

**IN THE SUPREME COURT
FOR THE STATE OF FLORIDA**

CASE NO: SC11-1257

RYVMED MEDICAL, INC.

Petitioner,

v.

**DEVON MEDICAL, INC.,
DEVON HEALTH SERVICES, INC.
and SUPPLY MARKETING, INC.,**

RESPONDENTS.

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

This is an action by Petitioner, Ryvmed Medical Products, Inc. (“Ryvmed”) to invoke this Court’s discretionary jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution to review the decision of the Florida Fourth District Court of Appeal in the case of *Devon Medical, Inc., et al. v. Ryvmed Medical Products, Inc.*, ____ So.3d ____, 2011 W.L. 17775770 (Fla. 4th DCA May 11, 2011). Petitioner, Ryvmed, incorrectly claims that the decision of the Fourth District Court of Appeal “expressly and directly” conflicts with this Court’s decision in *W.W. Gay Mechanical Contractor, Inc. v. Wharfside, Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989).

STATEMENT OF THE FACTS

Ryvmed was in the business of marketing, selling, and distributing medical devices. The Devon Companies¹ also marketed, sold, and distributed medical devices. Appendix 1. In July 2005 the Devon Companies and Ryvmed engaged in a series of oral communications and e-mails culminating in an agreement memorialized in an e-mail dated August 18, 2005 whereby Ryvmed would purchase containers of medical syringes from the Devon Companies and the Devon Companies would provide

¹ The Respondents are Devon Health Services, Inc. (DHS”), Devon Medical, Inc. (“DM”) and Supply Marketing, Inc (“SMI”). For ease of identification, the Respondents will be collectively referred to as the “Devon Companies”.

Ryvmed products, marketing support and access to its network of physicians. Appendix 2. Relying on the agreement, Ryvmed committed time and resources to developing the product. In late 2005 Devon advised Ryvmed that it would no longer provide telemarketing services. The market for Devon syringes never developed and Ryvmed asserted that it lost profits it would have realized had the Devon Companies performed the telemarketing obligations they assumed under the agreement. *Id.*

At trial Ryvmed presented claims for breach of an oral contract², breach of a written contract, promissory estoppel and tortious interference with contract. In support of its prospective lost profit claims for breach of contract and promissory estoppel, Ryvmed presented two experts: Michael Sperdutti, an expert in telemarketing, and Richard Dotson, a certified public accountant, who had no experience in telemarketing or in the sales of syringes. *Id.*

Sperdutti testified that Ryvmed could have expected a closing ratio of 10 percent of customers contacted. In formulating this opinion Sperdutti testified that he compared Ryvmed's business to another business called Medi Supply that he said conducted a similar business and concluded that "gross profits would have been between thirty-five and forty percent".

² The claims for breach of oral contract were dismissed on motion of defendants at trial by reason of the statute of frauds.

Appendix 2.

Richard Dotson calculated projected damages sustained by Ryvmed over a five year period by designing a financial model using Ryvmed's financial information and multiple data bases such as Integra and IBIS which compile financial information for various industries and report such things as average costs of sales, average sales margins, and average gross profit margin. Relying on Sperdutti's estimate and on the Integra data base for companies of that size market, Dotson estimated a profit margin of between twenty-seven and twenty-eight percent and valued Ryvmed's damages over a five year period at \$10,244,000.00. Appendix 3.

The jury found that Devon Medical alone breached the written agreement with Ryvmed and that DHS and SMI had not entered into a written agreement with Ryvmed. The jury further found all three of the defendants liable on the promissory estoppel claim and awarded damages on that claim and the breach of contract claim in the sum of \$1,400,000.00.

On appeal, the Florida Fourth District Court of Appeal held that the "yardstick" used by Ryvmed to measure its lost profits was not proven to be comparable to Ryvmed's circumstance and, as such, the expert's testimony lacked "the reasonable certainty necessary to support the yardstick approach to lost profits, rendering the testimony too speculative to sustain damages."

Appendix 5.

SUMMARY OF THE ARGUMENT

This Court's holding in *W.W. Gay Mechanical Contractor, Inc. v. Wharfside, Two, Ltd.* 545 So. 2d 1348 (Fla. 1989) permitted proof of damages of lost future profits by use of any standard by which such damages could be shown with reasonable certainty. Consistent with the *Gay* holding, Petitioner chose to prove its damages using the yardstick of a closely comparable company, that is, by proof of profits made by a similar company. Rather than imposing a new standard for determining lost future profit damages or wandering from the holdings of *Gay* and *Twyman v. Roell*, 166 So. 215 (Fla. 1936), the Fourth District Court of Appeal merely found that Petitioner did not present evidence to support the yardstick that it chose, thereby rendering the testimony of its experts too speculative to support an award for lost future damages. Thus, the decision of the Court below does not "expressly and directly" conflict with this Court's decision in *Gay* thereby requiring the denial of the instant Petition.

ARGUMENT

In Florida "the general rule is that anticipated profits of a commercial business are too speculative and dependant upon changing circumstances to warrant a judgment for their loss." *Levitt-ANSCA Towne Park Partnership*

v. Smith & Co., Inc., 873 So. 2d 392, 396 (Fla. 4th DCA 2004). However, this is not an inflexible rule. In *Twyman v. Roell*, 166 So. 215 (Fla. 1936) this court recognized that prospective lost profits may be recovered “if there is a yardstick or measure of damages” by which they may be determined. *Id.* at 217. This holding was affirmed in *W.W. Gay Mechanical Contractor, Inc. v. Wharfside, Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989), where the Court stated that a business without a “track record” of profits may nonetheless recover prospective lost profits if it can prove “(1) the defendant’s actions caused the damage and (2) there is some standard by which the amount of damages may be adequately determined.” *Id.* at 1351. As in *Twyman*, the *Gay* Court did not lay down specific parameters comprising the “yardstick” or “standard” to be applied but left the yardstick or standard to be determined on a case by case basis consistent with the overarching requirement that when the measure of damages is lost future profits, the loss must be proven with a reasonable degree of certainty. *Twyman v. Roell*, 166 So. at 217; *River Bridge Corp. v. American Somax Ventures*, 18 So. 3d 648, 650-51 (Fla. 4th DCA 2009); *Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d 1123, 1128 (Fla. 3d DCA 2003); *Levitt-ANSCA Towne Park Partnership v. Smith & Co., Inc.*, 873 So. 2d at 396; *Forest’s Men Shop v. Schmidt*, 536 So. 2d 334, 336 (Fla. 4th DCA 1988).

Petitioner argues that the decision of the District Court of Appeal conflicts with *Gay* because it imposed a standard or “measuring stick” different than the yardstick of *Gay*. Petitioner’s Brief at 5. It asserts that 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.” *Id.*

There is no conflict between the holding of *Gay* and the decision of the court below foremost because *Gay* did not establish or impose a yardstick or standard for determining lost future profits in circumstances where the plaintiff did not have a track record as argued by Petitioner. This is clear from the language used in the second prong of the *Gay* holding, that plaintiff prove “*some standard*” by which lost profits can be adequately determined. Thus, the *Gay* Court left it to the plaintiff to choose a standard or yardstick for proving its damages.

Here, the District Court of Appeal did not impose a “closely comparable company” standard on Petitioner to prove its damages. Rather, the standard of a “closely comparable company” was the standard of measure chosen by the Petitioner to prove its damages, a standard it failed to prove. As the court points out in its opinion, “In formulating his lost profit calculation, Sperdutti [Petitioner’s expert on telemarketing] testified that he

compared Ryvmed's business with another business called Medi Supply."

Appendix 2. It quotes the testimony of Sperdutti:

I actually had an account that was very similar, even in the terms of size of Ryvmed; and went to that and went to see the books of that particular client and discussed with them, you know, what they were doing, what their pricing was and matched everything up....

Id. Again, quoting Sperdutti, the Court observed, "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 testified that Ryvmed's gross profit would have been between thirty-five and forty percent." *Id.* However, Ryvmed's experts failed show any evidence of costs and expenses incurred by the comparative company, whether the company was a new or start-up company like Ryvmed, the amount of the profit made by the company or even if such company made a profit.³ In short, Ryvmed selected a standard of a comparable company for proving its lost profits but failed to prove that the company was comparable or that the comparable company actually made a profit. As such, the court properly held that the future lost profit claim of

³ Dotson, Petitioner's other expert, who had no experience in telemarketing or syringe sales, did not compare the profits earned by a similar company but relied on Sperdutti's estimate of profit margins and examined the average profit margins for companies in a publicly accessible database. Appendix 3. Like Sperdutti, Dotson presented no evidence of costs or expenses of a comparable company nor any evidence of the profit earned by a comparable company. Appendix 5

Ryvmed “lacked the reasonable certainty necessary” to support the yardstick chosen by the Ryvmed thereby rendering the testimony of its experts fatally speculative and based on mere conjecture. Appendix 5. Accordingly, there is no direct or express conflict between *Gay* and the holding of the Court below and the Petition to invoke the discretionary jurisdiction of this Court must be denied.

It should be noted that using the yardstick of a closely comparable company’s profits to predict future profits of a company without an earnings history is not only appropriate, but perhaps the only method under these circumstances which could result in ascertaining future profits with any degree of reasonable certainty. Clearly, a start-up hamburger fast food restaurant could not reasonably use the yardstick of McDonald’s as a predictor of its lost future profits. *Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d at 1128) (any yardstick used to show [lost future profits] must be reasonable”). What makes the prediction of lost profits reliable, and therefore worthy of the jury’s consideration, is the similarity of the companies and the fact that the similar company actually made or makes a profit. It is the proof that a similar company made a profit that is the “yardstick”, that is, the measuring device by which the profits of a newly formed company or enterprise without a “track record” can be measured.

While there may be other yardsticks for proving lost future profits, Petitioner did not present them in this case but relied solely on the yardstick of a “closely comparable company”.

Finally, putting aside the fact that Ryvmed chose the standard of a “closely comparable company” to prove its damages, Ryvmed asserts that such a standard renders the “some standard” language of *Gay* meaningless where unique companies and agreements are involved. Petitioner’s Brief at 5. This argument is without merit and is unavailing.

There is nothing in the record that suggests that the party companies or their business arrangements were in any way unique. Indeed, Sperdutti himself testified to the existence of a similar company. Appendix 2. More importantly, Petitioner does not explain how a unique company would render the “some standard” language of *Gay* meaningless. By employing the phrase “some standard” the *Gay* Court clearly left to the plaintiff the burden of presenting a “standard” or “yardstick” with which to measure its damages with reasonable certainty. Where a company or arrangement is so unique that there is not a reasonable measuring device to determine damages, any claimed damages would be by definition impermissibly speculative. However, such a condition does not render the “some standard” language of *Gay* meaningless.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petitioner's request for discretionary review of the decision of the Fourth District Court of Appeal.

Respectfully submitted

Paul Crowley
Mark Levy
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondents' Brief on Jurisdiction has been sent by U.S. mail, postage prepaid, this 5th day of July 2010 to Bruce S. Rogow, Esquire, Broward Financial Centre, Suite 1930, 500 E. Broward Blvd., Ft. Lauderdale, FL 33394 and to Justin Parafinczuk, Esquire, Koch & Trushin, PA, 110 E. Broward Blvd., Suite 1630, Ft. Lauderdale, FL 33301.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the font requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure as it has been prepared in Times New Roman 14-point font.

Paul Crowley
Mark Levy