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SUPREME COURT OF FLORIDA

JUN 03 1999

CLERK, SUPREME COURT

By _____

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

Petitioner/Cross-Respondent,

vs.

CASE NO. 94,530
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/Cross-Petitioners.

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

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

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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.

1. John Beranek
(counsel for appellants)
2. Caravelle Boats, Inc.
(appellant)
3. Gus H. Carratt
(counsel for appellee)
4. Centro Nautico Representacoes Nauticas, LDA
(appellant)
5. William F. Cobb
(counsel for appellant, Centro Nautico)
6. International Marine Co-Op, Ltd.
(appellee)
7. Terrance P. O'Connor
(counsel for appellee)
8. Honorable James M. Reasbeck
(trial judge)
9. Patricia S. Sechan
(counsel for appellant, Caravelle Boats, Inc.)

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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?

Additional Questions by Petitioner

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

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

Issues on Cross-Petition by Caravelle and 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. 6

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STATEMENT OF THE CASE AND FACTS

This is a reply brief by Caravelle Boats and Centro Nautico which are both respondents and cross-petitioners before this Court. Jurisdiction is based on a certified question regarding attorney's fees and on conflict. There are additional questions raised by both sides under the doctrine that the Court may review other issues once jurisdiction has been accepted. Feller v. State, 637 So. 2d 911 (Fla. 1994).

The Petitioners reply/answer brief of May 14, 1999 is an example of over-zealous argument. On page 1 IMC starts by arguing that Caravelle did not make a motion for a directed verdict on the statute of frauds issue. This same argument is repeated at page 20 which is the first issue on the cross-petition arguments. IMC's argument is limited to an analysis of two pages of the transcript, pages 972 and 973. These two pages are the very end of the arguments on the motions made by the defendants at the close of the evidence. IMC totally disregards the additional pages in the transcript (T. 966-973), which also included arguments on the motions for directed verdict.

These pages comprising the entire argument at pages 966-973 are cited and closely analyzed in the Caravelle/Centro Nautico brief at pp. 21-27. IMC refuses to even consider the quotations from and analysis of those pages of the transcript and instead limits itself solely to the last two pages. At the end of the argument, the trial judge denied the motion for directed verdict and ruled that the jury would be instructed that this was an oral

contract terminable at will. Of course, the defendants were happy to have this instruction, but this was only an alternative if the trial court denied the motion for directed verdict. Obviously, the parties and the court would not have even been discussing whether this was a one-year or multi-year contract but for the statute of frauds issue.

The statute of frauds was argued and the trial court denied the motion. Indeed, at page 973 Caravelle's lawyer stated: "I would also move for a directed verdict--" and the court responded: "I'm not granting a directed verdict". For IMC to argue that there was no motion or ruling is simply not supported by the record. This same argument was made to the Fourth District Court of Appeal and the District Court specifically found that the issue had been preserved. The Court stated: "Finding the critical issues sufficiently preserved, we reverse the breach of contract damage award against manufacturer" (Op. p. 1).

A further example of over-zealous argument of an amazingly technical nature is on page 2 of the opposing Statement of the Case and Facts. There, IMC criticizes Caravelle for stating that the parties had stipulated that Caravelle terminated the oral contract on a particular date. Instead, IMC argues that the parties had really "stipulated that Caravelle allegedly terminated its contract." (Br. p. 2). Obviously, IMC now wants to dispute simply everything. The difference between a termination and an alleged termination is a strange argument for IMC to make. It was the plaintiff IMC which was contending that the contract had been

terminated by Caravelle. On the next page of the brief, IMC neglects the fact that Caravelle gave it a 30 day grace period after termination of the contract. IMC argues the termination occurred on September 11, 1993 and that Caravelle would only honor orders placed prior to that date. (Br. p. 3). Again, this is simply not true. Caravelle gave IMC a 30 day grace period. (T. 706-7). The District Court's opinion specifically notes the grace period in which no orders were placed.

IMC also argues that it had business in numerous countries including Denmark, Germany, Japan, etc. Again, there is no real dispute here because it makes no difference. This particular case did not concern customers in Singapore. It concerned solely the Portuguese Centro Nautico company and the termination of that Portuguese business arrangement. Although the IMC complaint alleged it had spent large sums in acquiring European customers, IMC abandoned those claims and presented no evidence of actual expenses. (R. 4). IMC claimed damages solely of future lost profits.

The factual statement closes with a further attempt to poison the well by asserting that the supposed slanderous language was that IMC personnel were "liars and cheats." Again, IMC steadfastly refuses to recognize that these supposed slanderous words were not alleged in the complaint. The Fourth District Court of Appeal did not recognize these words as being the slanderous words, but instead limited its opinion to the words "we don't believe IMC is an honest company." The words "liars and cheats" are simply not a

part of this case because Centro Nautico was not sued for uttering those words.

SUMMARY OF THE ARGUMENT

IMC has grossly misstated the facts and the actual history of this case. A motion for directed verdict on the statute of frauds issue was made and denied and this was the reason why the District Court reversed as to Caravelle. However, the District Court should have gone further and also reversed as to Centro Nautico because Centro Nautico was found guilty of interfering with the very oral contract which should never have even been before the jury.

The jury found Centro Nautico guilty of interfering with the oral contract between IMC and Caravelle. Since that was a totally unenforceable contractual relationship and since reasonable notice of the termination of that relationship was held by the Court not to be required, a directed verdict should have been granted to both Caravelle and Centro Nautico.

All of the issues growing out of all six of the trial court's orders were appealed and were before the District Court. The two non-final handwritten orders were incorporated into later orders and did not have to be appealed. The District Court denied the IMC Motion to Dismiss these appeals. IMC's Motion to Dismiss raised certain jurisdictional issues and now IMC makes different jurisdictional arguments to this Court. IMC is sandbagging. If the same arguments had been made to the District Court, then Caravelle/Centro Nautico could have amended its notice to cure the technical defects. The District Court did allow an amendment to one of the Notices of Appeal. The District Court also denied the Motion to Dismiss as filed by IMC. IMC's brief now before this

Court totally refuses to recognize that the District Court so ruled.

ARGUMENT

Issues on Cross-Petition by Caravelle and 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.

IMC's argument under this point is two-fold. It argues that Caravelle did not move for a directed verdict on the breach of contract claim and that Centro Nautico did not move for a directed verdict based on the argument that a directed verdict in favor of Caravelle would have required a similar directed verdict in favor of Centro Nautico on IMC's tortious interference claim against Centro Nautico. Of course Centro Nautico never moved for a directed verdict based on this theory because the trial court denied rather than granted Caravelle's motion for directed verdict.

It is easy to grasp if one thinks in terms of how the trial proceedings actually occurred. At the conclusion of the evidence, Caravelle moved for a directed verdict on the oral contract count against it. That motion was denied--"I'm not granting a directed verdict." (R. 973). Thus, the contract count against Caravelle went to the jury and Centro Nautico certainly could not move for a directed verdict based on the denial of the Caravelle motion. Had the trial court granted a directed verdict to Caravelle, then, and only then, could Centro Nautico have made its motion.

However, after the District Court determined on appeal that there was absolutely no enforceable oral argument as a matter of

law, that ruling required a corresponding ruling that the jury's determination of tortious interference against Centro Nautico also had to be set aside.

IMC argues that a business relationship need not be evidenced by an enforceable contract and cites Ethan Allen, Inc. v. Georgetown Manor, 647 So. 2d 812 (Fla. 1994). This is a hypothetical statement of the law which Caravelle/Centro Nautico does not dispute. However, this case was not tried and presented to this jury based upon some nebulous "ongoing business relationship between Caravelle and IMC." As pointed out at page 38 of the Caravelle/Centro Nautico brief before this Court, the jury specifically found that Caravelle had breached its oral contract with IMC. The District Court opinion specifically says the "claims for intentional interference with that oral contract . . . by the retailer" [Centro Nautico]. The words "oral contract" were the Court's own.

If a directed verdict had been granted on the breach of oral contract issue, then the entire case would have looked much different to the jury. The jury would have been told that there was no breach of oral contract claim between IMC and Caravelle and the jury would have been limited solely to the argument that Centro Nautico had interfered with an unenforceable and non-contractual relationship between IMC and Caravelle. This was not the way the case was presented to the jury and the jury found directly that there was enforceable oral contract.

This has been grossly unfair to Centro Nautico. The oral

contract should not have been before the jury for a decision and the pure logic of this position is not even addressed in the slightest manner in the IMC brief before this Court. IMC argues solely that Centro Nautico had to make a motion for directed verdict on this issue. Such a motion would have been made but for the fact that the trial court denied the Caravelle Motion for a Directed Verdict on the oral contract issue.

Thus, basic fairness demands a directed verdict for Caravelle rather than merely a setting aside of the verdict as ordered by the District Court. Obviously, verdicts are not set aside unless the issues are preserved by appropriate motions during the trial and the District Court specifically found that this crucial issue had been preserved. If this Court does not believe that a directed verdict on the tortious interference with the oral contract count is required, then it may wish to simply remand the matter to the District Court of Appeal for further consideration of whether a new trial should be granted as to the interference count.

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.

On this point, IMC refuses to recognize the language "We don't believe IMC is an honest company." Instead, IMC relies upon the words "liars and cheats" as being slanderous. IMC makes the same argument based on its choice of language "liars and cheats" three different times in its brief. The complaint did not allege those words and the District Court's opinion does not recite those words as the slanderous words.

CONCLUSION

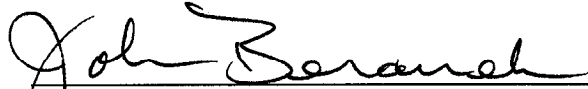
The certified question as to attorney's fees should be resolved in favor of the previous opinion of the Fourth District Court of Appeal. This Court should hold that a contingency risk multiplier is inapplicable to a court awarded attorney's fee where the only authority for the fee is a contractual provision rather than a statute. Unless there is some indication that the parties contracted for such a contingency risk multiplier, a mere contract provision for fees to a prevailing party should not be superimposed with a multiplier by the courts. Under IMC's arguments, the use of a multiplier will depend entirely upon how rich or poor the plaintiff is rather than upon the words of the contract. This should not be the law of the state of Florida.

This Court should reject the arguments that the statute of frauds was not raised as to the oral contract and further reject that hypertechnical arguments regarding jurisdiction over the eight different orders and judgments entered by the trial court herein.

On the cross-petition this Court should require a directed verdict on the tortious interference count as to Centro Nautico or remand for a new trial on that count. The Court should further hold that the words "We don't believe IMC is an honest company" is not slanderous under the circumstances of this case as a matter of fundamental law.

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 30 day of June, 1999.



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