IN THE SUPREME COURT OF FLORIDA

W. R. GRACE AND COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 72,522
	)	
GEODATA SERVICES, INC., etc.	)	
	)	
Respondent.	)	
	)	

On Review Of A Certified Question
Of Great Public Importance From
The Second District Court of Appeal

INITIAL BRIEF OF PETITIONER W. R. GRACE AND COMPANY

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Note: The following symbols are used in this brief:

"R" for record-on-appeal

"A" for appendix to this brief

"Exh." for trial exhibits

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Introduction

This case is before the Court for review of a decision certified by the Second District Court of Appeal as having passed upon a question of great public importance. Geodata Services, Inc. v. W. R. Grace and Company, 13 F.L.W. 1170 (Fla. 2d DCA May 11, 1986)[A 1-19]. By a 2-1 decision, the district court affirmed the final judgment for compensatory damages entered in favor of Geodata pursuant to a jury verdict on the alternative claims of breach of contract and promissory estoppel.[1] Finding the law in Florida "unclear as to the circumstances under which the doctrine of promissory estoppel may be applied," the court certified the following question as a matter of great public importance:

> CAN THE DOCTRINE OF PROMISSORY ESTOPPEL BE APPLIED TO ENFORCE ORAL PROMISES WHEN NECESSARY TO PREVENT INJUSTICE IN SITUATIONS NOT COVERED BY THE STATUTE OF FRAUDS WHERE A PROMISOR MAKES AFFIRMATIVE REPRESENTATIONS WHICH HE REASONABLY SHOULD EXPECT WOULD INDUCE THE PROMISEE INTO ACTION OR FORBEARANCE OF A SUBSTANTIAL NATURE IF THE PROMISEE CAN SHOW THAT HE DID IN FACT RELY ON THE REPRESENTATIONS TO HIS DETRIMENT?

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[1]As noted by the district court, Geodata also asserted claims based on theories of quantum meruit and an "independent tort beyond mere breach of contract fraud." These claims were rejected by the district court.

The district court unanimously rejected Geodata's appeal from the trial court's order striking the jury's award of punitive damages. All other issues presented to the district court were raised by Grace's cross-appeal. As will appear below, the question certified by the district court is not necessarily dispositive of Grace's cross-appeal.

This Court has jurisdiction arising under article V, section 3(b)(4) of the Florida Constitution.

In addition to the certified question, Grace seeks review of the district court's finding that the evidence was sufficient to support an award of compensatory damages based on breach of contract and further seeks review of the amount of the compensatory award.[2] The district court implicitly rejected Grace's challenge to the size of the compensatory award without discussing the grounds asserted by Grace on its cross-appeal.

Because the contract beween Geodata and Grace is the foundation of their relative rights and responsibilities, this brief will begin argument with the contract issue, followed by the holding below on promissory estoppel and concluding with the award of compensatory damages and a discussion of the pleadings and evidence relied upon to sustain it.

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[2]Once the Court accepts jurisdiction in a certified question case, the entire record is presented for review of error below. Lawrence v. Fla. East Coast R. Co., 346 So.2d 1012 (Fla. 1977). On prior occasions, the Court has declined to answer certified questions because "not germane" to disposition of the cause, Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972), or has rephrased the questions before answering them, Fisher v. Shenandoah General Constr. Co., 498 So.2d 882 (Fla. 1986); Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986). Although the author of the district court's majority opinion understandably phrased the certified question as he did, Grace will suggest in argument below an alternative phrasing that reflects the precise legal point involved as it has previously been determined by this Court.

STATEMENT OF THE CASE AND FACTS

W. R. Grace and Company (Grace) is engaged in the business of mining and processing phosphate [A 2]. In October, 1980, Grace entered into a drilling contract with Geodata Services, Inc. (Geodata), providing that Geodata would drill prospect holes as required by Grace [R 1197, 211]. The contract defined the scope of the work as the drilling of "approximately 1,300 prospect holes" in Manatee County. Article III of the agreement, entitled "CHANGES IN SCOPE OF WORK," allowed Grace to increase or reduce the scope of the work by adding or eliminating items. That article further authorized Geodata to submit a statement of additional fees and costs, if any, resulting from an increase in the scope of the work and required the parties to negotiate in good faith to agree upon any such additional payments due. Article XI, entitled "TERMINATION OF CONTRACT," provided that "Owner may terminate this Contract at any time by written notice to Contractor." Section 9 of Article XV contained an integration clause and further provided: "No amendment, modification or supplement to this Agreement shall be binding unless it is in writing and duly executed and delivered by each of the parties hereto."

During the next year and a half, the drilling contract was amended numerous times. Some of the amendments increased the scope of the work and others reduced it.

In May, 1982, Geodata, through its president, James E. Bromwell, requested an increase in price [R 160]. Two Grace employees, Brooks and McLaughlin, recommended that the increase

be approved [R 161, 213]. Grace's Manager of Phosphate Development and Expansion, Albert Vondrasek, declined to follow the recommendation as set forth in a memorandum dated June 3, 1982 [R 248-49]. Fifteen days later, by memorandum dated June 18, 1982, Grace invoked the termination clause in the contract, stating: "Due to the current economic situation we request that you cancel the drilling of prospect holes in the mining area located in Northeast Manatee County" [R 163].

Vondrasek testified that business conditions dictated termination of the contract in June, 1982 [R 242]. He said that 1980 was a good year for the phosphate industry but that a "slump" developed during the latter part of 1981 [R 277]. After Geodata's contract was terminated, Grace did not rebid the work nor did it use its own employees to do any drilling [R 279]. Grace's decision to curtail the drilling was based upon economic reasons that still prevailed at the time of trial [R 279].

Bromwell confirmed Vondrasek's testimony that economic conditions in the phosphate industry became progressively worse beginning in late 1981 and into the summer of 1982 [R 434]. He further testified he was aware that companies other than Grace were cutting out their drilling work [R 434]. Asked why he had not been concerned about the termination clause in the contract, Bromwell responded [R 475]: "I guess I was looking at the pie in the sky. There didn't seem to be any end to the work in sight."

Bromwell was asked if he had "an opinion" as to why Vondrasek terminated his contract. He responded: "I think he meant to put me out of business" [R 494].

In support of his plea of promissory estoppel,

> "Mr. Bromwell testified that subsequent to the execution of the written contract he was told that Grace would give Geodata additional work beyond the contract if Geodata woud purchase additional equipment. Relying on Grace's assurances of additional work, Mr. Bromwell secured a loan and obtained additional equipment. Mr. Bromwell further testified that Grace was aware that Geodata would be required to borrow money in order to purchase the additional equipment. He further testified that Grace continued to assure him that even though the phosphate industry as a whole was experiencing economic difficulties, Grace was unaffected by those conditions and would have drilling work available for Geodata for years to come. Relying on those continuing assurances, Geodata increasingly directed its efforts toward the drilling needs of Grace to the exclusion of other companies. . . . [J]ust a few months before Grace terminated Geodata's drilling contract, Geodata was the successful bidder for a $15,000,000 project in Lima, Peru. Upon the urging of Grace employees to turn down the contract and further assurances of continuing work, Mr. Bromwell declined to accept the Lima, Peru contract."[3]

After Grace terminated the drilling contract, Geodata went out of business. A CPA employed by Geodata, Jerry Speed,

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[3]The foregoing recitation of facts is quoted from the district court's majority opinion. Grace does not here contend that the district court has misperceived Bromwell's testimony in any way but does assert that the court mistakenly emphasized the Lima, Peru contract in light of Bromwell's further testimony as follows [R 393]:

> Q Are you claiming as a damage in this matter the lost contract in Lima, Peru?
>
> A No, sir.

Thus, the record reflects that any lost opportunity in Lima, Peru was not even an issue at the trial.

would later testify at trial that the company was worth $433,000 at the time Grace terminated its contract [R 654-655]. On cross examination, he clarified his testimony by stating that Geodata's assets were valued at $433,000 but that it had liabilities in approximately the same amount [R 747-48].

Geodata filed its initial complaint against Grace in September, 1982 [R 1096]. Ultimately, a second amended complaint was filed more than two years later [R 1190].

Flagship State Bank of Polk County, a creditor of Geodata, moved for and was granted leave to intervene [R 1126, 1132].

The complaint sought recovery of damages in an unstated amount [R 1096]. Successive sets of interrogatories served in July, 1983, and November, 1983, were answered by Geodata with the statement that its damages had not been ascertained. When discovery depositions of Geodata's president, Bromwell, and its accountant, Speed, taken shortly prior to trial, identified no information as to the amount of damages claimed, Grace moved in limine for an order limiting or excluding evidence as to damages [R 1338]. Hearing argument on the morning of trial, the trial judge denied the motion.

Over Grace's objection, the intervenor bank was allowed to participate fully in the trial before the jury [R 20]. Although the trial judge ruled that the bank's participation would be limited to its claim of third party beneficiary status [R 25], the bank's counsel examined all witnesses as to the issues pending between Geodata and Grace.

The case was submitted to the jury after denial of Grace's motion for directed verdict. The jury awarded Geodata $433,000 compensatory damages and $300,000 punitive damages [R 1342]. The punitive award was eliminated on Grace's post-trial motion, but all other post-trial motions were denied [R 1496]. Geodata appealed the elimination of the punitive damage award. Grace cross-appealed the remaining judgment awarding $433,000 damages.

The district court of appeal affirmed the order striking the punitive damage award without discussion. On Grace's cross-appeal challenging the compensatory award, the district court affirmed the final judgment as modified by elimination of punitive damages. Grace timely invoked this Court's jurisdiction for further review.

SUMMARY OF ARGUMENT

I. Grace's notice terminating its contract with Geodata did not breach the contract. The notice was fully in accord with Article XI, which provided: "Owner may terminate this Contract at any time by written notice to Contractor."

Any liability for breach of contract would have to be predicated on a violation of Article III for refusing to negotiate Geodata's request for additional compensation. Such a breach would authorize recovery of damages related solely to past drilling and would not support an award of damages based upon Geodata's "loss of business" theory.

II. Disposition of this case will not be aided by answering the question as certified by the district court of appeal. An answer to an amended question suggested by Grace may tend to focus on the reason why Geodata is not entitled to prevail in this case under the theory of promissory estoppel.

Any affirmative answer to the certified question should emphasize that Florida requires proof by "clear and convincing evidence" in order to support recovery based upon promissory estoppel.

In this case, Geodata did not present proof sufficient to authorize recovery under the doctrine because (1) the representations proven were so indefinite and illusory as to be unenforceable as promises; (2) Geodata's proof did not meet the "clear and convincing" standard; and (3) Geodata failed to prove any unfulfilled inducement relied upon by Grace to its detriment.

III. The district court's decision must be quashed for the additional reason that the award of compensatory damages:

A. Is not supported by any competent evidence.

B. Is based upon a theory of recovery--"loss of business"--that was neither pleaded nor revealed through requested discovery.

ARGUMENT

I. GRACE DID NOT BREACH ITS CONTRACT WITH GEODATA BY EXERCISING AN EXPRESS RIGHT TO SERVE A NOTICE OF TERMINATION.

Geodata's Count I charged Grace with breach of contract by reason of having given notice of termination of the drilling contract. The specific act complained of was Grace's memorandum dated June 18, 1982, stating: "Due to the current economic situation we request that you cancel the drilling of prospect holes in the mining area located in Northeast Manatee County" [R 163].

Grace's notice of termination was fully in accord with Article XI of the drilling agreement: "Owner may terminate this Contract at any time by written notice to Contractor."

Florida law has long recognized the validity of such a contract provision. When the parties so agree, as here, a contract may be terminable at the option of one of the parties. Thompson v. Shell Petroleum Corp., 130 Fla. 652, 178 So. 413 (1938); Rollins Services v. Metropolitan Dade County, 281 So.2d 520 (Fla. 3d DCA 1970); Bossert v. Palm Beach County Comprehensive etc., 404 So.2d 1138 (Fla. 4th DCA 1981). Geodata alleged nothing that would remove this contract from that general principle of Florida law.

Geodata alleged and argued that Grace's purpose in terminating the drilling contract was to put Geodata out of business. Aside from the unlikely truth of that assertion and from the evidence contradicting it, the argument has no relevance to the issue of Grace's liability or non-liability for breach of contract. If Grace expressly reserved the right to terminate the

contract, as is undisputed on this record, it could not be held liable for exercising that right regardless of its reason for doing so. Cf. Florida Telephone Corp. v. Essig, 468 So.2d 543, 544-45 (Fla. 5th DCA 1985); Ethyl Corp. v. Balter, 386 So.2d 1220, 1225 (Fla. 3d DCA 1980).

The trial court erred in denying Grace's motion for summary judgment, motion for directed verdict and post-trial motion for judgment n.o.v., each of which raised the ground discussed under this point.

On the breach of contract claim, the district court's disposition is further deficient in its failure to recognize that the damages recoverable under that theory would be far less than damages recoverable under a promissory estoppel theory. Under the latter theory, if it is found to be valid as applied here, damages would be recoverable for Geodata's reliance on representations made by Grace. Under the former, however, Grace can only be held liable for any damages flowing from the contract breach.

The majority opinion below correctly recognized that any liability for breach of contract would have to be predicated on a violation of Article III of the contract "by failing or refusing to negotiate with Geodata regarding Geodata's request for additional compensation" [A 3](emphasis added). This "additional compensation" related solely to past drilling and did not affect Grace's right to terminate the contract under Article XI. Yet the jury awarded damages based upon the full amount of

Geodata's "loss of business" theory. Clearly, such an award is improper under a claim against Grace for breach of contract.

The evidence demonstrated nothing more, according to the district court's own review of the record, than a failure on Grace's part to "negotiate with Geodata in 'good faith' regarding the requested increase and 'to exercise their best efforts to reach a mutual agreement' on this matter" [A 3]. This being so, the award of $433,000 for breach of contract cannot be allowed to stand.[4]

II. THE DISTRICT COURT ERRONEOUSLY APPLIED THE DOCTRINE OF PROMISSORY ESTOPPEL TO AUTHORIZE RECOVERY OF "RELIANCE" DAMAGES IN THIS CASE.

The promissory estoppel issue that prompted the district court to certify a question to this Court was raised below because of the trial court's jury instruction purporting to define that doctrine as a theory of recovery. The manner in which the issue was preserved for appellate review was stated in Judge Campbell's dissenting opinion [A 18-19]:

> [Grace] objected to the charge on promissory estoppel that was given to the jury. In addition, [Grace's] requested charge that would have limited the application of any promissory estoppel cause of

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[4]Damages attributable to Geodata's increased costs and fees as a result of changes in scope of the work were not established at trial. The reason was that Geodata never submitted a "detailed statement of the additional costs" as required by the contract [R 203-204].

> action to matters other than honest representations of future intentions was refused.

As a predicate for applying the doctrine, Judge Schoonover's opinion for the majority emphasized that

> (1) after the contract was signed, employees of Grace assured Geodata of additional work for several years if Geodata would acquire additional equipment and manpower,
>
> (2) Geodata reasonably relied on those assurances and incurred substantial debt in order to acquire additional equipment, and
>
> (3) even though Grace did award some additional work, Grace failed to fully comply with its assurances causing Geodata to default on the loan and to become insolvent [A 10].

Because of that rationale, Grace believes that the certified question more properly should be worded as follows in order to address the issue presented in this case:

> CAN THE DOCTRINE OF PROMISSORY ESTOPPEL BE APPLIED TO ENFORCE ORAL PROMISES WHEN NECESSARY TO PREVENT INJUSTICE IN SITUATIONS NOT COVERED BY THE STATUTE OF FRAUDS WHERE A PROMISOR MAKES AFFIRMATIVE REPRESENTATIONS OF A DEFINITE CHARACTER WHICH HE REASONABLY SHOULD EXPECT WOULD INDUCE THE PROMISEE INTO ACTION OR FORBEARANCE OF A SUBSTANTIAL NATURE IF THE PROMISEE CAN SHOW THAT HE DID IN FACT RELY ON THE REPRESENTATIONS TO HIS DETRIMENT?

Grace's representations, as testified to by Bromwell, were so indefinite and illusory as to be unenforceable as promises. For that reason, disposition of this case would not be aided by answering the question as certified by the district court. An affirmative answer to that question would not assist the Court in disposing of Geodata's claim on the merits.

An affirmative answer to the amended question suggested above would focus on the reason why Geodata is not entitled to prevail in this case under the theory of promissory estoppel. Even if "honest representations of future intentions"[5] are to be brought within the doctrine as defined in Florida,[6] the representations made to Bromwell were clearly not of a definite character susceptible of being enforced.

In the hope of avoiding confusion between an answer to the certified question and disposition of the present case on the merits, this brief will first address the certified question and then turn to the merits of the Geodata-Grace controversy.

A. The Certified Question

As will appear below, Grace takes the position that an affirmative answer to the certified question, either as posed by the district court or as amended according to Grace's suggestion, will be of no benefit to Geodata on the record made below.

Based upon the authorities discussed in Judge Campbell's dissenting opinion,[7] Grace suggests that the certified

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[5]See dissenting opinion of Judge Campbell at A 18.

[6]"[O]rdinarily, a truthful statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built." South Inv. Corp. v. Norton, 57 So.2d 1 (Fla. 1952).

[7]The two competing viewpoints are well covered in Judge Schoonover's majority opinion and Judge Campbell's dissent. They consequently need not be reviewed here. The law review article cited by Judge Campbell provides an excellent overview of the doctrine's development in Florida since 1939.

question should be answered in the negative. The reasoning in this Court's decision in the Tanenbaum case[8] is equally applicable here: the doctrine seems to partake more of legislative prerogative than judicial craftsmanship.

If the Court deems an affirmative answer to be appropriate based on the development of the doctrine in Florida to date, the Court should make clear that proof authorizing recovery "must be by clear and convincing evidence." Grimes, J., concurring in Crown Life Ins. Co. v. McBride, 517 So.2d 660, 663 (Fla. 1987). Otherwise, as his concurrence notes, application of the doctrine may tend to facilitate the possibility of fraudulent claims.

B. The Merits Of This Case

Regardless of how the Court answers the certified question, Geodata is not entitled to recover under the doctrine of promissory estoppel if that doctrine is reasonably interpreted according to all prior existing case law.

In the very first case presented to this Court seeking to invoke the doctrine of promissory estoppel, the doctrine was rejected because of the absence of a definite promise. In Hygema v. Markley, 137 Fla. 1, 187 So.2d 373 (1939), the Court said:

> Appellant also relies on Restatement of Contracts by American Law Institute, Sec. 90, where it is said:

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[8]Tanenbaum v. Biscayne Osteopathic Hospital, Inc., 190 So.2d 777 (Fla. 1966).

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding."
>
> The infirmity of the promise alleged is that it was not definite but, on the contrary, was entirely indefinite as to terms and time.

187 So. at 380.

The same infirmity burdens Geodata's claim. The only evidence offered to invoke the doctrine was the testimony of Bromwell, president of Geodata, who testified to differing representations made by employees of Grace at three different times. As to the first of these representations, which he said was made "shortly after [the] contract was signed" [A 21], Bromwell testified he was told "that they were going to give [me] some additional work if [I] would get some more equipment" [A 21]. As to the second, which he said occurred in October, 1981 [R 311], Bromwell testified he was told "that they thought I would be down in the Manatee area probably three to five years drilling options" [A 21] (emphasis added). Finally, as to the third, which he said occurred in April, 1982, Bromwell testified that he was told Grace would have work for him for "(f)ifteen to twenty years" [A 22]. [9]

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[9]All of the testimony concerning representations by Grace employees to Bromwell, which Bromwell said he relied upon, is reproduced in the appendix to this brief [A 21-25].

As noted above, the foregoing representations were so indefinite and illusory as to be unenforceable as promises.[10]

There are many impediments to Geodata's claim. Given the record made in this case, the majority's reliance on Crown Life Ins. Co. v. McBride, supra, is misplaced. This Court there found that the elements of an estoppel had not been proven. Justice Shaw's opinion for the majority in McBride shows why Geodata, like McBride, is not entitled to the benefit of the doctrine:

> [W]e find that respondent failed to meet his burden of proving his detrimental reliance upon Crown Life's representations. The sole evidence submitted in proof of this essential element was McBride's testimony. . . . Respondent offered no written policy, memoranda, witnesses, or other evidence to support this testimony. . . . In short, respondent did not prove that . . . refusal to enforce the alleged promise would sanction the perpetration of a fraud.

517 So.2d at 662 (emphasis added). The separate concurrences of Justice Grimes and Associate Justice Willis emphasize the necessity that proof in a case of this sort must be by clear and convincing evidence.

The same deficiency is present here. The only testimony or other evidence offered in support of the promissory estoppel theory was that of Bromwell. His recount of representations made by Grace employees falls far short of the "clear and convincing" standard required by McBride.

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[10]Hygema v. Markley, supra, at 15-16.

Neither fraud nor manifest injustice has been proven by the evidence in this case. Grace expressly reserved the right to terminate the contract at any time, whether or not all 1,300 holes had been drilled. Further, whether or not Grace formally "terminated" the contract, the record shows without contradiction that the cessation of drilling holes was due to economic conditions in the industry.[11] After terminating the contract, had Grace rebid the work and awarded the remaining drilling to another contractor, Geodata might well have some claim under the promissory estoppel doctrine. That simply did not happen in this case [A 26].

There is still another reason why Geodata must fail on the merits of this issue. Of the three representations testified to by Bromwell, Geodata relied only on the first, by purchasing additional equipment. Thereafter, Grace did what Bromwell said it was supposed to do: it gave him additional work [R 305, 307, 310, 311, 314]. At that point, Geodata had bought all of its equipment, borrowed the money to finance it and commenced repayment. There was no evidence of any additional reliance on the subsequent representations. The majority opinion's characterization of giving up the Lima, Peru job as reliance is incorrect. Bromwell so testified:

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[11]Bromwell confirmed the change in conditions in his letter to Grace [Exh. G-7; R. Vol. X, 15-16]: "The week of April 24, 1982, due to economic conditions, W.R. Grace and Company chose to shut down one drill rig and only work one rig."

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

A No, sir.

[R 393]. Once that answer was given, there was no reason for Grace to present evidence that Geodata could not have performed that contract under any circumstances.

Geodata failed to prove any unfulfilled inducement by Grace that was relied upon by Geodata to its detriment. The doctrine of promissory estoppel is unavailing in this case.

III. THE AWARD OF $433,000 COMPENSATORY DAMAGES MUST BE VACATED BECAUSE (1) THE AWARD IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE, AND (2) NO PROPER PREDICATE WAS ESTABLISHED BY EITHER PLEADINGS OR RESPONSES TO REQUESTED DISCOVERY.

In the district court of appeal, Grace challenged the compensatory award of $433,000 on two grounds. The district court did not discuss this aspect of Grace's cross-appeal but implicitly rejected it by affirming the judgment for compensatory damages in the amount returned by the jury.

As will appear below, Geodata presented no competent evidence that would support an award in that amount. Further, neither the pleadings nor responses to requested discovery furnished a predicate for recovery of damages based on Geodata's loss of its entire business. These two related points will be discussed seriatim.

A. THE AWARD IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE.

There can be no doubt whatever on this record of the basis underlying the jury's award of compensatory damages amounting to $433,000.

The evidence relied upon by Geodata to support the compensatory award came from Geodata's CPA, Jerry Speed. Asked over Grace's objection [R 646] to opine as to "the value of the corporation Geodata Services, Inc.," at the time Grace terminated the contract, Speed responded [R 655]:

> (By Mr. Battle) Okay, sir. And as to the value of the business?
>
> A $433,000.

Geodata's counsel reminded the jury of Speed's testimony during closing argument. He argued [R 1022]:

> And the date of valuation that's relevant to the award of damages in this case is 1982 when the contract was terminated. Because that's what put them out of business. And he said $433,000.

The jury returned precisely that figure as compensatory damages.

Geodata's evidence as to damage based upon loss of the value of its business was incompetent as a foundation for its damage claim. Speed's opinion testimony was based on the assumption that a willing buyer would purchase Geodata's assets[12] using

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[12]Speed's valuation ignored the fact that Geodata's liabilities were at least as large as its assets, meaning its net worth was zero [R 748).

a capitalization rate of 18%, resulting in his valuation of $433,000.[13] Speed's assumption that a willing buyer was floating around out there in the market in June, 1982, was contradicted by Bromwell's testimony, which we now quote:

> [R 433-34] Q I would like to ask you a few questions about the economy in the drilling industry, directing your attention to the summer of 1982.
>
> It was a real bad time, wasn't it, for drillers in the summer of 1982?
>
> A Yes, sir, it was a bad time for the industry.
>
> Q And when you are saying the industry that means the phosphate industry; true?
>
> A Phosphate, oil and gas. All exploration. It was a bad time for all exploration.
>
> Q Things had been a lot better in the summer of 1981; isn't that right?
>
> A That is correct.
>
> Q And it was so bad in the summer of '82 you couldn't even find anyone that wanted to buy the equipment from Geodata; could you?
>
> A That is correct.
>
> Q And the economy didn't get bad overnight, it was a progressive thing starting sometime in the late part of '81 and progressing thorugh '82; isn't that true?
>
> A That is correct.
>
> Q And you had knowledge before W. R. Grace terminated their contract with you that

[13]See exhibit E [A 20] for the genesis of Speed's valuation.

other companies were cutting out their drilling work?

A That is correct.

(Emphasis added.)

The above testimony is not Grace's evidence. It is the uncontradicted testimony of Bromwell, president of Geodata. This undisputed evidence totally undermines the assumption by CPA Speed that there was a willing buyer out there in the market in June, 1982, waiting to offer Geodata (or any other unfortunate owner of drilling equipment) a purchase price for drill rigs and ancillary equipment based upon a capitalization rate of 18%. Speed's assumption will not withstand scrutiny under Bromwell's own testimony.

This speculation as to value of Geodata Services, Inc., runs afoul the rule that evidence of the going concern value of a business must be based upon facts and assumptions that are supported by substantial evidence. "Self-serving and unsupported assumptions cannot sustain a calculation of going concern value." Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 582 (5th Cir. 1982).

To the same effect is the holding of the court in Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535, 538-39 (Fla. 4th DCA 1982), wherein the court said:

> Gesco also challenges the lower court's refusal to allow its real estate appraiser to testify as to damages suffered by Gesco as a result of the delay in the condominium's completion. We have reviewed the proffered testimony, as well as the testimony of Gesco's accountant, and concur in the lower court's determination. The testimony of each witness was premised on several assumptions,

which are not adequately supported by the record. Therefore, such testimony is not competent evidence on the issue of damages.

B. NO PROPER PREDICATE FOR "LOSS OF BUSINESS" DAMAGES WAS EITHER PLEADED OR REVEALED THROUGH DISCOVERY.

Up to the time Speed's testimony was offered at trial, Geodata had concealed its intended reliance on a "loss of business" theory as its measure of damages.

The initial complaint was filed in September, 1982 [R 1096]. On July 13, 1983, Grace served interrogatories upon Geodata [R 1296], one of which inquired as to the total amount of damages claimed and how the damages were calculated. Geodata responded:

> Plaintiff seeks all damages available to it under Florida law. The full extent of these damages has not yet been ascertained.

Grace served another set of interrogatories on November 29, 1983. No answers having been served more than six months later, Grace filed a motion to compel answers [R 1175]. Geodata then answered with the identical response quoted above [R 1296].

When the case was noticed for trial early in 1986, Grace filed a request for production [R 1240], a motion to conduct additional discovery [R 1296] and a motion in limine [R 1305], each for the purpose of obtaining the withheld discovery as to damages. Ultimately, just ten days before the trial was to begin, the trial judge ordered Geodata to produce its president, Bromwell, and its CPA, Speed, for pretrial depositions [R 1336].

Grace took the depositions and inquired as to Geodata's damages, but neither witness gave any figures as to the damages being claimed [R 1338].

On the morning of the first day of trial, Grace again moved in limine for exclusion of damages testimony [R 35-43]. The trial judge denied the motion and subsequently allowed both Bromwell and Speed to testify, over Grace's objection, to specific amounts of damage sustained by Geodata based upon loss of profits and the value of the business. As noted above, an exhibit admitted into evidence [A 20] showed the basis upon which Speed computed the value of the business.

Thus, the record shows that Grace, which had been trying for three years to learn the nature and extent of damages being claimed by Geodata, was allowed by the trial court and by Geodata's presentation to hear those matters, for the first time, from the witness stand on the fourth day of trial.

There is no doubt whatever on this record that Geodata successfully concealed this claim of special damages until Speed took the witness stand. Having failed for more than three years to obtain any meaningful statement of damages claimed by Geodata, Grace's counsel raised the issue by motion in limine on the first day of trial. The following ensued:

> [R 36] [By Mr. Pickett, counsel for Grace]
>
> Geodata is claiming that as a result of Grace notifying Geodata that the contract was terminated . . . Geodata went out of business and lost profits in the future that would have been earned on the subject contract, and therefore they want to put on testimony at

> this trial concerning the extent of those lost profits.
>
> * * *
>
> [R 44] [By Mr. Battle, counsel for Geodata]
>
> So Mr. Speed, did give the testimony [by deposition six days before the trial commenced] that there were lost profits, that there was a history of profitability. He testified as to a percentage of gross revenues from the Grace contract that was profit. Now I submit to the Court that that is enough.
>
> * * *
>
> [R 46-47] We will put into evidence through testimony on the stand and documents submitted that this contract was profitable, there was a profit being made and there was a profit that would have been made. There was history of profitability and there was lost profits.

Not one word about a claim of special damages based upon the value of the business itself. The record is silent as to any such damage claim before Speed's testimony, which was promptly objected to.

Speed did further offer his opinion on the profitability of Geodata's contract with Grace, opining that it was $98,000 [R 655]. Manifestly, there is a vast difference between those damages and the amount of the claim that Geodata concealed.

In Florida, an unpleaded sneak attack charging damages for "loss of the farm" or loss of the business will be rebuffed on appeal. An identical tactic was condemned in Alderman v. Murphy, 486 So.2d 1334 (Fla. 4th DCA 1986). That court held that a claim for "involuntary loss of property" is a damage element that must be specially pleaded, failing which the trial court

must sustain an objection to testimony concerning damages based upon such a theory. 486 So.2d at 1340.

Further, Florida courts have consistently condemned the method of conducting a trial by ambush used in this case as being unfair, prejudicial and reversible error. Here, the trial court's refusal to exclude the evidence as authorized by Florida Rule of Civil Procedure 1.380(b)(2)(B) constituted prejudicial error.[14]

With respect to the failure to respond to Grace's interrogatories and requests for production, the present circumstances are not unlike those faced by the court in Johnson v. Allstate Insurance Co., 410 So.2d 978 (Fla. 5th DCA 1982). After the plaintiff brought suit for loss of earning capacity, the defendant propounded interrogatories requesting information as to the method by which the plaintiff calculated her loss of earning capacity. When the plaintiff gave an incomplete and evasive response, the defendant moved for a better answer. The second response was still deficient, however, so the defendant filed another motion to compel and the court ordered the plaintiff to provide the answer within 30 days. This was followed by a motion for sanctions and yet another order directing the plaintiff to

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[14]The rule provides that if a party "fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make . . . [a]n order . . . prohibiting him from introducing designated matters in evidence." As the Fourth District has observed, "the purpose of this rule is to make available to the court the means of preventing injustice when one party has by his conduct placed the other party at an unfair disadvantage." Herold v. Computer Components International, Inc., 252 So.2d 576, 579 (Fla. 4th DCA 1971).

respond within 30 days or have her suit dismissed. Upon the plaintiff's failure to respond, the trial court dismissed the action and the Fifth District affirmed.

More specifically, a defendant is entitled to a new trial when the plaintiff, in violation of a pretrial order, fails to disclose valuation evidence during discovery that is subsequently admitted into evidence at trial over the defendant's objection. The reason is that the failure to disclose prejudices the defendant's ability to challenge the valuation evidence at trial. SNW Corp. v. Abraham, 491 So.2d 1223 (Fla. 4th DCA 1986).

The foregoing authorities demonstrate ample reason why the judgment must be reversed for a new trial if judgment is not entered in Grace's favor on the issue of liability.

CONCLUSION

No matter how the Court answers the certified question, the district court's decision should be quashed because of Geodata's failure to present evidence that would authorize recovery under any reasonable interpretation of the promissory estoppel doctrine.

Here, there were no representations of a definite and enforceable character. There was no detrimental reliance on any representation by Grace. And there certainly was no clear and convincing evidence of any induced detrimental reliance that would authorize recovery in this case.

Should the Court resolve the promissory estoppel issue in Geodata's favor on this record, the decision below should still be quashed because of the trial court's errors discussed under Point III. Geodata would then be entitled to a new trial on the issue of compensatory damages--nothing more.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Initial Brief Of Petitioner W. R. Grace And Company was served by U. S. Mail this 5th day of July, 1988, to: MAXWELL G. BATTLE, JR., Esq., Maxwell G. Battle, Jr., P.A., 1460 Beltrees Street, Suite A, Dunedin, FL 34698; and to JOHN A. NASER, Esq., 1349 South Florida Avenue, Lakeland, FL 33803.

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