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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MAY 16 1988
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Deputy Clerk

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

Plaintiff/Petitioner,

DCA-1 NOS. BQ-394
BQ-397

vs.

CASE NO. 72,357

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

Defendants/Respondents.

PETITIONER'S INITIAL BRIEF ON JURISDICTION

Petition For Discretionary Review of Opinion of the
First District Court of Appeal, Filed by Petitioner,
W.W. Gay Mechanical Contractor, Inc.

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INDEX AND TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>A & P Bakery Supply and Equipment Company v. Salameh K. Hawatmeh</u> , 388 So.2d 1071 (Fla. 3d DCA 1980).....	8
<u>E.F.K. Collins Corp. v. SMMG, Inc.</u> , 464 So.2d 214 (Fla. 3d DCA 1985).....	7
<u>F.A. Conner v. Atlas Aircraft Corporation</u> , 310 So.2d 382 (Fla. 3d DCA 1975).....	7
<u>Liza Danielle, Inc. v. Jamko, Inc.</u> , 408 So.2d 735 (Fla. 3d DCA 1982).....	8
<u>Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc.</u> , 388 So.2d 228 (Fla. 5th DCA 1980).....	7
<u>Hernandez v. Leiva</u> , 391 So.2d 292 (Fla. 3d DCA 1980).....	6
<u>Innkeepers International, Inc. v. McCoy Motels Ltd. and McCoy Motels, Inc.</u> , 324 So.2d 676 (Fla. 4th DCA 1975).....	7
<u>New Amsterdam Casualty Company v. Utility Battery Mfg. Co.</u> , 122 Fla. 718, 166 So. 856 (Fla. Sup. Ct. 1935).....	4
<u>North American Catamaran Racing Association, Inc. v. McCallister</u> , 480 So.2d 669 (Fla. 5th DCA 1985).....	8
<u>Polyglycoat Corp. v. Hirsch Distributors, Inc.</u> , 442 So.2d 958 (Fla. 4th DCA 1984).....	7
<u>Twyman v. Roell</u> , 123 Fla. 2, 166 So. 215 (Fla. Sup. Ct. 1936).....	6
<u>Welbilt Corp. v. All State Distributing Co.</u> , 199 So.2d 127 (Fla. 3d DCA 1967).....	6

STATEMENT OF THE CASE AND FACTS

Reference to Appendix will be by "A- ."

This case essentially revolves around two problems with the domestic water supply system of the Sheraton at St. Johns Place (hereafter, "the Hotel"): an odor in the water, and corrosion to the pipes, causing leaks. These two problems, in turn, arise out of the construction and use of the domestic water supply system for the Hotel, which opened for business on October 6, 1980. (T:119-120).

Gay was the plumbing subcontractor under the general contractor, Chanen. Gay operated under a written contract (PX:1). Gay's plumbing sub-contract was completed October 4, 1980, only two days before the hotel opened for business. Chanen Construction Company withheld \$230,000.00 from the final payment to Gay, although Chanen was paid in full by the owner, Wharfside (T:133,1204). Gay timely filed a proper Mechanics' Lien on the hotel property (PX:3).

Gay filed one suit in the Circuit Court, Duval County, Florida, against both Wharfside and Chanen (R:1-19). The suit against Wharfside, as owner was to foreclose the Mechanics' Lien. The count against Chanen was to recover the balance due under the contract, with interest, costs, and attorney's fees which were provided for in the subcontract (PX:1). Wharfside counterclaimed against Gay for damages (R:33-38), Chanen counterclaimed against Gay for damages, (R:71-77).

By agreement of the Court and the parties, the Mechanics' Lien foreclosures and the action against Chanen by Gay, along with the countersuits and cross-action were all tried before one jury. In effect, the Court used the jury verdict as advisory in ruling on the Mechanics' Lien foreclosure.

The testimony at the trial revealed that Wharfside had expended or would probably expend more than \$30,000.00 in repairs to leaks in the plumbing (T:231) and technical assistance over a period of time after Gay's warranty time had expired. See also (T:501 and T:514).

The trial lasted nine days and the jury returned a verdict, the form of which was proposed by Defendants (R:458-460). The effect of the verdict was to award Gay \$200,000.00 from both Chanen and Wharfside, together with interest; to award Wharfside, the owner, \$30,000.00 against Chanen, the General Contractor, together with interest.

Thereafter, on November 3, 1986, the trial court rendered its Final Judgment (R:537-540), awarding the damages, interest, costs, and attorneys fees. An appeal was taken from that Final Judgment to the District Court of Appeal, First District, which reversed the trial Court with opinion.

The First District Court of Appeal held (A-1) that the trial court should have admitted proffered evidence of lost profits sustained by the hotel. The admission of this testimony was denied by the trial court as too speculative. The District Court of Appeal found that while there was no "track record", certain

projected occupancy rates should have been sufficient for the jury to consider whether loss of profits due to occupancy less than the projected rates were provable, even though this was a new hotel without any record of profits.

The District Court of Appeal also held that the jury verdict was inconsistent when it awarded the owner \$30,000.00 damages from the General Contractor while at the same time holding that the subcontractor, Gay, had done no wrong.

Petitioner here seeks discretionary review of that opinion as being in conflict with former opinions of the District Court of Appeal, and the Supreme Court of Florida.

SUMMARY OF ARGUMENT

The Petitioner contends that the opinion of the District Court of Appeal that the testimony offered on the owner's claim of lost profits was not so speculative as to prohibit its admission into evidence for consideration by the jury directly conflicts with the finding of the Florida Supreme Court in any number of cases beginning with the case of New Amsterdam Casualty Company v. Utility Battery Mfg. Co., 122 Fla. 718, 166 So. 856 (Fla. Sup. Ct. 1935) wherein it is stated:

"The general rule is that the anticipated profits of a commercial business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule, however, to the effect that the loss of profit from the interruption of an established business may be recovered where the plaintiff makes it reasonable certain by competent proof what the amount of his actual loss was. Proof of the income and of the expenses of the business for a reasonable time anterior to the interruption charged, or facts of equivalent import, is usually required."

ARGUMENT

The Defendant's hotel had no "track record". It was a new hotel in Jacksonville, Florida and any number of attributes could affect its occupancy.

The trial court in the present case held that there were too many speculative items. The Defendant contended that prospective hotel guests were staying away because of the odor in the domestic water system. It had no hard proof that this was so--just speculation. This speculation involved:

- (a) Was there an objectionable odor?
- (b) Was an objectionable odor caused by Plaintiff?
- (c) Did any prospective guests refuse to come?
- (d) Did the guests who might have refused to come do so because of an odor in the water?
- (e) How many prospective guests refused to come?
- (f) Were there other reasons such as room rates, or other complaints which could have influenced prospective guests?
- (g) What amount of profit could have been lost?

The jury would have been required to guess about most, if not all, of these items.

It was obvious that the portion not be paid to Gay was what the jury found was paid or likely to be paid for repairs. The testimony of the witness, Katherine Michels, indicated that a total of some \$21,345.12 had been spent on leaks, \$4,000.00 for new water treatment, and \$7,400.00 for expert investigation and

consultation, for a total of \$32,745.12. (T:501, 514, 517, and 531).

The case of Twyman v. Roell, 123 Fla. 2, 166 So. 215 (Fla. Sup. Ct. 1936) states that:

There are three general principles which the courts apply to determine when lost profits will be allowed as compensation:

1. In both tort and contract actions, lost profits will be allowed only if their loss is proved with a reasonable degree of certainty.
2. ...lost profits will be allowed only if the court is satisfied that the wrongful act of the defendant caused the loss of profits.
3. In contract actions lost profits will be allowed only if the profits were reasonably within the contemplation of the defaulting party at the time the contract was entered into. 17 Fla. Jur.2d 82, Sect. 76.

See also Welbilt Corp. v. All State Distributing Co., 199 So.2d 127 (Fla. 3d DCA 1967). See also Hernandez v. Leiva, 391 So.2d 292 (Fla. 3d DCA 1980).

The Defendants attempted to introduce evidence that a certain projected occupancy rate was prepared prior to construction for the purpose of seeking financing for the construction; that after opening for business the hotel did not meet that projected rate. Using this deficiency Defendants then multiplied the loss of rate by the room rent it would have charges, and then wanted to take a percentage of that loss as lost profit. The trial court held that this approach was too speculative, particularly in light of admissions that there might be any number of reasons why people

would choose not to come to the hotel, and insufficient proof as to the cause of low occupancy.

"Proof of income and of the expenses of the business for a reasonable time anterior to the interruption charged, or of facts of equivalent import is usually required. However, recovery for lost profits is not generally allowed for injuries to a new business with no history of profits. The prospective profits of a new business are generally regarded as being too remote, contingent, and speculative to meet the legal standards of reasonable certainty."

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1984).

It was held in the case of Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc., 388 So.2d 228 (Fla. 5th DCA 1980) that:

"In order to recover lost profits, there must be an ongoing business with established sales record and proven ability to realize profits at an established rate."

See also Innkeepers International, Inc. v. McCoy Motels Ltd. and McCoy Motels, Inc., 324 So.2d 676 (Fla. 4th DCA 1975), and F.A. Conner v. Atlas Aircraft Corporation, 310 So.2d 382, (Fla. 3d DCA 1975).

A series of cases from the Third District Court of Appeal have clearly held that:

"It is axiomatic that to establish lost profits, a litigant must prove that his business has earned profits for a reasonable time anterior to the breach."

E.F.K. Collins Corp. v. SMMG, Inc., 464 So.2d 214 (Fla. 3d DCA 1985).

See also Liza Danielle, Inc. v. Jamko, Inc., 408 So.2d 735 (Fla. 3d DCA 1982).

See also A & P Bakery Supply and Equipment Company v. Salameh K. Hawatmeh, 388 So.2d 1071 (Fla. 3d DCA 1980), wherein the court also said:

"Where a record of past profitability is unavailable to inform the jury's deliberations, any finding it might make regarding lost profits must be purely speculative."

The District Court of Appeal found that the award of \$30,000.00 damages from Chanen, the contractor, to Wharfside, the owner, was inconsistent with the jury's finding that the subcontractor, Gay, had done no wrong. The District Court of Appeal reasoned that if Gay had done no wrong there could be no reason for the jury awarding the owner any damages from the general contractor who could only be liable vicariously because of fault in the subcontractor.

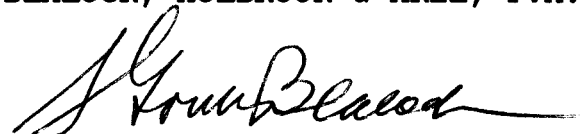
This feature of the opinion of the District Court of Appeal, while not directly conflicting with other opinions is ancillary to the main decision, and not supported, as stated by the case of North American Catamaran Racing Association, Inc. v. McCallister, 480 So.2d 669 (Fla. 5th DCA 1985) which held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

CONCLUSION

The evidence offered by the Defendants Wharfside and Chanen on the subject of lost profits was so uncertain and speculative as to be inadmissible. The verdict of the jury was not inconsistent. the decision of the First District Court of Appeal should therefore be reversed and the judgment of the trial court allowed to stand.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to ROBERT C. GOBELMAN, ESQ., 1500 American Heritage Life Bldg., Jacksonville, FL 32202-3385; and J. RICHARD MOORE, ESQ., 500 N. Ocean Street, Jacksonville, FL 32202, by U.S. Mail, this 10th day of May, 1988.


S. GORDON BLALOCK