DANIEL WEBSTER; PEGGY WEBSTER; WEBSTER GREENTHUME CO, KELLY GOFB, Plaintiffs/Appellants, v. FULTON COUNTY, GEORGIA, Defendant/Appellee/Cross-Appellant

00-11644 CC

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2000 U.S. 11th Cir. Briefs 11644; 2000 U.S. 11th Cir. Briefs LEXIS 116

July 3, 2000

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. CASE NO. 1-96-CV-2399-TWT.

Initial Brief: Appellee-Respondent

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TITLE: BRIEF

TEXT: [*i] **STATEMENT REGARDING ORAL ARGUMENT**

The Appellee/Cross-Appellant requests oral argument in this case because the issues are important and complex, and oral argument would be helpful to the Court.

[*xiii] **STATEMENT OF JURISDICTION**

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia. Appellate jurisdiction lies with this Court pursuant to *28 U.S.C. § 1291*.

[*1] **STATEMENT OF ISSUES**

Cross-Appeal Issues:

I. Did the District Court err in instructing the jury about its prior Order holding the County's Minority and Female Business Enterprise Program unconstitutional and in admitting evidence about the Program that was both irrelevant to Plaintiff's case and prejudicial to Defendants'?

II. Did the District Court improperly instruct the jury as to the definition of the term "intent," particularly [**8] where the instruction was given in response to a question from the jury during deliberations?

III. Did the District Court err in failing to grant Fulton County's Rule 50 motion particularly where the jury found that Compliance Officer Michael Cooper acted in a good faith effort to remedy a race discrimination complaint by an African-American vendor?

IV. Did the District Court err in failing to grant Fulton County's motion for judgment as a matter of law, where WGT presented insufficient evidence to enable the jury to calculate lost profits with requisite specificity?

V. Did the District Court err in failing to instruct the jury as to the proper evidentiary standard for lost profits damages under *42 U.S.C. § 1988* and Georgia law?

[*2] **Appeal Issues:**

I. Did the District Court correctly rule that *42 U.S.C. § 1981* does not provide a retaliation cause of action to an independent contractor who is a "disappointed bidder"?

II. Did the District Court correctly rule that Kelly Goff and Daniel and Peggy Webster, as shareholders of the corporations which were allegedly harmed by the County's actions, lack [**9] standing to sue as individuals?

[*3] **STATEMENT OF THE CASE**

1. Course of Proceedings and Dispositions in the Court Below

Plaintiff Webster Green Thumb ("WGT") filed this suit on September 17, 1996, claiming that it and other businesses owned by white males had been denied Fulton County contracts based on a pattern and practice of race and sex discrimination. (R1-1) WGT also claimed damages with respect to two specific incidents, one in 1995 in which the County Public Works Department assigned a work order for tree removal to a business owned by an African-American male, and another in 1996 where the Department reduced the cap on WGT's purchase order and correspondingly raised that of the same African-American owned business. On February 4, 1998, the Complaint was amended to add a claim that Fulton County's Minority and Female Business Enterprise ("MFBE") Program was unconstitutional per se, and seeking injunctive relief on that claim. (R2-35)

In May, 1999, the District Court held a bench trial on the constitutional challenge to "numerical participation goals" of the MFBE plan. Principally under the Court's decision in Engineering Contractors Ass'n [**10] of South Fla., Inc. v. Metropolitan Dade County, 122 F.3d (11th Circ. 1997), cert. denied, *118 S.Ct. 1186 (1998)*, the court found that the goals were racial preferences unsupported by [*4] the County's evidence using the strict scrutiny standard of review. (R22-176-53-54). Therefore, the district court enjoined the use of "participation goals." Id.

Other portions of the MFBE were not challenged by Plaintiffs, and therefore are presumptively constitutional. These portions include the provisions relating to:

> . "[T]he policy of Fulton County Government to promote full and equal access in contracting and procurement opportunities for all business in Fulton County";
>
> . The duty of the Contract Compliance Office to investigate complaints of unfair treatment.

(PEX-1 at pp. 1, 24) n1

> n1 Trial exhibits will be referred to hereafter as "PEX- " for WGT's Exhibit, and "DEX- " for Defendant's Exhibit.

Before and during the trial, Defendants Fulton County [**11] and Michael Cooper, head of the Office of Contract Compliance, vigorously objected to WGT's introduction of the prior holding of unconstitutionality. (R29-298; Doc 328-Pg 72) Defendants argued that, at the jury trial, WGT was only challenging the County's actions which occurred as a result of a race discrimination complaint by an African-American vendor. Defendants argued that those actions were not taken pursuant to the unconstitutional portions of the MFBE Program, and therefore, the [*5] unconstitutionality ruling was inadmissible. Instead, the County's defense was that the actions were to be taken in a good faith response to the other vendor's complaint.

Despite Defendants' repeated objections, the District Court itself read a very long and detailed instruction to the jury, prior to the introduction of any evidence, regarding the MFBE Program and the Order ruling portions of it unconstitutional. (Doc 328-Pg 72-84) That instruction included the following statements:

> [T]he racial, ethnic, and gender participation goals of the program were unconstitutional because they were not justified by a substantial showing of intentional discrimination against minorities by the county [**12] or passive participation in discrimination against minorities by private actors... [T]he racial, ethnic, and gender participation goals of the program were not narrowly tailored to achieve a compelling governmental interest. In June of last year, I issued an order enjoining Fulton County from using racial, ethnic, or gender participation goals in accepting or rejecting bids, determining whether bidders are responsive and responsible bidders, and in the awarding of Fulton County contracts. You must accept this Court's prior judgment as being correct.

(Doc 328-Pg 77-78)

The Court repeated essentially the same information in its final jury instructions. (Doc 334-Pg 1150-1151)

Moreover, over Defendants' objections, the Court admitted the evidence of Fulton County Commissioner Mitch Skandalakis, former deputy head of [*6] Purchasing Thomas Bruns, and expert witness George Easton. The testimony of these three witnesses went solely to inform the jury of the existence of the unconstitutional portions of the MFBE Program and their general effect upon the bid process.

The District Court instructed the jury to answer a special interrogatory form. Questions 1 and 2 on the verdict [**13] form read as follows: "The first question is, did the defendant Fulton County intentionally discriminate against the Plaintiff on the grounds of race? If your answer is yes, you'll check the space marked yes. If your answer to that is no, you'll check the space marked no. Question 2 asks: did the defendant Michael Cooper intentionally discriminate against the plaintiff on the grounds of race? If your answer to that is yes, you'll check yes. If your answer is no, you'll check no." (Doc 334-Pg 1158)

During its deliberations, the jurors submitted a question to the District Court asking for a definition of "intentional" as used in the phrase "intentionally discriminate" in the special verdict form: "Your honor, what is the meaning of the phrase 'intentionally discriminate' in questions 1 and 2, specifically what does, quote, intentional, close quotes, mean in this context?" (Doc 334-Pg 1166) The asking of the question demonstrates that this was a very close case which hinged upon the definition of discriminatory "intent." Although Fulton County requested [*7] that the Court give a definition of intent that was modeled after this Court's recent holding in In re Employment Discrimination [**14] Litigation against the *State of Alabama, 198 F.3d 1305 (11th Cir. 1999),* the District Court instead gave a supplemental instruction which did not incorporate the holding in that case. Fulton County objected that the given instruction was a misstatement of the law; it was also unbalanced, prejudicial, and made the finding of intent essentially automatic. Defendants also objected to the Court's instructions on damages. (Doc 334-Pg 1162-1164, 1179)

The jury's verdict also demonstrates how close the case was and reflects its mixed findings on the evidence.

WGT asked for an award against both Defendants of actual lost profits damages in the amounts of $ 1250 for the 1995 incident, and $ 10,250 for the 1996 incident. It further requested punitive damages of one million dollars against Michael Cooper. (Doc 334-Pg 1097, 1101-1102) The jury awarded $ 1250 for the 1995 bid and $ 7500 for the 1996 purchase order equalization against the County, and only $ 1.00 in nominal damages against Cooper. (Doc 334-Pg 1184-1186)

In the face of its general verdict, however, the jury also answered "yes" to Question Number 4, which asked "Did the defendant Michael Cooper intentionally discriminate [**15] against the Plaintiff on the grounds of race in a good [*8] faith effort to respond to a nonfrivolous complaint by another contractor of discriminatory treatment?" (Doc 334-Pg 1184-1185)

During the trial and following the verdict, Fulton County moved under Rule 50 for judgment as a matter of law. (Doc 334-Pg 1187-1194) While the District Court granted qualified immunity to Defendant Cooper based upon the jury's answer to the special verdict questions and dismissed him from the suit, the motion was denied as to the County. (Doc334-Pg 1195-1196) The motion was also denied with respect to Defendant's argument that Plaintiff did not introduce sufficient proof of damages in either 1995 or 1996. (Doc 334-Pg 1196)

Cross-Appellant/Appellee Fulton County objects to the Course of Proceedings statement of Appellants/Cross-Appellees to the extent that (1) Appellants mischaracterized the District Court's holding on retaliation, which was that an independent contractor who was a disappointed bidder could not maintain a claim under Section 1981; and (2) the jury trial giving rise to this appeal was not limited to damages issues, but issues of both liability and damages.

II. Statement [**16] **of the Facts**

Webster GreenThumb Company ("WGT"), the Plaintiff/Appellant/Cross-Appellee, brought to trial a claim of "reverse" race discrimination under *42 U.S.C. § 1983* against Fulton County, Georgia and its Contract Compliance officer, [*9] Michael Cooper. During the time period relevant to the trial, WGT's owner was a white female, Peggy Webster, and WGT operated as a certified female business enterprise under Fulton County's affirmative action plan, known as the Minority and Female Business Enterprise Program ("MFBE"). n1 (Doc 330-Pg 561-562) WGT's claim was based on its status as one of two vendors of tree removal services to Fulton County's Department of Public Works. The claim arose out of two events occurring in 1995 and 1996. These events were (1) the August, 1995 assignment of a $ 2,500 work order to the other vendor, Ben Edwards Landscaping Company ("BEL"), which was owned by Ben Edwards, an African-American male, and (2) the downward adjustment of WGT's 1996 purchase order to make it equal to BEL's purchase order. (Doc 328-Pg 87-88)

n1 WGT's claim for damages included only the time period from August, 1995 to February 29, 1996. Ms.

Webster later transferred ownership of the business to her husband, a white male. (Doc 330-Pg 561-562; Doc 528-Pg 116)

[**17]

In October 1994, Bill Mowrey, the Field Operations Manager for Public Works, requested that two tree removal contractors be selected for his department "based upon the anticipated work load for 1995." (PEX-378; Doc 330-Pg 499, 500-501) The Fulton County Board of Commissioners approved WGT and BEL as vendors to be issued purchase orders in equal dollar amounts. (DEX-366) Two purchase orders totaling $ 46,000 were issued to WGT, and a purchase order for [*10] $ 45,000 was issued to BEL. (PEX-436, 437 and 448) n2 WGT has not challenged the bid process, the selection process, or the roughly equal award of purchase orders to itself and BEL. It is therefore undisputed that the 1995 award to Plaintiff (a female business enterprise) and BEL (a minority business enterprise) was nondiscriminatory.

n2 The dollar amount of a purchase order is not a contract; rather, it sets a cap on the amount of work that the vendor is eligible to receive. (Doc 330-Pg 376-379) This was not disputed.

By the summer of 1995, BEL [**18] had not received any work orders from Public Works pursuant to its purchase order, while WGT had already received approximately $ 11,800 worth of work. (DEX-357) Edwards complained to Cooper that the work orders were not being fairly distributed as a result of race discrimination against him by the Public Works Department. (Doc 332-Pg-839-840) On August 3, 1995, Cooper, in his role as Director of the Office of Contract Compliance and Equal Employment Opportunity, asked Fred Artis, Director of Public Works, to "monitor" the award of work orders to ensure that "Ben's Landscaping will be treated fairly." (PEX-393) Cooper wrote this memo based upon Edwards' specific complaint, not to implement any racial goals of the MFBE Program. n3 (Doc 331-Pg 614) Cooper's actions were required by and consistent [*11] with his role as Contract Compliance Officer. He was assigned the duties of investigating alleged violations of the County's policy prohibiting discrimination and of enforcing compliance with that policy. (PEX-1 at p. 24)

n3 The attainment of "goals" were measured at the purchase order stage; allocation of work orders were not monitored. (Doc331-Pg 609)

[**19]

BEL was subsequently assigned by Public Works to do a tree removal project on Mt. Paran Road. (Doc 332-Pg 841; Doc 331-Pg 508-509) WGT introduced evidence that it quoted $ 2,500 and BEL quoted $ 3,800 to do this job. (Doc 330-Pg 482-483; PEX-378)

Under WGT's two purchase orders for tree removal in 1995, WGT received $ 44,735 out of the $ 46,000 cap. Between August (after Edwards' complaint of discrimination) and December of 1995, WGT received $ 28,285. During this same time frame, BEL received only $ 14,350 out of its $ 45,000 purchase order. (DEX-357)

On January 23, 1996, Mowrey evaluated BEL's performance. BEL's average score was 4 on a 4 point scale. Mowrey, who is white, stated that he would "select/recommend" this vendor again. Under the categories of "Quality of Goods and/or Services" and "Timeliness of Delivery or Performance," Mowrey rated BEL a "4." The definition for a "4" is "Excellent Performance - there are no quality problems, vendor is immediately responsive, highly efficient and/or effective; there (sic) no delays; key employees are experts and require minimal [*12] directions; customers' expectations are exceeded." BEL also received a "4" for "Business [**20] Relations" and "Contractor's Key Personnel," while on "Customer Satisfaction," it received a "3." (DEX-32)

In 1996, the County did not solicit new bids from tree removal contractors. Instead, it exercised its option to renew

the 1995 tree removal vendors for one additional year, and thus renewed BEL and WGT as approved vendors with a maximum amount of $ 100,000 to be divided between the two vendors. (Doc 331-Pg 697-698, DEX-366) WGT has not challenged this renewal process, and it is therefore undisputed that the process was not discriminatory.

When the Purchasing Department issued purchase orders to the two vendors in 1996, however, the amounts were decidedly unequal. WGT received a purchase order for $ 66,000, and BEL received a $ 25,000 purchase order. Fulton County introduced evidence that this unequal distribution violated the Board of Commissioners' resolution approving the renewal of the two vendors. (Doc 331-Pg 769-771; Doc 332-Pg 918-919; DEX 22, 23)

On January 26, 1996, Cooper wrote to the Acting Director of Public Works advising that he had received another complaint from Edwards asserting repeated and continuing race discrimination due to the Department's unfair distribution [**21] of work. (PEX-395) On February 2, 1996, Cooper received a written complaint from [*13] BEL's attorney requesting an explanation for the disparity in work assigned to BEL. (DEX-30)

Cooper (again pursuant to his job as Contract Compliance Officer) undertook a review of BEL's second complaint. He also held a meeting with Edwards and various Public Works employees, all of whom were white, including Mowrey and Frank Bockman (who was the acting Director of Public Works), to discuss the distribution of the tree removal work. (Doc 331-Pg 629-631) Cooper expressed his concern about the disparity of the work allocation between BEL and WGT. (Doc 331-Pg 633) In response, the representatives of the Public Works Department, Mowrey in particular, complained about BEL's lack of responsiveness, sloppiness, and failure to repair damage. (Doc 330-Pg 452, 525; DEX-550) Cooper was concerned that Public Works' (particularly Mowrey's) complaints about BEL were made only after its outstanding official written evaluation by Mowrey himself, and were thus pretextual. Cooper testified that he was concerned that "the comments from Mr. Mowrey were in direct contradiction to the evaluation that was submitted [**22] in the files," and this "told me that they were trying to build up a case against" Edwards. (Doc 331-Pg 625)

After this investigation, the Purchasing Department issued new purchase orders for WGT and BEL in equal amounts of up to $ 45,500 each. (PEX-204, [*14] PEX-446) This action was of no practical significance because there was not enough work for either vendor to get more than $ 45,000 of work orders. (Doc 330-Pg 463-465) This equalization of the purchase orders was WGT's second claimed instance of discrimination.

III. Statement of the Standard of Review

This Court "reviews jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Board of Regents of the University System of Georgia, 208 F.3d 969, 973 (11th Cir. 2000).* The reviewing Court assesses whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. While the trial judge is given wide discretion as to the style and wording employed in the instructions, the instructions must accurately reflect the law. Id.

The Eleventh [**23] Circuit reviews a lower court's ruling on the admissibility of evidence for abuse of discretion, overturning the evidentiary ruling where the moving party establishes that the ruling resulted in a "substantial prejudicial effect." *Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305-06 (11th Cir. 1999).* A district court abuses its discretion by making a clear error of judgment, or applying an incorrect legal standard. Id.

[*15] *De novo* review is applied to the District Court's denial of a motion for judgment as a matter of law, *Gupta v. Florida Board of Regents, 212 F.3d 571 (11th Cir. 2000);* to its conclusions of law as well as its application of law to the facts, *Engineering Contractors Assoc. of South Fla., Inc. v. Metropolitan Dade County, 122 F.3d 895, 903 (11th Cir. 1997);* to its rulings on standing, id.; and to its grant of Fulton County's motion for summary judgment, *Jones v. Bill Heard Chevrolet, 2000 WL 712860* *2 (11th Cir. June 2, 2000).

IV. Summary of the Argument

The District Court's instructions to the jury as to the court's prior bench trial ruling holding Fulton [**24] County's MFBE Program unconstitutional, as well as its ruling admitting evidence relating to the unconstitutional aspects of that Program, were harmful and reversible error. The unconstitutionality instructions were irrelevant because Plaintiff never linked the unconstitutional portions of the Program to its claims. Likewise, the other MFBE evidence had no relevance to WGT's claims and was more prejudicial than probative. Because Fulton County was severely prejudiced by the instructions and the evidence, these errors necessitate retrial of WGT's claims against Fulton County.

The District Court's supplemental jury charge on the definition of "intentional" discrimination misstated the law to Fulton County's prejudice, [*16] particularly because it was given in response to the jury's request for additional guidance on an essential element of WGT's case. This erroneous charge necessitates reversal and remand for a new trial.

Because the jury found that Defendant Cooper acted in good faith and in response to a credible claim of race discrimination by another vendor, Plaintiff failed to demonstrate the intent element of its case. The district court's denial of Fulton County's Rule [**25] 50 motion was therefore error, and this Court should enter judgment for Fulton County on WGT's claims.

The District Court's failure to apply Georgia law regarding the sufficiency of lost profits evidence and failure to instruct the jury accordingly caused prejudicial harm to Fulton County. WGT failed to demonstrate evidence of lost profits with requisite specificity under applicable Georgia law, and thus did not prove the damages element of its case. The Court's failure to grant the County's Rule 50 motion was therefore reversible error; moreover, its jury instruction on lost profits damages was an incorrect statement of law which caused the County prejudice. This Court should thus enter judgment for Fulton County, or in the alternative reverse for retrial.

The District Court correctly granted summary judgment to Fulton County on WGT's retaliation claim because Section 1981 does not permit a retaliation [*17] action to be brought by a "disappointed bidder" independent contractor such as WGT. Also, the District Court correctly ruled that Kelly Goff and Daniel and Peggy Webster lack individual standing in this action because shareholders have no standing to sue for actions derivative [**26] of their corporation's cause of action, regardless of the individual damages they may have alleged.

[*18] **ARGUMENT AND CITATION OF AUTHORITY**

I. The District Court Erroneously Instructed The Jury That It Had Held The MFBE Program Unconstitutional And Should Not Have Admitted Evidence About The Unconstitutional Aspects Of The Program.

WGT's individual claims for damages were about the 1995 and 1996 actions the County took to remedy BEL's complaint. Accordingly, only evidence that tended to prove intentional discrimination in these two incidents was relevant. This case was not about the affirmative action "goals" of the County's MFBE Program. The District Court, however, twice instructed the jury at length that it had previously found the MFBE Program to be unconstitutional, instructed the jury it must find the Court was "correct" as to that ruling, and permitted WGT to introduce extensive evidence about that Program. These actions were obviously erroneous and substantially prejudiced Defendant's rights in this very close case.

Fulton County therefore appeals from the District Court's orders of November 19, 1999 and February 8, 2000, ruling that it would [**27] inform the jury that the MFBE program was unconstitutional and ruling that WGT could introduce evidence of the MFBE program as relevant evidence of an official policy of discrimination (R25-221; R28-274). Further, Fulton County appeals from the District Court's rulings both before and during trial allowing the jury to hear the testimony of Thomas Bruns, Mitch Skandalakis, and George Easton, inasmuch as [*19] their testimony concerned the MFBE program and unrelated decisions in the selection of other vendors and did not concern any of the specific facts of WGT's claims. (R28-269)

A. The Jury Instructions Regarding The Unconstitutionality Order Constitute Prejudicial Error.

Proof of the County's liability revolved around the question of intent. None of the essential and objective facts were disputed: the parties agreed that the 1995 work order had been allocated to BEL as a result of his having complained to Cooper. No party disputed that the 1996 purchase orders had been equalized in BEL's favor after his second complaint to Cooper. Nor did any party dispute Cooper's role in these actions. The only truly disputed issue was the critical element of intent to discriminate [**28] on the basis of Peggy Webster's race. The Court's introduction of the MFBE plan and its unconstitutionality allowed the jury to substitute the existence of the County's "official policy" of affirmative action for any real evidence of intent to discriminate against Plaintiff.

Because the District Court's jury instructions as to the unconstitutionality of the MFBE Program confused and misled the jurors to the prejudice of Fulton County, this Court must vacate the jury's verdict against the County and remand for a new trial. *Palmer v. Board of Regents of the University System of Georgia, 208 F.3d 969, 973 (11th Cir. 2000).*

[*20] **1. The Unconstitutionality Instructions Were Irrelevant And Very Likely To Be Given Great Weight By The Jury On The Essential Issue Of Intent.**

The District Court's decision to instruct the jury as to its prior ruling holding particular portions of the MFBE Program unconstitutional was prejudicial error. The unconstitutionality of the goals portion of the Program did not make it more or less likely that the County had acted with the requisite "intent to discriminate" against WGT when it responded to BEL's race discrimination [**29] complaint. The District Court made "a clear error of judgment" by instructing the jury as to the prior ruling, and thereby severely prejudiced Fulton County. This constitutes reversible error. *Piamba Cortes, 177 F.3d at 1305-06.*

Regardless of its constitutionality, the "goals" portion of the MFBE Program was not the cause of the two specific acts that WGT claimed were discriminatory. Cooper, as Compliance Officer, had an official and constitutional duty to investigate BEL's complaint about the allocation of work after he was awarded a bid. (PEX-1 at p. 24) The Program set goals for minority and female participation in the awarding of bids; it does not address the allocation of work by County Departments. Neither Daniel nor Peggy Webster testified at trial as to any way in which the MFBE goals caused them any damage in these two incidents. WGT did not challenge either the non-discriminatory process by which it and BEL [*21] were awarded the tree removal bid in 1995 or the renewal of the two vendors' purchase orders in 1996.

Because the Court and WGT failed to causally link the unconstitutional aspects of the Program to its individual discrimination case, [**30] the District Court's ruling regarding the Program was not probative of the Defendants' intent to discriminate. See *Sampson v. Secretary of Transportation, 182 F.3d 918, 1999 WL 455399* *2 (6th Cir. June 23, 1999) (existence of affirmative action plan does not carry plaintiff's burden of proof on intent unless plaintiff successfully demonstrates causal link between plan and alleged acts of discrimination); *McKie v. Miller Brewing Co., 1992 WL 150160,* *4 (M.D. Ga. Mar. 6, 1992) (same). The unconstitutionality ruling therefore had no relevance to WGT's claims, n4 and the District Court should not have informed the jury of it.

n4 The unconstitutionality Order was also legally irrelevant. The District Court simply found that the County did not meet its burden of proof in establishing the prerequisites for a legal affirmative action plan under *Engineering Contractors Assoc. of South Fla., Inc. v. Metropolitan Dade County, 122 F.3d 895, 903 (11th Cir. 1997);* it did not make findings of intentional discrimination by the County in any specific past bid awards.

[**31]

2. Fulton County Was Severely Prejudiced By The Jury Instructions As To The Unconstitutionality Ruling.

It is difficult to overstate the impact of a federal judge instructing jurors from the bench and telling them that he has found the goals portion of Fulton [*22] County's affirmative action plan unconstitutional and illegal. n5 The District Court gave that lengthy instruction at the very beginning of trial, and the knowledge of his instruction then necessarily

tainted the jurors' thinking about the critical issue of intent. The District Court repeated the instruction again at the end of the trial, along with the other jury charges, so that the unconstitutionality of the Program was like a set of bookends framing the trial from start to finish.

n5 The District Court's instructions are akin to improper commentary upon the evidence in terms of their harmful effect upon the jury. When a trial judge comments upon an ultimate factual issue to be decided by the jury, he oversteps his authority and a retrial is necessary. E.g., *McCullough v. Beech Aircraft Corp., 587 F.2d 754, 761 (5th Cir. 1979)* (trial judge's mistaken assertions virtually destroyed appellant's circumstantial case, requiring reversal).

[**32]

The instructions were also prejudicial because they misled the jury about what the County and Cooper intended at the time. n6 The Court acknowledged in its Injunction Order that it was not "clear" that the program was unconstitutional in 1995 and 1996. (R19-136-35) However, he did not tell the jury this, so it could have improperly imputed discriminatory motive or intent during these years to the County.

n6 Other instructions exacerbated the problem; he told the jury "The fact that I have ruled that the 1994 MFBE Program was unconstitutional and illegal does not mean that the plaintiff is automatically entitled to prevail in the claim for monetary damages that you are to decide." (Doc 334-Pg 1151) This was misleading because the Court focused on the damages issues, not the intent issue.

[*23] The prejudicial effect is shown by the seemingly conflicting jury verdict holding the County liable for actual damages, but Cooper - the County's actor - only liable for nominal damages. Because the jury found [**33] that Cooper acted pursuant to the MFBE Program, yet also acted in a good faith effort to remedy Edwards' complaint, the MFBE program must have been the basis for the jury's decision to hold the County more liable than it held Cooper.

Because the instructions as to the unconstitutionality of the MFBE Program were so prejudicial to Fulton County, this Court should vacate the judgment and remand this cause of action for a new trial.

B. The MFBE Evidence Was Not Relevant To WGT's Claims, And Should Have Been Excluded Under FRE 401 And 402.

The District Court also admitted evidence of the implementation of the goals portion of the MFBE Program. This decision was erroneous because the evidence was not relevant within the meaning of Fed. R. Evid. 401, and thus should have been excluded under Fed. R. Evid. 402. This Court should reverse and remand for retrial on the basis of the erroneous admission of this evidence, which was an abuse of the District Court's discretion and resulted in "substantial prejudicial effect to the County." *Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305-06 (11th Cir. 1999).*

[*24] The District Court allowed the jury [**34] to hear the testimony of Mitch Skandalakis, the former Chairman of the County Commission, Thomas Bruns, the former Deputy Director of Fulton County's Purchasing Department, and George Easton, WGT's expert witness. n7 Skandalakis testified primarily that the MFBE program was run as a mandate or requirement of minority participation rather than as a goals program. (Doc 329-Pg 212-213) He gave an example of pairing a well-rated white law firm with a minority firm that "was way down the row as least qualified" in order to satisfy the percentages under the MFBE policy. (Doc 329-Pg 215-216) Significantly, Skandalakis "didn't know a thing about the County's contracting relationship" with either WGT or BEL. (Doc 329-Pg 218) Further, he had no knowledge whatsoever whether or not the goals portion of the MFBE program had anything to do with the award of bids to WGT and BEL. (Doc 329-Pg 242)

n7 Defendants had moved in limine and objected at trial to this testimony. (R25-223; R26-236; Doc 329-Pg 185-188; Doc 329-Pg 265-266; Doc 329-Pg 334-335)

[**35]

Bruns testified about the MFBE program and various practices in the Purchasing Department which he indicated were used to "make the 35 percent minority and female business enterprise goal in our contracting program." He used examples of bids submitted by vendors other than WGT or BEL, for goods [*25] and services other than tree removal, and for Departments other than Public Works. (Doc 329-Pg 274-289) Bruns admitted that none of his examples related in any direct way to WGT. (Doc 329-Pg 297) Moreover, WGT's claim of discrimination was not related to the award of contracts in Fulton County; it related to the allocation of work orders. (Doc 329-Pg 206) It did not relate to practices in the Purchasing Department. (Id.) It did not relate to bids submitted to the Purchasing Department. (Id.)

Easton testified that "that there is something [other than chance] driving this difference" between the percentage of minority businesses in the Atlanta metropolitan area and the percentage in dollars of County business awarded to minority businesses. (Doc 329-Pg 330) He stated that his study had nothing to do with Cooper's actions relating to the Public Works Department, but only addressed [**36] purchasing decisions across all Fulton County departments based on quarterly summary reports. (Doc 329-Pg 336) Easton conceded that he had not performed a study of FBE and MBE businesses which received bid awards from the County for the purpose of analyzing the allocation of work orders to determine whether an inference of intentional discrimination could be shown. ("That would be a very interesting question, certainly not the one I looked at.") (Doc 329-346)

[*26] Neither Skandalakis nor Bruns nor Easton linked the goals portion of the MFBE program or any practices of the Purchasing Department to the 1995 Mt. Paran work order or to the 1996 equalization of purchase orders. Without this causal link, the evidence of the Program did not, as a matter of law, assist WGT in proving its burden of demonstrating intentional discrimination. E.g., *Sampson, 1999 WL 455399* *2; *McKie, 1992 WL 150160,* *4. Because the Program and the admitted evidence of these three witnesses did not affect the allegedly discriminatory actions at issue in the trial, it had no "tendency to make the existence of any fact that is of consequence to the determination of the action [**37] more probable or less probable than it would be without the evidence." It thus should have been excluded under Fed. R. Evid. 401.

Finally, WGT was a female owned business and a beneficiary of the MFBE Program. The existence of the MFBE Program could not possibly show an "official policy of race or sex discrimination" against WGT, because the policy preferred females. Nothing in the MFBE program prevented WGT, owned by Peggy Webster, from competing on an equal footing during the time period at issue in the jury trial - 1995 and early 1996. (Doc 328-Pg 150) The evidence thus was not relevant.

[*27] **C. Because The MFBE Evidence Was More Prejudicial Than Probative, It Should Have Been Excluded Under FRE 403.**

Even if it found the MFBE evidence relevant, the District Court should not have admitted it under Fed. R. Evid. 403 n8 because it was more prejudicial than probative, led to confusion of the issues, and misled the jury.

n8 Rule 403 restricts the admissibility of relevant evidence by providing that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added.)

[**38]

Not only were the jurors told by the District Court that the Program was unconstitutional, they were also exposed

through the testimony of Skandalakis, Bruns, and Easton to the inflammatory rhetoric surrounding the issue of affirmative action" words such as quotas, goals, preferences and set-asides. (Doc 328-Pg 73; Doc 329-Pg 220; Doc 329-Pg 238; Doc 329-Pg 240; Doc 329-Pg 317; Doc 328-Pg 349) The testimony of these witnesses undoubtedly confused the jury by encouraging it to believe, again incorrectly, that the unconstitutional MFBE Program caused discrimination against Plaintiff. Again, the prejudice is shown because the jury found Cooper acted in good faith and awarded only nominal damages ($ 1) but found the County liable for actual damages, apparently because [*28] of the MFBE since there was no other evidence on which it could have predicated a finding that the County intentionally discriminated (Doc 334-Pg 1187-1197)

The District Court's admission of the MFBE evidence was not only error, it represented a "clear error in judgment" and as such was an abuse of discretion. See *Piamba Cortes, 177 F.3d at 1305-06.* This Court therefore should vacate the verdict [**39] of the jury and remand for a retrial. Id.

II. The District Court's Supplemental Jury Charge On The Definition Of "Intentional" Discrimination Was Erroneous And Prejudicial To Fulton County.

The jury must have considered the definition of "intent" to be of critical importance to its verdict, because it interrupted its deliberations to request additional instruction on the meaning of that element. (Doc 334-Pg 1166) In response to the jury's request, Fulton County submitted the following proposed instruction:

> I charge you that "intent," as used in this case to mean discriminatory intent, means that a decisionmaker selects a particular course of action at least in part "because of" its adverse effects upon an identifiable group. Discriminatory intent does not occur if a decisionmaker selects a particular course of action merely "in spite of" its adverse effects upon an identifiable group. The identifiable group in this case is white persons. Discriminatory intent or motive implies more than a decisionmaker's simple act of making a choice. Discriminatory intent or motive also implies more than a decisionmaker's awareness of consequences.
>
> [*29] I remind [**40] you that the phrase "intentionally discriminate against the Plaintiff on the grounds of race," referred to in the verdict form, means the race of the Websters, which is white.

(R29-303, Doc 334-Pg 1170-1174)

Fulton County's requested charge was based on recent Eleventh Circuit authority, In re Employment Discrimination Litigation against the *State of Alabama, 198 F.3d 1305 (11th Cir. 1999),* which correctly stated the law as follows:

> In order to prove an equal protection violation, however, a plaintiff must demonstrate discriminatory intent, "that the decisionmaker. . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

Id. at 1321 (quoting *Personnel Adm'r v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)).* The Eleventh Circuit also stated:

> [T]he requirement of discriminatory motive implies more than intent as volition or intent as awareness of consequences.

Id. at 1319 (citing *Feeney, 442 U.S. at 279, 99 S.Ct. at 2296).* n9

n9 Fulton County used the definition of "volition" from Black's Law Dictionary, 7th edition, 1999.

[**41]

The District Court did not give Fulton County's requested instruction, but instead gave the following charge:

> [*30] Intentional discrimination in this context means that the defendant, or defendants, made decisions on the basis of race. A decision is made on the basis of race when the decisionmaker selected a particular course of action at least in part because of, not merely in spite of, race. A defendant who acts with no racial animosity but who makes decisions on the basis of race can be held liable for intentional discrimination. In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination. Liability for intentional discrimination requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus. I caution you that my response to your question should not be interpreted to imply that I believe that the defendants did or did not intentionally discriminate against the plaintiff on the basis of race. That is a question of fact which you must decide.

Doc 334-Pg 1178-1179.

A. The Supplemental "Intent" Instruction Was A Misstatement Of The Law Which Misled The Jury To Fulton [**42] **County's Prejudice.**

Jury instructions are reviewed *de novo* to determine whether, considered as a whole, they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Board of Regents of the University System of Georgia, 208 F.3d 969, 973 (11th Cir. 2000).* While the trial judge is given wide discretion as to the style and wording employed in the instructions, the instructions must accurately reflect the law. Id.

The charge as given by the District Court misstated the law in two critical ways. First, the charge failed to include a substantial and critical part of the Eleventh Circuit definition and substituted erroneous language. The District Court [*31] told the jury that intentional discrimination occurred if a decisionmaker made a decision on the basis of race, and that a decision was made on the basis of race if it was made in part "because of," not merely "in spite of," race. In contrast, the Eleventh Circuit definition required that an intentional act of discrimination was a decision made in part because of, not merely in spite of, its adverse effects upon an identifiable group. This difference was [**43] significant, because many decisions might be made on the basis of race, without being made, even in part, because of adverse effects on an identifiable group. Here, Edwards' race was a factor because he had made a complaint of race discrimination, but the jury needed to understand clearly that the County had to take its actions "because of" their adverse effects on Plaintiff and because of Plaintiff's race which is white.

Second, the supplemental instruction as given was a misstatement of the law because it was not balanced. It informed the jury that intentional discrimination is less than "racial animosity," "ill will, enmity or hostility" or "invidious hostility or animus." It did not, however, as Fulton County requested, inform the jury of what it is: intentional discrimination requires more than a decisionmaker's simple act of making a choice or his awareness of consequences. (Doc 334 - Pg 1174) It therefore improperly emphasized those elements that WGT did not have to prove [*32] in order to prevail on the issue, without mentioning those elements that it did have to satisfy.

B. The Erroneous Instruction Was Particularly Prejudicial Because [**44] **It Responded To A Request By The Jury For Additional Guidance On An Essential Element Of WGT's Case.**

The District Court's jury instruction on intent misstated the law and misled the jury. The error on this instruction was particularly prejudicial to Fulton County because the instruction was given in response to a specific question from the jury during their deliberations. Moreover, the question arose in the context of the defense evidence that Cooper had acted in a good faith effort to remedy race discrimination. Shortly after receiving the instruction, the jury returned with a verdict finding Fulton County and Cooper liable for intentional discrimination, albeit in a very small amount of damages and without a punitive damages award. (Doc 334 - Pg 1179, 1184.)

The Eleventh Circuit recently found reversible error in a district court's failure to properly re-instruct the jury in an age discrimination case after it had asked for additional instruction. *Broaddus v. Florida Power Corp, 145 F.3d 1283, 1287-88 (11th Cir. 1998)* ordered retrial where this Court was "persuaded that the jury may have been misled and [was] left with a substantial doubt as to whether the [**45] jury was properly guided in its deliberations. Furthermore, we find that the [*33] court's supplemental instruction ... misstated the law ... and caused prejudicial harm to [defendant.]" While Broaddus addressed the lower court's failure to inform the jury that it was focusing upon a "non-issue," its rationale is equally applicable where, as here, the lower court fails to supplement its instructions to focus the jury on the most important issue in the case - intent - on which the jury has shown that it needs the court's help.

It is proper to vacate a judgment and order a retrial where a district court has issued an erroneous instruction on an essential element of a discrimination case. Such improper instruction is harmful error and can only be corrected by retrying the affected claim. E.g., *Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606, 614 (5th Cir. 1999)* (vacating verdict and remanding for new trial where instruction in trial of sexual harassment claim misstated the law regarding intentional infliction of emotional distress; instruction ignored that plaintiff must actually suffer severe distress and that defendant must act intentionally [**46] or recklessly, and gave no statement of "the kind of conduct that the jury would have to find in order to conclude that Mitchell intentionally inflicted emotional distress on Skidmore."); *Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency, 77 F.3d 26 (2d Cir. 1996)* (reversing and remanding for new trial where jury instruction in §1983 retaliation action omitted [*34] the "state-of-mind requirement" for governmental liability); *Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997)* (reversing for retrial; lower court abused discretion in civil rights retaliation case by failing to instruct that improper motive must have had a "determinative effect on," rather than a mere "motivating factor in," defendant's decision to fire employee; moreover, separate instruction improperly characterized evidence as direct rather than circumstantial evidence of retaliatory intent).

The District Court's failure to accurately characterize Eleventh Circuit law regarding the essential element of intent was harmful to Fulton County in this case where the jury believed and found that Cooper had acted pursuant to a good faith effort [**47] to remedy race discrimination. This Court can only be left with "substantial and ineradicable doubt" that the jury was not properly guided in its deliberations.

For all these reasons, Fulton County requests that this Court hold that the District Court's supplemental instruction on intent was harmful error, vacate the jury's verdict, and remand this case for a new trial.

III. The District Court Should Have Granted Fulton County's Rule 50 Motion, Particularly Because The Jury Found That The County Compliance Officer Acted In Good Faith.

[*35] WGT's theory of liability against Fulton County was that County liability was based upon the acts of Cooper, its Compliance Officer. n10 It was Cooper's investigation that resulted in the 1995 Mt. Paran being assigned to BEL and in the 1996 equalization of the two purchase orders. Despite Plaintiff's theory, the jury, however, found as a fact in answer to a special interrogatory that Cooper acted "in a good faith effort to respond to a nonfrivolous complaint by another contractor of discriminatory treatment," even though it concluded that he discriminated against WGT. (R29-306-2) Based on the evidence, proper application of [**48] the law to the facts and this jury finding, the District Court erred in refusing to grant Fulton County's Rule 50 motion.

n10 In his closing argument, Plaintiff's lawyer argued that the 1995 and 1996 acts of discrimination would not have happened if Mr. Cooper had not communicated his findings to other departments. (Doc 334-Pg1085-1086)

The Eleventh Circuit has recognized that a conclusion of intentional discrimination is fatally inconsistent with a finding that an official acted in good faith to remedy race discrimination. See *Citizens Concerned About Our Children v.*

School Board of Broward County. Florida, 193 F.3d 1285, 1295 (11th Cir. 1999) (affirming summary judgment for lack of evidence of discriminatory intent where defendant school board was in good faith attempting to desegregate and had rapidly responded to complaints of race discrimination in the desegregation [*36] efforts. "This evidence does not support an inference of discriminatory intent. (Indeed, if anything this evidence [**49] depicts a well-meaning Board tiptoeing through a racial minefield.)"), r'hrg and r'hrg en banc denied, *211 F.3d 596 (11th Cir. 2000).* The County was certainly in the position of the Broward County school board, attempting to navigate the racial minefield created by its obligation to remedy Edwards' credible claim of race discrimination. In such a situation, the County can not logically have been held to harbor discriminatory intent.

At least one other federal court has agreed that the concepts of intentional discrimination and good faith are fatally inconsistent. See, e.g., *Anderson v. Wilson Area School District, 1985 WL 5042,* *2 n.2 (E.D. Pa. 1985) ("We can think of no instance in which a fact-finder could conclude a defendant in an age or sex discrimination case under Title VII or ADEA acted with the necessary discriminatory intent where disparate treatment is alleged but find at the same time that the defendant acted in good faith. This Court believes those concepts to be mutually exclusive.").

Theoretically, of course, it is possible that the County acted through other employees who possessed the "intent" to discriminate. However, that possibility [**50] was not proven at trial. In closing, WGT argued that the 1995 Mt. Paran award to BEL "would not have happened had Mr. Cooper not written his memo." (PEX- [*37] 393; Doc 334-Pg 1086) Similarly, WGT argued that the 1996 equalization of the purchase orders occurred "at the insistence of Michael Cooper." (Doc 334-Pg 1096)

Plaintiff offered no evidence that other County employees had the requisite discriminatory intent. Mowrey, Bockman and Artis played a role in assigning the 1995 Mt. Paran work order to BEL. Mowrey, Plaintiff's witness, testified that his recommendation to use BEL was not intended to discriminate against the Websters. (Doc 329-Pg 534-535) Bockman said he was directed by Artis to award the Mt. Paran job to BEL. (Doc 334-Pg 383-384) Plaintiff did not call Artis to testify nor offer other evidence of his intent.

Similarly, it was Plaintiff's theory that the 1996 purchase order equalization was done at the insistence of Cooper. (Doc 334-Pg 1086) Again, Cooper's good faith proves the County's good faith because WGT offered no evidence of any other employees' intentions. The County offered testimony that Roger Ball made the actual decision to change the 1996 purchase [**51] order, but he did not testify about his intent. (Doc 331-Pg 711-712). Plaintiff did not probe his intent at all on cross-examination. (Doc 332-782-795) Tony Moore confirmed that Ball told him that he had decided to equalize the purchase orders. (Doc 331-Pg 711-712)

[*38] The substantial "evidence" the Plaintiff did rely upon was the MFBE, the ruling on its unconstitutionality, and the Skandalakis, Easton and Bruns testimony about its implementation. n11 As argued earlier, Plaintiff did not attempt to link the MFBE, its unconstitutionality, or the testimony of these witnesses causally or logically to the challenged County actions. n12 Instead, Plaintiff used invective and argument, beginning closing argument with the following:

> I told you that in 1995 and 1996, Fulton County had an illegal policy of preferring black persons for 26 percent of its business. This is the program his honor has told you about and has ruled unconstitutional. This illegal preference program was a consideration in every contract and award that Fulton County made. Michael Cooper was under the direct and constant pressure of the Fulton County Commission to give as much money to black contractors [**52] as possible.

(Doc 334-Pg 1083)

n11 This "evidence" should not have been admitted as argued in Section I, Supra, pp. 18-28.

n12 See Section I, Supra, p. 26.

Plaintiff's argument continued in this vein, referring to the County's "policy" or "illegal policy" eight more times in a twenty page argument. n13 He also stressed the court's instructions three times, n14 arguing, for example, "First you [*39] must take it as a given in this case that Fulton County had an illegal policy of race discrimination. His honor has told you that and will tell you again." (Doc 334-Pg 1092)

n13 See Doc 334-Pg 1083, 1092, 1093.

n14 See Doc 334-Pg 1096-1097, 1083, 1092-1093.

For these reasons, the evidence submitted by WGT at trial was not sufficient to meet its burden on the intent element of its race discrimination claim. The District [**53] Court thus erred in refusing to grant Fulton County's Rule 50 motion. This Court should therefore reverse and remand for entry of judgment in favor of Fulton County. *E.g., Gupta, 2000 WL 633024* (reversing and remanding for entry of judgment in favor of Defendant where plaintiff failed to present sufficient evidence to support the jury's verdict on Title VII retaliation claim.)

IV. WGT Failed To Prove Its Actual Damage In The Form Of Lost Profits.

At trial, WGT failed to establish a requisite element of its intentional discrimination case - that it sustained damage in the form of lost profits. n15 Despite the lack of evidence to support lost profits for either the 1995 or 1996 events, the District Court erroneously refused to grant Fulton County's motion for judgment as a matter of law. (Doc 334-Pg 1194-1197) Fulton County thus requests that this Court vacate the jury's award, and enter judgment in its favor.

n15 WGT conceded that lost profits are the sole measure of damages for this case. (R26-240)

[**54]

[*40] **A. The District Court Erred In Not Applying Georgia Law To Its Determination Whether WGT Introduced Sufficient Evidence From Which The Jury Could Calculate Lost Profits.**

The district court declined to apply Georgia law to determine whether WGT had produced sufficient evidence of lost profits to submit that issue to the jury. If the court had applied Georgia law, it would have been compelled to grant Fulton County's Rule 50 motion on damages.

Compensatory damages for deprivation of a federal right are governed by federal standards as provided in *42 U.S.C. §1988. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).* Section 1988 directs a court to apply the common law of the forum state to determine compensatory damages for a cause of action under §1983. See id.; see also *42 U.S.C. §1988*(a). This is so because §1988 provides that "in all cases where [the laws of the United States] are deficient in the provisions necessary to furnish suitable remedies . . ., the common law, as modified and changed by the constitution and statutes of the [forum] State. [**55] .., so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ...." Id. (emphasis added.)

[*41] In this case, federal law is indeed deficient in providing a remedy based on lost profits, as §1983 is entirely silent on the issue of compensatory damages. Further, a state law formulation of a remedy for lost profits is not inconsistent with the federal laws and Constitution. *Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1262 (10th Cir. 1995)* (applying Colorado law in §1981 action to determine whether lost profits were proved with sufficient

certainty because the issue "involves a determination of contract loss, and the state rule will serve the federal policy.") Therefore, Georgia common law regarding the measure of lost profits "shall . . . govern" in this trial and disposition. Id.; *Emerald Outdoor Advertising v. City of Portland, 1999 WL 1441942*, *11 (D. Or. Nov. 1, 1999) (same, applying Oregon law to §1983 action); cf. *Heidorf v. Town of Northumberland, 985 F. Supp. 250, 261 n.5 (N.D.N.Y. 1997)* [**56] (holding that federal courts may utilize state law rules to assist in computing damages for § 1983 civil rights violations, and looking to state law for proper measure of damages for permanent injury to real property). The district court's refusal to apply Georgia law was thus erroneous and should be reversed.

B. WGT Failed To Demonstrate Evidence Of Lost Profits With Requisite Specificity.

At trial, WGT asserted that it was entitled to $ 1250 as lost profits of 50% on the $ 2500 bid for the Mt. Paran Road project. (Doc 334-Pg 1097) WGT also [*42] asserted that it was entitled to recover $ 10,250 in lost profits stemming from the 1996 purchase order equalization, representing 50% of the $ 20,500 difference between the $ 66,000 original 1996 purchase order and the $ 45,500 equalized purchase order. (Doc 334-Pg 1097) WGT, however, failed to introduce any evidence beyond pure speculation and bold assertion to support its request for lost profits in any amount, let alone a 50% profit margin. Nevertheless, the jury awarded WGT $ 1250 for the 1995 bid and $ 7500 for the 1996 purchase order equalization, and the trial court declined to enter a judgment as a matter of [**57] law for Fulton County on the issue.

Under Georgia law, lost profits must "be shown with reasonable certainty. The profits recoverable in such cases are limited to probable, as distinguished from possible benefits ...." *Ga. Grain Growers Assn. v. Craven, 95 Ga. App. 741, 747, 98 S.E.2d 633 (1957)* (punctuation omitted). "'[T]o recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery.'" *Grossberg v. Judson Gilmore Assoc., Inc., 196 Ga. App. 107, 395 S.E.2d 592 (1990)* (quoting *Kitchens v. Lowe, 139 Ga. App. 52, 531, 228 S.E.2d 923 (1976)).*

[*43] Although WGT put forth evidence that the gross amount of the Mt. Paran bid was $ 2500, it put on absolutely no evidence of its anticipated expenses in connection with either the 1995 or 1996 events. Daniel and Peggy Webster were the only witnesses testifying as to lost profits. Daniel Webster merely asserted that WGT's desired (not historical) profit margin is 50%, yet failed to give testimony or show documentation that supported any calculation [**58] of lost profits. (Doc 328-Pg 117-118) Webster did not offer any proof of the expenses of the job, nor of his business expenses in general. This testimony is patently insufficient to support a lost profits award under Georgia law. In fact, the Georgia Court of Appeals has held that a party may not rely upon "bold assertions" made by its witnesses as to the amount of lost profits where those statements are generalized and "unsubstantiated by any precise data." *Tri-State Sys., Inc. v. Village Outlet Stores, Inc., 135 Ga. App. 81, 84, 217 S.E.2d 399, 402-03 (1975).* Mr. Webster's "bold assertion" that WGT's profits would be half of its bid amount "form[s] no better basis of recovery than the speculations of the jury themselves." Id. The jury clearly did speculate, because it awarded a 50% profit margin for the Mt. Paran job but a 36.6% profit margin on the 1996 claim even though the testimony had been the same for both claims.

[*44] Peggy Webster testified as to the company's overall income for 1995 and 1996 but failed to introduce any evidence, documentary or testimonial, regarding the company's expenses or net profits for those years. In fact, she stated that [**59] she could not even calculate the company's net profits because the profit on each separate project was different. ("Q. So you have no basis for knowing what the profit would be on that, whatever figure it is you may be claiming? A. Well, you know, that was for tree services, and every tree is different. I wouldn't know.") (Doc 330-Pg 568-569)

Since WGT failed to put forth evidence of net profits or data from which net profits could be calculated and has provided no comparative indication of the expenses it incurred when performing services for the defendant in prior years, lost profits are too remote and speculative to be recovered. *Grossberg, 196 Ga. App. 107;* see also *Moody v. Harris, 170 Ga. App. 254, 316 S.E.2d 781 (1984)* (insufficient evidence from which to calculate lost profits where plaintiff's testified only as to the dollar amount of their purported losses but failed to give any evidence from which the

jury itself could calculate the measure of lost profits). WGT introduced no proof of revenues, no evidence of expenses, and no evidence of its track record of profits. Because WGT failed to introduce sufficient evidence for the jury to "calculate [**60] the amount [of Plaintiff's damages] without basing their [*45] finding on guesswork or speculation," *Gipson v. Phillips, 232 Ga. App. 235, 236, 501 S.E.2d 570 (1998),* the District Court erred in declining to grant judgment as a matter of law to Fulton County on the issue of compensatory damages.

C. WGT Could Not Have Sustained Any Lost Profits As A Result Of The Decision To Equalize The 1996 Purchase Orders Because The County Awarded Only A Total of $ 21,775 To WGTAnd BEL In 1996.

The District Court also erred as a matter of law in refusing to direct a verdict for Fulton County as to the 1996 purchase order equalization, because WGT could not have earned profits in any amount on the $ 20,500 difference between its original 1996 purchase order of $ 66,000 and the reissued purchase order of $ 45,500. The entire dollar amount awarded by the County in 1996 pursuant to both WGT's and BEL's purchase orders was only $ 21,775. (DEX-357) Even if WGT had received every single dollar of tree removal work under the 1996 renewal purchase order, WGT would not have reached the amount of the lower $ 45,500 purchase order. In other words, there was no harm [**61] resulting from the decrease in the purchase order, because WGT could not, under any set of circumstances, have received an amount between $ 45,500 and $ 66,000.

The only possible way for WGT to create damage is to speculate that it would have received more than $ 45,500 in actual work orders if only its purchase order had remained at $ 66,000. Since it, in fact, received only $ 3,425, this [*46] speculation does not even have the force of logic or common sense behind it. Moreover, WGT provided the Court and the jury no reason to believe that it would have received more work assignments if the purchase order had remained at $ 66,000. n16 The purchase order equalization thus did not cause damage to WGT under any set of circumstances.

n16 WGT never asserted that it was wrongfully denied any work orders in 1996.

WGT opposed Fulton County's Rule 50 motion by arguing that witnesses Bockman and Mowrey testified that there was enough available work to fulfill WGT's original 1996 $ 66,000 purchase order. Bockman, [**62] however, actually testified that the downward adjustment made no practical difference at that point because the County did not have sufficient work to reach over $ 45,500. (Doc 330-Pg 463-465) Bockman only testified that there might have been enough work for both contractors if another project known as "Pickering Lane" had begun in 1996. He was not aware whether the Pickering project had in fact begun that year, and deferred to Mowrey on that point. (Doc 330-Pg 465) Mowrey confirmed that the Public Works department was "struggling" to find work for WGT and BEL in 1996. (Doc 330-Pg 529-530) He further testified, contrary to WGT's assertions, that although the Pickering Lane project did become available in 1996, that job [*47] was not awarded to either BEL or WGT but rather was bid out to an unrelated contractor, whose race was not mentioned at trial. Significantly, Mowrey also testified that this decision was entirely unrelated to the race or gender of either WGT's or BEL's owners. (Id.)

Because WGT's claims of lost profits in 1996 were entirely speculative and dependent upon a project that was awarded to a bidder other than BEL, it failed to prove an essential element [**63] of its §1983 claim against Fulton County. n17 The County therefore respectfully requests this Court to reverse the District Court's denial of judgment as a matter of law, and direct a verdict in its favor.

n17 The court below recognized the problems with the 1996 claim, ("It's a much closer question in my mind as far as the 1996 purchase order."), but still refused to grant judgment for Defendants on this claim. (Doc 334-Pg 1196)

D. The District Court Erred By Improperly Instructing The Jury On The Legal Standards For Determining Whether Lost Profits Were Proven With Sufficient Specificity.

The District Court also erred by improperly instructing the jury on the standards for determining whether lost profits have been adequately proven. Rather than instructing the jury as to the Georgia law standards applicable to the case (as set forth in the prior section), the District Court declined to look to state law. Instead, the District Court read the following pattern jury instructions regarding compensatory [**64] damages:

> [*48] Damages must not be based on speculation or guesswork because it is only actual damages, what the law calls compensatory damages, that are recoverable. In this case, the Plaintiff's compensatory damages are limited to damages suffered by the Plaintiff because of lost profits, that is to say, profits which the plaintiff would have made but for the unlawful conduct of the Defendants.
>
> If you should find from a preponderance of the evidence in the case that damage to Plaintiff's business or property such a- excuse me, such as a loss in the profits was proximately caused by the defendants' illegal conduct complained of, the circumstances that the precise amount of Plaintiff's damages may be difficult to ascertain should not affect Plaintiff's recovery, particularly if the Defendants' wrongdoings have caused the difficulty in determining the precise amount.
>
> On the other hand, the Plaintiff is not to be awarded purely speculative damages. An allowance for lost profits may be awarded only when there is some reasonable basis in the evidence in the case for determining that Plaintiff has, in fact, suffered a loss of profits, even though the amount of such loss is difficult [**65] of ascertainment.
>
> In arriving at the amount of any lost profits sustained by the Plaintiff, you are entitled to consider any past earnings of the Plaintiff in the business in question as well as any other evidence in the case bearing upon the issue.

Doc 334-Pg 1153-1154.

This instruction, which was a combination of the Eleventh Circuit pattern jury instruction Damages 1.2 and Devitt & Blackmar § 86.04, failed to state the standard for determining whether the evidence put forth by WGT as to lost profits was sufficient under Georgia law. Had the District Court applied state law as [*49] requested by Fulton County, the jury would have been aware that Mr. Webster's "bold assertions" that he expected to make a 50% profit were inadequate proof of lost profits for both 1995 and 1996. The jury would have recognized that WGT's failure to produce evidence of its expenses or its history of profits mandated a finding in favor of both Defendants. Moreover, the phrase "even though the amount of such loss is difficult of ascertainment" may have confused the jury as to the definition of "speculative." Additionally, these damages were not difficult of ascertainment and there was no [**66] evidence that "Defendant's wrongdoing have caused the difficulty in determining the precise amount." These were the District Court's sole instructions on damages, so that the charge viewed as a whole does not cure the error. The District Court's failure to properly instruct the jury resulted in prejudicial harm to Fulton County, and is reversible error. *Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283, 1295 (11th Cir. 1998).*

V. The District Court Correctly Granted Summary Judgment To Fulton County On WGT's Retaliation Claim.

WGT appeals from the District Court's order granting summary judgment to Fulton County on WGT's retaliation claim. The District Court reasoned,

> "This Court has found no authority to support a specific retaliation claim under Section 1981 or the Equal Protection Clause for the local government's failure to award contracts to independent contractor bidders."

[*50] (R19-136-36)

In so ruling, the District Court cited the Supreme Court's holding in *Board of County Com'rs v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L.Ed.2d 843 (1996).* Umbehr held that independent contractors who have a preexisting, [**67] ongoing contractual relationship with a governmental body are entitled to First Amendment protection and may sue for retaliation under § 1983 if the government entity terminates that contractual relationship. The Court cautioned, however, that its decision was "limited." "Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Id. at 685, 116 S. Ct. at 2352.* The Court thus left open the question whether such "disappointed bidders" may bring a retaliation action based upon a local government's failure to award a contract. WGT was a disappointed bidder and the District Court correctly refused to extend Umbehr's holding to cover WGT's retaliation claim.

One circuit has similarly refused to extend Umbehr, by holding that such disappointed bidders do not have a "sufficiently ongoing" relationship to support a claim for retaliatory conduct. See *McClintock v. Eichelberger, 169 F.3d 812* (3d Cir.), cert. denied, *120 S. Ct. 182, 145 L. Ed. 2d 154 (1999).* [**68] McClintock [*51] addressed the viability of a retaliation claim brought by independent contractors who had had several distinct prior contractual relationships with a regional planning and development commission, including a three-year vendor-vendee relationship immediately preceding the events at issue in the case. The executive board of the commission refused to award a new contract to the vendors because they had backed disfavored political candidates. The Third Circuit distinguished Umbehr as involving the termination of "an active ongoing independent contractor relationship," not "bidders or applicants for new government contracts." *Id. at 816.* The McClintock appellants, by contrast, were bidders or applicants for new government contacts, despite their history of prior contractual relationships with the commission. Id. The court therefore refused to allow the retaliation claim to go forward.

In the case at bar, the facts alleged by WGT on summary judgment establish that WGT was, at best, a disappointed bidder or applicant for a new government contract. WGT alleged at the summary judgment stage that after the filing of this suit in September, [**69] 1996: 1) WGT did not receive post card notifications of upcoming bid opportunities; 2) Mr. Webster never received a requested 1997 bid [*52] package; and 3) a WGT 1998 bid proposal was not accepted. n12 (R16-110-18-19). WGT's retaliation allegations all involved new bids, not a pre-existing contractual relationship. Moreover, WGT's 1996 purchase order could not have been rolled over or renewed for 1997. n13 Tree removal services were put out for a new bid for 1997, (Doc 329-Pg. 178), and WGT was required to submit a new bid in 1997 if it desired to be an approved vendor of tree removal services for the Public Works Department that year. It had no expectation that its bid would be accepted. It did not have an ongoing relationship with Fulton County with regard to these services. It did not have an automatic renewal of its previous purchase order.

n12 Although WGT asserted somewhat different facts in its proffer at the jury trial, those facts would not change the outcome of the District Court's ruling. For example, the proffer showed that Mr. Webster did indeed receive the 1997 bid package. Further, WGT admits that the reason for the denial of the 1998 bid was that it lacked the proper license to spray pesticide, which was essential to the project. (R16-110-19) Fulton County controverts WGT's other allegations on the merits as well, but accepts them as true only for purposes of WGT's summary judgment motion.

[**70]

n13 WGT received a purchase order from the County in 1995. Pursuant to the 1995 bid document to which WGT agreed, the Fulton County Board of Commissioners had an option to "roll over" purchase orders for one year only. (PEX-205 at p. 22)

Appellant's reliance upon this Court's holding in *Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405 (11th Cir. 1998)* is utterly misplaced. n14 Andrews [*53] holds that, in the wake of Congress' 1991 Amendments to § 1981, retaliation claims brought pursuant to that statute are newly cognizable. This principle is not controverted and was not the point at issue in the District Court's dismissal of the claim. n15 The retaliation claim discussed in Andrews relates to the termination of an employee due to her filing of an EEOC race discrimination complaint, not the failure to award a bid to an independent contractor. Andrews is simply not on point.

> n14 Moreover, the trial court was aware of Andrews, as WGT cited it in its pretrial order and argued it at the November 30, 1999 status conference. The district court nevertheless refused to reinstate the retaliation claim. (R51-232-5)

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> n15 Appellant's statement that the district court's dismissal of the retaliation claim was "entirely predicated upon the lack of a cause of action for retaliation under *42 U.S.C. §1981*" is patently inaccurate. The district court's citation of and parenthetical describing Umbehr makes clear that the dismissal of Appellant's retaliation claim was predicated upon the distinction between independent contractors such as WGT which are "disappointed bidders," and independent contractors whose ongoing, pre-existing commercial relationships have been terminated.

Because WGT was, at most, a disappointed bidder and did not enjoy an ongoing contractual relationship with Fulton County, the trial court's ruling dismissing WGT's retaliation claim should be affirmed.

VI. The District Court Correctly Granted Summary Judgment To Fulton County On The Standing To Sue Of Kelly Goff And Daniel And Peggy Webster.

In its Order dated February 12, 1999, the district court ruled that Kelly Goff lacked standing to sue, stating:

> [*54] Goff has not shown that he individually [**72] has ever bid on a Fulton County contract, or that he is likely to bid on such a contract in the future. It is well established that shareholders lack standing to bring a Section 1983 or 1981 action claiming injury to the corporation in which they own shares. Goff is not even a current shareholder in the Minority Distributing Corporation. He has no standing to assert any claim in this action.

(R40-136-22) (internal citations omitted). The court also ruled in a hearing on June 28, 1999 that Daniel and Peggy Webster lacked standing individually at the jury trial stage of litigation, on the same legal basis. (R49-10). The district court's rulings on shareholder standing were correct and should be affirmed.

A. Kelly Goff's Standing.

Goff's assertion that he should have individual standing is particularly ironic, given his history of manipulating Minority Distributing Company ("MDC") in whatever manner suited his purposes. According to Goff, he was the person who originally set up MDC for the purpose of providing Willie Hill with retirement income. (Goff deposition at pp. 20-21) Hill, an African-American male, had been employed by Goff's company, Kelgo, as a delivery [**73] person. (Id. at 17-18.) MDC was originally owned equally by Goff, Hill, and Marjorie Simpson, a white female who performed secretarial services for the company. (Id. at 29.) However, in order to be certified as an MBE or FBE, a business was required to be at least 51% owned by either a minority or female person. Ms. Simpson and Goff [*55] consequently

transferred 51% ownership of MDC to Hill, retaining 25% and 24% ownership, respectively. (Id. at 31.) Simpson later sold her shares to Goff, leaving him with 49% ownership. (Id. at 120.) At all times, MDC was supported by Goff's company Kelgo. For example, MDC rented space from Kelgo for the token amount of $ 100 a month, and used Kelgo's credit line until such time as it received its own banking line. (Id. at 20-23.) MDC also bought tools and equipment from Kelgo. (Id. at 20-21.) Despite his 51% ownership of MDC, Hill was not even the President of the company until Michael Cooper inquired as to why he was not. (Id. at 37.)

In 1993 or 1994, in fact, a hearing was held about MDC's certification as an MFBE, and the hearing officer determined that MDC was not controlled by an African-American. (Id. at [**74] 74-76.) MDC was no more than a sham or front for Goff. (Id. at 74-78.)

B. Daniel And Peggy Webster's Standing.

Daniel and Peggy Webster were or are shareholders in WGT. Mr. Webster has owned WGT from 1996 to the present. (Doc 328 - Pg 143, 146). Ms. Webster owned the company from 1990 or 1991 (when she owned the predecessor company) until late 1996, when she told her husband that she "wanted him to assume more responsibility for the business." (Doc 330 - Pg 561-562) Daniel [*56] Webster elected to assume corporate status for WGT because of the tax advantages of this business form. (Doc 328-Pg 143-148 ("If there was a tax advantage from my accountant to express a share to my wife or a share to me or a share to my dog, I would do what my accountant advised me to do."))

C. Shareholders Do Not Have Standing To Sue For Actions That Are Derivative Of Their Corporation's Cause Of Action.

Appellants argue that overarching principles of standing and equal protection mandate that Mr. Goff and the Websters be granted individual standing in this action, but they essentially ignore the basis for the district court's decision, i.e., the well-established principle [**75] that shareholders do not have standing to sue for actions which are merely derivative of their corporation's cause of action.

In support of this principle, the District Court cited *Bellows v. Amoco Oil Co., 118 F.3d 268, 276-77 (5th Cir. 1997),* cert. denied, *522 U.S. 1068, 118 S.Ct. 739 (1998),* which is directly on point. The Bellows plaintiff was an African-American co-owner of PICI, a contracting company. Following what he perceived to be racially discriminatory treatment by the defendants, which allegedly had resulted in loss of work for PICI, Bellow filed suit under §1981 and §1985(3), on behalf of himself and PICI. The Fifth Circuit rejected Bellow's individual § 1981 claim, noting that Bellow's claim was "merely derivative" of the company claim, so that he had "no individual cause of action." *Bellows, 118 F.3d at 276-77;* see [*57] also *Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990).* This principle was the law in the Fifth Circuit before the Eleventh Circuit was created, e.g., *Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981); Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968)* [**76] n16 and thus is binding on this Court.

> n16 Moreover, numerous federal courts are in agreement with the Fifth Circuit. See, e.g., *Flynn v. Merrick, 881 F.2d 446, 450 (7th Cir. 1989); Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 991 F.Supp. 573 (N.D. Tex. 1998); T&S Service Assoc., Inc., 505 F. Supp. 938, 943* (D. R.I.), vacated on other grounds, *666 F.2d 722 (1st Cir. 1981);* see also, e.g., *Hudson v. Radnor Valley Country Club, 1996 WL 172054* (E.D. Pa. April 11, 1996) ("individuals who are not parties to the existing or prospective agreement allegedly impeded lack standing to sue" under §1981, and collecting cases.)

Bellows also disposes of Appellants' argument that Mr. Goff and the Websters have individual standing because they have suffered non-economic damages distinct from that suffered by the corporation - namely, emotional distress:

> Although Bellow claimed that he sustained emotional damages that were [**77] different from PICI's

> economic damages, his emotional damages result from the same violation that gave rise to PICI's economic damages - Amoco's alleged violation of PICI's right to contract. Bellow does not have an individual claim for an alleged violation by Amoco of PICI's section 1981 rights, whether or not Bellow suffered emotional damages as a result thereof.

Bellows, 118 F.3d at 277 n.27.

[*58] The Bellows holding thus is directly on point in this. The alleged violations of the right to contract free from race discrimination, which the Websters and Mr. Goff assert as the basis for their individual §1981 and §1983 claims, are identical to the alleged violations forming the basis for the claims of their respective corporations, WGT and MDC. n17 Whether the Websters and Goff have an injury due to emotional distress is, therefore, of no consequence.

> n17 MDC, of course, voluntarily withdrew from this litigation. This fact does not, however, give Mr. Goff any additional basis for standing. Rather, if Mr. Goff believes that his former corporation acted improperly by refusing to maintain suit against Fulton County, his proper remedy is a derivative suit against the directors of the corporation, not against the County.

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Appellants note that the Seventh Circuit has recognized a theoretical exception to the general shareholder-standing doctrine in cases where a shareholder suffers injuries that are "separate and distinct from those suffered by other shareholders." *Flynn v. Merrick, 881 F.2d 446, 449 (7th Cir. 1989).* The Eleventh Circuit is, of course, not bound by the holdings of the Seventh Circuit, n18 [*59] and is bound by the holding of the 1968 Fifth Circuit in *Schaffer, 397 F.2d at 896.* Here, Fulton County is not alleged to have breached a duty owed directly to Mr. Goff or to the Websters personally, only to their corporations. The Schaffer exception thus does not apply. The remaining cases cited by Appellants are all inapplicable to the question of law at issue in this case. Fulton County has no quarrel with the basic principles of standing asserted in cases such as *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976),* nor does it take issue with the principle that non-economic damages alone may in certain situations confer standing. Those cases, however, do not address the particularized issue [**79] of shareholder standing to bring a suit which properly belongs to his or her corporation, and they are thus completely inapposite. Likewise, *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977),* upon which Appellants rely heavily, is not on point because it addresses the standing of a third-party tenant who was not a shareholder of the plaintiff corporation.

> n18 Moreover, Flynn did not apply the exception of which it spoke, and Flynn, which was not a discrimination case, addressed a § 1983 due process claim and unlike Bellows, was not faced with the question whether non-economic damages such as emotional distress may constitute the requisite "separate and distinct" harm necessary to confer standing. Other courts have held that emotional distress does not suffice to grant separate individual standing in such a situation. See *Bellows, 118 F.3d at 277 n.27; Perez v. Abbott Labs., 1995 WL 86716* (N.D. Ill. Feb, 27, 1995); cf. *California Micro Devices, Corp. v. Rizvi, 1996 WL 411601,* *2 (N.D. Cal. July 16, 1996) (emotional damages for intentional interference with contractual relations not sufficient to confer shareholder standing).

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For these reasons, Fulton County requests that this Court affirm the District Court's rulings denying Kelly Goff and Peggy and Daniel Webster individual standing in this action.

CONCLUSION

[*60] For all these reasons, Fulton County respectfully requests that this Court reverse and remand for entry of judgment in favor of Fulton County on WGT's intentional race discrimination claims. In the alternative, however, the County requests that the Court reverse and remand for a new trial on WGT's claims against the County.

This 3rd day of July, 2000.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)B. This brief contains 13654 words.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLEE/CROSS-APPELLANT'S BRIEF** has been served upon all counsel of record by depositing a copy of same in the United States Mail, addressed as follows:

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