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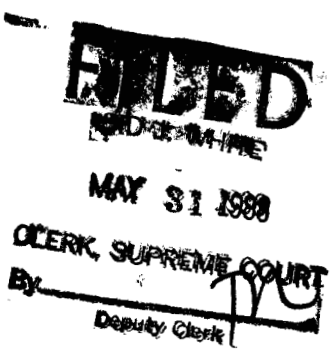
IN THE SUPREME COURT
STATE OF FLORIDA

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.

PETITION FOR DISCRETIONARY REVIEW OF OPINION OF THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA
DCA-1 NOS.: BQ-394 & BQ-397

REPLY BRIEF AND APPENDIX OF RESPONDENT WHARFSIDE TWO, LTD. ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

References made to the Appendix will be by the symbol "A ". References made to the Trial Transcript will be by the symbol "T ".

Respondent Wharfside Two, Ltd., the owner of the Sheraton at St. Johns Place Hotel in Jacksonville, Florida will accept the Statement Of The Case of Petitioner W.W. Gay Mechanical Contractor, Inc., insofar as it tracks this case's progress through the Courts. Wharfside will also accept the Statement of Facts with the following additions.

First, the cost of repairing pipe leaks was $21,345.12. (T-511-514).

The evidence offered by Wharfside to support its claim for lost profits was not limited to projected occupancy rates.

Prior to the development of the hotel, economic feasibility studies were made. Their purpose was to determine if the project was a good investment, to obtain financing for the hotel and to obtain a management agreement with one of the hotel companies. (T-147).

They were done by a nationally recognized organization. (T-147). Three studies were done at different times. (T-148, 149, 151). These studies projected the room rate, occupancy, and how they related to the profits which the hotel was expected to make. (T-341). The profit centers of the hotel were the rooms and food and beverage departments. (T-342).

Jay Litt, a hotel management and consulting firm president, (T-395), testified. At one time he had been manager of the hotel. An investigation which he performed then to determine why the hotel was losing money showed that the hotel had an occupancy problem, (T-399-400), and that an odor in the water was its major cause. (T-409).

Also offered was the present manager of the hotel who had been in the business for 28 years and had opened several hotels. (T-1058-1060). He felt the low occupancy rates of the hotel were caused by odor in the water, particularly since it came so soon after problems which another hotel had had with Legionnaires Disease. (T-1071). He compared the amounts of money earned with the projections. (T-1073-1093).

Dr. Joseph Perry, an Economist, with experience in the hotel consulting field was offered as a witness. (T-1138, 1139). Dr. Perry, comparing the actual performance of the hotel with the financial projections, estimated the total lost profits in excess of $1,000,000. (T-1156) (T-1157).

Prior to opening, the water in the hotel was noted to have an objectionable petroleum odor. (T-164). Gay tried to resolve the odor for one year after the hotel opened and then refused to do anything further. (T-170, 127-128). Wharfside contended Gay caused the odor because a lubricant used to thread galvanized pipe was improperly applied. (T-959) (T-582). Some witnesses testified the odor was still present in the water even at the time of trial. (T-206).

The Trial Court would not allow Wharfside to claim lost profits. The stated reason given by the Court was that the hotel was a new business with no history of profits for a reasonable time prior to the alleged wrongful acts and therefore could not recover lost profits. (T-1091, 1093).

The District Court reversed the Trial Court and held that the evidence offered by Wharfside was sufficient for the jury to have considered the issue of lost profits even though it was a new business.

The Court's opinion also noted that the verdict contained inconsistencies, which fundamentally undermined its underlying basis as there was no evidence to sustain the verdict as it was rendered.

SUMMARY OF ARGUMENT

This decision does not conflict with other decisions of the Florida Supreme Court or other holdings of the District Courts of Appeal.

Rulings of those Courts that a new business generally may not recover lost future profits are not so inflexible that evidence may never be offered which is sufficiently competent for a jury to award such damages.

The holdings only stand for the proposition that usually evidence as to those profits is too speculative to allow recovery. However, the decisions also hold that where a Claimant can offer a sufficient yardstick, based upon reliable and established data, to measure the amount of lost anticipated profits, that they may be claimed and recovered by any business.

The District Court's holding is that Warfside's evidence was sufficiently reliable for recovery and is consistent with previously enunciated law.

ARGUMENT

POINT ONE

UNDER THE FACTS OF THIS CASE THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH OPINIONS OF THE SUPREME COURT OF FLORIDA OR OTHER FLORIDA DISTRICT COURTS OF APPEAL.

Petitioner's argument that this Court should take jurisdiction in this matter is founded upon an erroneous premise. The Trial Court did not refuse to admit evidence of Wharfside's lost anticipated profits on the basis that the totality of the evidence was too speculative to determine the cause or amount of the loss. Rather, the Judge ruled that lost anticipated profits could not be recovered by a new business regardless of the evidence.

There is no question that the water at the Sheraton Hotel smelled like petroleum. Evidence showed that the cause of the odor was the negligence of Gay. Qualified witnesses testified that the hotel had lost profits as a result and determined the amount of the loss using established market data.

Therefore, the evidence of Wharfside was not merely speculative. There is no basis for Plaintiff's argument that jurisdiction should be accepted on that ground.

The only plausible argument that can be made that the opinion of the District Court conflicts with other Appellate Decisions is the Court's holding that this hotel, a new business, should have been allowed to claim damages for lost

anticipated profits. That argument has to be based upon the proposition that Florida decisions stand for the principle that a new business may never recover lost profits regardless of the circumstances or evidence of the case.

In that connection, Gay apparently does contend that a line of cases beginning with New Amsterdam Casualty Co. v. Utility Battery Mfg. Co., 122 Fla. 718, 166 So. 856 (1935), hold that a new business may never recover for the loss of anticipated profits.

The First District's opinion recognizes that Florida Courts have generally held that lost profits cannot be recovered by a new business as the claim is usually too speculative. (A-4). However, as the opinion states, that rule is not iron clad. (A-5).

The New Amsterdam decision stands for the proposition that proof of profits prior to the interruption must be shown in order to recover lost profits, or that "facts of equivalent import" must be offered.

Shortly after New Amsterdam, the Supreme Court set out what type of evidence of equivalent import would satisfy the requirement for recovery of lost future profits.

Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936), adopted what is called the "yardstick" test as the alternative theory to the "profits before and after test". The Court said that the requisite to recovery of such damages was evidence of "some

standard, such as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained."

When the two decisions are read in pari materia, it is obvious that this Court has not held that a new business can never recover lost prospective profits. In fact, the rulings stand for the proposition that one may do so if it can offer fact and cause of damage and present reliable evidence of the amount of the loss.

The First District previously held that the rulings of New Amsterdam and Twyman were not inflexible. In Massey-Ferguson, Inc. v. Santa Rosa Tractor Co., 415 So.2d 865 (1st Fla. DCA 1982), the Court observed that lost anticipated profits could be recovered if sufficient evidence was offered so that the amount of the loss could be satisfactorily ascertained.

Similarly, the Third District in Resorts International, Inc. v. Charter Air Center, Inc., 503 So.2d 1293 (3rd Fla. DCA 1987), allowed a new business to recover lost profits where a contract could be used as a reliable measure of their amount.

Also see G.M. Brod & Co., Inc. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985), based on Florida law, where the Court held that the Florida rule that a new business could not recover lost profits was not absolute. The Court said that even when there was no record of prior profits, damages would be allowed if a sufficient yardstick could be offered of the loss.

Petitioner's contention that various other decisions which it cites stand for the proposition that a new business may never recover lost profits is not justified.

A reading of the cases shows that most, if not all, are limited to their facts. In those cases the Plaintiff had no evidence to offer, such as financial projections and opinions of economic and business experts, to pinpoint the probable amount of the loss.

The decision here merely stands for the proposition that the evidence offered by Wharfside met the Twyman or yardstick test as it was sufficiently reliable for the jury to determine that lost profits had been sustained and in what amount. The opinion is not in conflict with the Supreme Court's decisions establishing the rule that competent non-speculative evidence must be offered to support a claim for lost profits. It conforms to them.

Neither is there any merit to Petitioner's contention concerning the verdict inconsistencies.

What the First District held was that the verdict could not stand because it contained inconsistencies of a fundamental nature not supported by the evidence. That is in direct agreement with and follows the decision of North American Catamaran Racing Assoc., Inc. v. McCallister, 480 So.2d 669 (5th Fla. DCA 1985).

CONCLUSION

Wharfside offered a competent yardstick or measure of damages by which the jury could determine lost prospective profits. The decision of the District Court reversing the Trial Court for refusing to allow this evidence, does not conflict with other Appellate Court decisions. Neither does the ruling that the verdict was so fundamentally flawed through its inconsistencies that it should not be allowed to stand.

Therefore this Court should not accept jurisdiction of this cause as there is no basis for it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a copy of the foregoing instrument has been furnished to S. Gordon Blalock, Esquire, 2301 Independent Square, Jacksonville, Florida 32202 and Robert C. Gobelman, Esquire, 126 West Adams Street, Suite 700, Jacksonville, Florida 32202, by U. S. Mail, this 26th day of May, 1988.

Attorney