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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

PETITIONER'S REPLY BRIEF AND ANSWER BRIEF ON CROSS-PETITION

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CASE NO.: 94,530
4TH DCA NOS.: 96-03885/97-00548
Centro Nautico, et al. v.
International
Marine Co-Op., LTD

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.)

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STATEMENT OF THE CASE AND FACTS

In this Brief, the following symbols will be used:

"R ____" - Record on appeal

"T ____" - Trial transcript

"A ____" - Appendix to Reply Brief of Petitioner

The Petitioner, IMC, files this supplement to Respondent's statement of the case and facts concerning issues on cross-petition. The Defendants have made numerous factual allegations in their brief without any reference to the record in the lower Court. Those statements should be disregarded because it is impossible to verify the accuracy of the statements without a reference to the record. In those instances when the Defendants do make a reference to the record, a review of the record often does not confirm those factual allegations. Since many of the factual statements in Defendant's Brief are either 1) inaccurate 2) incomplete or 3) hotly disputed at trial - and rejected by the jury, the Petitioner will supplement and correct Defendants' statement of the case and facts.

The Defendants argue that a directed verdict should have been ordered by the District Court of Appeal concerning the statute of frauds, and Defendants state that "In a strange ruling the District Court did not phrase its opinion in terms of a directed verdict in favor of Caravelle". However, a review of the record shows that Caravelle did not move for a directed verdict on the breach of contract claim (T 972-973). Caravelle

did not mention the statute of frauds at the close of the evidence, but instead requested that the Court rule that Caravelle's contract with IMC was terminable at will, upon reasonable notice to IMC (T 972-973). Caravelle requested a jury instruction that the contract was terminable at will, upon reasonable notice to IMC (T 972-973). Caravelle insisted that whether it gave reasonable notice to IMC was a jury question (T 972-973).

Caravelle states at page 5 of its brief that it was stipulated that Caravelle terminated the oral contract by so informing IMC on September 11, 1993. However, a review of the transcript indicates that the parties stipulated that Caravelle allegedly terminated its contract with IMC by verbally informing IMC on September 11, 1993 (T 30). Caravelle advised IMC that they did not want to lose Centro Nautico's $1 million a year account (T 352, 361). Centro Nautico was purchasing $1 million worth of Caravelle boats a year (T 831). While Caravelle claims in its Brief at page 7 that Centro Nautico initially contacted Caravelle concerning the purchase of boats and that Caravelle referred Centro Nautico to IMC, the facts at trial were that Centro Nautico initially contacted IMC - not Caravelle (T 399).

Defendants state at page 8 of its Brief that IMC would mark-up boat prices 20% when selling Caravelle boats to Centro Nautico. However, the 20% mark-up only applied to the sale of boat parts and not to the sale of boats or boat options (T 123-

134). At trial, Centro Nautico admitted that it was not overcharged for boats and that it was charged according to the agreement reached in 1992 (T 659). Centro Nautico states at page 9 of its Brief that it was charged a 20% mark-up on a windshield, however, Centro Nautico admitted at trial that a windshield is considered a boat part, not an option (T 648).

Caravelle did not give IMC any notice when it attempted to terminate its contract with IMC (T 137). Caravelle advised IMC at the September 11, 1993, boat show that it was terminating the contract with IMC immediately, but that it would honor all boat orders placed and accepted prior to September 11, 1993 (T 137). IMC had previously warned Caravelle that Centro Nautico would attempt to circumvent IMC and buy boats directly from Caravelle (T 134-135).

Caravelle entered into direct negotiations and took orders from Centro Nautico within 9 days of the September 11, 1993 boat show. The Defendants then divided the compensation earmarked for IMC (T 659). Caravelle incorrectly states at page 10 of its Brief that IMC's only customers for Caravelle boats in Europe, excluding Centro Nautico, were 2 accounts in Switzerland and Austria. The evidence at trial established that IMC also had Caravelle customers in Denmark, Germany, Spain, Italy, Japan and Singapore (T 139, 371-375, 377-379, 802, 803).

Centro Nautico argues in its Brief that it was not guilty of slander, because its remarks were opinion and/or privileged.

However, Centro Nautico did not move for a directed verdict on these issues, and never raised the issues during the course of the trial. The only motion for directed verdict offered by Centro Nautico at the close of the evidence was directed to the economic loss rule (T 966-1001). Centro Nautico also did not raise these matters in its post-trial motion for a new trial (R. 315-322).

The evidence of slander by Centro Nautico was more substantial than referred to at page 3 of Centro Nautico's Brief. The actual testimony at trial was that Centro Nautico slandered IMC by claiming IMC could not be trusted because they were dishonest, liars, and cheats, and disloyal to the Caravelle family (T 351, 597, 616). This evidence was not objected to at trial (T 351, 597, 616).

SUMMARY OF THE ARGUMENT

Centro Nautico never requested a directed verdict on the defamation claim based on its current argument that the statements were opinion and/or privileged. These issues cannot be raised for the first time on appeal. Moreover, the slanderous statements made by Centro Nautico are slander per se, and are neither privileged nor opinion.

Since Caravelle did not move for a directed verdict on the breach of contract claim, and did not even mention the statute of frauds at the close of the evidence, it is not entitled to an Order granting a directed verdict. At the close of the evidence, Caravelle requested a ruling that as a matter of law its contract with IMC was terminable at will, upon reasonable notice to IMC. Caravelle specifically argued that the issue of reasonable notice was a jury question. The trial Judge granted Caravelle's request and instructed the jury accordingly. Caravelle may not take an inconsistent position on appeal and request that the jury verdict be discarded.

Even if this Court was to find that a directed verdict should be entered on the breach of contract claim against Caravelle, it would not affect the tortious interference count against Centro Nautico. Florida law does not require an enforceable contract in order to support a tortious interference claim. The claimant only has to prove that there was an advantageous

business relationship between the parties. Furthermore, Centro Nautico did not move for a directed verdict on these grounds, and is precluded from doing so for the first time on appeal.

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?

Centro Nautico states at page 20 of its Brief that the prevailing party "merely is entitled to attorneys' fees". However, a prevailing party is entitled to reasonable attorneys' fees. Thus, when assessing fees, Courts are required to determine reasonable attorneys' fees.

This Court has previously identified the factors utilized to determine whether a multiplier should be used in a particular case. Standard Guar. Ins. Co. v. Quanstrom, 555 So.2d 828, 834 (Fla. 1990). This Court held in Quanstrom that a multiplier is a useful tool to assist courts in determining a reasonable fee in cases in which the risk of non-payment is established. Id. In this case, Centro Nautico has never challenged the trial Court's findings regarding the factors listed in Quanstrom. Instead, Centro Nautico is urging a blanket prohibition on the use of a contingency risk multiplier when the prevailing party is awarded fees pursuant to a contract.

The position urged by Centro Nautico would lead to an anomalous result. In many cases in which a fee shifting statute is applicable the risk of non-payment may not be substantial, yet in many cases in which there is a contractual provision for

attorney fees the risk of non-payment may be very significant. A plaintiff in a contract case may need to locate an attorney who will take the case on a contingency basis and the attorney who is forced to take the case on a contingency fee basis should be compensated for the risk of non-payment. Unlike tort cases, insurance coverage usually is not available in breach of contract cases. Thus, the risk of non-payment in many contract cases may be much greater than those in which a fee shifting statute is applicable.

This Court's decision in Sun Bank v. Ford, 564 So.2d 1078 (Fla. 1990) does not prohibit the use of a contingency risk multiplier in contract actions. In fact, it is not clear that the decision prohibits the use of a multiplier in all promissory note actions. The Sun Bank opinion merely finds that under the facts of that case, a multiplier is unwarranted. In Sun Bank, the plaintiff's attorneys did not have a risk of non-payment, since they were retained under a partial contingency fee agreement, and the plaintiff was a large commercial bank that did not have a difficult time obtaining counsel.

Centro Nautico argues at page 17 and 20 of its Brief that the parties to a contract should not be presumed to have contemplated a fee multiplier and that such language cannot be added to a contract. However, when a contract provides for reasonable attorneys' fees, than the amount has not been liquidated, and the Court must determine what is a reasonable

fee. The parties to the agreement are fully aware that the prevailing party will be entitled to a reasonable fee if litigation ensues. If the agreement does not prohibit the use of a multiplier, then Courts should have the discretion to use a contingency risk multiplier.

The defaulting party in a contract action should not be allowed to benefit from their actions. The defaulting party in a contract action may cause extreme financial strain on the non-defaulting party thereby precluding the non-defaulting party from obtaining counsel on an hourly fee basis. If an attorney is contemplating taking a contract case on a contingency fee basis, with no insurance coverage available, the attorney is less likely to take the case if he will be limited to a normal hourly rate. A normal hourly rate simply will not compensate the attorney for the risk of non-payment, especially when the attorney may be faced with years of litigation before he can receive payment.

Centro Nautico also argues in its brief (page 21) that the legislature has not created a statute authorizing a contingency fee multiplier in contract cases. However, Centro Nautico has failed to point out legislative enactments allowing the use of a contingency risk multiplier in fee shifting statutes. The use of a multiplier originated in the courts, and the question whether a multiplier should be utilized properly resides with the judiciary.

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.

By failing to directly address Issue II, Caravelle is attempting to divert attention from the fact that it did not move for a directed verdict concerning the statute of frauds. Caravelle claims at page 23 of its Brief that the trial Court directly denied a motion for directed verdict concerning the statute of frauds. However, Caravelle fails to cite to the page in the transcript where a motion for directed verdict was denied at the close of the evidence. A party must move for a 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).

Caravelle claims at page 21 of its Brief that the primary issue before the District Court was whether the statute of frauds issue had been preserved and "that the Court directly decided this issue in Caravelle's favor". Caravelle did not argue in its initial Brief to the Fourth District whether or not the statute of frauds had been properly preserved. IMC pointed out in its Answer Brief that Caravelle did not move for a directed verdict

based on the statute of frauds. The Fourth District Court of Appeal did not directly address the issue in its opinion, but simply found "the critical issues sufficiently preserved". Thus, in what Caravelle characterizes as a "strange" ruling, the Fourth District Court of Appeal reversed the award against Caravelle but did not order a directed verdict in its favor.

At page 25 of its Brief, Caravelle attempts to confuse the Court when it states that it moved for a directed verdict. A review of page 973 of the transcript indicates that Caravelle was moving for a directed verdict on the conspiracy claim. At page 23 of its Brief, Caravelle states that Caravelle's counsel "renewed her motion for directed verdict". The actual statement by Caravelle's counsel at page 966 is as follows:

> Your Honor I would renew my motion that the Court direct as a matter of law that this contract was a contract which is terminable at will by the parties.

Caravelle's attorney then stated as follows:

> Your Honor, I'm not arguing that. That's a jury question as to 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'm asking you is to direct as a matter of law it was a contract at will. (T 972)

Furthermore, Caravelle's counsel made it abundantly clear in the ensuing colloquy that she was relying on the Uniform Commercial Code in arguing that the contract was terminable-at-will, upon reasonable notice (T 972-973). Since the testimony at

trial established that there was an ongoing contractual relationship between Caravelle and IMC that could go on for a year or several years, Caravelle made a strategic decision to request a ruling that the contract was terminable-at-will, rather than risk a verdict establishing that there were a series of renewable one-year contracts (T 395, 775).

Caravelle states at page 27 of its Brief that IMC was grossing less than $150,000 per year, and that the amount of damages assessed by the jury was irrational. Caravelle does not cite to the record in support of its statement because the statement is inaccurate. Centro Nautico was purchasing $1,000,000 a year in Caravelle boats (T 831, 352, 361). Additionally, there were numerous other boat dealers in which IMC was selling Caravelle boats.

The jury followed the evidence and followed the Court's instructions in determining the amount of damages. Caravelle has not shown that the jury did not follow the instructions and did not properly assess the damages. Caravelle did not request an interrogatory verdict as to the amount of damages, and specifically requested a court ruling and jury instructions that the question of reasonable notice was a jury question. Caravelle cannot take an inconsistent position on appeal and claim for the first time that notice was not a jury question.

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 does not directly address Issue III(A) and III(B) and totally avoids discussing §672.309(3), Fla. Stat. (1965), the Uniform Commercial Code. This is a tacit <u>admission</u> by Caravelle that §672.309(3) applies and that Caravelle was required to provide reasonable notice when terminating its agreement with IMC.

Caravelle specifically argued to the trial Court that the Uniform Commercial Code applied to this case (T 972-973). A review of §672.309(3) indicates that Caravelle was relying specifically on that statute when arguing to the trial Court that Caravelle's contract was terminable-at-will upon reasonable notice to IMC.

Furthermore, since Caravelle specifically requested the ruling that the contract was terminable-at-will, upon reasonable notice, and that the jury must decide whether reasonable notice

was given, it is now precluded from arguing that it did not have to give reasonable notice. It is a well-established rule in Florida that a party cannot complain of a ruling which it 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).

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.

The defendants do not directly address IMC's Issue IV, and they argue in their brief that there was confusion regarding the series of orders and judgments in this case. It is respectfully submitted that most of the confusion is caused by the defendants' presentation of the facts and their presentation of the procedural history of the case.

For example, at the bottom of page 29 of Defendants' Answer Brief, and throughout the Brief, the Defendants refer to the Amended Final Judgments as orders. This is an obvious attempt to obfuscate the facts of the case. Furthermore, at the top of page 30 of the Defendants' Brief, they state that the Amended Final Judgments were "not specifically described in the last notice of appeal, but were within the preceding 30-day period". The Defendants fail to point out that the Amended Notice of Appeal dated February 11, 1997, was an appeal solely by Centro Nautico, and was directed only to a Final Judgment assessing attorneys' fees and costs dated January 13, 1997 (A 1-4). The Notice of Appeal was not directed to the Amended Final Judgments dated January 30, 1997. Furthermore, Caravelle did not join in the

Notice of Appeal dated February 11, 1997, since the Judgment being appealed was only against Centro Nautico.

The cases cited by Defendants actually support IMC's argument that the Fourth District Court of Appeal lacked jurisdiction to review the Amended Final Judgments dated January 30, 1997. In Cobb v. St. Joseph Hospital, Inc., 550 So.2d 1 (Fla. 2nd DCA 1989), the trial Court entered a summary judgment on July 8, 1988 in favor of the defendant hospital and entered a summary judgment on July 12, 1998 in favor of the defendant doctor.

On August 31, 1988, the trial Court in Cobb denied, in one order, both motions for rehearing. On September 29, 1988, the plaintiffs filed a notice of appeal. Id. The notice of appeal only stated the plaintiff's were appealing the summary judgment dated July 12, 1988 and the order denying the motion for rehearing. Id.

On October 28, 1988, the plaintiff in Cobb filed an amended notice of appeal adding a specific reference to the summary judgment dated July 8, 1988. Id. The District Court of Appeal in Cobb denied the plaintiff's motion to amend the notice of appeal and held that the defect in the original notice was more than technical. Id. at 2. The Court noted that the original notice of appeal unambiguously referred to the July 12 summary judgment, and since the amended notice of appeal was untimely as

to the July 8, 1988 summary judgment, the Court struck the amended notice of appeal. Id. at 3.

Likewise, in the instant case, Centro Nautico's Amended Notice of Appeal dated February 11, 1997 unambiguously refers to the January 13, 1997 Judgment assessing fees and costs against Centro Nautico. Furthermore, Centro Nautico attached the January 13, 1997 Judgment for fees and costs to the Amended Notice of Appeal (A 1-4). A review of that Judgment indicates it was entered solely against Centro Nautico, and solely for fees and costs.

The Defendants' reliance on Craft v. John Sirouni's and Sons, Inc., 574 So.2d 167 (Fla. 4th DCA 1990) is misplaced since the appellant timely filed a notice of appeal and accurately described that it was appealing a summary judgment. The notice of appeal in Craft inaccurately stated the date of the summary judgment, and the Court allowed the appellant to correct the date stated in the notice of appeal. Id. at 168. In the present case, Centro Nautico's Notice of Appeal dated February 11, 1997 was directed only to a judgment for fees and costs dated January 13, 1997.

The Defendants' reliance on Westfield Ins. Co. v. Sloan, 671 So.2d 881 (Fla. 5th DCA 1996), and Eisman v. Ross, 664 So.2d. 1128 (Fla. 3rd DCA 1995) is also misplaced. In Westfield, a party which was subject to a final judgment was inadvertently omitted from a Notice of Appeal. Id. at 882. Similarly, in

Eisman a party which was subject to a final judgment was inadvertently omitted from a notice of appeal. Id. at 1129. The Courts in Westfield and Eisman allowed the notice of appeal to be amended to include the omitted parties.

In the Westfield and Eisman cases the omitted parties were subject to the judgments being appealed. Furthermore, in Westfield and Eisman, the appellants were not attempting to add separate and independent judgments to the notice of appeal. In this case Caravelle was not subject to the January 13, 1997 judgment for fees and costs that Centro Nautico appealed on February 11, 1997. Additionally, Centro Nautico only appealed the January 13, 1997 judgment for fees and costs.

The Defendants in this case are arguing that Centro Nautico's Amended Notice of Appeal dated February 11, 1997 should be amended to include the Amended Final Judgment against Centro Nautico dated January 30, 1997. Moreover, the Defendants are arguing that Caravelle should be included in the February 11, 1997 Notice of Appeal, even though Caravelle was not subject to the judgment which was appealed on February 11, 1997. Caravelle would then have this Court go one step further and bootstrap Caravelle's separate and independent Amended Final Judgment onto Centro Nautico's Notice of Appeal dated February 11, 1997.

Even if the Court was to allow Centro Nautico to amend its February 11, 1997 Notice of Appeal to include a separate and independent final judgment, there is no authority to allow the

addition of Caravelle to the Notice of Appeal. Furthermore, even if the Court was to allow Centro Nautico to amend the February 11, 1997 Notice of Appeal to include the Amended Final Judgment entered against it, there is no authority to allow Caravelle to bootstrap its separate and independent judgment into the Notice of Appeal.

V

(Issue on Cross-Petition)

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.

Centro Nautico argues that a directed verdict should be ordered in favor of Caravelle on the breach of contract claim, and that if a directed verdict is ordered in Caravelle's favor then a directed verdict should also be entered in favor of Centro Nautico on the tortious interference count. Centro Nautico's position is erroneous for several reasons.

First, Caravelle did not move for a directed verdict on the breach of contract claim. Second, Centro Nautico did not move for a directed verdict based on its current position that IMC did not have an enforceable agreement with Caravelle. In fact, Centro Nautico does not claim in its Brief that it moved for a directed verdict on this basis, and its post-trial motion for new trial did not raise the issue (R 315-322). A party must move for a directed verdict at the close of the evidence or it waives the right to make that motion. Prime Motor Inns, Inc. v. Waltman, 480 So.2d 88, 90 (Fla. 1985). Furthermore, Centro Nautico did not raise the issue in its Answer or Pretrial Stipulation (R 63-78; 237-241).

Finally, whether IMC and Caravelle had an enforceable agreement is irrelevant to the tortious interference count. A protected business relationship need not be evidenced by an enforceable contract. Ethan Allen, Inc. v. Georgetown Manor, 647 So.2d 812 (Fla. 1994). IMC not only had an ongoing business relationship with Caravelle, but also had Caravelle dealerships in Japan, Singapore, Switzerland, Denmark, Austria, Spain and Italy (T 139, 371-379, 802-803).

The jury found that Centro Nautico intentionally interfered with IMC's agreement with Caravelle, which involved IMC's worldwide network of dealerships. Centro Nautico has not cited any authority for the proposition that an enforceable agreement is necessary to support a tortious interference claim, and this part of the Final Judgment should be affirmed.

VI

(Issue on Cross-Petition)

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.

This issue does not properly set forth the defamatory statements made by Centro Nautico. The principals of Centro Nautico stated that IMC was dishonest, could not be trusted, were liars and cheats and they were disloyal to the Caravelle Family (T 351, 497, 616). This evidence was not objected to at trial.

Centro Nautico did not move for a directed verdict based on its current position that the above statements were opinion and/or privileged (T 988-1001). A party must move for a directed verdict at the close of the evidence or it waives the right to make that motion. Prime Motor Inns, Inc. v. Waltman, 480 So.2d 88, 90 (Fla. 1985). Centro Nautico does not claim in its Brief that it made such a motion. Additionally, Centro Nautico did not raise the issue of opinion in its Answer or Pretrial Stipulation (R 63-78; 237-241).

Centro Nautico did not raise the issue of privilege in the pre-trial stipulation. The only issue raised in the pre-trial stipulation concerning Centro Nautico's defense to the defamation count was whether the statements were true (R 239). Centro Nautico did not raise the defense of privilege or opinion in its post-trial motion for new trial (R 315-322). In sum, Centro

Nautico raised the issues of opinion and privilege for the first time on appeal.

In any event, the defamatory statements uttered by Centro Nautico were neither privileged nor opinion. A statement which accuses one of dishonesty in connection with his/her business is libel per se. Owner's Adjustment Bureau, Inc. v. Ott, 402 So.2d 466, 470 (Fla. 3rd DCA 1981); Walsh v. Miami Herald Publishing Co., 80 So.2d 699 (Fla. 1955); Wolfson v. Kirk, 273 So.2d 774 (Fla. 4th DCA 1973); Hardwood v. Bush, 273 So.2d 359 (Fla. 4th DCA 1969). Furthermore, statements which impute conduct and characteristics to a plaintiff which are plainly incompatible with the proper exercise of the plaintiff's business constitute libel per se. Spronero v. Miller, 404 So.2d 793 (Fla. 3rd DCA 1981); Drennen v. Westinghouse Electric Corp., 328 So.2d 52 (Fla. 1st DCA 1976).

Centro Nautico relies on Seropian v. Forman, 652 So.2d 490 (Fla. 4th DCA 1995) for its position that the statements were not slanderous. However, a close review of Seropian actually requires an affirmance. In Seropian, the Court held that words are defamatory when they charge a person with an infamous crime or tend to subject one to hatred, distrust, ridicule, disgrace, or tend to injure one in one's business or profession. Id. at 495. The Court found that the use of the words "influence peddling" by Defendant did not impute conduct incompatible with the proper exercise of plaintiff's office or tend to subject him

to hatred, distrust or ridicule. "Influence peddling" does not come close to the heinous and malicious comments of Centro Nautico. The words liar and cheat would certainly subject IMC to hate, distrust, ridicule, contempt and disgrace.

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.

The trial Court properly entered final judgments in favor of Petitioner, IMC, in the matters raised on cross-petition. Accordingly, the final judgments in favor of IMC should be affirmed.

I HEREBY CERTIFY that the size and style of type used in this Brief is 12 point Courier New.

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., 2586 S. E. Eighth Court, Pompano Beach, FL 33062, PATRICIA SECHAN, ESQ., 633 South Andrews Avenue, Ft. Lauderdale, FL 33316, and JOHN BERANEK, ESQ., P. O. Box 391, Tallahassee, FL 32302 on this 14th day of May, 1999.

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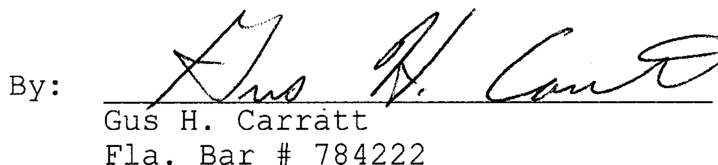
By: 
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Chief Deputy Clerk

Supreme Court of Florida
Clerk of the Court
500 S. Duval Street
Tallahassee, FL 32399-1927

Re: International Marine Co-Op, Ltd., Petitioner, and
Caravelle Boats, Inc., et al, Respondents
Case No. 94,530

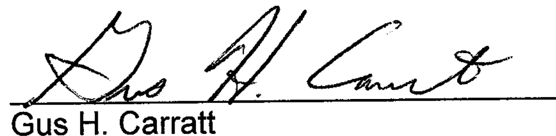
Ladies and Gentlemen:

Enclosed please find original and seven copies of the following:

1. Petitioner's Reply Brief and Answer Brief on Cross-Petition.
2. Appendix to Petitioner's Reply Brief/Answer Brief.

Respectfully,

MORGAN, CARRATT AND O'CONNOR, P. A.

By: 
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Enclosures
cc: International Marine Co-Op, Ltd.