IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,530
FOURTH DCA NOS.: 96-03885 / 97-00548

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

Petitioner,

vs.

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

Respondents

_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

Gus H. Carratt
Florida Bar No.: 784222
MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Petitioner
2601 East Oakland Park Boulevard, Suite 500
Fort Lauderdale, Florida 33306
Telephone: (954) 565-0501

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner, International Marine Co-Op, LTD., certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. John Beranek
   (counsel for Respondents)

2. Caravelle Boats, Inc.
   (Respondent)

3. Gus H. Carratt
   (counsel for Petitioner)

4. Centro Nautico Representacoes Nauticas, LDA
   (Respondent)

5. William F. Cobb
   (counsel for Respondent, Centro Nautico)

6. International Marine Co-Op, Ltd.
   (Petitioner)

7. Terrence P. O'Connor
   (counsel for Petitioner)

8. Honorable James M. Reasbeck
   (Trial Judge)

9. Patricia S. Sechan
   (counsel for Respondent, Caravelle Boats, Inc.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is an appeal filed by the Petitioner, International Marine Co-op, Ltd., a Florida Limited Partnership, pursuant to a certified question from the Fourth District Court of Appeal. In this appeal, IMC will be referred to as "Petitioner" or "IMC". IMC was the plaintiff in the trial court. The Defendants/Respondents, Caravelle Boats, Inc., a Georgia Corporation and Centro Nautico, Representacoes Nauticas, Lda., a Portuguese Limited Partnership, will be referred to respectively as Caravelle and Centro Nautico. The Respondents will collectively be referred to as Defendants.

In this brief the following symbols will be used:

"R." -- Record on Appeal

"T." -- Transcript of Trial

"A." -- Appendix

The Fourth District Court of Appeal certified the following question as being of great public importance:

> Is a contingency risk multiplier inapplicable to a court awarded attorneys' fee where the only authority for fees is predicated on a contractual provision and not a statute?

There is also conflict between the District Courts of Appeal regarding this issue.

There are three (3) additional issues which are important for this Court to review. Issues II and III involve the Fourth District Court of Appeal's decision to overturn a jury verdict against Caravelle even though Caravelle failed to properly preserve its argument concerning the Statute of Frauds. IMC also contends that the Fourth District Court of Appeal incorrectly interpreted the law concerning at-will contracts, and such an interpretation will have a tremendous impact on Florida law. The Fourth District Court of Appeal's holding is contrary to the position Caravelle advanced at trial regarding the termination of at-will contracts.

Issue IV concerns whether the Fourth District Court of Appeal had jurisdiction to hear the appeal when the original Final Judgments for Damages had subsequently been amended, and the defendants did not appeal the Amended Final Judgments for Damages. This court has discretion to review these other issues once it has accepted jurisdiction to hear the appeal. Savoie v. State, 422 So.2d 308, 310 (Fla. 1982); Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986).

IMC is an international boat distributor. (T 97-8). Caravelle is a boat manufacturer. IMC and Caravelle first met at the Miami Boat Show in 1990 and discussed the possibility of IMC distributing Caravelle Boats. (T 193). A verbal agreement was reached granting IMC exclusive rights to distribute Caravelle Boats outside the Continental United States, excluding Canada. (T 29). IMC would first buy the boats from Caravelle and then resell and distribute the boats to

international dealers. (T 101). The testimony of both parties established that there was an ongoing contractual relationship which could go on for a year or for several years. (T 395, 775). Caravelle's president stated there was no discussion as to the length of the contract, but it could go on for longer than one year. (T 775). As part of the agreement between IMC and Caravelle, Caravelle agreed that if the contract terminated, Caravelle would not deal directly with IMC's dealers. (T 113).

On November 1, 1991, IMC and Centro Nautico executed a written agreement whereby IMC authorized Centro Nautico to sell Caravell's products in Portugal and Spain. (T 29-30). The contract period was two (2) years. The contract authorized either party to terminate the contract by furnishing sixty (60) days written notice. (T 30). On September 11, 1993, at the Chicago Boat Show, and in the presence of Caravelle's officers, Centro Nautico's representative handed IMC's principals a letter allegedly terminating the agreement with IMC. (T 30). Centro Nautico's representative told Caravelle's officers that IMC could not be trusted because they were dishonest, liars and cheats, and that they were disloyal to the Caravelle family. (T 351, 597, 616).

Following these comments, Caravelle stated that it was terminating its agreement with IMC. (T 30). Subsequently, Caravelle wrote a letter to IMC advising that Caravelle would honor any boat purchases ordered and accepted prior to October 11, 1993. (T 707). Caravelle directly negotiated with and took

boat orders from Centro Nautico within nine (9) days of the September 11, 1993 meeting, in direct violation of Caravelle's agreement with IMC. (T 657).

IMC sued the Defendants on various theories of liability. The only issue relevant to this appeal pertaining to Caravelle is the claim that Caravelle breached its oral contract with IMC. The jury found in favor of IMC and against Caravelle in the amount of $252,195.00. (R 306-8). The jury also found in favor of IMC and against Centro Nautico on IMC's claims for breach of contract, tortious interference with a business relationship, and slander, for a combined sum of $290,883.00. (R 306-8). Final Judgments were entered by the trial court in favor of IMC and against each Defendant. (R 311-314). Each Defendant appealed the Final Judgments (R 348-349) and a cross-appeal was filed by IMC. (R 361-366).

On January 14, 1997, the trial court entered a Final Judgment on attorneys' fees and costs in the sum of $64,521.96 against Centro Nautico (R 394-395) and a Final Judgment against Caravelle on costs. (R 397). The court utilized a multiplier of 1.75 in the attorneys' fee award. (R 376). On February 10, 1997, Centro Nautico filed a Notice of Appeal directed to the Final Judgment assessing attorney's fees and costs. (R 405-406). Caravelle did not appeal the cost judgment assessing costs.

On November 19, 1996, IMC filed a motion to assess pre-judgment interest against the Defendants. (R 345-347). The trial court granted the motion. On

January 30, 1997, the court rendered Amended Final Judgments for damages against the Defendants. (R 403-404). The Amended Final Judgments materially altered the original Final Judgments by adding $79,195.37 in pre-judgment interest and $9,896.60 in post-judgment interest against Caravelle, and $91,344.31 in pre-judgment interest and $11,413.82 in post-judgment interest against Centro Nautico.

No timely appeal was filed by either Defendant as to the January 30, 1997 judgments. Seventy-seven (77) days after the Amended Final Judgments were rendered, the Defendants sought to amend their Notice of Appeal to include the Amended Final Judgments. (A 1-4). A Petition for Writ of Prohibition has been filed with this Court requesting that a Writ be issued prohibiting the Fourth District Court of Appeal from issuing a mandate due to the lack of jurisdiction to review those judgments. (Case No.: 94,446). A mandate was issued by the Fourth District Court of Appeal on January 15, 1999 (A 14).

The Fourth District court of Appeal issued an opinion holding that IMC's agreement with Caravelle was terminable-at-will, but that reasonable notice was not required to terminate the contract, and that the Statute of Frauds barred enforcement of the agreement. (A 10-13). IMC contends that the Fourth District Court of Appeal erred in its holding for three (3) reasons: (1) Caravelle did not request a directed verdict at the close of the evidence based on the Statute of

Frauds, and in fact, the record clearly reflects that Caravelle waived the Statute of Frauds Argument and requested that the breach of oral contract claim be submitted to the jury (T966-982); (2) the Uniform Commercial Code explicitly states that reasonable notice must be given to terminate an at-will-contract; and (3) Caravelle took the position at trial that reasonable notice must be given to terminate an at-will-contract, and that such issue was a jury question. (T 972-973).

During the early stages of the lower court proceedings, Caravelle advised the Court that there was a valid and enforceable oral contract, and that the only disputed questions concerned the terms and conditions of the oral contract. (T 23). The parties' joint pre-trial stipulation did not mention the Statute of Frauds, and specifically stated that the only disputed issue concerned the terms and conditions of the parties' oral contract. (R 239). Most significantly, at the close of the evidence, Caravelle strenuously argued that a verbal and enforceable oral contract existed, and that the contract was terminable at-will, upon reasonable notice (T 972-973). Caravelle argued that the jury must decide whether reasonable notice was given to IMC. (T 972-973).

The trial court granted Caravelle's motion that the oral agreement was terminable-at-will upon reasonable notice. (T 972-973). The jury was instructed that the contract was terminable-at-will, upon reasonable notice. (T 1039, 1133). The jury found that Caravelle breached the agreement with IMC by not giving

reasonable notice of terminating the agreement. (R 306-8). Thus, the jury decided the issue Caravelle requested be submitted to the jury.

Caravelle appealed the jury verdict and on appeal took the position that the Statute of Frauds barred enforcement of the agreement with IMC, and that Caravelle did not have to give reasonable notice of terminating the contract. The Fourth District Court of Appeal reversed the jury verdict, disregarding the fact that Caravelle's position on appeal was directly contrary to its position at trial.

SUMMARY OF THE ARGUMENT

The application of a contingency fee multiplier is appropriate when assessing prevailing party attorneys' fees, irrespective of whether the fees are authorized pursuant to a contract or statute. Since the reason for utilizing a contingency risk multiplier is the risk of non-payment to an attorney, no logical distinction exists to limit the use of a multiplier to attorneys fees awarded pursuant to statute.

There is no basis for the Fourth District Court of Appeal to hold that the Trial Court erred in failing to grant Caravelle's motion for directed verdict concerning the Statute of Frauds, since Caravelle did not request a directed verdict at the close of the evidence. Caravelle actually argued that a valid and enforceable contract existed, and specifically requested that the Trial Court submit this issue to the jury. The Trial Court submitted the issue to the jury based on Caravelle's request. Accordingly, the Fourth District Court of Appeal erred by reversing the jury's verdict, since the issue was not adequately preserved and affirmatively waived at trial.

Caravelle requested a ruling at the close of the evidence, that it's contract with IMC was terminable-at-will upon reasonable notice to IMC. The court

granted the request and instructed the jury accordingly. Caravelle argued that the issues of reasonable notice and breach of contract were jury issues. Furthermore, § 672.309(3), Fla. Stat. (1965) explicitly provides that reasonable notice must be given when terminating at-will contracts. The jury ruled against Caravelle on these issues, and Caravelle can not change its position and argue that it did not have to give IMC reasonable notice of the termination. Any error committed by the trial court was invited by Caravelle.

The Fourth District Court of Appeal erred when it exercised jurisdiction to hear an appeal of the Amended Final Judgments. Since the Amended Final Judgments materially altered the Final Judgments by adding substantial compensatory damages, an appeal of the Amended Final Judgments was necessary. The defendants did not appeal the Amended Final Judgments, and did not move to amend the original Notice of Appeal until seventy-seven (77) days had passed following the rendition of the Amended Final Judgments. Therefore, this court should issue a writ of prohibition, nunc pro tunc, directing the Fourth District Court of Appeal to refrain from issuing its mandate and prohibiting it from exercising jurisdiction regarding the Amended Final Judgments.

ARGUMENT

I

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 Trial Court awarded attorney's fees to IMC pursuant to a clause in the written agreement between IMC and Centro Nautico, which provided for attorney's fees to the prevailing party. The agreement between IMC and its attorneys was a contingency fee contract. The Fourth District Court of Appeal reversed the amount of attorney's fees because the trial court utilized a contingency-risk multiplier.

This court has approved the use of a multiplier or "contingency risk factor" where the prevailing party's attorney is employed on a contingency fee basis. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). In Rowe, supra, this court adopted the federal lodestar approach, and held that courts must consider those factors enunciated in rule 4-1.5, of the Rules Regulating the Florida Bar, and must consider a contingency risk factor when awarding statutorily directed reasonable attorney's fees to counsel employed under a contingency fee

agreement. Id. at 1151. The Rowe decision involved statutorily awarded fees and the opinion did not discuss the use of a contingency risk multiplier when fees are awarded pursuant to a contract.

Subsequently, the federal courts have restricted the use of a contingency risk multiplier when computing fees under the lodestar approach. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987). However, this Court has not taken the same restrictive approach as the federal courts, and has reaffirmed its approval of a contingency risk multiplier in certain cases. Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

In Quanstrom, supra, this Court identified three categories of attorney fee cases: (1) public policy enforcement cases; (2) tort and contract claims; and (3) family law, eminent domain, and estate and trust matters. Id. at 833. The Court approved the use of a multiplier in tort and contract cases, and identified certain factors to be addressed when determining whether a multiplier should be utilized. Id. at 834. This Court stated that a multiplier is a useful tool to assist courts in determining a reasonable fee in these categories of cases when a risk of non-payment is established. Id.

While Quanstrom involved the use of a fee shifting statute, the decision did not limit the use of a multiplier in tort and contract cases to cases in which fees are awarded pursuant to a statute. Rather, the decision limits the use of a multiplier to

those cases in which the risk of non-payment is established. Thus, where the prevailing party has retained counsel pursuant to a contingency fee agreement, and the factors enunciated by this court in Quanstrom are present, a multiplier may be utilized. That is exactly what took place in this case, and why the trial court was justified in utilizing a multiplier.

Both the First and Second District Courts of Appeal have held that the contingency risk multiplier is applicable to cases in which fees are awarded pursuant to a contract. See Boyette v. Martha White Foods, Inc., 528 So. 2d 539, 541 (Fla. 1st DCA 1998); Freedom Sav. & Loan v. Biltmore Const., 510 So. 2d 1141, 1142 (Fla. 2d DCA 1987). The Third District Court of Appeal appears to have also approved the use of a contingency risk multiplier in contract cases. Askowitz v. Susan Fener Interior Design Inc., 563 So. 2d 752, 754 (Fla. 3d DCA 1990), rev. denied, 576 So. 2d 292 (Fla. 1991); Hollub v. Clancy, 706 So. 2d 16, 19 (Fla. 3d DCA 1997).

This Court has approved a Trial Court's refusal to apply a multiplier in a promissory note action, where the attorneys were employed pursuant to a partial contingency fee agreement. Sun Bank v. Ford, 564 So. 2d 1078 (Fla. 1990). However, in Sun Bank, supra, the attorneys were guaranteed some payment, since it was a partial contingency fee arrangement. Furthermore, since the attorneys were employed by a large commercial bank, and banks generally do not have a

difficult time finding attorneys to represent them, the court held that under the facts of that case a multiplier was inappropriate. Id. at 1079-80.

The only Court to categorically reject the use of a contingency risk multiplier in contract cases is the Fourth District Court of Appeal. Command Credit Corp. v. Mineo, 664 So. 2d 1123, 1125-26 (Fla. 4th DCA 1995); USB Acquisition Co., Inc. v. Stamm, 695 So. 2d 373, 376 (Fla. 4th DCA 1997), rev. gr., 703 So. 2d 475. However, this court's decisions in Quanstrom and Sun Bank do not mandate such a result. In fact, it appears that this court's decisions, as well the decisions of the First, Second, and Third District Courts of Appeal, allow each case to be decided on an individual basis.

Since it is the risk of non-payment in contingency fee cases that justifies the use of a multiplier, a contingency risk multiplier should be allowed for fees awarded pursuant to either a contract or statute. In assessing fees, courts should review the criteria set forth in Rowe and Quanstrom, and decide whether a multiplier should be utilized. A rule limiting the use of a multiplier to cases involving a statute would prohibit the use of a multiplier in most contract disputes. Such a hard and fast rule is not only unnecessary, but undesirable, since there are certainly contract cases in which a contingency risk multiplier is justified. Trial courts should be given the discretion, upon the presentation of appropriate

evidence, to utilize a contingency risk multiplier in both contract and statutory fee cases.

In this case, an appropriate evidentiary presentation was provided in the Trial Court. The attorneys' fee multiplier, and the attorneys fee award, should have been affirmed, and the decision of the Fourth District Court of Appeal must be reversed.

II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED WHEN IT REVERSED THE JURY VERDICT BASED UPON THE STATUTE OF FRAUDS, WHERE THE STATUTE OF FRAUDS ARGUMENT WAS NOT PRESERVED FOR REVIEW BECAUSE CARAVELLE DID NOT MOVE FOR A DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE.

The undisputed record shows that Caravelle did not move for directed verdict at the close of the evidence based on the Statute of Frauds. (T 966 - 982). Instead, Caravelle actually pleaded with the Court to determine, as a matter of law, that the contract was terminable at will, upon reasonable notice, given to the other party. (T 966 - 968). Caravelle's counsel stated:

> That's a jury question whether or not we provided reasonable notice. But this was certainly a contract at will that either side could terminate at any time with reasonable notice. All I am asking you to do is direct as a matter of law it was a contract at will. (T 972).

The Fourth District Court of Appeal stated in its decision that the critical issues were sufficiently preserved for review. (A 10-13). However, the record does not support the District Court of Appeal's opinion, and the record reveals that Caravelle did not preserve for review the Statute of Frauds argument. A party must move for directed verdict at the close of all the evidence or it waives the right

to make that motion. Prime Motor Inns, Inc. v. Waltman, 480 So. 2d 88, 90 (Fla. 1985). County Manors v. Master Antenna Systems, 534 So. 2d 1187, 1191 (Fla. 4th DCA 1988).

In Prime Motor Inns, supra, the trial Court granted a post trial motion for directed verdict, determining that a directed verdict should have been entered at the close of plaintiff's case. Id. at 90. The District Court of Appeal reversed, finding that the last motion for directed verdict was made during a charge conference, held while the trial was still in progress and while evidence was still being received. Id. This Court affirmed the District Court of Appeal decision and held that:

> One who submits his cause to the trier of fact without first moving for directed verdict at the end of all the evidence has waived the right to make that motion. Id.

Similarly, in the present case, Caravelle did not move for a directed verdict, based on the statute of frauds, at the close of all the evidence. Thus, the Fourth District Court of Appeal was powerless to review the issue. County Manors, supra, 534 at 1191.

Early in the case, Caravelle advised the court that there was a valid and enforceable oral contract, and that the only questions were the terms and conditions of the contract. (T 23). In effect, Caravelle stated that there was a valid oral contract between the parties. (T 23). Furthermore, Caravelle never

raised the Statute of Frauds as a trial issue in the parties' joint pre-trial stipulation. (R 237-241). Caravelle acknowledged that there was a valid contract for the purposes of arguing that IMC's unjust enrichment count should be dismissed. (T 22,23). Under Florida law, if a cause of action for breach of an oral contract is precluded by the Statute of Frauds, the Statute of Frauds would not bar an action for unjust enrichment or quantum meruit. Harrison v. Pritchett, 682 So. 2d 650 (Fla. 4th DCA 1996).

Thus, Caravelle sought to have its cake in the trial court by acknowledging the existence of a valid agreement, and subsequently eating the cake by arguing to the appellate court that the agreement was unenforceable because of the Statute of Frauds. A party can not take an inconsistent position on appeal. Fuller v. Palm Auto Plaza, 683 So. 2d 654, 655 (Fla. 4th DCA 1993). Furthermore, a party can not complain on appeal about an error which he or she has invited the trial court to make. Fuller, supra, at 655.

Since Caravelle did not present a motion for directed verdict at the close of all the evidence and argued that the contract was subject to termination by the giving of reasonable notice to the other party, it was a fact question for the jury to decide whether Caravelle breached the contract by failing to give reasonable notice. Moreover, based on Caravelle's actions before and during trial, Caravelle is estopped from arguing the Statute of Frauds for the first time on appeal.

III

(A) WHETHER THE FOURTH DISTRICT COURT OF APPEAL REVERSIBLY ERRED WHEN IT HELD THAT CARAVELLE DID NOT HAVE TO GIVE REASONABLE NOTICE TO TERMINATE ITS AGREEMENT WITH IMC.

(B) WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED WHEN IT HELD THAT CARAVELLE DID NOT HAVE TO GIVE REASONABLE NOTICE TO TERMINATE ITS AGREEMENT WITH IMC, SINCE CARAVELLE INVITED ANY ERROR ON THE TRIAL COURT'S PART BY REQUESTING A RULING BY THE TRIAL COURT THAT REASONABLE NOTICE MUST BE GIVEN AND THAT THE JURY MUST DECIDE THE ISSUE.

Caravelle asked the court to determine, as a matter of law, that the contract was terminable at will upon reasonable notice given to the other party. (T 966-972). Caravelle argued:

> [It's] a jury question whether or not we provided reasonable notice, but this was certainly a contract at will that either side could terminate at any time with reasonable notice. (T 972).

The trial court agreed with Caravelle. (T 973).

Caravelle argued that it was a jury question as to when the contract was terminated and whether there was a breach of the contract by failing to give reasonable notice to terminate. (T 1026, 1038). Caravelle also submitted a jury

instruction which stated that the contract was terminable at will, which either party could terminate upon reasonable notice to the other party. (T 1039, 1133).

The trial court did exactly as Caravelle asked, and it submitted the issue to the jury. (T 1038). The jury ruled against Caravelle, and found that Caravelle breached its contract with IMC by failing to give reasonable notice. The Fourth District Court of Appeal reversed the jury verdict and held that, as a matter of law, Caravelle did not have to give reasonable notice to terminate the contract. This was error for two reasons.

First, § 672.309(3), Fla. Stat. (1965),the Uniform Commercial Code, clearly provides that reasonable notice must be given when terminating at will contracts. Second, even if the trial court erred in its ruling, it was Caravelle that requested a ruling that (1) reasonable notice must be given to terminate its contract with IMC; (2) requested a ruling that it was a jury question whether reasonable notice had been given, and if not, whether it resulted in a breach of contract; and (3) requested and received a jury instruction that reasonable notice must be given to terminate the contract with IMC. It is a well established rule in Florida that a party can not complain of a ruling which they invited or requested. Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475, 478 (Fla. 1995); Bould v. Touchette, 349 So. 2d 1181, 1186 (Fla. 1977).

§ 672.309(3), Fla. Stat. (1965) states:

> Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Thus, under Florida law reasonable notice must be received by the non-terminating party. Caravelle asked the trial court to rule that reasonable notice must be given, and that the issue must be decided by the jury, because Caravelle realized that Florida law required the giving of reasonable notice to terminate an at-will contract.

The "invited error" rule prohibits a party from complaining about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make. Fuller v. Palm Auto Plaza, Inc., 683 So. 2d 654, 655 (Fla. 4th DCA 1996). The "invited error" rule prohibits a party from taking a position on appeal which is inconsistent with that advanced at trial. Id. at 655. In Fuller, Mr. Fuller argued at trial that it was a jury question whether or not the transaction at issue was exempt under the Consumer Leasing Act. Id. Furthermore, the jury instruction submitted to the jury was prepared by Mr. Fuller. Id.

After the jury ruled against him, Mr. Fuller moved for a new trial on the ground that it was a question of law whether the transaction at issue was exempt

under the Consumer Leasing Act. Id. at 655. The trial court granted the motion for new trial, but on appeal the Fourth District Court of Appeal reversed. Id. The Fourth District Court of Appeal held that pursuant to the invited error rule the trial court erred in granting Fuller's motion for a new trial. Id. The court stated that Fuller was precluded from claiming that it was error to submit the issue to the jury, since he sought to have the issue submitted to the jury at trial. Id.

Likewise, in Sundale Assoc. v. Southeast Bank, 471 So.2d 100 (Fla. 3rd DCA 1985), a jury found that Southeast Bank waived the payment of interest on a loan through the date of the jury verdict. Pursuant to Southeast's post trial motion the trial Court reduced the waiver period to the date the lawsuit was filed. Id. at 102. The Third District Court of Appeal reversed the trial Court, since Southeast's counsel specifically agreed on the record that the extent of the waiver, including whether it extended to the time of the verdict, was for the jury to determine. The Court held that:

> Any only-now alleged error in this regard was therefore not only not preserved but was affirmatively invited and may therefore not be successfully presented in this court. Id.

Similarly, in the present case, Caravelle can not claim on appeal that it did not have to give reasonable notice to terminate its agreement with IMC. Furthermore, Caravelle can not argue on appeal that it was not a jury question

whether it gave reasonable notice, and is precluded from arguing that the jury should not decide whether the failure to give reasonable notice resulted in a breach of the contract. The arguments advanced by Caravelle at the Fourth District Court of Appeal were inconsistent with Caravell's position at trial, and the trial court's rulings were invited or requested by Caravelle. Since Caravelle was prohibited from raising the above mentioned issues on appeal, the Fourth District Court of Appeal erred when it reversed the jury verdict, and this court should reinstate the jury verdict against Caravelle for breach of contract.

IV

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED WHEN IT UNDERTOOK JURISDICTION OF THE AMENDED FINAL JUDGMENTS, WHEN NO APPEAL WAS TAKEN OF THE AMENDED FINAL JUDGMENTS, AND THE AMENDED FINAL JUDGMENTS MATERIALLY ALTERED THE FINAL JUDGMENTS.

If an amendment to a judgment materially changes the original judgment, then the limitations period for seeking appellate review begins from the date of the amended judgment. St. Moritz Hotel v. Daughtry, 249 So. 2d 27, 28 (Fla. 1997). In the present case, after the original judgments were entered, the Trial Court granted the petitioner's motion to assess pre-judgment interest. On January 30, 1997, the Court rendered an Amended Final Judgment against Caravelle for

$341,286.97 and an Amended Final Judgment against Centro Nautico for $393,641.13. (R 403-04). The Amended Judgments added $79,195.37 in pre-judgment interest against Caravelle Boats, Inc., and $91,344.31 in pre-judgment interest against Centro Nautico, Representacoes Nauticas, LDA. Pre-judgment interest is an element of compensatory damages. Miller v. Reinhart, 548 So. 2d 1174, 1175 (Fla. 4th DCA 1989). Thus, the original judgments were amended in a material way to include a substantial amount of compensatory damages.

The Defendants did not appeal the Amended Final Judgments. Caravelle and Centro Nautico were required to file a notice of appeal directed to the Amended Final Judgments within thirty (30) days of the date of their entry. Skylake Gardens Rec. v. District Court of Appeal, 511 So. 2d 293 (Fla. 1987); St. Moritz Hotel v. Daughtry, 249 So. 2d 27 (Fla. 1971); Drummon v. Gerwe, 264 So. 2d 474 (Fla. 4th DCA 1972). In Skylake Gardens, supra, this court held that where an amended judgment has been entered, a notice of appeal must be filed within thirty (30) days of the rendition of amended final judgment. Id at 294.

In the instant case, the Defendants filed a Motion to Amend and Clarify and Consolidate the Appeal. (A 1-4). IMC, in its response, argued that the Fourth District Court of Appeal did not have jurisdiction to review the Amended Final Judgments. (A 5-8). However, the Court deferred ruling on the jurisdiction issue, and directed the parties to brief the issue. (A 9). The motion should have been

denied. Bove v. Ocwen Financial Corporation, 23 Fla. L. Weekly D564 (Fla. 4th DCA February 25, 1998).

In Bove, supra, the appellants timely filed a notice of appeal to a final judgment, but did not file a separate notice of appeal as to a cost judgment. Subsequently, after the time elapsed for appealing the cost judgment, the appellants filed a Motion to Amend the Notice of Appeal to include both the final judgment and the subsequent cost judgment. The court in Bove denied the motion to amend the notice of appeal on jurisdictional grounds, since no notice of appeal was filed within thirty (30) days of the cost judgment. Id. at 565. The court explained that multiple final orders may be reviewed by a single notice of appeal, so long as the notice is timely as to each order. In the instant case, the Defendants did not file a Notice of Appeal directed toward the amended final judgments, and did not seek to amend the original Notice of Appeal until seventy-seven (77) days after rendition of the Amended Final Judgments.

The same issue was considered by the Court in the case of Velickovich v. Ricci, 391 So. 2d 258 (Fla. 4th DCA 1981), in which the appellants appealed a final judgment granting a mandatory injunction in favor of the appellees. Subsequently, the Trial Court entered a final order taxing costs, but a notice of appeal was not filed as to the order taxing costs. The court held that it did not have jurisdiction to review the order on costs, and stated as follows:

> The Appellants also assert the trial court erred in taxing costs. The attack on the Order Taxing Costs has an independent basis in that Appellants argue the cost arose from certain depositions which were not introduced in evidence. We have no jurisdiction to consider this issue. The final judgment was entered and thereafter a Notice of Appeal was filed. Eight days after the filing of the Notice of Appeal, the Court entered the Order Taxing Costs. No Notice of Appeal or Amended Notice of Appeal was filed directed to the Order Taxing Costs. As such we conclude that we do not have jurisdiction to review it. This court cannot review judicial acts of a trial court taking place after the filing of a Notice of Appeal unless those judicial acts are themselves made the subject of a new notice of appeal or other appropriate appellate proceedings...p 259-260.

A writ of prohibition is appropriate to prevent the District Court of Appeal from exercising jurisdiction when the court has not been properly vested with jurisdiction to hear the appeal. In State Dept. Of Nat. Res. v. Dist. Ct., Second Dist., 355 So. 2d 772, 773 (Fla. 1978), a petition for review of final agency action was filed with the Second District Court of Appeal forty-nine (49) days after the adoption of the Administration Rule sought to be reviewed on appeal. Id. The Department of Natural Resources moved to dismiss the petition as untimely, but the Court of Appeal denied the motion. Thereafter, the department and various state officers filed a writ of prohibition with this court. This Court granted the Writ of Prohibition, and prohibited the Second District Court of Appeal from exercising jurisdiction, since the petition seeking to review the adoption of the administration rule was untimely. Id.; see also State Ex. Reel. Sarasota City. v Boyer, 360 So. 2d 388, 392 (Fla. 1978).

In the Fourth District Court of Appeal, the Defendants relied on the case of Iseman v. Ross, 664 So. 2d 1128 (Fla. 3d DCA 1995), for the proposition that it could amend its original notice of appeal. However, reliance upon the Iseman case is misplaced since that case deals with a notice of appeal, which was timely filed as to several matters, and the Court held that defects in the notice of appeal could be corrected as they relate to those matters, unless there was substantial prejudice to the adverse parties. Iseman does not stand for the proposition that jurisdictional defects, such as when an appeal has not been timely taken from a materially amended final judgment, can be corrected by simply amending an earlier notice of appeal taken from earlier final judgments in the case.

As the Fourth District Court of Appeal stated in its recent decision in Easley, McCaleb, and Stallings v. Gibbons, 667 So. 2d 988 (Fla. 4th DCA 1996), if a party wishes to appeal a subsequently entered judgment, then a new notice of appeal would be necessary. Id. at 989. Consequently, under the above cases, the appeal taken by the appellants from the final judgments entered by the trial court on October 9, 1996, which judgments have been entered pursuant to jury verdict, would not provide the Fourth District Court of Appeal with jurisdiction for an appeal from the Amended Final Judgments rendered on January 30, 1997. Thus, the Fourth District Court of Appeal reversibly erred when it undertook jurisdiction to review the Amended Final Judgments. A writ of prohibition should be issued,

nunc pro tunc, prohibiting the Fourth District Court of Appeal from issuing its mandate and exercising any further judicial acts regarding the Amended Final Judgments.

CONCLUSION

The Fourth District Court of Appeal erred when it undertook jurisdiction of the Amended Final Judgments, and a Writ of Prohibition, nunc pro tunc, should be issued. Alternatively, the Petitioner, IMC, respectfully submits that the Fourth District Court of Appeal erred when it overturned the jury verdict against Caravelle, and the Fourth District Court of Appeal's decision must be reversed and the jury verdict reinstated. The Fourth District Court of Appeal also erred when it reversed the amount of attorneys' fees awarded against Centro Nautico, and the judgment for fees and costs should be reinstated.

Respectfully submitted this 27th day of January 1999.

MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Petitioner
2601 E. Oakland Park Blvd., Suite 500
Ft. Lauderdale, FL 33306
Tel: (954) 565-0501

By: _____
Gus H. Carratt
Fla. Bar # 784222

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to: William F. Cobb, Esq., 633 South Andrews Avenue, Suite 203, Ft. Lauderdale, FL 33316, Patricia S. Sechan, 633 South Andrews Avenue, Suite 203, Ft. Lauderdale, FL 33316, and John Beranek, Esq., P.O. Box 391, Tallahassee, FL 32302, this 27th day of January 1999.

MORGAN, CARRATT AND O'CONNOR, P.A.
Attorneys for Petitioners
2601 E. Oakland Park Boulevard, Suite 500
Ft. Lauderdale, FL 33306
Telephone No: (954) 565-0501

By: _____
Gus H. Carratt
Fla. Bar No. 784222