a process known as galvanic corrosion (T:587), which results from a natural electric flow between dissimilar metals which are in contact in the presence of a fluid solution. (T:587). When galvanic corrosion occurs in a galvanized pipe system, it "eats away" at the interior of the galvanized pipe, eventually causing a leak (T:227-228, 642-643, 1023-1024), and at the same time deposits iron oxide particles (which come from the inside of the corroding pipe) in locations further "downstream" in the piping system. (T:650, 661-662). Thus, the galvanic corrosion process not only causes pipe leaks at the joinder of dissimilar metals as well as downstream in the piping system, but also causes a build-up on the interior surface of other portions of pipe, restricting water flow and reducing water pressure. (T:650, 1024, 1510, 1558).

Within roughly eighteen months after the Hotel opened, pipe leaks began occurring in the hot water side of the Hotel's domestic water supply system. (T:226, 507, 976, 1379, 1450). When a pattern of continuing leaks began to emerge, a number of possible sources of the problem were investigated. (T:417, 531, 586, 947, 1036-1038). After eliminating such possibilities as

electrical grounding on the water pipes (T:947, 1036-1038), and the chemical composition of the City water serving the Hotel (T:586-588, WX:18), it was determined that the cause of the problem was twofold: (1) galvanic corrosion resulting from Gay's failure to use dielectric couplings betwen the galvanized pipe and the brass valves[5] (T:587-588, 1023-1024) and (2) the failure to use a silicate-based water treatment system on the hot water piping. (T:646, 649, 652, 664). In order to minimize the continuing problem of pipe corrosion and resulting leakage, it was determined, after consultation with appropriate experts, to leave the Gay-installed polyphosphate water treatment system connected to the cold water portion of the Hotel's water supply, but to replace it with a silicate water treatment system on the hot water portion.[6] (T:228, 229, 516, 652). This was done, and the leakage problem began abating (at least in terms of new leaks). (T:229, 516, 517, 656-657). Even with the silicate water treatment system on the hot water portion, however, the corrosion

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[5] This conclusion was not undisputed in the testimony. Several witnesses testified that no such couplings were necessary (T:902, 1374-1375, 1412, 1489-1490, 1535), and at least one testified that the problem was due to the corrosive nature of the City's water. (T:1562-1563).

[6] Because polyphosphates undergo a chemical breakdown in hot water, especially in a recirculating hot water system such as the Hotel uses, a silicate water treatment system is better suited for the Hotel's hot water pipe system. (T:662-663, 1477).

process continued, albeit at a reduced rate; in any event, the silicate treatment system would not repair the existing corrosion or completely prevent future corrosion from occurring. (T:647-648, 660).

As noted above, the Hotel also had a water odor problem. The odor was apparently first noticed on September 19, 1980, less than a month before the Hotel opened,[7] and was recorded in an engineering field note. (T:164; WX:4). Several subsequent such field notes observed that the problem continued, despite efforts to track it down and cure it. (T:170; WX:5; WX:6; WX:7; WX:8). Even after the Hotel opened, the very first item on the "punch list"[8] was the water odor problem. (T:913-914). Gay, as the plumbing subcontractor, continued to try to resolve this problem for roughly a year after the Hotel opened before giving up on it. (T:127-128; 129; 199-200; 484-485; WX:12).

The source, extent, severity, and duration of the Hotel's water odor problem were all contested at trial. There was substantial evidence that the cause of the water odor problem was Gay's use of a pipe dope called Rectorseal #5, rather than

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[7] An odor in the water piping during the construction phase is not unexpected; it is only when the odor persisted after the Hotel opened for business that it became a problem. (T:174, 802).

[8] Essentially, a list of miscellaneous unresolved construction matters to be completed or corrected.

Rectorseal Odorless, and the improper application of that pipe dope by Gay, which caused the water odor problem. (T:581-582, 621, 958-959, 1354-1355, 1364-1365, 1416). There was evidence that excessive amounts of this pipe dope had been applied (T:959), and had been applied improperly to the female pipe thread, rather than the male pipe thread, thereby forcing the excess into the interior of the pipe. (T:582, 1354-1355). This theory was supported by several witnesses (including Gay's vice-president and project manager, Mr. Langford) who testified that the water odor was precisely the same as that of Rectorseal #5. (T:918, 958-959, 1419-1420, 1432; WX:31). It was further buttressed by a chemical analysis which demonstrated, by gas chromatography, that Rectorseal #5 was indeed the culprit. (T:922-923). Additionally, when the domestic water system was flushed, chunks of Rectorseal #5 were found throughout the system even months after the Hotel had opened to the public. (T:268-269, 931, 959, 1448-1450; WX:35).

In addition to trying to show that Rectorseal #5 was not the cause of the water odor problem, Gay attempted to establish that, even if Rectorseal #5 were the cause, Gay should not be held responsible because it did not have sufficient water pressure available to properly flush the system until a few days before the Hotel opened. (T:1375-1378; 1413). In this regard, the evidence shows that there was sufficient water available, through

a two inch construction water hook-up (T:161, 162, 743-744, 942, 1431, 1437) and several six inch wells on the property (T:162, 908, 942), to fill the domestic water system and pressure test it prior to opening.[9] (T:750-752, 1435-1436). Additionally, the hot water recirculating system was checked with the boiler fired. (T:1438). Finally, when the six inch permanent water main connection with the City water system was hooked up three or four days before the Hotel opened, the system was "hard flushed" for an hour.[10] (T:1441-1442). The system was also flushed on the following day. (T:945, 1442).

Witnesses testified that it did not matter when the system was hard flushed, and that it didn't make any difference if the flushing took place before or after the Hotel opened, so long as an adequate flushing was performed. (T:803, 1550). There was also testimony that a proper hard flushing would remove any

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[9] A pressure test consists of filling the pipes, putting a slight amount of pressure on them, and letting the pipes stand full of water for several days to see if any leaks develop. (T:806, 1435).

[10] The hard flushing lasted only an hour on the first day because Gay determined that it was quitting time at the end of that hour. (T:1441-1442). Rectorseal Corporation recommended two hours of hard flushing. (T:945, 1364).

excess pipe dope which would normally be expected. (T:1549-1550).[11] Furthermore, Gay's witnesses conceded that they had no record that they had ever advised Chanen that they needed more water pressure to flush the system, or needed it sooner than it was in fact obtained. (T:1440-1441; 1444-1445). Gay's head man on the job, Richard Tison, kept a daily log book of all significant matters concerning the job, and not having enough water pressure to flush the system was significant (T:1440), yet, his log book contains no entry anywhere to the effect that there was not sufficient water pressure to perform the flushing operation. (T:1444-1445). Mr. Tison's superior, Carl Bowles, the general superintendent for Gay on this project (T:1370), testified that he never told either his own superiors or Chanen's top man on the scene that they did not have the water pressure needed for flushing the system. (T:1385, 1393-1394, 1397). Thus, the testimony of Gay's own employees buttresses the testimony of Chanen employees (T:162, 245-248, 297, 735-736, 745-746, 829-831) that Gay never mentioned a need for more water pressure at an earlier date in order to flush the pipe system properly.

When the pre-opening flush of the pipe system didn't solve

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[11] There was, however, also testimony that flushing would not be as effective if it didn't occur until several months after the piping system had been completed. (T:994-995).

the odor problem (T:173-174, 175; WX:9; WX:10), Gay continued to recommend flushing of the system (T:173-174, 185), and this was done on a number of occasions even after the Hotel opened. (T:170-173, 185, 249, 406-407, 931; WX:5; WX:6; WX:7; WX:8). When this still did not resolve the problem (T:177, 406, 486, 808-809; WX:10; WX:11), heavy doses of chlorine were added to the water to determine if that would correct the problem. (T:182, 251-252, 1388). It did not. (T:186-187, 1388, 1398). Another attempt at resolving the problem was made when Gay suggested turning off the polyphosphate water treatment system for a while to see if that was the cause of the problem. (T:251-252). That, too, was tried and failed. (T:251-252, 1476-1477). Finally, Gay took the position that its warranty[12] had expired, and abandoned any further effort to correct the water odor problem. (T:199-200; WX:12).

The only thing that seems to have made any difference in the water odor is the passage of time, and even the efficacy of that approach is subject to dispute, with one witness indicating that the water odor had faded within the first year of Hotel occupancy (T:990), and others testifying that it was still present even on the eve of trial, nearly six years after the Hotel opened.

[12] Gay had given a one-year express written warranty on its plumbing work. (T:976).

(T:206, 1066-1067).

Chanen consistently took the position that Gay had not fulfilled its contractual responsibilities until it delivered an odor-free system. (T:266-268, 1184, 1197). Accordingly, Chanen withheld payment to Gay of the last $230,000 which would otherwise have been due under Gay's subcontract. (T:119-120, 126). It was that withheld $230,000 which led to the filing of the instant case.

Gay sued Chanen and Wharfside for the unpaid amount. (R:1-19). Among its affirmative defenses, Chanen asserted a partial failure of consideration. (R:31, ¶5). Wharfside cross-claimed against Chanen for breach of the general construction contract, for breach of warranty, and for supplying a defective domestic water system. (R:177-206). Wharfside also sued Gay for breach of Gay's subcontract with Chanen and for negligence, breach of warranty, and strict liability as to the construction of the domestic water supply system. (R:116-127). Chanen also sued Gay, seeking indemnity for any liability Chanen might have to Wharfside by virtue of Gay's acts or omissions (R:258-300), as well as for breach of the plumbing subcontract and for negligence, breach of implied warranty, and strict tort liability as to the construction of the domestic water piping system. (R:258-300).

In addition to charging the jury on the various counts and

claims involved, and the relevant standards to be applied, the trial court instructed the jury as to the various elements of damage it should consider in conjunction with each claim. (T:1924, 1926). Since the parties had agreed that the court, rather than the jury, was to compute and add any prejudgment interest which might be involved (T:1843-1844), the jury was specifically _not_ instructed to include _interest_ as an element of damages in connection with any of the claims or counts.

This nine-day trial was submitted to the jury at 3:27 P.M. (T:1940). One hour and eighteen minues later, at 4:45 P.M. on a Friday afternoon, the jury returned its verdict. (T:1940). That verdict (R:458-460) found Wharfside and Chanen liable to Gay for breach of contract, and assessed damages of $200,000 "plus total of the same accrued interest as Chanen Construction received while holding the monies paid to them by Wharfside Two for W. W. Gay." (R:459). The jury held Gay not liable to Wharfside on any of Wharfside's claims (R:459), thereby holding that Gay had not breached its construction contract, nor been negligent in construcing the domestic water supply. That finding cannot be reconciled with the jury's determination (R:459) that Wharfside and Chanen were liable to Gay for $200,000, since the _stipulated amount_ due on that claim, assuming there was no partial failure of consideration, was $230,000. (T:119-120). If, as the jury answered questions one and two of the special verdict (R:459),

Wharfside and Chanen were liable for only part of the remaining balance under Gay's contract, it could only be because Gay did not fully perform its contract; accordingly, Gay would perforce be liable to Wharfside. Yet, the jury found that Gay was not liable to Wharfside in response to question three. (R:459).

Not only that, the jury then reversed its position and held Chanen liable to Wharfside in the amount of $30,000 "plus same condition as question 2 of Part I" (regarding the imposition of interest). (R:460). In short, Chanen, as general contractor, was held liable to Wharfside for $30,000 (plus interest on $230,000, when there was no evidence that Chanen had earned any interest or, if so, in what amount) when the evidence demonstrated beyond dispute that any liability of Chanen to Wharfside would have to be due to its vicarious responsibility for Gay's acts and omissions. Yet, the jury held Chanen -- but not Gay -- liable to Wharfside. (R:459).

Furthermore, it must be noted that the $30,000 assessed against Chanen, when combined with the $200,000 assessed in favor of Gay against Wharfside and Chanen, precisely equals the $230,000 stipulated amount withheld from Gay. In short, it is obvious from a review of the verdict that the jury simply took the $230,000 which had not been paid to Gay and, ignoring the instructions given to them just moments earlier, in an effort to play Solomon, "split it up" by making Chanen and Wharfside

jointly liable to Gay for $200,000 of it and Chanen liable to Wharfside for the remaining $30,000 (plus interest on $230,000 in each case).

Continuing, the jury then found (R:460) that, as between Chanen and Gay, Chanen was 100% responsible for the total amount of damages to Wharfside -- a response wholly at odds with the jury's $30,000 reduction in the amount due to Gay. (R:459). Finally, the jury held that Gay was not liable to Chanen for breach of contract, negligence, or breach of implied warranty. (R:460).

Final Judgment (R:537-540) was entered on the jury's verdict, and post-trial motions were denied. (R:541-542). Thereafter, both Wharfside and Chanen appealed to the District Court of Appeal, First District, State of Florida. (R:546-547; 548-549, 550-551). The District Court of Appeal, First District, filed its opinion on April 12, 1988, reversing the lower court's Final Judgment and remanding the case for a new trial on all issues. Wharfside Two v. W.W. Gay Mechanical Contractor, 523 So.2d 193 (Fla. 1st DCA 1988). The Supreme Court of Florida, on September 6, 1988, accepted jurisdiction of this case pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The basic issue involved in this appellate proceeding is whether the instant decision of the District Court of Appeal, First District, expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

In its decision, the First District Court of Appeal held that Wharfside's evidence concerning its lost profits was sufficiently reliable to support a jury's consideration of its claim for loss of prospective profits and therefore the trial court erred in refusing to admit such evidence. Additionally, the First District Court of Appeal held that the jury verdict was fundamentally inconsistent.

The First District Court of Appeal's decision in the instant case does not expressly and directly conflict with a decision of another district court of appeal or of this Supreme Court on the same question of law. Petitioner has cited no case in its brief (either jurisdictional or on the merits) that demonstrates such a conflict. Therefore, the Petition should be denied, the decision of the District Court of Appeal, First District, should be affirmed and this cause should be remanded to the trial court for a new trial on all issues.

ARGUMENT

POINT ONE

DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA, ERR IN ITS HOLDING THAT THE PROFFERED EVIDENCE OF WHARFSIDE ON ITS CLAIM OF LOST PROFITS WAS NOT SO SPECULATIVE AS TO REQUIRE ITS EXCLUSION?

This particular point does not involve Chanen since, in the lower court proceeding, Chanen had no claim for lost profits. Chanen agrees with Wharfside's argument on this point contained in Wharfside's Answer Brief and adopts said argument by reference.

POINT TWO

DID THE JURY'S VERDICT CONTAIN INCONSISTENCIES WHICH FUNDAMENTALLY UNDERMINED ITS UNDERLYING BASIS?

The District Court of Appeal, First District, was absolutely correct in holding that the jury verdict contained inconsistency which fundamentally undermined its underlying basis. The question before this Court is whether or not that holding expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Obviously, it does not! Even Petitioner Gay concedes that.

In Gay's Brief to this Court, at page 11, Gay states:

> "This feature of the opinion of the District Court of Appeal, while not directly conflicting with other opinions is ancillary to the main decision, and not supported, as stated by the case of North American Catamaran Racing Association, Inc. v. McCallister, (sic), 480 So.2d 669 (Fla. 5th DCA 1985) which held that party must object to the inconsistency before the jury is discharged."

We agree with Gay that the First District Court of Appeal's decision on this point does not conflict with any other decisions. Consequently, the First District Court of Appeal's holding on this point should not be disturbed by this Court.

We disagree with Gay in stating that the First District Court of Appeal's holding is "not supported" by the case of North American Catamaran Racing Association, Inc. v. McCollister, 480 So.2d 669 (FLa. 5th DCA 1985), Rev. den. 492 So.2d 1333 (Fla. 1986). The cited case did not hold that a party "must object to the inconsistency before the jury is discharged.", as stated by Gay on page 11 of Petitioner's Brief.

The holding in the McCollister case is exactly in point, consistent with, and supportive of the holding of the First District Court of Appeal in the instant case. In the cited case, North American Catamaran Racing Association (NACRA) appealed contending that the jury verdicts were inconsistent and required reversal. McCollister argued on appeal that North American Catamaran Racing Association had waived appellate review of the

inconsistency by not objecting before the jury was discharged. The Fifth District Court of Appeal pointed out at page 671 in its opinion that ordinarily a party must object to defective verdict forms or inconsistent verdicts before a jury is discharged in order to preserve the claim. The Fifth District Court of Appeal then went on to say:

> "Here, however, the inconsistency is of a fundamental nature because the only evidence of negligence offered against NACRA at trial related to its alleged negligent design. .....Accordingly, we have no alternative but to reverse the judgment and remand for entry of judgment in NACRA'S favor." At page 671.

Clearly, the holding of the First District Court of Appeal on this point in the instant case is expressly and directly consistent with the holding of the Fifth District Court of Appeal in the North American Catamaran Racing Association case.

A reading of the jury's verdict in the instant case (R:458-460), will clearly establish its fundamental inconsistency. At page 11 of its brief to this Court, Gay states:

> "By this arithmetic, the jury was deciding that out of the $230,000.00 remaining in Chanen's hands, Gay should receive $200,000.00, and Wharfside should recover $30,000.00, which it had already paid Chanen. The witness, Chanen, testified that Wharfside had paid the cost of repairs. (T:1209). By using the form of verdict supplied by the Defendants, the jury accomplished exactly that. The complaint of Appellants about the jury's comment on interest to be awarded is of no consequence. The trial court handled the matter of interest when it rendered the Final Judgment." At page 11.

The trial jury was <u>not</u> instructed by the trial court to decide who was entitled to the $230,000 previously paid to Chanen by Wharfside and to award it either in total or divided up between Gay and Wharfside. Obviously, that is exactly what the jury did (as evidenced by the jury's handwritten addition to the verdict regarding the awarding of interest on $230,000 to both Gay and to Wharfside) and, in doing so, the jury completely disregarded the evidence and the trial court's instructions.

Based upon the evidence presented in this case, Chanen's liability to Wharfside would be identical to Gay's liability to Wharfside. Even Gay's trial counsel conceded that. In addressing the trial judge during the charge conference, Gay's trial counsel stated:

> "Wharfside's suit against Chanen is two counts; one is breach of contract because Gay didn't perform and; two, implied warranty because Gay didn't furnish the right kind of piping. <u>And the only way Wharfside can ever recover against Chanen is to -- by the proof that Gay breached its contract</u>.
>
> They don't allege that Chanen did anything wrong. They just allege that the contract was breached because Gay didn't furnish the -- didn't complete its contract.
>
> THE COURT: That's right. I understand.
>
> MR. BLALOCK: And I don't see how -- <u>the only way that the jury could find in favor of Wharfside in the suit against Chanen is to find that Gay didn't complete its contract</u>.
>
> THE COURT: That's right.

> MR. BLALOCK: By reason of Gay's not completing its contract Wharfside has been damaged.
>
> THE COURT: Right." (T:1736-1737).

Wharfside's counsel likewise agreed that Chanen's liability to Wharfside was entirely contingent on Gay's liability. (T:1791).

A verdict exonerating Gay of all liability and simultaneously holding Chanen liable to Wharfside is, as counsel for each concerned party recognized, simply <u>not</u> one of the possible outcomes of this case. Yet, that is precisely what the jury did. The jury held Gay wholly free of liability to either Chanen or Wharfside, and stated that 100% of the damage responsibility to Wharfside was on Chanen -- yet, the same jury <u>still</u> reduced the contract amount due Gay, and in precisely the same amount as it awarded Wharfside in damages against Chanen.

The jury's wholesale disregard of the trial court's instructions is further demonstrated by the jury's unilateral and unauthorized addition of interest to the damage award. (R:459, 460). The trial court meticulously instructed the jury on what elements of damage it could consider in regard to Gay's claim against Chanen and Wharfside and in regard to Wharfside's claim against Chanen. (T:1924, 1926). In neither case did the trial court mention interest or instruct the jury that an award of

interest was permissible. Indeed, the parties had agreed, outside the presence of the jury, that the trial judge would compute and add any appropriate interest. (T:1843-1844). Yet, notwithstanding the fact that the trial judge carefully instructed them as to the damage elements they were entitled to consider, the jury, contrary to the court's instructions and the evidence, decided to award interest.[13]

As to the jury's legally impermissible awarding of interest as part of its verdict, Gay's position is that it is of "no consequence" because the trial court "handled the matter of interest when it rendered the Final Judgment." (See page 11 of Gay's brief.)

The truth of the matter is that the jury's verdict was fundamentally inconsistent because it was not based upon the evidence, nor did it conform to the court's instructions on the law. The trial judge could not "handle the matter" by ignoring it and entering a Final Judgment on the defective jury verdict. The First District Court of Appeal was absolutely correct in holding that the jury verdict in this case was fundamentally inconsistent and reversing the Final Judgment and remanding for a new trial on all issues.

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[13] No evidence was introduced that Chanen had received <u>any</u> interest on these monies, much less the amount of any such interest.

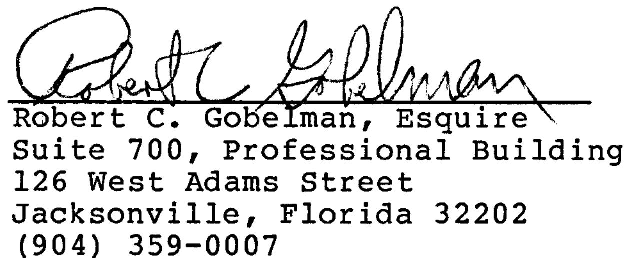
CONCLUSION

The jury verdict in this case contained inconsistencies which fundamentally undermined its underlying basis.

The decision of the District Court of Appeal, First District, State of Florida, in holding that the jury verdict was fundamentally inconsistent, does not expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law and, therefore, said decision should be affirmed.

Respectfully submitted,

GOBELMAN AND LOVE



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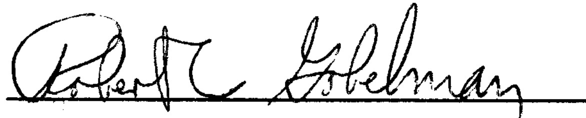
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to S. Gordon Blalock, Esquire, 2301 Independent Square, Jacksonville, Florida 32202, and J. Richard Moore, P.A., 500 North Ocean Street, Jacksonville, Florida 32202, by U.S. Mail, this 24th day of October, 1988.



Attorney