

IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC11-1257

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**RYVMED MEDICAL PRODUCTS, INC.,**

Petitioner,

vs.

**DEVON HEALTH SERVICES, INC., DEVON MEDICAL, INC.,  
d/b/a DEVON MEDICAL SUPPLIES, and SUPPLY  
MARKETING, INC.,**

Respondents.

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**PETITIONER'S BRIEF IN SUPPORT OF  
JURISDICTION TO REVIEW A DECISION OF  
THE DISTRICT COURT OF APPEAL FOR THE  
FOURTH DISTRICT COURT OF FLORIDA**

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## **STATEMENT OF THE CASE AND FACTS**

The Fourth District Court of Appeal reversed a jury verdict awarding \$1,413,394 to Ryvmed Medical, Inc. for lost profits caused by the Devon Companies, finding that Ryvmed failed to establish lost profit damages under the “yardstick test.” *Devon Medical, Inc. v. Ryvmed Medical, Inc.*, \_\_\_ So. 3d \_\_\_, 2011 WL 1775770 (Fla. 4th DCA May 11, 2011). Appendix at 1, 4-5. The court below affirmed the trial court in all other respects, holding that Ryvmed’s promissory estoppel claim was not barred by the statute of frauds; that Ryvmed proved the existence of an enforceable written contract; and that Ryvmed’s recovery of \$13,394 for tortious interference was proper. *Id.* at 1, 5.

However, as to lost profits, the court “reverse[d] Ryvmed’s lost profits damages for the promissory estoppel and breach of contract claims” utilizing its *River Bridge Corp. v. Am. Somax Ventures ex rel. Am. Home Dev. Corp.*, 18 So. 3d 648, 650 (Fla. 4th DCA 2009) adoption of the “yardstick test,” concluding that *Ryvmed* flunked the test. The court quoted with emphasis the *River Bridge* requirement that under the yardstick test it is “*essential to establish that those contractors [to whom the plaintiff was comparing itself] were ‘closely comparable’ to [it].*” Appendix at 5 (emphasis in original). And then the court below discounted the testimony of the experts who presented the lost profits damages, concluding that their company comparisons fell short:

Likewise, in the instant case, neither of Ryvmed's experts provided evidence of profits made by a comparable company. While Michael Sperdutti testified that he compared Ryvmed's business with another business called Medi Supply, he failed to establish that Medi Supply was closely comparable to Ryvmed. Sperdutti only made a blanket statement regarding similarity and did not prove how Medi Supply resembled Ryvmed in size, location, profits and position.

Further, Ryvmed's second expert witness, Richard Dostson, did not testify as to the profits, costs, or expenses of a similar company. Rather, Dotson testified that in designing his financial model he

reviewed a number of the financial information for Ryvmed; the Quick Books, the purchase orders. We reviewed Devon's website. We tried to review anything pertaining to Ryvmed on the Internet. We utilized publicly accessible databases, such as Integra information, IBIS World, and pretty much basic modeling and financial modeling formulas as well.

Notably, Dotson did not establish that Medi Supply or any other company in the databases were in the same "start-up" position as Ryvmed, did not introduce any evidence of costs and expenses of a similar company, and did not testify that a similar company made a profit. Thus, the testimony of both of Ryvmed's experts lacked "the reasonable certainty necessary to support the yardstick approach to lost profits, rendering the testimony too speculative to sustain the damages." [*River Bridge*] *Id.* at 651.

Appendix at 5.

The enforceable written contract which was breached was described by the decision below:

Ryvmed is in the business of marketing, selling, and distributing medical devices. Devon Companies are also in the business of manufacturing, marketing, selling, and distributing medical products and devices. In July 2005, representatives of Ryvmed and Devon Companies began a series of oral conversations and emails culminating in an agreement: Ryvmed would purchase containers of medical syringes from Devon Companies in exchange for Devon Companies providing Ryvmed with products, marketing support and access to their substantial network of physicians. The terms of the agreement were memorialized in an email dated August 18, 2005, and titled “Devon Agreement.”

Relying on this agreement, Ryvmed committed time and resources to developing the product and claimed it lost momentum with the Ryvmed brand and many of its customers. In late 2005, however, Devon informed Ryvmed that it would no longer provide telemarketing services. Consequently, a market for Devon syringes never developed and Ryvmed asserted that it lost profits it would have realized, had Devon Companies performed their obligations under the agreement.

Appendix at 1-2.

Ryvmed’s damages experts provided, *inter alia*, this testimony:

First, Michael L. Sperdutti, an expert in telemarketing testified that Ryvmed could have expected a ten percent closing ratio, a figure representing the number of people telemarketers convert into buying customers. In formulating his lost profit calculation, Sperdutti testified that he compared Ryvmed’s business with another business called Medi Supply. . . .By “[t]aking a look at the Ryvmed books, as well as taking a

look at my client who had a very similar business,” Sperdutti opined that Ryvmed’s gross profits would have been between thirty-five and forty percent.

Next, Richard Dotson, a Certified Public Accountant, testified regarding his year-by-year calculation of the damages Ryvmed suffered from the breach of contract. In order to estimate Ryvmed’s damages, Dotson designed a financial model after reviewing Ryvmed’s financial information and using multiple databases such as Integra and IBIS World. . . . Further, in determining Ryvmed’s profits margin, Dotson relied on Sperdutti’s estimate and examined “the Integra database for companies in that size market,” which documented profit margins of between twenty-seven to twenty-eight percent. Dotson estimated the present value of Ryvmed’s damages to be \$10,244,000.00 over a five-year period.

Appendix at 2-3.

The jury, whose findings of breach of contract and promissory estoppel were affirmed, concluded that the damages proven were \$1,413,394. But the court below concluded that its *River Bridge* “closely comparable” standard was not met, noting that “Dotson had no experience in telemarketing or in the sale of syringes” and that “Dotson did not establish that Medi Supply or any other company in the databases were in the same ‘start up’ position as Ryvmed, did not introduce any evidence of costs and expenses of a similar company, and did not testify that a similar company made a profit.” Appendix at 3, 5.

For the reasons set forth below, Petitioner seeks to invoke the Article V, § 3(b)(3) jurisdiction of this Court because the decision below expressly and directly conflicts with *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989).

### **SUMMARY OF THE ARGUMENT**

*W.W. Gay Mechanical Contractor, Inc. v. Wharfside, Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989) held:

A business can recover lost prospective profits regardless of whether it is established or has any “track record.” The party must prove that the defendant’s action caused the damages and 2) there is some standard by which the amount of damages may be adequately determined.

*Id.* at 1351. If “competent and substantial evidence” supports a jury’s finding *vis a vis* those two elements, an appellate court cannot overrule the jury. *Id.*

The decision below expressly and directly conflicts with *W.W. Gay* because the district court imposed a measuring stick different from that set forth in *W.W. Gay*, and set aside a verdict supported by substantial competent evidence, again directly conflicting with *W.W. Gay*. The court below imposed a “closely comparable company” test that turned the “some standard” language of *W.W. Gay* into a meaningless standard where unique companies and unique agreements are involved.



## **ARGUMENT**

### **THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH *W.W. GAY v. MECHANICAL CONTRACTOR, INC.*, 545 So. 2d 1348 (Fla. 1989)**

The decision below does not doubt that there was a breach of contract and that there were lost profits. Instead, it imposes a “closely comparable” component of proof upon a plaintiff and reverses a jury verdict. The district court’s “yardstick test” standard cannot be squared with *W.W. Gay* because nothing in *W.W. Gay* supports undoing a jury verdict due to the uniqueness of the business enterprise and the contractual arrangements entered into by the parties.

The focus of the conflict is on the *W.W. Gay* requirement that “there is *some* standard by which the amount of damages may be adequately determined.” 545 So. 2d at 1351 (emphasis supplied). *W.W. Gay* embraced the *Twyman v. Roelle*, 166 So. 215 (Fla. 1936) construct that “if there is a ‘yardstick’ by which prospective profits can be measured, they will be allowed if proven.” *Id.* at 1350. But the yardstick cannot be a device that forecloses damages for an established breach of contract. Nor does the *W.W. Gay* language require, as did the court below, that a plaintiff must prove “how Medi Supply resembled Ryvmed in size, location, profits, and position.” Appendix at 5.

Neither *Twyman* nor *W.W. Gay*, held that *sine qua non* for lost profits proof for new ventures is the existence of a “closely comparable” company. Both cases

leave it to the jury to determine the adequacy of the proof; neither case suggests that an appellate court can discount lost profits testimony because a company is unique or its contractual arrangement is unprecedented. *W.W. Gay* countenanced lost profits in a foul odor, less than projected occupancy rates, scenario and held:

This evidence was supported by studies prepared by reputable economic analysts and provided a sufficient standard to support the experts' testimony concerning lost profits. The expert testimony, when combined with the economic studies, was clearly sufficient to raise a jury question.

*Id.* at 1351. Indeed, *W.W. Gay* allowed great leeway – “if there is a yardstick by which profits can be measured, they will be allowed if proven . . . uncertainty which defeats recovery in such cases is the cause of the damage rather than the amount.” *Id.*

Florida law has been vigilant in enforcing contracts and allowing those injured by contractual breaches to seek damages. “The fundamental principle of the law of damages is that the person injured by the breach of contract. . .shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant’s act which gives rise to the action.” *Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d 1123, 1129 (Fla. 3d DCA 2003) citing this Court’s decision in *Hanna v. Martin*, 49 So. 2d 585 (Fla. 1950). Even the court below, in a decision that preceded *W.W. Gay*, recognized the principle that recovery is the norm:

Difficulty in proving damages or uncertainty as to the amount will not prevent recovery as long as it is clear that substantial (rather than merely nominal) damages were suffered as a result of the wrong, and the competent evidence is sufficient to satisfy the mind of a prudent, impartial person as to the amount.

*Forest's Men Shop v. Schmidt*, 536 So. 2d 334, 336 (Fla. 4th DCA 1988). That was consistent with *W.W. Gay*: “If from proximate estimates of witnesses a satisfactory conclusion can be reached, it is sufficient if there is such certainty as satisfies the mind of a prudent and impartial person.” *W. W. Gay*, 545 So. 2d at 1350, *citing Twyman*, 166 So. at 218. The decision in this case, *Ryvmed*, is inconsistent with *W.W. Gay*.

Here, a prudent, impartial jury found there to be substantial competent evidence to justify an award of substantial damages. The court below reversed the award by improperly adding “closely comparable” company to the measuring stick.

That approach is antithetical to progress and creativity. In a world where novel ideas and unusual contractual arrangements are being made between companies and individuals, engrafting a “closely comparable” company standard can sound a death knell to parties seeking to enforce and protect against breaches of novel contracts in novel businesses. *W.W. Gay* did not countenance such a cramped approach to proof of lost profits. The decision below is thus in express and direct conflict with *W.W. Gay*.

## **CONCLUSION**

For the foregoing reasons, the Court should accept jurisdiction to review the decision below.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Reply Brief complies with Fed. R. App. P. 9.210 and is typed in Times New Roman 14-point font.

\_\_\_\_\_  
BRUCE S. ROGOW

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this \_\_\_\_\_ day of June, 2011 to: Paul Crowley, Esquire, LAW OFFICES OF PAUL CROWLEY, Attorney for Appellants, Devon Health Services, Inc., Devon Medical, Inc. d/b/a Devon Medical Supplies, Inc. and Supply Marketing, Inc., 257 W. Uwchlan Avenue, Suite 204, Downingtown, PA 19335, Telephone: 610-269-7940, Facsimile: 610-269-7993.

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