IN THE SUPREME COURT OF FLORIDA

W. R. GRACE AND COMPANY,

Petitioner,

vs.

GEODATA SERVICES, INC., ETC.,

Respondent
_____/

CASE NO. 72,522
2nd District - No. 87-296

ANSWER BRIEF OF RESPONDENT GEODATA SERVICES, INC.

Respectfully submitted,

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NOTE CONCERNING RECORD CITATIONS:

R- Denotes cite to Original Record page number and Transcript page number, the Index to Record on Appeal indicating that these page numbers are identical.

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INTRODUCTION

This case is before the Court based upon invocation of the Court's discretionary jurisdiction due to the Second District Court of Appeal having certified a question as being of great public importance. Geodata Services, Inc. v. W. R. Grace and Company, 13 F.L.W. 1170 (Fla. 2nd DCA, May 11, 1988) [A 1-19]. However, it is clear that the Appellant GRACE is merely using the certified question to obtain review of the Second District Court of Appeal's decision and not because it necessarily disagrees with the Second District Court of Appeal's promissory estoppel analysis. This is clear because from the outset GRACE suggests that this Court not answer the question certified by the Second District. That being the case, one wonders why it is necessary to burden this Court with reviewing the decision below at all. However, since this Court has the discretion to review the decision of the Second District Court of Appeal, once the certified question issued Lawrence v. East Coast R. Co., 346 So.2d 1012 (Fla. 1977), GEODATA will respond on an issue by issue basis in the same order that GRACE has presented its arguments in an effort to assist the Court in expeditious resolution of this cause.

STATEMENT OF THE FACTS

In September of 1980 the Defendant, W. R. GRACE & CO. ("GRACE") requested bids from several companies [R-8 (E-G-2), 142) for phosphate prospect drilling on some of GRACE's realty located in Manatee County, Florida. These bidders included Plaintiff. At that time, the Plaintiff, GEODATA SERVICES, INC. ("GEODATA") was already performing drilling for GRACE as successor to a previous driller's contract [R-297]. GEODATA submitted a bid and, although GEODATA was not the lowest bidder, the contract was awarded to GEODATA [R-144, RE-21 through 31 (E-G-12)] because GRACE thought GEODATA was the better of the bidders [R-147].

After the bids were received and just prior to the time that the contract was awarded to GEODATA, GRACE officials called GEODATA's President, James E. Bromwell, into their offices in Bartow, Florida, and discussed the potential of awarding the contract to GEODATA. GRACE officials told Mr. Bromwell that they would award the contract to GEODATA and give it substantial other work in the future if GEODATA acquired additional manpower and equipment [R-299, 300]. GEODATA acquired the additional resources and equipment and obtained the contract it had just bid [R300, 301].

Subsequent to execution of a written contract between GRACE and GEODATA, GRACE represented to GEODATA that GRACE would give GEODATA additional work beyond the contract if GEODATA would purchase still more equipment [R-301, 302]. GEODATA purchased the additional equipment of the type necessary for the promised work in reliance upon GRACE's representations [R-302, 303, 304]. Later, various changes to the scope of the work covered by the initial written contract were made and then written amendments were executed between GRACE and GEODATA There were nine such amendments to the contract [R-147 through 159, RE-32 through 44 (E-G-13 through G-21)] and in each case the work involved in the change of scope of the work was commenced by oral agreement of GRACE and GEODATA and a written change order was executed later.

In late 1981 [R-347, 348, 349] it appeared that business for phosphate prospect drillers was drying up although GRACE seemed to have plenty of work of GEODATA. However, as a prudent businessman, Mr. Bromwell began to seek other markets for GEODATA's drilling services. When Mr. Bromwell discussed his plans for other customers, GRACE officials told him not to pursue other markets because GRACE would keep him busy for years to come and wanted him to do all of their drilling [R-346, 347]. At first GEODATA kept

looking for other markets, but kept GRACE apprised of his position. Then GEODATA bid and was awarded a contract in Lima, Peru, for fifteen million dollars worth of drilling work [R-347]. Prior to accepting the Lima contract, Mr. Bromwell approached GRACE officials in April, 1982, advised them of this opportunity for his company. GRACE induced him not to accept the contract by representing that GRACE had enough work to keep his company busy for years despite what appeared to be slow downs in other phosphate company's drilling programs [R-177, 178, 348]. GEODATA relied upon GRACE's representations and declined the Lima contract [R-348, 349, 365, 366, 367]. However, it became clear at a later point in time that GRACE never had any intention of giving GEODATA substantial additional work or of keeping GEODATA busy for years. As set forth below, GRACE made false statements of its intentions merely to further its immediate needs, all without regard for GEODATA's rights.

In May of 1982 GEODATA demanded an increase in unit prices under the contract due to additional changes in the scope of work which had increased its cost of operation. Two management level GRACE employees reviewed the request and recommended that it be granted and told Mr. Bromwell that the extra money would be forthcoming [R-360]. Their superiors at GRACE then refused to negotiate the extra and

told Mr. Bromwell that if GEODATA persisted in requesting additional money, its contract would be terminated [R-253, 254, 255, 256, 257, 258, 363] and that his company would be put out of business.

GEODATA, acting in good faith, persisted in trying to negotiate an increase (or extra) for the additional expense and GRACE terminated the contract [R-364, RE-45 (E-G-22)]. GRACE then proceeded to bid the work covered by the contract and did not allow GEODATA to bid the work [R-193, 194, 195]. GRACE also subsequently performed drilling work previously promised to GEODATA with its own employees, some of whom were previous employees of GEODATA which it hired after GEODATA's contract was terminated [R-164]. At least one of these former GEODATA employees was still working for GRACE at the time of trial [R-164].

GEODATA immediately tried to reacquire the Lima contract, but another company had already been given the contract after GEODATA had declined the award in April [R-349]. The cancellation of the GRACE/GEODATA contract by GRACE and hiring of GEODATA employees put GEODATA out of business [R-365].

STATEMENT OF THE CASE

Upon termination of the October 1980 GEODATA/GRACE contract, GEODATA sued GRACE advancing four theories of recovery: 1) Breach of contract, 2) Quantum Meruit, 3) Independent tort beyond mere breach of contract fraud, and 4) Promissory estoppel [R-1096 through 1123, 1134 through 1162, 1190 through 1221]. The case followed a somewhat tortured path through the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida. Some four different judges had been assigned the case by the time it went to trial. During the course of pre-trial motion practice, a creditor of the Plaintiff, GEODATA, was allowed to intervene and was present as a party at the trial [R-1163 through 1165, 1132 through 1133]. The intervenor sued Defendant GRACE on a third party contract beneficiary theory and sued Plaintiff directly for the deficiency on a note evidencing short term debt financing obtained by GEODATA in expanding its manpower and equipment at GRACE's insistence [R-1163 through 1165].

A veritable plethora of pre-trial motions were filed by the Defendant GRACE including motions in limine, motions for summary judgment and a motion to bifurcate the intervenor's case for trial purposes [R-1237 through 1239, 1291 through 1295, 1296 through 1298, 1305 through 1324,

1331, 1333 through 1335, 1338 through 1340]. All were denied.

At the time the Plaintiff and Intervenor rested their initial case, another plethora of motions were initiated orally by the Defendant GRACE. With the exception of granting a directed verdict against the Intervenor on its third party contract beneficiary claim against GRACE, all of these motions were either denied or taken under advisement.

At the close of all evidence the case was sent to the jury after a five day trial with all four of Plaintiff's original counts intact. The jury awarded Plaintiff $433,000 in compensatory damages and $300,000 in punitive damages [R-1342].

GRACE renewed its previous motions for directed verdict and filed several written post trial motions, including a motion for new trial [R-1343 through 1351, 1381]. The Court upon considering the post trial motions struck the punitive damage award and denied all other post trial motions. Appellant/Plaintiff GEODATA appeals to this Court the judgment striking the punitive damage award [R-1496].

GEODATA appealed and GRACE cross appealed. The Second District Court of Appeal affirmed upon both breach of contract and promissory estoppel theories and certified a

promissory estoppel question as being of great public importance. GRACE then invoked the discretionary jurisdiction of this Court based upon the certified question.

SUMMARY OF ARGUMENT

I. GRACE breached the contract by acting in bad faith in direct contravention of an express duty of good faith contained in the contract which GRACE itself prepared. There was sufficient, competent evidence to support the damage award on that basis.

II. An affirmative answer to the question certified by the District Court of Appeal is necessary to disposition of this case only if this Court reverses the Second District Court of Appeal on the breach of contract theory. If this Court affirms the decision of the District Court of Appeal on the breach of contract theory, then there is no necessity for this Court to answer the certified question. However, it should be clearly recognized that if GEODATA is entitled to prevail on either breach of contract or promissory estoppel, the decision of the Second District Court of Appeal must be affirmed.

An affirmative answer to the certified question would result in a necessary affirmance of the Second District Court of Appeal's decision. There is no need for clear and convincing evidence in order to support recovery based upon promissory estoppel. Florida courts have required only a preponderance of the evidence to support an

award based upon fraud. GRACE's attempt to get this Court to adopt a clear and convincing standard is clearly based upon the recognition by GRACE that a change in the law of promissory estoppel is necessary for them to prevail. However, even if this Court were to adopt a clear and convincing evidence standard with regard to promissory estoppel cases, GEODATA is still entitled to prevail because the evidence is clear and convincing in support of GEODATA's promissory estoppel claims.

III. The Second District Court of Appeal's decision must be affirmed because the award of compensatory damages is clearly supported by substantial competent evidence. To the extent that GRACE complains of not being able to put on a defense at trial, it is due to the lack of preparedness of GRACE's counsel and not any "unpleaded sneak attack". Further, GRACE, over GEODATA's objection, had an expert witness sit at counsel table during GEODATA's damage testimony who reviewed all of the documentation supporting GEODATA's damage testimony, and then testified for the defense at trial. Amazingly enough, his testimony supports GEODATA's damage claims and GEODATA based its closing argument on GRACE's expert's testimony.

ARGUMENT

I.

GRACE BREACHED ITS CONTRACT WITH GEODATA PRIOR TO EXERCISING AN EXPRESS RIGHT TO SERVE A NOTICE OF TERMINATION

GRACE breached its contract with GEODATA by failing to deal in good faith. The good faith requirement in contractual relationships can arise under Florida law both by implication and by express contractual provision. Every contract carries with it an implied duty of the parties to the contract to deal in good faith with one another. However, the contract at issue in this case which was prepared by GRACE contained an express duty of the parties to deal in good faith.

The evidence was clear that GRACE failed to deal with GEODATA in good faith prior to the notice of termination. The notice of termination itself, and the manner and circumstances of its delivery, were evidence of GRACE's bad faith. GRACE should not be allowed to breach the contract by dealing in bad faith and should not be allowed subsequent to this substantial and material breach, to use the termination clause of the contract to avoid liability for its prior substantial and material breach. See Sound City, Inc. v. Kessler, 316 So.2d 315 (Fla. 1st DCA

1975) and Rector v. Larson's Marine, Inc., 479 So.2d 783 (Fla. 2nd DCA 1985), review dismissed (486 So.2d 596 Fla. 1986).

This is exactly the analysis of the Second District Court of Appeal in its opinion below.

The most damning evidence in the entire record below was the testimony that came from the head of GRACE's operations in Bartow, Florida, Albert F. Vondrasek. While GRACE once again persists in arguing that it terminated the contract for good faith reasons, to-wit: adverse economic conditions, the following excerpts from Mr. Vondrasek's testimony conclusively tell the story:

> A. ...Undoubtedly there are some hungry drillers out there that may want the job. [Emphasis added].
>
> Q. Hungry drillers? That was your hope, that there would be a hungry driller out there?
>
> A. It was supposition on my part.
>
> Q. Okay sir, there is nothing in there anywhere that says we need to terminate the Geodata contract because of adverse economic conditions is there?
>
> A. No. [R-248, 249].

It is clear that GRACE did not negotiate the changes in scope of work in good faith. Rather, GRACE was hoping there was some unfortunate driller out there of which it

could take advantage while at the same time destroying GEODATA.

While GRACE continues to argue that they terminated the contract for economic conditions, the following excerpts from the testimony of John T. Brooks, Mr. Vondrasek's subordinate, disprove this contention:

> Q. I show you what has been marked for identification as Exhibit G-7, sir. Can you identify that for the jury, please?
>
> A. Yes. This is a letter from Mr. Bromwell to myself requesting an increase in the cost for drilling, the price of drilling;...[R-160].
>
> * * *
>
> Q. Did you think his request was reasonable in that letter of May 25, 1982?
>
> A. I believe at the time I stated I felt that it was a reasonable request based upon the things that we had done in the past, [Emphasis added] such as compensating him for changes in the scope of the work.
>
> Q. And Mr. Vondrasek is the one that made the decision not to follow your recommendation?
>
> A. Yes. He is the one that made the final decision. [R-161]

The foregoing exchanges between Plaintiff's counsel and GRACE's employees, Vondrasek and Brooks, clearly demonstrate that Mr. Brooks who was closest to the actual

performance of the contract between GEODATA and GRACE, believed that GEODATA's request for additional compensation was reasonable and should be granted, and that notwithstanding this fact, Vondrasek made a decision not to negotiate in good faith on behalf of GRACE. Further evidence of the bad faith of GRACE includes the following exchange between Plaintiff's counsel and Mr. Vondrasek (concerning Mr. Vondrasek's deposition and his reading and signing the transcript:

Q. "Question: I also stated to Mr. Bromwell that -- I said -- and this was for his advice only. I said, "This is a very close knit industry, and contractors usually don't go around suing clients for legal -- termination of a contract that's legal. I said, "It's entirely within your perogative." But I said, "You've got to remember that this may effect your long term liability in the field." Do you recall saying that?

A. Yes.

Q. Now you said liability there and you recall saying that? Do you also recall reading your deposition?

A. Yes.

Q. And submitting some changes to the court reporter?

A. Yes.

Q. And do you recall that one of those changes was that you had told the court reporter that the word was not liability, it was

viability?

A. Viability, right.

Q. Now which was it? Was it liability or was it viability?

A. Viability, right.

Q. What does viability mean to you?

A. That means long term tender in the field.

Q. Ability to stay in business?

A. That is correct.

Q. Viability is something that's alive as opposed to something that is dead?

A. That is correct. [R-256 - 258].

The foregoing exchange between Plaintiff's counsel and Mr. Vondrasek makes it absolutely clear that GRACE did not negotiate in good faith. One who negotiates in good faith does not threaten the death of the opposing party. This discussion and threat by Mr. Vondrasek on behalf of GRACE was made to Mr. James Bromwell on behalf of GEODATA. Mr. Bromwell testified about the foregoing exchange as follows:

Q. He told you he would terminate the contract?

A. Yes.

Q. Did he tell you he would put you out of business?

A. Yes.

Q. Are you out of business?

A. I haven't worked since in the drilling business.

Q. Now, Mr. Vondrasek, you were sitting here yesterday when he testified?

A. Yes.

Q. Did you hear him say that he gave you fatherly advice?

A. I didn't take it as that at the time.

Q. Did your father ever give you any advice like that?

A. No.

Q. Did you get the impression that he was being fatherly; did you?

A. No I did not.

Q. Now would you please tell the jury what Exhibit G-22 is?

A. This is Amendment 10 that canceled my association with W. R. Grace.

Q. How long after the conversation with Mr. Vondrasek did you get that?

A. I can't remember exactly, but I think it was about 3 or 4 days.

Q. In the meantime were you still drilling?

A. Yes.

Q. Did anyone from Grace call you on the telephone before you received that piece of paper to tell you it was coming?

A. Yes.

Q. Do you recall who it was.

A. John Brooks.

Q. And what did he tell you?

A. He said that Vondrasek had said to go ahead, since I was persisting in asking for more money that they were going to terminate the contract. I said, well look, John, I don't want to ruin my contract with W. R. Grace. I have to have the contract in order to meet my bills. I will try and continue drilling at what my present rate is right now."

Q. Why were you willing to continue drilling if you had been asking for more money.

A. I had a pretty large debt reduction and payments to make, and I would at least be able to make those. My profits were down; but I was still making my payments.

Q. It was better than going out of business.?

A. Yes, it was. [R-363 - 365].

Obviously the jury believed Mr. Bromwell's version of the conversation and no doubt was heavily influenced by the fact that Mr. Vondrasek admitted telling Mr. Bromwell that if he persisted in attempting to negotiated as permitted by the contract, his company could lose its viability. Because GEODATA persisted, GRACE made good on its threats to terminate the contract and destroy GEODATA.

II.

THE DISTRICT COURT PROPERLY APPLIED THE DOCTRINE OF PROMISSORY ESTOPPEL TO AUTHORIZE RECOVERY IN THIS CASE

At the outset of argument on this issue, it is both appropriate and important to point out the fallacy in GRACE's argument that GEODATA did not rely upon the representations and promises of GRACE in giving up the Lima, Peru job. Mr. Bromwell clearly relied upon GRACE's representations. On this issue he testified:

> Q. Would you tell the jury what business plans you were making at the time prior to and up to the time this contract was terminated?
>
> * * *
>
> A. In the winter of '81 there was an ad in one of the trade publications for work in Lima, Peru, December or January of '81 -- January of 82, December of '81, and I went down to Lima, Peru and looked at a job there. It was providing a completely new water system for the city of Lima. I came back. I worked out a proposal for that job and sent it in, and got by return mail that I was awarded that contract for $15 million dollars to provide a new water supply for the City of Lima. [Emphasis added].
>
> I went to W. R. Grace some time before I was to return down to Lima and told John Brooks that I had that opportunity to go down there and work, and he stated to me that I really didn't need to leave the country, that W. R. Grace had plenty of work for me as far as he could see in the years to come.
>
> Q. And so you chose not to do that?

A. Right.

Q. Why in the world were you looking in Lima, Peru for work, Mr. Bromwell? I mean that's a long way away from here.

A. I wanted to expand my scope and realm of work.

Q. And so you went to Mr. Brooks and you told him because of problems in the industry that you were thinking about going down there and taking that job?

A. Yes.

Q. And you told him that you had been awarded that job?

A. That is true.

Q. And he told you, "Don't take it because Grace is going to keep you busy"?

A. That is right. He said that I had plenty of work for 2 rigs and I didn't need to leave the United States.

Q. Did you know whether or not Grace had any other drilling rigs it was operating with its own people at that time?

A. No.

Q. Had they told you they were going to have you doing their drilling?

A. Yes.

Q. Had they talked about counties other than Manatee County?

A. Oh, yes. If fact I was drilling in other counties beside Manatee County.

Q. Did you have any reason at all not to

believe Mr. Brooks in April of 1982 when he told you that?

A. Not at all. [R-347 - 349].

It is absolutely clear from the uncontroverted testimony of Mr. Bromwell that GEODATA relied upon W. R. GRACE's assurances in not taking the Lima, Peru contract for $15 million dollars. It is also absolutely clear from the uncontroverted testimony of Mr. Bromwell that the contract had actually been awarded to GEODATA. It was not a mere expectation, it was in fact a valuable right. The proposal was an offer and the award was an acceptance.

GRACE argues vehemently as it did in the court below that the following exchange between Mr. Bromwell and defense counsel at the trial indicates a lack of reliance:

Q. Are you claiming as a damage in this matter the lost contract in Lima, Peru?

A. No, sir. [R-393].

GRACE misunderstands this exchange and misrepresents its import. Mr. Bromwell's answer clearly is that he is not claiming as a damage the profits from a contract he did not execute in Lima, Peru. That is entirely consistent with Mr. Bromwell's testimony, as set forth above, that he made an offer to do the work in Lima, Peru, and that offer was accepted. However, based upon the representations of GRACE, Mr. Bromwell <u>did not execute</u> the contract in Lima, Peru,

because GRACE induced him to confine his operations to those for GRACE within the United States. This is further supported by Mr. Vondrasek's statements to Mr. Bromwell that GRACE was not affected by the then present economic conditions and that they would continue supplying business to GEODATA [R-493]. Therefore, GRACE's reliance upon Mr. Bromwell's statement that he wasn't asking for the lost profits on a contract he didn't execute is completely misplaced. It is quite clear that $15 million dollars worth of work was foregone based upon the representations of GRACE.

Further, GEODATA went heavily into debt to obtain additional equipment based upon assurances of additional work from GRACE and that GRACE knew at the time the representations were made and prior to the debt being incurred, that GEODATA was relying on GRACE's assurances in incurring the debt and obtaining the equipment. The Second District Court of Appeal clearly recognized this as well as the fact that upon urging of GRACE employees, GEODATA declined to accept the Lima, Peru, contract after it had been awarded to GEODATA. (See Page 9 of the Opinion below.)

The question certified by the Second District Court of Appeal should be answered in the affirmative. Two (2) previous decisions of this Court have recognized and adopted

promissory estoppel as the law of this State. Mount Sinai Hospital of Greater Miami, Inc. v. Jordan, 290 So.2d 484 (Fla. 1974); Crown Life Insurance Co. v. McBride, 517 So.2d 660 (Fla. 1987).

In Mount Sinai, the Court was faced with whether a mere gratuitous promise of future gift lacking consideration could be enforced under the doctrine of promissory estoppel. The Court in Mount Sinai held promissory estoppel applicable to charitable pledges, while the Court placed two (2) limitations on the doctrine regarding enforcement of charitable pledges against the estate of a promissor, these limitations were based upon considerations of public policy peculiar to charitable pledges and Florida probate law. Those considerations are not present under the facts of the instant case.

In Crown Life Insurance, this Court adopted promissory estoppel as applied to contracts of insurance. This Court's view of the doctrine of promissory estoppel and its limitations was indicated by the following statement:

* * *

> "The doctrine, however, only applies where to refuse to enforce a promise, even though not supported by consideration, 'would be virtually to sanction the perpetration of fraud or would result in other injustice'" [517 So. at 662]. [Emphasis added]

* * *

Thus, this Court indicated that it would apply the doctrine of promissory estoppel in two (2) situations:

> 1. Where the failure to enforce a promise would sanction the perpetration of fraud, or
>
> 2. Where to fail to enforce the promise would result in other injustice.

This case clearly falls within the second instance - "other injustice". This Court then went on to define the parameters of injustice which would invoke the application of promissory estoppel in this State as follows:

* * *

> Such injustice may be found where the promissor reasonably should have expected that his affirmative representations would induce the promissee into action or forebearance substantial in nature, and where the promissee shows that such reliance thereon was to his detriment. [517 So.2d at 662] [Emphasis added]

* * *

In the instant case it is plain that GRACE reasonably should have expected its affirmative representations would induce GEODATA to incur substantial additional debt and to forego the Lima, Peru contract. It is equally plain that GEODATA

relied upon these representations to its detriment. GEODATA did incur the additional debt and purchased the additional equipment based upon GRACE's affirmative representations that sufficient additional work would be forthcoming for it to liquidate the debt, and then GEODATA was unable to liquidate when GRACE failed to go forward with its promise. GEODATA also forewent the Lima, Peru contract in reliance upon the affirmative representations of GRACE. Either would have kept the company in business. Thus, in this case, GEODATA was induced both into action and into forebearance by the affirmative representations of GRACE. It is clear that both the action and forebearance were of a substantial nature.

While GRACE continues to argue evidence which it asserts rebuts GEODATA's contention of action and forebearance, this argument merely goes to the weight of the evidence. As the Second District Court of Appeal recognized below, the jury apparently believed Mr. Bromwell's version of the facts. Neither the Second District Court of Appeal nor this Court can or should re-weigh the evidence.

Therefore, the certified question should be answered in the affirmative and the decision of the District Court below affirmed.

III.

THE COMPENSATORY DAMAGE AWARD MUST BE AFFIRMED BECAUSE THE AWARD IS SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE

Two (2) expert witnesses testified as to the value of the damages. GEODATA produced as its expert Jerry Speed, who was qualified as an expert by the court at trial and gave testimony that was both competent and convincing. Mr. Speed provided a range of value of the damages. He testified to three (3) valuations of the business based upon different capitalization rates. At the maximum value Mr. Speed testified that the business was worth slightly in excess of $500,000.00. At a minimum he testified that the value of the business was about $390,000.00. His actual opinion was that the business was worth approximately $450,000.00, based upon all of his years of experience in valuing businesses [R-648, 649]. This opinion is clearly evidenced by the following exchange:

> Q. And would you please tell the jury in a loud and clear voice what your opinion of the value of that business was at that time [referring to the date of termination]?
>
> A. Okay. My opinion is that the value of the business is a range,
>
> * * *
>
> and then I used my opinion that an expected buyer would want an 18% rate of return. I believe that came out to be about

$450,000.00.

* * *

Q. Okay, sir, so the business, in your opinion, is worth $450,000.00 back in 1982 at the time the W. R. Grace contract was terminated?

A. Yes. [R-647, 648, 649].

Further, Mr. Speed testified that the company was profitable and that the net profit on the contract, but for the termination, would have been about $100,000.00 [R-644] and that his actual calculation was $98,000.00. [R-65] Finally, Mr. Speed testified that the facts and data that he relied upon in reaching his conclusions and opinions were of the type that are normally and by custom relied upon by certified accountants in reaching their opinions [R-777]. There is no question but what he examined the books and records of the corporation in preparing his opinions and that review formed the basis of his opinions [R-637, 638, 640, 641, 642].

In response, GRACE produced an expert, John Hoffman, who testified that, using Speed's formula, the value was only $312,000.00 [R-935, lines 3 through 5]. However, the jury apparently believed Speed and didn't believe Hoffman.

The only requirement for proof and recovery of the damages awarded GEODATA in the court below is that some

reasonable standard for ascertaining them exist, such as regular market values or established data. Tyman v. Roell, 123 Fla. 2, 166 So. 215 (Fla. 1936); Welbilt Corp. v. All State Distributing Co., 199 So.2d 127 (Fla. 3rd DCA 1967); Born v. Goldstein, 450 So.2d 262 (Fla. 5th DCA 1984). Jerry Speed's testimony, together with Jim Bromwell's testimony, and GEODATA's business records satisfy the data requirement and the reasonable standard requirement. There is ample, substantial competent evidence to support the jury's verdict and the judgment of the trial court entered thereon.

Finally, GRACE complains once again of an "unpleaded sneak attack". This simply is not the case. A review of the Second Amended Complaint upon which the case was tried [R-1190] reflects that the case was set for trial six (6) times - March 11, 1985, June 3, 1985, September 16, 1985, October 28, 1985, February 18, 1986 (amended to February 17, 1986) and May 12, 1986. In every case, Defendant GRACE waited until moments before the trial to pursue discovery. The trial court recognized this in denying the Defendant's Motions for Continuance and Motion in Limine immediately prior to the trial. There was certainly no "sneak attack" in this case or trial by ambush which resulted from any actions on behalf of the Plaintiff. If the Defendant was ill prepared for trial, it was Defendant's own failure to

act which led to it being unprepared.

With regard to the assertion that the damages were not pleaded, it would appear that once again GRACE has failed to reach the Second Amended Complaint upon which the case was tried. In Paragraphs 13, 21, 22, 23, 30, 33, and 34 of the Second Amended Complaint, GEODATA alleged that it had been rendered insolvent and put out of business by the actions of GRACE. Of particular telling import in refuting the allegation of a "unpleaded sneak attack" is Paragraph 34 of the Second Amended Complaint which reads:

> "34. As a result of the foregoing, Plaintiff has been damaged in that it has been rendered insolvent, incapable of carrying on its business operation, it has been unable to pay off its loans which were obtained for the purpose of acquiring the manpower, equipment and facilities as aforesaid, and its business has been destroyed."

Finally, GRACE could not possibly have been prejudiced by the Speed testimony. GRACE had an opportunity to thoroughly cross-examine Mr. Speed at the trial in this cause and took that opportunity [R-696 through 777]. Further, Mr. Hoffman, GRACE's expert witness on the damage issue, sat in the courtroom and listened to Mr. Speed's testimony and was provided with an opportunity to examine all of Mr. Speed's calculations, work papers, and spread sheets, and consulted with Mr. Pickett prior to Mr.

Pickett's cross-examination of Mr. Speed. [R-677, 678].

In addition, a synopsis of Mr. Speed's testimony had been provided to GRACE well prior to trial, along with all of the documents upon which Speed relied. In fact, the documents were even made available during the deposition of Mr. Speed and the deposition of Mr. Bromwell, and then again during a break in the trial at which time defense counsel and his experts examined all of the records and work papers of Speed thoroughly. [R-499, 500, 501]. An extremely thorough job of cross-examination of Mr. Speed was accomplished by defense counsel at the trial [R-696 through 777] and GRACE's opposing expert, John Hoffman, testified at length in rebuttal [R-929 through 939].

Thus, it is abundantly clear that there was no "unpleaded sneak attack" on the Defendant in this case with regard to damage testimony, that Defendant had ample opportunity to cross-examine this testimony and present rebuttal testimony and took advantage of that opportunity. The damages were clearly pleaded in the Second Amended Complaint upon which the case went to trial, and all of the documents and records supporting the damage testimony were provided to the defense prior to trial, at the time depositions were taken concerning the damages, and then provided to the defense again during the trial for further

examination. There simply was no prejudice to the defense which resulted from any action or inaction by the Plaintiff. Any ill preparedness at trial was clearly the result of conscious decisions by the defense in its conduct of discovery in the case and its preparation for trial.

CONCLUSION

The certified question should be answered in the affirmative and the Second District Court of Appeal's decision affirmed.

Even if the certified question were to be answered in the negative, the Second District Court of Appeal's decision should be affirmed based upon the breach of contract.

Finally, there were no errors by the trial court below as discussed by GRACE under its Point III. GRACE comes before this Court complaining as it did at the trial court level and before the Second District Court of Appeal that it was the victim of an "unpleaded sneak attack". The trial court was in the best position to evaluate the actions of the parties in preparation for trial and concerning discovery, and it resolved the complaints raised by GRACE in favor of GEODATA. These arguments were once against raised before the Second District Court of Appeal which also found no merit in them.

The judgment of the trial court is clearly supported by substantial, competent evidence and the decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

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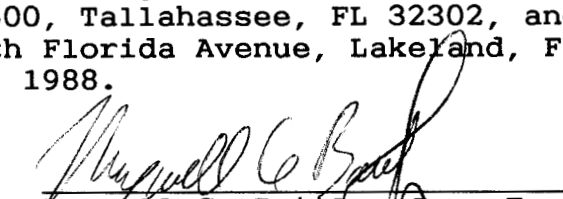
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Julian Clarkson, Esq., Holland & Knight, P. O. Drawer 810, Barnett Bank Building, Suite 600, Tallahassee, FL 32302, and John A. Naser, Esq., 1349 South Florida Avenue, Lakeland, FL 33803, this 23rd day of July, 1988.



Maxwell G. Battle, Jr., Esq.