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

REPLY 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 the initial brief

"AA" for appendix to this brief

"PX" for plaintiff's exhibit

"Br." for the initial brief or answer brief as specified in the text

TABLE OF CITATIONS

REPLY BRIEF

Introduction

Geodata's statement of the facts in its answer brief contains multiple distortions of the testimony presented at trial. These will be examined in the first section of this reply brief.

Additional sections are included for the purpose of discussing the proper measure of damages recoverable for breach of contract, this Court's prior precedents dealing with promissory estoppel and the "clear and convincing evidence" standard required by the Court in such cases.

At the threshold of reply argument, Grace directs the Court's attention to Geodata's shift in position concerning any lost opportunity in Lima, Peru. As noted in the initial brief,[1] any such possible opportunity for Geodata was not even an issue at the trial. Geodata's president, Bromwell, eliminated any such claim by an unambiguous answer to a direct question [R 393]:

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

Once that answer was given, there was no reason for Grace to inquire further or to present evidence that Geodata could not have performed that contract under any circumstances.

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[1]Br. 5 n.3, 18-19.

a. [Grace] "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."

As recited in Grace's initial brief, Bromwell did so testify [R 363]. But the additional references to the testimony of Al Vondrasek not only do not support Geodata's statement, they positively rebut it[3] [AA 1-6].

b. [After terminating Geodata's contract,] "GRACE then proceeded to bid the work covered by the contract and did not allow GEODATA to bid the work [R-193, 194, 195] (emphasis added).

The testimony of John Brooks was directly to the contrary [AA 7-9]. Brooks testified that Grace did not rebid the work covered by Geodata's contract. No one contradicted his testimony.

c. "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]" (emphasis added).

This is perhaps the most gross distortion of all. The entire testimony of John Brooks upon which it is based is as follows [AA 10]:

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[3]Vondrasek's testimony, as well as other mischaracterized testimony discussed below, is included in the appendix to this reply brief [AA 1-12].

Q Have they [Grace] done any drilling since that contract was terminated with their own forces?

A Yes.

Q In fact, they hired some of Mr. Bromwell's former employees to assist them to do that, didn't they?

A I think we have one person that works for us that used to work for Mr. Bromwell.

There is not one line of testimony in the record stating that Grace performed drilling work "previously promised to Geodata."

d. "GEODATA immediately tried to reacquire the Lima contract. . . [R-349]."

Bromwell did not so testify. What he actually said when asked that specific question was that the job had been awarded to someone else and was not available at the time Grace terminated his contract [R-349] [AA 11].

e. "The cancellation of the GRACE/GEODATA contract by GRACE and hiring of GEODATA employees put GEODATA out of business [R-365]" (emphasis added).

Neither the reference quoted [AA 12] nor any other testimony stated that Grace hired any Geodata employee before Geodata went out of business.

Two other misleading statements appear in the argument section of Geodata's brief. At page 24, Geodata argues that Grace represented that "sufficient additional work would be forthcoming for it to liquidate the debt" to Flagship Bank. No record reference is included, nor could there be; there is no

such testimony in the record. Further, at pages 25-26, Geodata infers that its accountant, Jerry Speed, testified to a range of values for the business, from which the jury selected a mid-range figure. As noted in Grace's initial brief [Br. 20], Speed gave a precise figure ($433,000) and counsel asked the jury to award that sum, which the jury did.

2. Damages for Breach of Contract

As noted in Grace's initial brief [Br. 11-12], the majority opinion below premised its breach of contract theory on Article III of the contract, charging Grace with "failing or refusing to negotiate with Geodata regarding Geodata's request for additional compensation."[4] The district court majority then cited two cases as support for its premise that the judgment in Geodata's favor should be affirmed based upon breach of contract.

Neither of those cases stands as authority for the result reached below: affirmance of an award of damages not shown to have been caused by the breach. Grace's failure to negotiate appropriate additional compensation for extra work performed by Geodata did not cause damage in the amount of $433,000.

During its case in chief, Geodata offered into evidence an exhibit prepared by Grace's employee, Brooks, showing that Geodata would have been entitled to approximately $1,500 in increased compensation had Grace honored Geodata's request for more money [PX G-6, R 860-61, 1069-70]. Geodata's counsel

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[4]See appendix to Grace's initial brief at p. A 3.

resisted Grace's motion for directed verdict on the contract count by reference to this exhibit [R 857].

If, as the majority below held, Grace breached Article III of the contract by refusing to negotiate the request for additional compensation, the damages flowing from that breach were about $1,500.[5]

Since the English case of Hadley v. Baxendale[6] was decided in 1854, damages for breach of contract have universally been limited to those naturally and proximately flowing from the breach. Nothing in the two cases cited by the majority alters that rule. Sound City, Inc. v. Kessler[7] merely held that a reasonable notice of termination should have been given under a contract lacking any express provision as to duration. Rector v. Larson's Marine, Inc.,[8] defined alternative remedies available for "a total breach of contract."

Geodata's "failure to negotiate in good faith" claim could not deprive Grace of its contractually-authorized right to terminate the drilling agreement under Article XI.[9] The real

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[5]Authorized termination of a contract does not terminate rights already accrued at the time of termination. Bernecker v. Bernecker, 60 So.2d 399 (Fla. 1952).

[6]9 Exch. 341, 156 Eng. Reprint 145.

[7]316 So.2d 315, 318 (Fla. 1st DCA 1975).

[8]479 So.2d 783, 785 (Fla. 2d DCA 1985), rev. dismissed, 486 So.2d 596 (Fla. 1986).

[9]"Owner may terminate this Contract at any time by written notice to Contractor. Any such termination shall be effective in the manner specified in such notice. . . . Upon receipt of such notice, Contractor shall, unless directed otherwise, immediately

issue presented is whether Grace breached the contract by serving its notice of termination regardless of its reason for doing so, which is legally inconsequential. Florida Telephone Corp. v. Essig, 468 So.2d 543, 544-45 (Fla. 5th DCA 1985)(exercise of contractual right creates no liability regardless of motive); Ethyl Corp. v. Balter, 386 So.2d 1220, 1225 (Fla. 3d DCA 1980)(plaintiff cannot recover for damages caused by an act which is the product of mixed motives, some of which are perfectly legitimate); Cadillac LaSalle Co. v. Claude Nolan, Inc., 118 Fla. 250, 158 So. 883 (1935)(motive which actuates termination of contract is immaterial).

3. Promissory Estoppel

Both the majority opinion below and Geodata in its answer brief rely upon two decisions of this Court as precedent for allowing Geodata to recover damages under a promissory etsoppel theory.

In the initial brief, Grace discussed the reasons why the McBride case[10] does not support recovery here.[11]

The other decision, Mount Sinai Hospital, Inc. v. Jordan,[12] involved a suit to enforce a charitable pledge and discussed policy considerations far removed from a commercial

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discontinue the Work hereunder and shall thereafter perform only such services in connection with the Work as Owner may direct. . . ." [A 13]

[10]Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla. 1987).

[11]See initial brief at pp. 17-18.

[12]290 So.2d 484 (Fla. 1974).

contract negotiated between sophisticated business enterprises. Nonetheless, the Court in Mount Sinai imposed a strict requirement that the conditions of a charitable pledge be stated with particularity before the promise would be enforceable under the theory of estoppel. 290 So.2d at 486. As discussed in Grace's initial brief, the requirement of particularity is not met by Geodata's evidence.

Geodata's answer brief presents no case law even arguably supporting application of the promissory estoppel doctrine to its claim other than the two cases cited by the majority below.

In its initial brief Grace cited this Court's decision in Hygema v. Markley[13] for the controlling premise that the doctrine of promissory estoppel is inapplicable to a promise of indefinite character. Florida's position in that regard is supported both by case law and by noted commentaries. E.g., 1A A. CORBIN, CONTRACTS §201 (rev. ed. 1963)("An 'illusory promise' is not turned into a promise by action in reliance, and the rule stated in sec. 90 has no application"); Neeley v. Bankers Trust Co. of Texas, 757 F.2d 621 (5th Cir. 1985) ("This . . . case teaches anew the importance of getting it in writing"; indefinite promises unenforceable); Spooner v. Reserve Life Ins. Co., 287 P.2d 735, 738 (Wash. 1955)(supposed promise may be illusory because it is so indefinite that it cannot be enforced).

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[13]137 Fla. 1, 187 So. 373 (1939).

4. The Evidentiary Standard -- "Clear and Convincing"

In its summary of argument [Br. 9], Geodata argues:

> There is no need for clear and convincing evidence in order to support recovery based upon promissory estoppel.

Having summarized its intended argument, Geodata apparently found nothing to support it. The argument section of the brief does not repeat that theme.

Any fair reading of this Court's McBride decision and its several opinions requires rejection of Geodata's argument.

The reason for the requirement of corroborated evidence meeting the clear and convincing standard in a case such as this one is to minimize "the possibility of fraudulent claims." Grimes, J., concurring, in McBride, 517 So.2d at 663. The record made here presents sharp contrasts between Bromwell's oral testimony and his prior writings. One example will suffice.

At trial, Bromwell testified as to representations he says Grace employees[14] made in April, 1982:

> [R 313]
>
> Q And what did they tell you?
>
> A Things were getting bad in '82 after--actually it was April, about April of '82 things were getting a

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[14]Grace's counsel repeatedly objected to questions posed to Bromwell inquiring what he was told by "employees of W. R. Grace" without specifying the name of the employee. The trial judge consistently overruled these objections and stated that Grace's counsel could obtain the information on cross-examination. E.g., R 301-02, 312, 493.

> little bit uptight, and I went to John Brooks and Sammy McLaughlin and expressed my concern because I had a pretty large debt reduction to make at the banks, and I was told at that time that as long as I kept drilling like I was doing and could produce for W. R. Grace that I didn't need to worry.
>
> Q Did they give you any kind of a time frame that they would have work for you?
>
> A Fifteen to twenty years.
>
> Q For how many rigs?
>
> A Two rigs, at least.

Compare that sworn testimony with Bromwell's letter to Grace [PX G-7; R Vol. X, 15-16] in which he wrote:

> 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. (We had been operating two rigs) and only work a four day work week.

Bromwell's contemporaneous written declaration in 1982 is far more likely to be reliable than his 1986 trial testimony under the "clear and convincing" requirement imposed by this Court.[15]

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[15]The "clear and convincing" standard is incorporated into section 139 of the Restatement (Second) of Contracts, which refers to "clear and convincing evidence" of the making and terms of a promise inducing reliance.

CONCLUSION

The decision of the district court of appeal should be quashed and the cause remanded either for entry of judgment in Grace's favor or for a new trial on the issue of compensatory damages.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief has been furnished by U. S. Mail this 8th day of August, 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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