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8 *Spencer*

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: 72,357

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

Petitioner,

vs.

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

Respondents.

FILED
JUN 6 1978
CLERK OF SUPREME COURT
By: *pl*
Deputy Clerk

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

ANSWER BRIEF AND APPENDIX OF RESPONDENT
CHANEN CONSTRUCTION COMPANY, INC.
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 Record on Appeal will be by the symbol "R". References made to the Trial Transcript will be by the symbol "T".

Respondent Chanen Construction Company, Inc., the general contractor for the construction of the Sheraton At St. Johns Place Hotel in Jacksonville, Florida, will accept the Statement Of The Case and Facts as set forth in Petitioner's Initial Brief on Jurisdiction as supplemented by the additions contained in the Statement Of The Case and Facts of Respondent Wharfside Two, Ltd.'s Brief On Jurisdiction and as further supplemented by the additions contained herein.

Among its affirmative defenses to W. W. Gay Mechanical Contractors' (hereinafter "Gay") Complaint, Chanen Construction Company (hereinafter "Chanen") asserted a partial failure of consideration defense (R-31, ¶5). Wharfside Two, Ltd. (hereinafter "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 system in the hotel (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 minutes later, at 4:45 P.M. on a Friday afternoon, the jury returned its verdict (T-1940). The 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 found 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 constructing the domestic water supply system. 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 1 and 2 of the special verdict (R-459), Wharfside and Chanen were liable for only part of the remaining balance due under Gay's contract, it could only be because Gay did not fully perform its contract; accordingly, Gay would have to be liable to Wharfside. Yet, the jury found that Gay was not liable to Wharfside in response to question 3 (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) 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 by the court, 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 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 was entered on the jury's verdict (R-537-540).

The District Court of Appeal, First District, reversed the trial court's Final Judgment and remanded for a new trial on all issues on the ground, inter alia, that the verdict was fundamentally inconsistent (A-6).

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal, First District, 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.

ARGUMENT

Petitioner seeks this Court's review of the decision of the District Court of Appeal on the basis that said decision expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Respondent Wharfside Two, Ltd., in its Brief, argues that the District Court of Appeal was correct in reversing the trial court for refusing to admit proffered evidence concerning Wharfside's lost profits and that the appellate decision is not expressly and directly in conflict with another appellate court decision. Chanen is in total agreement with Wharfside's argument and adopts Wharfside's argument by reference.

As to that portion of the appellate court's decision holding that the jury verdict was fundamentally inconsistent, Petitioner has failed to cite a single decision from either this Court or any district court of appeal which expressly and directly conflicts with the instant decision.

The issue of the jury verdict's fundamental inconsistency is not even mentioned in Petitioner's Summary Of Argument on page 4 of its Brief; the only portion of Petitioner's argument discussing this issue is found on page 8 of Petitioner's Brief. On page 8, Petitioner, while discussing this issue, makes the statement: "This feature of the opinion of the District Court of Appeal, while not directly conflicting with other opinions is ancillary to the main decision...." (Emphasis added.)

As to this issue, even Petitioner concedes that the subject decision 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" as required by Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Since there is no direct conflict, this Honorable Court has no jurisdiction to review the decision.

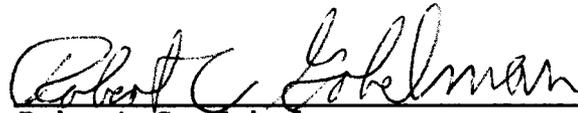
Petitioner at page 8 of its Brief, cites the case of North American Catamaran Racing Association, Inc. v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1986), as holding that a party must object to inconsistent verdicts before a jury is discharged. Petitioner misconstrues the holding of the cited case. In its decision, at page 6, the First District Court of Appeal cited the North American Catamaran Racing Association case in support of the proposition that the jury verdict in the instant case was fundamentally inconsistent since it was not supported by the evidence (A-6). That is in direct agreement and does not conflict with the North American Catamaran Racing Association decision.

CONCLUSION

Petitioner has failed to carry its burden of showing that the instant decision expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law and, 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 that a copy of the foregoing instrument has been 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 3rd day of June, 1988.


Attorney