SUPREME COURT OF FLORIDA

INTERNATIONAL MARINE CO-OP,
LTD., a Florida Limited
Partnership,

Petitioner,

CASE NO. 94,530

vs.

4TH DCA CASE NOS. 96-03885

97-00548

CENTRO NAUTICO REPRESENTACOES
NAUTICAS, LDA., a Portuguese
Limited Partnership and
CARAVELLE BOATS, INC., a
Georgia corporation,

Respondents.

_________________________________/

ON REVIEW OF AN OPINION
OF THE FOURTH DISTRICT COURT OF APPEAL
ON PETITION AND CROSS-PETITION

BRIEF OF CARAVELLE BOATS, INC. AND CENTRO NAUTICO REPRESENTACOES NAUTICAS, LDA, AS RESPONDENTS AND CROSS-PETITIONERS

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Caravelle Boats, Inc. v. International Marine, Inc.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellants, Centro Nautico Representacoes Nauticas, LDA. and Caravelle Boats, Inc., certify that the following persons and entities have or may have an interest in the outcome of this case.

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2. Caravelle Boats, Inc.
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4. Centro Nautico Representacoes Nauticas, LDA
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6. International Marine Co-Op, Ltd.
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7. Terrance P. O'Connor
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8. Honorable James M. Reasbeck
   (trial judge)

9. Patricia S. Sechan
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CERTIFICATE OF TYPE SIZE

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STATEMENT OF THE CASE AND FACTS

This is a brief by Caravelle Boats, Inc. (Caravelle) and Centro Nautico Representacoes Nauticas, LDA., (Centro Nautico) directed to the January 27, 1999 brief by International Marine Coop, LTD (IMC) and further in support of the Cross-Petition for Review filed herein. Basically, Caravelle contends that the decision by the Fourth District Court of Appeal is correct as to Caravelle in most respects. Centro Nautico contends the opinion of the Fourth District Court of Appeal as to Centro Nautico is in error and should be reversed.

The parties may be summarized as follows:

> IMC: A boat distributor which was plaintiff in the trial court and appellee in the Fourth District Court of Appeal. IMC is now the petitioner and cross-respondent before this court.
>
> Caravelle: A boat manufacturer which was a defendant in the trial court, a successful appellant in the Fourth District Court of Appeal and now a respondent and cross-petitioner in this court.
>
> Centro Nautico: A Portuguese limited partnership engaged in the retail sale of boats in Portugal. It was a defendant in the trial court, an unsuccessful appellant in the Fourth District and is a respondent and cross-petitioner in this court.

The District Court referred to the parties as the manufacturer, the distributor and the retailer.[1] IMC considered Caravelle to be its agent and dealt with it confidentially. (T. 350).

IMC sued the two defendants Caravelle and Centro Nautico

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[1]The parties will generally be referred to by name. The record will be designated (R. ___) and the transcript designated as (T. ___).

based upon different oral and written contracts between the parties and on multiple theories of contract and tort liability. (R.1-18). IMC had a two year written contract with Centro Nautico and an oral contract with Caravelle.

Caravelle moved for summary judgment based on the application of the Statute of Fraud to the oral contract between Caravelle and IMC. The motion was denied. Caravelle also moved for a directed verdict on the Statute of Frauds issue at the end of the IMC case and at the end of all the evidence. (T. 966-973). This motion was denied but the trial court did rule that the oral contract with no stated duration was terminable at will. (T. 973). Caravelle had terminated the oral contract because of disputes between IMC and Centro Nautico and the termination of that relationship.

The claims which were actually submitted to the jury as to Caravelle were: (1) breach of the oral contract and (2) a claim of tortious interference with the two-year written contract between IMC and Centro Nautico. (R.306-8). The jury rejected the tortious interference count but found in favor of IMC on the breach of oral contract count assessing damages solely for future lost profits for several years at $252,195. (R.306-8). The court initially entered a final judgment for the verdict. A handwritten order without words of finality was entered on December 12, 1996. The court also entered a subsequent final judgment against Caravelle for costs and post-judgment interest in the amount of $5,660.67. (R.397). A further amended final

judgment was then entered assessing prejudgment interest against Caravelle. Prejudgment interest was set at $79,195.37 and postjudgment interest at $9,896.60 for a total of $341,286.97. (R.403-4).

As to Centro Nautico, the theories submitted to the jury were: (1) breach of written contract, (2) tortious interference with the oral Caravelle-IMC contract relationship, (3) slander, and (4) punitive damages. (R.306-8). Centro Nautico had delivered a letter terminating the two year contract approximately six weeks early and breach of the written contract was found. The jury assessed $44,040 in damages. In addition, the jury found Centro Nautico guilty of tortious interference with the oral contract between Caravelle and IMC and assessed damages for this tort at $71,843. The jury further found Centro Nautico guilty of slander by stating that IMC was not "an honest company", assessing compensatory damages at $25,000. In addition, the jury found Centro Nautico liable for punitive damages in the amount of $150,000 based upon the slander count. (R.306-8). The total damages were $290,883. The court later entered further judgments against Centro Nautico for $57,006 in attorney's fees using a multiplier and $91,344 in prejudgment interest. (R.394).

There were eight overlapping orders/judgments entered after the single verdict. The trial court initially entered the two final judgments for damages in IMC's favor against both defendants which were immediately appealed and cross-appealed.

Thereafter, the court entered final judgments for costs and attorney's fees, and after a relinquishment of jurisdiction from the District Court, amended the judgments to add prejudgment interest. The court had also entered two handwritten orders which did not contain words of finality. The amended final judgments on prejudgment interest were entered on January 29, 1997, pursuant to an order of relinquishment of jurisdiction from the District Court of January 21, 1997, which order provided that a copy of the prejudgment interest ruling should be promptly provided to the Court and that the appeal "shall [then] proceed." The two prejudgment interest orders were filed with the Fourth District on January 31, 1997 and the appeal proceeded. Amended Notices of Appeal which incorrectly described the orders being appealed were filed by Centro Nautico on February 10 and 11, 1997.

A Motion to Dismiss portions of these appeals was filed by IMC on April 1, 1997. The motion argued that the two earlier handwritten orders signed by the trial judge on December 23, 1996 were really final judgments and had to have been appealed. The District Court rejected this argument and denied the Motion to Dismiss.

In all, there were six different judgments entered plus the two handwritten orders for a total of eight. After the motion to dismiss due to alleged defects in the Notices of Appeal, the District Court allowed clarification and amendments of the Notices. The court denied the motion to dismiss. (R.350, 352,

394, 397, 403, 404).

There has never been any doubt that the defendants were appealing the main judgments plus the two sets of ancillary judgments on attorney's fees, costs, and prejudgment interest which are, of course, based on the main judgments. The last amended judgments added prejudgment interest and were immediately filed with the District Court pursuant to that Court's specific order. No further notice of appeal was necessary as to these orders.

This was a consolidated case before the trial court and the District Court. The various different contract and tort claims against the two defendants were tried before the same jury and the appeals were consolidated.

Caravelle

Caravelle was a manufacturer building family-oriented outboard and inboard/outboard boats in Americas, Georgia. (T.268, 406, 722, 746-8). It was a relatively small company. (T.747-8). Caravelle sold its boats in the United States and had some small contracts for boat sales in the European market in Austria and Switzerland. (T.727, 776). Caravelle wanted to increase its boat sales in Europe, and for this reason entered into an oral agreement with IMC in 1989. The evidence from the plaintiff's side was that this 1989 oral agreement had no fixed term, but that it was expected to last more than one year and for some undetermined period. IMC asserted it could have lasted "forever". (T.395, 775). The judge's rulings on the contract

were confusing. In denying Caravelle's Motion for Directed Verdict, he stated, "I think its a one year contract." (T. 972). A renewable one year contract would not have been governed by the Statute of Frauds. However, the judge also ruled that this oral agreement was "terminable at will" and that Caravelle could terminate for any reason upon reasonable notice. (T.972-3).

It had been stipulated that Caravelle terminated the oral contract by so informing IMC on September 11, 1993. (T.30). Caravelle gave IMC a 30 day period after the termination during which it agreed to honor any boat orders by IMC. (T.706-7). The contract thus spanned over three years and there was no assertion of any breach before the affirmative termination statement in September of 1993. It was this oral agreement which was the basis for the breach of contract claim by IMC against Caravelle which was successful before the jury. IMC sought no past damages. Instead, it sought damages for future lost profits over a five to seven year period after termination of the oral contract. (T.480-490, 502).

International Marine Co-Op

IMC was a boat distributor functioning internationally. (T.97-8). An oral agreement was reached that IMC would distribute Caravelle boats outside the United States and Canada. (R.3-4, T.110). IMC would first buy the boats from Caravelle and then resell and distribute them to European concerns. (T.101). This was purely a verbal arrangement and there was no agreement whatsoever as to the term of the agreement. (T.141, 395). The

parties adopted a wait and see attitude and there were no assertions of any problems with boat deliveries by Caravelle to IMC before it resold and distributed the boats to others. In short, there were no breaches prior to the day Caravelle announced that it no longer wanted to do business with IMC.

IMC took the position that the contract could certainly not be performed in one year and that it would last at least several years and perhaps "forever". (T.141, 158, 395). Sometime shortly after reaching the oral agreement, IMC acquired its first new client when Caravelle received a faxed inquiry directly from Centro Nautico in Portugal about the possibility of buying Caravelle boats. (T.569, 782). Caravelle informed Centro Nautico that it should deal directly with its distributor IMC and gave them the name and number. (T.569).

IMC then had a single meeting with representatives of Centro Nautico in Miami and entered into a two year written agreement with Centro Nautico concerning the supplying of Caravelle boats for sale in Portugal and Spain by Centro Nautico as a retailer. (R. Ex. to Complaint). The price or prices to be paid for the boats was <u>not</u> stated in the written agreement and there was a hotly disputed oral understanding which was changed as business was carried out. (T.339-40, 431, 609, 619). Price lists were furnished, but there were disputes about IMC's percentage markups. (T.607, 609, 619).

IMC thus had an oral contract which was terminable at will with Caravelle and a written contract with Centro Nautico with no

prices which would automatically expire at the end of two years or by November 1, 1993.

Centro Nautico

Centro Nautico was a small Portuguese limited partnership in the boat business. It wanted to start selling boats of the sort manufactured by Caravelle; family boats in the medium to low price range. Centro Nautico contacted Caravelle directly and at the request of Caravelle, then contacted IMC. The two partners of Centro Nautico visited the United States and made a deal with IMC. The two year written contract was signed on November 1, 1991 and it would have automatically expired as of November 1, 1993. The contract had a 60 day notice of cancellation provision. Centro Nautico attempted to terminate the contract six weeks early (on September 11, 1993) because of dissatisfaction with the "honesty" of IMC. The date happened to be the date of the 1993 Chicago Boat Show, when all of the principals had the chance for a face to face meeting.

The Chicago Boat Show in 1993

These parties routinely attended the Chicago Boat Show where all three parties met for at least the three years in question. The overall arrangements had worked only reasonably well during the initial stages.

The disputes between Centro Nautico and IMC regarding pricing concerned admitted markups in prices by IMC. There was a U.S. Dealer's list of prices which was the price at which IMC was able to purchase and sell boats in the United States. IMC would

then mark up those prices by up to 20% as it resold the boats to Centro Nautico. However, Centro Nautico contended that the agreement had been that it would be able to buy boats at the same price that the U.S. customers were able to buy them at. (T.578, 583). The prices were not stated in the written contract and this was a disputed oral side agreement. Centro Nautico bought more than the 50 minimum number of boats required during the first and the second year. (T.624-5). At the end of the first year, at the 1992 Chicago Boat Show, Centro Nautico stated its dissatisfaction with IMC's charges and explained that they had always understood they would buy boats at the U.S. price levels rather than at the higher level it had been charged during the previous year. (T.339-40, 431). After negotiations, IMC agreed to Centro Nautico's position and began selling the boats at the lower price level. (T.346, 431, 786-7). IMC got a reduction in prices from Caravelle so that it could still make its desired profit margin.

Thus, IMC communicated confidentially with Caravelle as its own agent. This also occurred in advance of the 1993 boat show when IMC told Caravelle about anticipated problems with Centro Nautico and enlisted Caravelle's aid in keeping the Portuguese company happy. (T. 350).

Centro Nautico believed that the 1992 revised pricing structure applied across the board to boats, parts and accessories. (T.583). However, IMC eventually contended that parts and accessories were not included in the price structure

and that it could still add a 20% markup to parts and accessories. However, it never expressly told Centro Nautico about these markups. Shortly before the 1993 Chicago Boat Show, Centro Nautico found a document accidentally left in a boat by IMC and realized that it was being charged the additional 20% on a new windshield and apparently on all other parts. (T.436-7, 610). Centro Nautico became dissatisfied with IMC over both the price and loyalty issues and at the September 1993 boat show delivered a letter to IMC advising that it no longer wished to carry on business with it. (T.614-619). This letter was delivered six weeks before the two year contract would have terminated automatically on November 1, 1993. Centro Nautico's representative orally stated: "we no longer trust IMC and we don't believe IMC is an honest company" and that "IMC is not part of the Caravelle family . . . and is completely disloyal to Caravelle". (R.14). These statements, in the presence of the Caravelle company representative whose aid had been enlisted by IMC, were alleged in the complaint as being defamatory and slanderous of IMC. (R. 14, 350). The statements in the IMC brief at p. 3 about IMC being "liars and cheats" must be disregarded. These were not in the Complaint and were not argued to the jury. (T. 1073). The District Court also clearly and correctly disregarded them.

The Complaint and Proof

The complaint, as initially filed, was in ten counts and sought compensatory and punitive damages. (R.1-18). IMC had no

European customers for Caravelle boats other than Centro Nautico and the two accounts in Austria and Switzerland which Caravelle had given to IMC along with the Centro Nautico account. Although the IMC complaint alleged it had spent substantial sums of money in acquiring European customers, IMC abandoned these claims and presented no evidence of actual expenses in acquiring customers. (R.4).

The jury found both defendants guilty of a breach of their respective contracts and also found that Centro Nautico had interfered with the contract between Caravelle and IMC and that Centro Nautico had slandered IMC in the presence of the Caravelle representative. (R.306-8). The court had directed a verdict against IMC on its claim that there had been a conspiracy between Caravelle and Centro Nautico to breach the contracts prior to the boat show in 1993. (T.1022). The evidence was absolutely uncontested that there was no contact whatsoever between Centro Nautico and Caravelle on these issues before the 1993 boat show. Caravelle had been told by IMC that there were problems with Centro Nautico and that this customer was dissatisfied with IMC. (T.350). However, Centro Nautico gave no hint to Caravelle that it intended to terminate its relationship with IMC. When Centro Nautico advised IMC that it no longer would do business with it, Caravelle had to make a decision whether it would stay with IMC or whether it would do business directly with Centro Nautico. It chose to leave the non-binding oral arrangement with IMC and to begin doing business directly with Centro Nautico.

The terms of the oral arrangement and the breach of that contract between Caravelle and IMC were alleged in the complaint as follows:

> 15. CARAVELLE has failed to perform said [oral] agreement and still refuses to perform the agreement, in that, it refuses to sell its boats to Plaintiff, and refuses to allow Plaintiff to sell/distribute CARAVELLE boats, although demand has been made by Plaintiff.
>
> 16. By reason thereof, Plaintiff has been damaged, in that, it expended substantial sums of money in cultivating, advertising, distributing, and entering into agreements with dealers and distributors in foreign countries, including CENTRO. Furthermore, Plaintiff has been unable to earn profits from the sale and distribution of CARAVELLE's boats.
>
> 17. By reason thereof, Plaintiff is owed in excess of $15,000.00.

IMC abandoned its claims for past damages, presenting no evidence on them, and offered evidence solely as to <u>future profits</u> over the five to seven year period after termination of the contract. (T.480-490, 502).

The Verdict

The jury concluded that Caravelle had not interfered with the IMC-Centro Nautico written contract and the court had already directed a verdict that there was absolutely no conspiracy between Caravelle and Centro Nautico. The jury found that Caravelle had breached its <u>oral agreement</u> with IMC assessing $252,195 as future lost profit damages. The jury also found Centro Nautico had breached its written agreement by terminating the agreement six weeks early and assessed damages for this six week breach at $44,040. The jury also concluded that Centro Nautico had tortiously interfered with the <u>oral agreement</u> between

IMC and Caravelle resulting in its termination. The jury further found that Centro Nautico had slandered IMC at the meeting between the officers of the three companies at the Chicago Boat Show. The jury further found $150,000 in punitive damages based on the slander count.

The trial court entered subsequent judgments on attorney's fees and prejudgment and postjudgment interest. All of these judgments were considered in a consolidated appeal.

The Opinion of the Fourth District Court of Appeal

The District Court opinion is a total reversal as to the judgment against Caravelle and, except for a reversal and certification on attorneys fees, is a total affirmance as to the several judgments against Centro Nautico. The single trial produced an intertwining of all issues and the manner in which the contract issue was disposed of in favor of Caravelle directly affects the claim against Centro Nautico for interference with the contract and business relationship between IMC and Caravelle. It is thus necessary to analyze the entire opinion.

As to Caravelle, the Court ruled that "no evidence or legal theory supports this award." As it has done here, IMC also argued below that the Statute of Frauds issue had not been preserved by an appropriate motion for directed verdict. This was the main issue as to Caravelle and the opinion expressly finds that the issue had been "sufficiently preserved." The evidence was overwhelming that the oral contract was to have lasted for over one year and may have lasted for many years.

The District Court directly held that the oral contract was within the Statute of Frauds, that it was terminable at will, that it had indeed been terminated, and that there could be no valid claim for future lost profits under the oral contract which had been ended. In a strange ruling, the District Court did not phrase its opinion in terms of a directed verdict in favor of Caravelle. Instead, the Court said: "It was error to let this part of the jury verdict stand." The Court should have reversed and ordered a directed verdict and this ruling would have required a reversal of at least a portion of the Centro Nautico verdict and judgment.

The Court affirmed on almost all issues as to the retailer Centro Nautico. IMC and Centro Nautico had a two year written contract and due to the genuine dispute Centro Nautico decided to terminate the contract and did so six weeks early. Centro Nautico chose this time because it happened to be the Chicago Boat Show where all three entities would be meeting to discuss their overall business relationship. During that meeting, the Centro Nautico representative stated: "We do not believe [IMC] is an honest company." The District Court affirmed the jury's finding that Centro Nautico had interfered with the contract and business relationship which existed between IMC and Caravelle. The jury's verdict specifically concluded that there had been an enforceable oral contract between IMC and Caravelle and that Caravelle had breached this oral contract causing damage to IMC. This was, of course, the contract claim on which the District

Court found error and on which the District Court should have ordered a directed verdict.

The District Court also affirmed the defamation claim based upon the single comment by the Portuguese representative that they no longer believed IMC to be an honest company. The District Court rejected all arguments as to the defamation claim finding that the statement was not an expression of opinion. The Court also concluded that the words themselves were sufficient to constitute slander. The Court also affirmed the jury's punitive damage award which was based solely upon the slander count. The Court rejected arguments that there was a total absence of malice and further rejected arguments that the punitive award would unquestionably bankrupt the small Portuguese boat retailer. The Court ruled that the retailer had failed to preserve the issue in post-trial motions and concluded "Thus we have no authority to consider it for the first time."

As to attorneys fees under the written contract, the trial court had employed a multiplier and the District Court reversed the amount of the attorneys fee award and certified the question to this Court as to whether a contingency risk multiplier could be used when attorneys fees were awarded solely on a contract provision rather than a statute. This issue has been certified in other cases and this Court had previously granted review in U.S.B. Acquisition Co. v. Stamm, 695 So. 2d 373 (Fla. 4th DCA 1977), review granted in Bell v. U.S.B. Acquisition Co., Case No. 90-321 and 90-426 (Fla. Dec. 12, 1997). This case (Bell) was

orally argued before this Court on February 5, 1998, and on February 26, 1999, a Stipulation of Dismissal was filed. We are advised by the Clerk's Office that the Bell case is still under consideration by the Court.

SUMMARY OF ARGUMENT

On the certified question this Court should hold that the Fourth District is correct and that a multiplier may not be used in an attorney's fee award based on a contract which does not contemplate use of such a multiplier. Petitioner has raised several other issues based on this Court's jurisdiction over the entire case. The Court should reject the argument that the Statute of Frauds issue was not preserved. A motion for directed verdict was made based on the Statute of Frauds at the close of the plaintiff's case and the close of all the evidence and the motion was denied. Reasonable notice is not a meaningful issue in this case. The Fourth District Court clearly had jurisdiction and even if there were technical deficiencies in the notices of appeal, there was no prejudice and timely notices were filed as to all the orders and judgments before the District Court.

On cross-petition, this Court should rule that the District Court erred in not requiring a directed verdict on the Statute of Frauds issue. Such a directed verdict would have also required a reversal of the tortious interference count against Centro Nautico. Further, the District Court erred in concluding that the language concerning the honesty of IMC could constitute slander under the circumstances. The language was pure opinion as a matter of law and was made under privileged circumstances.

ARGUMENT

The Certified Question

IS A CONTINGENCY RISK MULTIPLIER INAPPLICABLE TO A COURT AWARDED ATTORNEY'S FEE WHERE THE ONLY AUTHORITY FOR FEES IS PREDICATED ON A CONTRACTUAL PROVISION AND NOT A STATUTE?

The Fourth District Court of Appeal has directly held that a contingency risk multiplier may not be used under these circumstances. In the Court's decision in U.S.B. Acquisition Co. v. Stamm, 695 So. 2d 373 (Fla. 4th DCA 1997) the issue was directly decided and certified to this Court on February 5, 1998 in Case No. 90,321 and 90,426. On February 26, 1999, the parties to that case filed a Stipulation of Dismissal which as not yet been acted on. This issue has already been thoroughly briefed and orally argued before this Court. The Court may or may not choose to rule on the issue despite the Stipulation for Dismissal.

In Command Credit Corporation v. Mineo, 664 So. 2d 1123 (Fla. 4th DCA 1995), the Fourth District Court of Appeal in a well-reasoned opinion addressed the issue of whether an attorney's fees award predicated on a contractual provision and not a statute could include a fee multiplier. After analyzing prior case law and public policy, the court concluded "a contingency multiplier is not applicable where the only authority for a fee award is based on a contractual provision and not a statute." Mineo, 664 So. 2d at 1125, 1126. The parties to the contract should not be presumed to have contemplated a fee multiplier. The issue of whether counsel will be available to

handle the case was obviously not a part of the contract.

In reaching its conclusion in Mineo, the Fourth District analyzed this Court's opinions; Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), Standard Guarantee Insurance Company v. Quanstrom, 555 So. 2d 828 (Fla. 1990), as well as State Farm Fire & Casualty Company v. Palmer, 555 So. 2d 836 (Fla. 1990).

Rowe adopted the federal approach and established the loadstar formula to assist courts "directed by statute to set attorney's fees." Rowe, 472 So. 2d at 1149, 1150. This Court, as noted by the Fourth District, stated in Rowe that "[w]hen the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney's fee." Mineo at 1124 quoting Rowe, 472 So. 2d at 1151 (emphasis supplied in Mineo). Similarly, in Quanstrom, this court explained that it had adopted the Rowe approach in a personal injury action in which the "legislature had determined that the prevailing party, plaintiff or defendant, was entitled to attorney's fees." Quanstrom, at 831. As noted by the Fourth District Court, this Court in Quanstrom emphasized that "the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule." Mineo, 644 at 1124 quoting Quanstrom, 555 So. 2d at 834 (emphasis supplied in Mineo). Thus, this Court premised both Rowe and Quanstrom on the basis of statutory attorney's fees.

The Fourth District also analyzed this Court's opinion in Palmer (which had been relied upon by the appellee in Mineo) and recognized, just as this Court did, that in Palmer the authority for fees was pursuant to statute even though the action was a claim under an insurance contract. In Palmer, this Court specifically noted that the trial court's application of Rowe principles included the contingency multiplier under the authority of Section 627.428(1), Fla. Stat. Palmer at 837. The fee shifting in Palmer was authorized by statute and not by a private contract. Thus, even though the claim was brought under an insurance contract, it was the statute, not the contract, which shifted the fee obligation to the insurer and triggered the trial court's authority to consider a Rowe contingency multiplier. Similarly in Quanstrom, where attorney's fees were incurred in litigating a claim under an insurance policy, the fee award was again predicated on an insurance statute and not on the contract.

Additionally, the Fourth District in Mineo examined Sun Bank v. Ford, 564 So. 2d 1078 (Fla. 1990). The Fourth District noted that this Court in Sun Bank, which was a suit on a promissory note, expressly stated: "It is not and never has been contemplated that a court should utilize a contingent-fee multiplier to calculate a reasonable attorney's fee for an attorney in such an action." Mineo, 664 at 1125 (quoting Sun Bank, 564 So. 2d at 1079).

Thus, after analyzing the reasoning of the above-referenced

Florida Supreme Court cases, the Fourth District concluded that a contingency multiplier is not applicable where the only authority for a fee award is by contract and not statute.

Petitioner argues that the Fourth District's view is not supported by this Court's prior decisions. This Court meant what it said in Sun Bank--it is not and never has been contemplated that a multiplier should be used to calculate a fee for an attorney in a contractual action based upon a promissory note. The Petitioner ignores this express language instead relying upon the fact that the Court went on to explain that a contingency risk multiplier also would not be applied in the particular circumstances of Sun Bank because it did not appear that the client would have difficulty in obtaining competent representation. Petitioner would render this Court's opinion inherently inconsistent. Sun Bank, used the language "in such an action," and was referring to the promissory note action which was being litigated. The additional language later in the opinion referring to the lack of difficulty in obtaining counsel was only further support for the position.

The Fourth District's position is consistent with contract law and public policy. If a contract between private parties means anything, it is that parties bargain for their respective positions, and upon agreement, execute the contract. It is not the prerogative of the courts to rewrite contracts and it is axiomatic that a court is prevented from doing so. Home Development Company of St. Petersburg v. Bursani, 178 So. 2d 113

(Fla. 1965). Thus, when parties bargain for an agreement which contains an attorney's fees provision, the parties are bargaining for just that, that a prevailing party merely is entitled to attorney' fees. If the contract is silent on the issue of contingency fee multiplier, such language cannot be added to the contract it was not contemplated by the parties when negotiating and entering into their agreement. See, e.g., Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So. 2d 844 (Fla. 3d DCA 1992). The legislature has not created any statute to provide for a multiplier in a contractual fee award case, and it is not the judiciary's role to create such a substantive right. Thus, the holdings of this Court and of the Fourth District in both Mineo and the subject action comport with public policy with regard to private parties and contracts. The above is basically the same argument as made by counsel in the Bell case and a decision therein may well be determinative.

In addition to the certified question, IMC has also raised several other points based upon this Court's jurisdiction over the entire case via the certified question. The respondents have cross-petitioned also based on this Court's jurisdiction over the entire case. Respondents also assert conflict jurisdiction as will be argued under the cross-petition section of this brief.

WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THE ORAL CONTRACT CLAIM WAS BARRED BY THE STATUTE OF FRAUDS AND THAT THE ISSUE HAD BEEN RAISED AND PRESERVED.

IMC argues that there was absolutely no motion for directed verdict on the Statute of Frauds issue and that the entire issue

was completely waived. IMC further asserts that Caravelle actually sought the ruling it now complains about. Nothing could be further from the truth.

The primary issue before the District Court was whether the Statute of Frauds issue had been preserved and the Court directly decided this issue in favor of Caravelle. There is really no genuine question about the Statute of Frauds being a bar to this case -- the only question seems to be whether it was properly raised.

The general Statute of Frauds on contracts to be performed in over one year is Section 725.01 and the UCC provisions are Sections 672.201 and 672.309. The Statute of Frauds requires a signed written contract by the party to be charged and there was no written contract with Caravelle here. There simply was no enforceable arrangement between these parties even though Caravelle had been willing to sign a contract, IMC rejected the idea.

These statutes were relied upon from the beginning of this case including a motion for summary judgment by Caravelle relying on the Statute of Frauds which was denied. (R.141). At the very beginning of the trial plaintiff's counsel (Mr. Carratt) recognized that the Statute of Frauds had been raised as a defense. Mr. Carratt stated: "Caravelle has gone ahead and raised defenses, Statute of Frauds . . . because I have an oral agreement therefore its not a valid oral agreement". (T.22). As the case proceeded, the Statute of Frauds was raised and never

abandoned. At the end of the plaintiff's case counsel for Caravelle (Ms. Sechan) specifically argued for a directed verdict based on the Statute of Frauds citing both the statutes and case law. (T.558-565). At this point the only thing that was argued by IMC's counsel was that partial performance took the case out of the Statute of Frauds. (T.558-60). The trial court denied the motion for directed verdict. Throughout the trial, there was confusion because of the interplay between the general Statute of Frauds and the UCC Statute of Frauds. Despite this, it was clear that the statutory requirement of a written contract was being consistently relied upon by Caravelle.

At the end of all the evidence Ms. Sechan, Caravelle's counsel, renewed the motion for directed verdict and a somewhat confusing argument ensued. (T.966-973). Counsel discussed, and was finally successful in obtaining a ruling that the oral contract was terminable at will, but the trial court also directly denied the motion for a directed verdict and specifically ruled against defendant Caravelle on the Statute of Frauds issue.

As stated, the argument was somewhat confusing and pages 966-973 must be closely analyzed. Clearly, both the judge and plaintiff's counsel (Mr. Carratt) thought that the Statute of Frauds was being argued and the trial court specifically ruled against Caravelle's counsel on the issue. Certainly Caravelle wanted the court to rule that the contract was terminable at will but that was only an alternative position if the court was not

going to direct a verdict. Thus, counsel's petition on an "at will contract" was certainly not an abandonment.

At the end of the evidence at p. 966, Caravelle's counsel renewed her motion for directed verdict and the previous motion at the end of the plaintiff's case had specifically relied upon the Statute of Frauds. (T.558-561,966). All that was necessary was a renewal of the earlier motion.

As the argument progressed at the end of the evidence, cases were cited and argued by both sides and beginning at p. 969 Mr. Carratt argued Grossman v. Levy's, 81 So. 2d 752 (Fla. 1955), pointing out that it was a "Statute of Frauds" case. Grossman was a situation where there was an oral contract and the issue was whether it was a one year contract which could be renewed for additional one year terms or whether it was an oral contract of an indefinite length and thus within the Statute of Frauds prohibition. The Grossman trial court had ruled that the contract was for more than a year and that it was governed by the Statute of Frauds. The Supreme Court disagreed. The Court held that it was merely a one year contract which was being renewed at the end of each year, and as such, the Statute of Frauds did not apply. The Court discussed Section 725.01, Florida's general Statute of Frauds throughout the opinion. Thus the argument about Grossman in this IMC trial was clearly an argument about the Statute of Frauds and everyone including the trial judge knew it.

After Grossman was argued along with the further application

of the Statute of Frauds as contained in the Uniform Commercial Code, the trial judge, the Honorable James Reasbeck, ruled as follows at p. 792:

> The Court: It is a contractual relationship to merchandise a producer's product.
>
> Ms. Sechan: Judge, they didn't --
>
> The Court: Not as units, but as a contractual arrangement for a period of one year or more depending, and I think it's a one year contract, but I think it requires a reasonable notice to terminate the contract.

Taking out the interruptions and with emphasis supplied, the Court's comments and ruling were as follows:

> It is a contractual relationship to merchandise a producer's product. ... not as units, but as a contractual arrangement for a period of one year or more depending, <u>and</u> <u>I</u> <u>think</u> <u>it's</u> <u>a</u> <u>one</u> <u>year</u> <u>contract</u>, but I think it requires a reasonable notice to terminate the contract. (T. 972).

The judge apparently concluded that this was in fact <u>a</u> <u>one</u> <u>year</u> <u>contract</u> and for that reason the Statute of Frauds did not apply. The judge had specific reference to the <u>Grossman v. Levy's</u> opinion which had just been argued to him by IMC's counsel Mr. Carratt immediately prior to this ruling. This was the whole point of the <u>Grossman</u> opinion. Because the judge apparently concluded this was only a one year contract subject to renewal annually, he chose not to apply the Statute of Frauds. The statute would have been applicable if it had been a contract for a period of more than one year.

Immediately after the court's "one year contract" ruling, counsel for Caravelle again moved for a directed verdict, stating

at T. 973: "I would <u>also</u> move for a directed verdict --". At this point Caravelle's counsel was interrupted by Mr. Carratt's objection and the court announced: "I'm not granting a directed verdict". (R.973). At this point Caravelle's counsel asked, in the alternative, if the court would instruct that "it was a contract at will." (T. 973).

Based on all the above, it is clear that a motion for directed verdict at the conclusion of all of the evidence was made. Even though the argument was less than perfect, the issue was presented and directly ruled upon. The comment (after the court's denial) that the court should instruct the jury that it was an "at will" contract was certainly not a waiver.

Precisely the same Statute of Frauds issue was again raised and argued in the post-trial motions. (R.315-322 and Hg. of 11/5/96). During these post-trial motions plaintiff's counsel never suggested that the Statute of Frauds had not been argued and preserved. Indeed, immediately after Caravelle's attorney cited and argued the Statute of Frauds (Sections 725.01, 672.201) and <u>Chong v. Milano</u>, 623 So. 2d 536 (Fla. 4th DCA 1993), Mr. Carratt responded:

> Yes. Your Honor, you already ruled on that specific issue at trial. (T. Hg. of 11-5-96, p. 4).

Certainly, Mr. Carratt thought the Statute of Frauds had been ruled upon and ruled upon in his favor.

Under all of these circumstances, the District Court correctly held the issue had been preserved and thus applied the Statute of Frauds to this oral contract which was clearly for

more than one year. All of the plaintiff's witnesses testified that it would last at least 5 years and perhaps "forever." (T.141,158,395,500-502). The plaintiff's sole damage witness testified that he computed damages based on a 5-7 year contract. (T.500-502). Yates v. Ball, 181 So. 341 (Fla. 1937); Chong v. Milano, 623 So. 2d 536 (Fla. 4th DCA 1993) and Khawly v. Reboul, 488 So. 2d 856 (Fla. 3d DCA 1986) are directly on point and hold that this contract was unenforceable as a matter of law and fact.

There is no reason for this Court to even consider whether notice of termination was required or given. At the post-trial motions, IMC's counsel recognized that the only basis for a breach of the oral contract was possibly that the jury thought a reasonable time for termination had not been given by Caravelle. (T.Hg. 11/5/96 p.24). Caravelle had the right to terminate the contract for no reason and Mr. Carratt specifically advised the judge that the jury must have concluded that a longer notice time was necessary. (T. 24) The jury's verdict was $258,000. Caravelle gave IMC a written 30 day period during which it could continue to order boats. IMC ordered one and then cancelled the order. (T.875). The jury's verdict is totally irrational. Thirty days was enough as a matter of law but even if it was not, the verdict is still totally irrational.

Obviously, there were no damages sustained in the first 30 days when IMC did not buy a single boat. Perhaps the jury thought 60 days should have been given. It would still have been totally irrational to find $258,000 in damages. IMC's only

damage witness testified that IMC was grossing something less than $150,000 per year. Even with a 50% profit margin, to justify the jury's damage figure would have required years. If the jury concluded that a reasonable time to terminate this totally unenforceable contract was several years, such an irrational ruling would be plainly unsupported by the evidence and reversible.

In conclusion under this point, Caravelle suggests the result reached by the Fourth District was entirely correct but the language and manner in which the District Court arrived at the reversal was improper. Instead of ordering a directed verdict in favor of Caravelle on the oral contract claim, the opinion states that: "It was error to let this part of the jury verdict stand." Thus the District Court indicated the verdict should be vacated but did not indicate that a directed verdict should have occurred at the trial. If Caravelle was entitled to have the verdict vacated, then Caravelle was unquestionably entitled to have received a directed verdict at the trial and there is no question that the Motion for Directed Verdict was made and denied because that was the main issue before the District Court.

This ruling vacating the improper verdict rather than granting a directed verdict makes no difference to the result in Caravelle's favor, but it makes a substantial difference to the result in the Centro Nautico case. This is because the jury found that there was an enforceable oral contract between

Caravelle and IMC and the jury concluded that Centro Nautico had tortiously interfered with that same enforceable contract. Thus a directed verdict would have totally removed this oral contract issue from the jury's consideration. The District Court should have also reversed the tortious interference verdict the jury returned against Centro Nautico. This will be dealt with on the arguments in support of Centro Nautico's cross-petition herein. However, so the issue may be preserved, Caravelle also urges it was entitled to a directed verdict. This issue was fully addressed in the briefs and on the motions for rehearing before the Fourth District Court of Appeal but it chose not to expressly rule on the issue.

WHETHER THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE NUMEROUS (8) ORDERS AND JUDGMENTS ENTERED IN THIS CASE.

After the jury verdict, the trial court entered immediate judgments on the verdicts. Those judgments were appealed by both Caravelle and Centro Nautico which were represented by the same law firm. The undersigned counsel became appellate counsel in the case. There was also a cross appeal by IMC on numerous issues. Thereafter, there was confusion regarding the series of ancillary judgments and orders on attorneys fees, pre and post judgment interest and costs, all of which were entered after the main judgments and all of which were appealed. Despite the confusion, there was never any question that both defendants were appealing all of the orders and judgments. The case is out of the ordinary because of the eight overlapping orders and

judgments which were entered plus a relinquishment of jurisdiction for an amendment to the initial final judgments which were already on appeal. The appeal proceeded without the necessity for a further notice of appeal directed to the orders entered pursuant to the District Court's order of relinquishment. There were also amended notices of appeal filed within 30 days of the very last judgments and those notices could be amended if necessary to correctly list the correct date and nature of the orders.

Now before this Court, IMC argues that the District Court lacked jurisdiction to review the orders of January 29 or 30, 1997. These orders added prejudgment interest to the amounts already incorporated in the earlier judgments. The very first Notice of Appeal in this entire matter was filed November 20, 1996, and the last of the several different notices of appeal in this matter was filed on February 11, 1997, obviously within 30 days of the January 30, 1997 orders. These two January 30, 1997 orders, within a few days of their entry, were filed directly with the District Court. There were absolutely no further orders or judgments entered by the trial court after the last notice of appeal of February 11, 1997. The January 30, 1997, orders were not specifically described in that last notice, but were within the preceding 30-day period. Thus, even if there were deficiencies in the notices of appeal, those deficiencies could be remedies by amendments to the notices and the District Court was not deprived of jurisdiction to consider the portion of the

overall appeal concerning interest. There is also no question that IMC was always well aware and on formal written notice that all orders and rulings were being appealed by both defendants. The judgments were being appealed and the interest assessed on the judgments was also being appealed.

Previous Prohibition Ruling

Every single argument which is now raised in the IMC brief before this Court is copied word for word from the Petition for Prohibition which IMC previously filed in this Court on precisely the same jurisdictional issue. By order of February 24, 1999, this Court denied the Petition for Writ of Prohibition. The denial of the writ could only have been based on the existence of jurisdiction below in the Fourth District and thus this Court has already held that the jurisdictional attack by IMC lacks merit. The order of February 24, 1999 was a denial without issuance of an order to show cause with one justice indicating that she would have issued an order to show cause. The prohibition denial is not a nullity. In short, this Court meant what it said in its February 24, 1999 order and has already ruled on everything which now follows on the jurisdictional issues.

It is noteworthy that the argument now asserted is that the orders assessing prejudgment interest were not appealed. IMC made a previous Motion to Dismiss portions of these appeals but the previous Motion to Dismiss did not address the January 30, 1997, Amended Final Judgments. Instead, IMC's previous Motion to Dismiss argued that two handwritten orders of December 23, 1996,

on attorneys fees and costs had to have been appealed. These two handwritten orders contained no words of finality and did not constitute judgments and thus need not have been appealed.

The Amended Final Judgments of January 30, 1997, were entered pursuant to a specific order of the Fourth District Court of Appeal which relinquished jurisdiction over the appeals from the various orders entered prior thereto. This Order of Relinquishment of Jurisdiction was dated January 21, 1997, and stated:

> Jurisdiction is hereby relinquished to the trial court for a period of thirty days to determine the issue of prejudgment interest . . . the appellee [cross-appellant] shall forward to this court a copy of any order issued during relinquishment. And further ordered that the appellee [cross-appellant] shall monitor this proceeding in the trial court, if further time is needed beyond this relinquishment. It shall be the duty of appellee [cross-appellant] to request an extension of time by proper motion to this court. This case shall proceed in this court upon expiration of relinquishment. . . .

In fact, the two orders of January 30, 1997, determining prejudgment interest were then filed directly in the Fourth District Court of Appeal by a notice signed by IMC's counsel of January 31, 1997. Caravelle and Centro Nautico understood that the appeal was to proceed based on these amended judgments. The appeal continued on the basis of the initial Final Judgments plus the amendments to the judgments which occurred on relinquishment. No further Notice of Appeal was necessary as to these orders entered on relinquishment of jurisdiction which were actually filed with the appellate Court within the appeal and which IMC knew were part of the pending appeal.

Indeed, on the same day that the orders were filed in the District Court of Appeal, an IMC Motion to Review another order entered by the trial court allowing a letter of credit as a supersedeas bond in these appeals was filed by IMC's counsel. Mr. Carratt successfully sought review of this supersedeas order and since he filed the Motion for Review on the same day as the orders in question, he well knew that those orders were already a part of this appeal. No further notice of an appeal from the interest orders was necessary and the appeal went forward on this basis.

In addition to the previous argument, the District Court had jurisdiction for another reason. There were two amended notices of appeal filed within days after the two orders (February 10 and 11) after the two orders of January 30, 1997. Florida law is clear that technical deficiencies in a notice of appeal do not divest the district court of jurisdiction. See Craft v. John Sirouni's and Sons, Inc., 574 So. 2d 167 (Fla. 4th DCA 1990) and Westfield Ins. Co. v. Sloan, 671 So. 2d 881 (Fla. 5th DCA 1996). There have been numerous cases where a notice of appeal is filed describing the wrong order and date, such as a notice which purports to appeal only from an order denying a motion for new trial when in fact the appeal could only be taken from the final judgment entered prior to the order denying the new trial. Such notices of appeal are routinely held sufficient to vest the appellate court with jurisdiction if the notice is filed within the required time from the judgment. In Craft, the wrong date

and wrong description of the final order was contained in the notice of appeal, but the dismissed appeal was reinstated and all the errors allowed to be corrected. The notice in Craft did not even mention the order in question. To the same effect is this Court's decision in Cobb v. St. Joseph's Hospital, Inc., 550 So. 2d 1 (Fla. 1989). ("Technical defects in the notices of appeal . . . do not require dismissal of the appeal.").

Thus, even if the last notice of appeal of February 11, 1997, did not accurately describe the Amended Judgments of January 30, 1997, it was certainly timely as to those judgments, was subject to amendment and was sufficient to give the District Court jurisdiction.

This is particularly true when there was absolutely no prejudice and when all other pleadings in the file make it clear that the appellee was aware that the orders were being appealed. Indeed, IMC is not only an appellee, it was also a cross-appellant, having filed its own Notice of Cross-Appeal. IMC fully pursued its cross-appeal and addressed numerous issues in its brief before the District Court of Appeal on cross-appeal. If it had won the cross appeal, it would have been happy to receive additional interest.

In the District Court, IMC moved to dismiss the appeals in part and Caravelle and Centro Nautico filed a Response to Motion to Dismiss and a further Motion to Amend the Notices of Appeal. The Motion to Dismiss was substantially different than the jurisdictional arguments now made before this Court. The Motion

to Dismiss asserted that two handwritten orders of December 23, 1997 on fees and costs should have been appealed and gave extensive argument on that issue. The absence of Caravelle's name from one of the notices was also raised. We are not absolutely certain that IMC has abandoned those arguments and in an abundance of caution, we will repeat some of the arguments.

Centro Nautico and Caravelle filed a Motion to Amend and Clarify the Notices of Appeal and for overall consolidation of all the issues. The conclusory paragraph of the Motion to Amend and Clarify the Notices stated:

> WHEREFORE, appellants move to amend the Notices of Appeal to the extent necessary to show Caravelle as an appellant on the cost/fee judgment of January 13, 1997, and further to consolidate all appellate issues based upon (1) the main judgments (2) the judgments for cost and attorneys fees and (3) the amended judgments for prejudgment interest. (See Motion of April 17, 1997).

If a plaintiff is on notice of what is being appealed, then technical deficiencies or even the listing of a wrong order or the absence of the name of a party in a Notice of Appeal will not divest the court of jurisdiction. The entire record will be looked to determine what is actually being appealed. In Craft, the Court looked to the briefs to see which parties were listed even though the timely notice had been substantially defective.

The Third District's decision in Eisman v. Ross, 664 So. 2d 1128 (Fla. 3d DCA 1995) is directly on point. As the court stated, the question is one of notice and whether anyone has been prejudiced or misled as a result of errors or deficiencies in the proceeding. The court stated as follows:

> When Rule 9.110(d) (providing for notice of appeal) was crafted, it was "intended that defects in the notice would not be jurisdictional or grounds for disposition unless the complaining party was substantially prejudiced." Fla.R.App.P. 9.110(d) 1977 Committee Note. According to our supreme court:
>
>> The purpose of a notice of appeal is to disclose to an adverse party and the reviewing court that an appeal from an appealable order, judgment or decree of the trial is intended. As long as parties have received that notice and have not been prejudiced by any deficiencies or ambiguities in the notice of appeal, the dismissal of such an appeal is inconsistent with the concept of appellate review and with the proper administration of justice.
>>
>> Milar Galleries, Inc. v. Miller, 349 So.2d 170, 171 (Fla. 1977) (citations omitted). The court went on to write:
>
> [I]n testing the sufficiency of the notice, the record itself should be examined. Where the examination of the notice of the appeal and other appellate documents such as assignments of error, briefs and other pertinent papers show that the parties have not been misled or prejudiced by any deficiencies or ambiguities in the notice itself, the dismissal of such an appeal would not only be contrary to prior precedents of this Court but inconsistent with the concept of our appellate procedures and the true administration of justice.

The Eisman case is particularly relevant here because it allowed for the amendment of the appellate court's mandate after the case was completely over with. A lawyer who was actually a party in the case had left his name off the notice of appeal and no one realized it until the case was completely over before the district court. Even at that stage, the court allowed an amendment to include this individual as a party to the appeal. The court was particularly impressed with the fact that this party had filed a supersedeas bond so the plaintiff's in the case

could not possibly have been misled into believing that he was not appealing.

In the present case, two cost judgments of January 13, 1997 were entered as to each defendant. An amended notice of appeal was filed, but it include only Centro Nautico and not Caravelle and the Notice did not fully describe the orders appealed from. This notice should have included both judgments and both defendants. Caravelle posted a letter credit in lieu of a supersedeas bond pursuant to a specific order of the trial court. Obviously, Caravelle Boats would never have posted a supersedeas bond were it not appealing and everyone has known this from the beginning. The letter of credit specifically covered the amount of the main judgment and "costs, interest, attorneys' fees as finally determined to be owed by Caravelle Boats". Just as in Eisman v. Ross, the bond put the plaintiff on notice that Caravelle was also appealing these matters along with Centro Nautico. Caravelle also filed Designations to the Court Reporter on the December 23, 1996 hearing and this also indicated Caravelle's intent to appeal. Of course, there is absolutely no prejudice to the appellee and it has not been mislead in any way.

In an abundance of caution, Centro Nautico and Caravelle also gave formal notice of the fact that the amended judgments on prejudgment interest were also before the Court for review pursuant to this Court's own order of relinquishment of January 21, 1997.

Clearly, the court had jurisdiction over all judgments and

orders and this Court's denial of prohibition was completely correct and should be reaffirmed.

Issues on Cross-Petition by Centro Nautico

WHETHER THE DISTRICT COURT SHOULD HAVE ORDERED A DIRECTED VERDICT ON THE STATUTE OF FRAUDS WHICH WOULD HAVE REQUIRED A REVERSAL OF THE TORTIOUS INTERFERENCE VERDICT AGAINST THE CO-DEFENDANT CENTRO NAUTICO.

Direct conflict exists on this issue because Caravelle was entitled to a directed verdict and the trial court's denial has been affirmed or simply unruled upon in view of the Court's ruling "not letting the verdict stand." Florida law is absolutely clear that when there is no evidence on which a jury could lawfully find for the plaintiff, a directed verdict for the defendant is mandated. There are literally hundreds of cases so holding from this Court and every other appellate court in Florida.[2]

In this case, the Fourth District's opinion directly holds that a directed verdict should have been granted. The Court stated as the first sentence of the third paragraph of its opinion; "We agree with manufacturer [Caravelle] the no evidence or legal theory supports this award". Conflict exists because the District Court has chosen not to reverse the denial of the motion for directed verdict, but to instead simply hold that: "It was error to let this part of the jury verdict stand. The

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[2]Will not belabor the point by extensive citations and will recite only a few: McKinnon v. Lewis, 53 So. 940 (Fla. 1910); CNH Contractors, Inc. v. McKee, 177 So. 2d 851 (Fla. 2d DCA 1965); Baro v. Wilson, 134 So. 2d 843 (Fla. 3d DCA 1961) and Hugh v. Miami Coca Cola Bottling Co., 19 So. 2d 862 (Fla. 1944).

correct ruling, and indeed the ruling required as a matter of law, was a directed verdict. It is not even necessary that a party make a motion for new trial in order to review the denial of its valid motion for directed verdict during the trial. Furr v. Gulf Exhibition Corp., 114 So. 2d 27 (Fla. 1st DCA 1959) and Sheehan v. Allred, 146 So. 2d 760 (Fla. 1st DCA 1962).

Centro Nautico contends the District Court's reversal as to Caravelle mandated a corresponding reversal of the verdict and judgment finding tortious interference against Centro Nautico. The jury found as follows as to Caravelle:

> 1. Do you find Caravelle breached its oral contract with the plaintiff?
> Answer: Yes.
> 1.A. Do you find plaintiff was damaged as a result of this breach?
> Answer: Yes.
> 2. What are the damages due plaintiff from Caravelle on the breach of contract claim?
> Answer: $252,195.
>
> ***
>
> Do you find Caravelle tortiously interfered with the business of the Plaintiff?
> Answer: No.
>
> ***
>
> Do you find Centro Nautico tortiously interfered with the business of plaintiff?
> Answer: Yes (damages set at $71,843).

It is absolutely clear that the jury found there was an enforceable oral contract between the manufacturer Caravelle and distributor IMC. This is the oral contract which has now been held totally unenforceable. This is also the oral contract which the jury found that Centro Nautico interfered with. The business of the plaintiff was nothing other than the distributorship contract with Caravelle. The IMC-Caravelle oral contract should

never have been before the jury at all because a directed verdict should have been granted on that issue. As a matter of law, Caravelle was entitled to a directed verdict.

The opinion does not mention or address this primary argument which was strongly urged in the Centro Nautico brief. The argument was that if a directed verdict had been granted in Caravelle's favor, then the jury would never have known anything about the IMC contract claim against Caravelle and certainly would not have believed there was a valid and enforceable oral contract or oral business arrangement. That contract issue would simply not have been before the jury. Instead of being told there was an enforceable oral contract terminable on notice, the jury would have been told there was no contract or they would have been told nothing at all. The error in the Caravelle case (as found by the District Court) infected the Centro Nautico case. Indeed, there was only <u>one</u> case before the jury.

If IMC had no rights under its business relationship with Caravelle and had no contract, then the claim for interference with the relationship or contract would have been worth nothing, or at the very least, it would have been worth dramatically less in the jury's mind. Centro Nautico received an unfair trial because this jury wrongly thought and <u>directly</u> <u>found</u> there was an <u>enforceable</u> <u>oral</u> <u>contract</u> which had been interfered with. Even if there is some theory supporting a claim for tortious interference other than based on interference with the oral contract with Caravelle that is not the way this case was tried

and presented to this jury. This jury found an enforceable oral contract and it was directly asked to find that Centro Nautico interfered with it.

For unknown reasons, the opinion simply misses this Centro Nautico argument. Indeed, the opinion says that Centro Nautico's "first argument" was based on the economic loss rule. That is flatly wrong as the District Court briefs show. In fact, the economic loss rule was the last argument in the Centro Nautico brief and the argument outlined above was the <u>first argument</u>. This was pointed out on rehearing but not addressed.

Elsewhere in this section of the opinion, the District Court concludes "It was error to let this part of the jury verdict stand". It certainly was improper to let the jury verdict on the oral contract stand, but the much more serious error was the trial court's denial of the <u>directed verdict</u> motion on the contract issue initially. If a verdict had been directed and the issue not submitted to the jury, then it would have greatly affected the verdict against Centro Nautico. The Fourth District's decision is internally inconsistent and seriously unfair as to Centro Nautico.]

If the verdict had been directed, then the oral contract would have been totally removed from the jury's consideration. On appeal, the District Court had to put the parties in the position they would have been in had the correct ruling been made during the trial. A post-trial motion for judgment notwithstanding the verdict cannot raise any grounds not argued

on directed verdict motions during trial. Cheek v. Long, 235 So. 2d 349 (Fla. 2d DCA 1970). Centro Nautico is entitled to a reversal of the tortious interference count and, of course, the interest on that amount.

WHETHER THE DISTRICT COURT ERRED IN HOLDING THE WORDS "WE DON'T BELIEVE IMC IS AN HONEST COMPANY" WERE SLANDER UNDER THE CIRCUMSTANCES IN WHICH THEY WERE STATED.

As this Court has recognized, statements of pure opinion are not actionable as slander. Sullivan v. Barrett, 510 So. 2d 982 (Fla. 4th DCA 1987); Zambrano v. Devanesan, 484 So. 2d 603 (Fla. 4th DCA 1986). This rule is based on the right of free speech having its foundations in the United States and Florida Constitutions. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974). An appellate court may make the determination of opinion versus fact on review. Zambrano, 484 So. 2d at 606.

This Court discussed the distinction between comments that are pure expressions of opinion and those the are mixed expressions of opinion in Zambrano, where it said:

> Pure opinion is based upon facts that the communicator sets forth in the publication, or that are otherwise known or available to the reader or the listener as a member of the public. Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication. Rather, the communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion. Pure opinion is protected under the First Amendment, but mixed opinion is not.

Zambrano (citing Hay v. Independent Newspapers, Inc., 450 So. 2d 293 (Fla. 2d DCA 1984). See also, From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. 1st DCA 1981), rev. denied, 412 So. 2d

465 (Fla. 1982). The Fourth District avoided all of this by relying on Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) which holds Gertz does not create a wholesale defamation exception for opinions.

Specifically, the statements alleged to be slanderous were “we no longer trust IMC and we don’t believe IMC is an honest company". (R. 14). The jury found that these statements were slanderous, and assessed damages of $150,000 plus punitive damages of $150,000. (R.307). There was no attempt to present any evidence of actual damages resulting from this oral statement by Centro Nautico. The damage figure was plucked from thin air.

Under Florida law, the statements made by Centro Nautico were simply not defamatory as a matter of law in the context in which they were stated. In Seropian v. Forman, 652 So. 2d 490 (Fla. 4th DCA 1995). The District Court held "influence peddling" was not defamatory as a matter of law and further cited Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537 (1970), where "blackmail" was also held not actionable. The language here ("we don't believe IMC is an honest company") was not even close to this level of criminal accusation. These statements were pure opinions and thus not actionable as slander. The question is whether the speaker has accurately presented the underlying facts of the situation before making the allegedly defamatory remarks, so that the facts upon which the statement is based upon are known to the listener. Clearly, in this situation, Caravelle was fully aware of the

facts supporting Centro Nautico's remarks when they were made, as complaints about markup pricing were the sole reason the parties chose to meet at that time. Further, Centro Nautico had made similar complaints in the past, as evidenced by IMC's agreement to lower its prices to Centro Nautico and IMC's subsequent negotiations with Caravelle in order to maintain its profit margin. Finally, the IMC representative had told Caravelle that they feared Centro Nautico was going to leave IMC over the price dispute just before the boat show meeting. (T.350). Centro Nautico, when making its remarks, did not imply concealed or undisclosed defamatory facts that would confirm its statements, which would allow liability to attach. Zambrano, 484 So. 2d at 606. Even where the speaker does not present the facts with its publication, a finding of pure opinion is still justified where the facts are already known to the audience. See From, 400 So. 2d at 52. There is no doubt that Caravelle, the only party present other than IMC, was aware of the facts supporting Centro Nautico's remarks as they were made, and thus liability should not attach. IMC had enlisted the aid of Caravelle to keep Centro Nautico as a customer. (T. 350). Caravelle was the agent of IMC in this controversy.

Even if the statements made at the Chicago Boat Show meeting were not pure opinions, Centro Nautico was clearly privileged to make such remarks. Under Florida law, a qualified business privilege exists where an otherwise slanderous publication is made in regard to the business, made by one having an interest in

the business and solely to others having an interest in the business. Axelrod v. Califano, 357 So. 2d 1048, 1051 (Fla. 1st DCA 1978). Thus, mutuality of interests is required for the privilege to attach: the communication must be made by a person having an interest in the subject matter, to another party, other than the party against whom the statements are made, having a corresponding interest.

Centro Nautico's statements were made by its representative interested in the well-being of its operations. Caravelle, as the manufacturer of the boats that were the subject of the dispute between Centro Nautico and IMC, had a corresponding business interest and that interest was expressly invited by IMC. As no other parties were present when the remarks were made, Centro Nautico did not exceed its qualified business privilege and stated only an opinion. Both the slander and punitive damages verdicts should be reversed.

CONCLUSION

The certified question should be answered in the negative. All rulings should be in favor of both Caravelle and Centro Nautico.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to **Gus H. Carratt** and **Terrance P. O'Connor**, Morgan, Carratt and O'Connor, P.A., 2601 East Oakland Park Boulevard, Suite 500, Fort Lauderdale, FL 33306, this _____ day of April, 1999.

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