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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,502

NORM BURG CONSTRUCTION CORPORATION,

Petitioner,

-vs-

JUPITER INLET CORPORATION,
et al.,

Respondents.

FILED

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BRIEF OF PETITIONER,
NORM BURG CONSTRUCTION CORPORATION

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF CASE AND FACTS	
Introduction	1
Case	2
POINT INVOLVED ON APPEAL	7
SUMMARY OF ARGUMENT	7
ARGUMENT	9
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

	<u>Page</u>
<u>Ballard v. Hopkins,</u> 142 So. 2d 738 (Fla. 2d DCA 1962)	10
<u>Hotel Roosevelt Co. v. City of Jacksonville,</u> 192 So. 2d 334 (Fla. 1st DCA 1966)	13
<u>Kenilworth Ins. Co. v. Drake,</u> 396 So. 2d 836 (Fla. 2d DCA 1981)	12
<u>Menfi v. Exxon Co.,</u> 433 So. 2d 1327 (Fla. 3d DCA 1983)	10, 12
<u>Webb Gen. Contracting, Inc. v. PDM Hydrostorage, Inc.,</u> 397 So. 2d 1058 (Fla. 3d DCA 1981)	11

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BRIEF OF PETITIONER,
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STATEMENT OF CASE AND FACTS

Introduction

This case is before the court pursuant to a question certified by the District Court of Appeal, Fourth District, relating to whether one in the position of a third party plaintiff is required to file a notice of appeal to seek review of a separate final judgment entered in favor of one in the position of a third party defendant as a jurisdictional prerequisite for review of such judgment, or whether a previously filed notice of appeal involving totally different parties is sufficient to bring before the appellate court all subsequent final judgments. The petitioner, NORM BURG CONSTRUCTION CORPORATION (hereinafter referred to as "BURG"), was initially involved in this litigation as a direct defendant, and became a cross-defendant thereafter. BURG ultimately proceeded in the litigation in the nature of a third party defendant after being eliminated as a direct defendant pursuant to a summary final judgment in connection with all direct claims of the plaintiff. BURG proceeded in the District Court of Appeal, Fourth District, as

an appellee, filing a motion to dismiss the appellate proceedings. The respondents, JUPITER INLET CORP. and JUPITER INLET LIMITED PARTNERSHIP #1 (hereinafter referred to as "JUPITER"), were defendants in the trial court, cross-plaintiffs until BURG was eliminated as a direct defendant, and then proceeded in the nature of a third party plaintiff at the trial level. JUPITER was unsuccessful in the trial court and became the appellant in the District Court of Appeal, Fourth District, upon filing a notice of appeal seeking review of only a final judgment entered in favor of the original plaintiff and against JUPITER. Marguarita Brocard, as personal representative of the estate of George Brocard, was the plaintiff in the trial court and the appellee in the District Court of Appeal, Fourth District.

The following symbols will be used in this brief:

"R" -- Record-on-Appeal

"T" -- Transcript of trial proceedings

"A" -- Appendix filed simultaneously herewith

All emphasis is supplied by counsel unless otherwise indicated.

Case

Brocard initiated this litigation seeking wrongful death damages in connection with the death of George Brocard against JUPITER and BURG. (R. 1490-1516). It was asserted that Brocard, an employee of BURG, had fallen at a construction site.

BURG filed responsive pleadings and asserted worker's compensation immunity as an affirmative defense. (R. 1519-1520). A summary final judgment was entered in favor of BURG and against Brocard pursuant to the worker's compensation exclusive remedy doctrine, which eliminated BURG from the litigation as a defendant.

(R. 1927-1928, 1944-1946).

JUPITER responded to Brocard's action and also filed a claim for common-law and contractual indemnification against BURG. (R. 1527-1558, 1575-1579, 1682). With the summary final judgment having been entered in favor of BURG and against the original plaintiff, Brocard, BURG remained in the litigation in the nature of a third party defendant.

The case proceeded to jury trial with a jury determining multiple issues pursuant to a special interrogatory verdict form. The jury rendered the following verdict:

1. Was there negligence on the part of JUPITER INLET CORPORATION for failure to supervise construction which was a legal cause of loss to the Estate and survivors of GEORGE BROCARD?

Yes X No

2. Was there negligence on the part of JUPITER INLET CORPORATION for failure to provide a safe place to work?

Yes X No

3. Did JUPITER INLET CORPORATION delegate its responsibility to supervise the construction and to provide a reasonably safe place to work to NORM BURG CONSTRUCTION CORPORATION?

Yes X No

4. Is JUPITER INLET CORPORATION's [SIC] responsibility to MARGUARITA BROCARD based solely on the negligence of NORM BURG CONSTRUCTION CORPORATION in failing to carry out its delegated responsibility?

Yes No X (R. 2794-2795)

The foregoing special interrogatory verdict form was produced after the parties had labored with multiple verdict forms and the trial court had requested the parties to see if they could resolve an appropriate verdict form under the evidence and issues in the

case. (T. 1354). JUPITER announced this compromised verdict form. (T. 1356). JUPITER voiced no objections to the form it had announced and it is clear that the verdict form was intended to be responsive to multiple issues.

The record is abundantly clear that the jury verdict form was responsive to the third party indemnification allegations of JUPITER against BURG as to common-law indemnification, however, the parties had previously stipulated that the issues pertaining to the claims of JUPITER against BURG relating to contractual indemnification under the requirements of Florida Statutes Section 725.06 would be determined by the court. (T. 1358). It was specifically acknowledged by all parties that a separate and independent judgment would be entered after further and additional hearings in connection with the claims of JUPITER against BURG for contractual and common-law indemnification. (T. 1487-1488). It was clearly intended that separate final judgments would be entered in the litigation, with one judgment being entered in connection with the direct action of Brocard against JUPITER, and a separate final judgment after further proceedings in connection with the claims of JUPITER against BURG.

On February 15, 1985, a final judgment was entered in favor of Brocard and against JUPITER. (R. 2796). Such document did not in any way touch upon or affect the rights of BURG, and did not adjudicate or determine the claims of JUPITER against BURG.

On April 9, 1985, JUPITER filed a notice of appeal seeking review of the final judgment dated February 15, 1985, which was a final judgment in favor of Brocard and against JUPITER. (R. 2819). The District Court of Appeal, Fourth District, specifically re-

quired JUPITER to file with the appellate court a copy of the order being appealed and JUPITER complied with the court's order and filed a copy of the judgment, which was only the judgment dated February 15, 1985, in favor of Brocard and against JUPITER. This final judgment did not in any way affect or touch the rights of BURG. (A. 1).

Further hearings and proceedings were had in connection with the dispute between JUPITER and BURG and over a month after the first notice of appeal had been filed the only final judgment which affects the rights of BURG was entered on May 17, 1985. The entry of this separate and independent judgment in connection with the claims of JUPITER against BURG was clearly contemplated by the parties (T. 1487-1488), and no notice of appeal was ever filed in connection with the separate and independent final judgment which was entered in favor of BURG and against JUPITER.

When JUPITER filed its appellate brief in connection with seeking review of the judgment entered in favor of BROCARD and against JUPITER, JUPITER slipped in an argument under a "sufficiency of the evidence" heading suggesting to the court that the May 17, 1985, judgment in favor of BURG and against JUPITER should also be reversed in addition to the judgment under review. BURG filed its motion to dismiss the appeal and demonstrated to the court that the only final judgment to which BURG was a party was dated May 17, 1985, and no notice of appeal was ever filed in connection with such separate and independent final judgment. BURG asserted that the District Court of Appeal, Fourth District, had no jurisdiction to review or adjust the rights of the parties under the final judgment dated May 17, 1985, which was never appealed. (A. 2-4). In an

abundance of caution, BURG responded to the arguments of JUPITER and filed an appellate brief, and included therein an appellate point challenging jurisdiction.

On January 6, 1986, the District Court of Appeal, Fourth District, entered its order granting the motion to dismiss filed by BURG, and dismissed the appeal as to BURG only, with the appeal to proceed as to the party affected by the judgment which was properly before the court for review. (A. 5).

JUPITER filed a petition for rehearing and the District Court of Appeal, Fourth District, rendered an opinion on rehearing which certified a question to this court. (A. 6-9). The District Court of Appeal, Fourth District, clearly outlined that the only final judgment entered in this litigation involving BURG was dated May 17, 1985, and no notice of appeal was ever filed in connection with such final judgment. The District Court of Appeal, Fourth District, identified the issue as relating to whether an appeal from one final judgment entered against a different party was sufficient to vest jurisdiction for review of a separate final judgment entered at a subsequent time if certain issues had been considered and determined in a common jury verdict. Thus, the District Court of Appeal, Fourth District, formulated the question as:

DOES A NOTICE OF APPEAL FILED AFTER JURY VERDICT BUT BEFORE AN APPROPRIATE FINAL JUDGMENT REMAIN IN LIMBO AS TO ANY ASPECT OF THE JURY VERDICT WHICH IS NOT REFLECTED IN SUCH FINAL JUDGMENT FILED THEREAFTER, BUT IS EVENTUALLY REFLECTED IN A SUBSEQUENTLY RENDERED FINAL JUDGMENT? (A. 9).

BURG submits that the issue is improperly phrased by making reference to jury verdicts because jury verdicts are not appealable items, and appeals must relate to final judgments. Additionally,

the question does not accommodate the fact that there are separate and distinct judgments involving separate and distinct parties involved in this case. The rights of the separate and distinct parties were not partially or totally adjudicated or determined in a final judgment relating to any other party. Further, the question as phrased does not accommodate the fact that there are separate and independent claims involved in this litigation that are not totally dependent upon one another. Thus, BURG would respectfully suggest that the issue is:

POINT INVOLVED ON APPEAL

WHETHER THE FILING OF A NOTICE OF APPEAL DIRECTED TO A FINAL JUDGMENT WHICH HAS ADJUDICATED THE RIGHTS OF ONLY ONE PARTY IN AN ACTION VESTS AN APPELLATE COURT WITH JURISDICTION TO REVIEW A SUBSEQUENT FINAL JUDGMENT WHICH ADJUDICATES SEPARATE, INDEPENDENT AND DISTINCT CLAIMS AS TO A SEPARATE, INDEPENDENT AND DISTINCT PARTY WHO WAS NOT A PARTY TO OR AFFECTED BY THE EARLIER FINAL JUDGMENT IN THE ABSENCE OF A TIMELY NOTICE OF APPEAL DIRECTED TO SUCH SEPARATE AND INDEPENDENT JUDGMENT?

SUMMARY OF ARGUMENT

The certified issue before this court requests determination of whether an appeal filed in connection with one final judgment bootstraps appellate jurisdiction to review a subsequent separate and independent final judgment entered on separate and independent claims involving separate and independent and different parties. The appellate court simply has no jurisdiction to review the separate and independent final judgment entered in favor of BURG in this case because no appeal was ever filed. An appeal directed to one final judgment does not vest an appellate court with some type of continuing appellate jurisdiction broad enough to review a separate and independent final judgment, entered on separate and

independent claims involving separate, independent and different parties, notwithstanding the fact that they have been involved in the same case name.

A separate and independent final judgment which adjudicates a separate and independent claim in the nature of a cross-claim or third party claim stands on its own merit and is a distinct final judgment for which a notice of appeal must be filed to vest an appellate court with jurisdiction to affect the rights of parties under such independent judgment.

A mere jury verdict will not support an appeal, and only a final judgment which represents a judicial act will support a final appeal. A party may not simply file a notice of appeal specifically directed to one final judgment, and then assert that such appeal is broad enough to draw separate and independent final judgments into the appellate process merely because a jury has returned a verdict which touches upon some of the elements involved in the litigation.

This case does not involve some superficial problem, is not based upon some clerical or typographical error, but addresses the heart and foundation of appellate jurisdiction in this state. While the absolute jurisdictional appellate time periods and documents may be of a somewhat technical nature, the uniformity in connection with such timetables and documents is essential to maintain the integrity of the appellate process and the finality of judgments. If the position asserted by JUPITER in the court below, and apparently adopted by the district court of appeal below, is accepted by this court, then the filing of one notice of appeal directed to a specific final judgment would be sufficient to vest

appellate jurisdiction as to any and all multiple and subsequent final judgments rendered in connection with any and all and multiple claims, issues and parties, if a jury verdict in any way touched upon such matters. It is submitted that one would never know when a judgment became final until such time as appellate briefs were filed to determine which judgments were under review. It is submitted that such is not and should not be the law in this state.

ARGUMENT

THE FILING OF A NOTICE OF APPEAL DIRECTED TO A FINAL JUDGMENT WHICH HAS ADJUDICATED THE RIGHTS OF ONLY ONE PARTY IN AN ACTION DOES NOT VEST AN APPELLATE COURT WITH JURISDICTION TO REVIEW A SUBSEQUENT FINAL JUDGMENT WHICH ADJUDICATES SEPARATE, INDEPENDENT AND DISTINCT CLAIMS AS TO A SEPARATE, INDEPENDENT AND DISTINCT PARTY WHO WAS NOT A PARTY TO OR AFFECTED BY THE EARLIER FINAL JUDGMENT IN THE ABSENCE OF A TIMELY NOTICE OF APPEAL DIRECTED TO SUCH SEPARATE AND INDEPENDENT JUDGMENT.

The foundation of the concept of the finality of judgments and the initiation of proper appellate review is the timely filing of a jurisdictionally required notice of appeal directed to a particular final judgment. The absence of a timely appeal renders the final judgment immune from appellate attack. This is one requirement that has not been subject to time extensions for good cause excuses, and is an absolute. The district court of appeal below suggests and believes that the notice of appeal requirements are of a technical nature, which everyone certainly recognizes. The thirty day technical time period and the notice of appeal requirement have been established and should either be applied or simply disregarded. These "gray" areas which the district court of appeal below is attempting to create simply is contrary to existing Florida law.

This case does not involve some superficial deficiency, does

not involve a mere typographical error, does not involve a clerical error, and does not involve some nonsubstantial form defect. No notice of appeal was ever filed in connection with the separate and independent judgment entered in favor of BURG and now there is an attempt to bootstrap review of such final judgment under an appeal directed to a different and separate final judgment involving a different, separate and totally unrelated party. It is submitted that the suggested "limbo" concept simply has no application in this case which involves separate and distinct judgments and separate and distinct parties. It is submitted that it is the concept of a final judgment which is controlling and reference to a jury verdict is irrelevant in determining appropriate notices of appeal. Appeals can be prosecuted only from judgments and simply cannot be prosecuted from a jury verdict. See generally, Ballard v. Hopkins, 142 So. 2d 738 (Fla. 2d DCA 1962); Menfi v. Exxon Co., 433 So. 2d 1327 (Fla. 3d DCA 1983).

The motion to dismiss and the initial dismissal in this case were based upon the sum and substance of appellate jurisdiction. A final judgment becomes and is final, just as its style implies, if jurisdiction to review such judgments is not properly placed or vested in a higher court. Under the concept suggested by JUPITER to the appellate court, and as apparently accepted by the lower appellate court, the concept of separate and distinct claims, separate and distinct final judgments, and separate and distinct parties have no meaning and are abolished, and one may simply file a notice of appeal without regard to separate and independent claims, separate and independent final judgments, and separate and

independent parties, and obtain review of any final judgment ever entered in the case regardless of the number of claims, final judgments, or parties in the litigation.

It is submitted that the very issue has been previously addressed by the District Court of Appeal, Third District, and a totally contrary opinion rendered. In Webb Gen. Contracting, Inc. v. PDM Hydrostorage, Inc., 397 So. 2d 1058 (Fla. 3d DCA 1981), a defendant, Webb, filed a cross-claim against PDM and Federal for breach of contract. PDM and Federal in turn also filed cross-claims against Webb for indemnification. Separate and distinct final judgments were entered. A final judgment in favor of Webb and against PDM and Federal was entered on Webb's cross-claim for breach of contract. On the same day, a separate and distinct final judgment was entered in favor of PDM against Webb on the cross-claim for indemnification. Only Webb filed an appeal seeking review of the final judgment which had been entered against it. Thereafter, PDM and Federal attempted to seek review of the separate judgment which had been entered against them but which was late, and the appeal was dismissed. In Webb, PDM and Federal attempted to file a notice of cross-appeal which was rejected. The court clearly held that in order for PDM and Federal to appeal the judgment which they sought to have reviewed, it was incumbent upon them to file a notice appealing that judgment within 30 days from its rendition.

Reverting to the facts presented in this case, there are totally different parties to the two separate and distinct judgments. The only parties affected by the judgment for which a notice of appeal was filed are the original plaintiff, Brocard, and JUPITER

as a defendant. The final judgment for which a notice of appeal was filed does not in any way touch upon or adjudicate the rights of BURG. BURG was not involved in and was not a party to the claims which were adjudicated and determined in the final judgment which was appealed. It is absolutely clear that pleadings, motions, and determinations in connection with cross-claims or third party proceedings for indemnification do not in the least affect the rights between the original plaintiff and the original defendant as set forth by the court in Menfi v. Exxon Co., 433 So. 2d 1327 (Fla. 3d DCA 1983).

It is clear that modern litigation often involves multiple claims, multiple parties, and the adjudication of separate and independent rights involving separate and independent parties. Even if the claims were more interdependent in this litigation, the appeal must still be dismissed. For example, as noted by the court in Kenilworth Ins. Co. v. Drake, 396 So. 2d 836 (Fla. 2d DCA 1981), the court could not address issues pertaining to cross-claims where no appropriate appeal had been filed. In Kenilworth, a claimant filed an action against two insurance companies and one of the insurance companies filed a cross-claim against the other insurance company. The court noted that no one had filed an appeal from the order on the cross-claim and, therefore, the appellate court's hands were "tied" by the fact that no one had filed an appeal. The court noted that it could not reach or consider the issues pertaining to the non-appealed cross-claim.

There can be no doubt that claims and litigation in the nature of third party actions, which are essentially involved in this case,

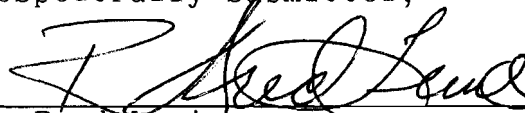
are separate and distinct and judgments entered in connection therewith support separate and distinct final judgments and appeals. A determination of a third party claim is clearly a final appealable order. Hotel Roosevelt Co. v. City of Jacksonville, 192 So. 2d 334 (Fla. 1st DCA 1966).

It is submitted that the position asserted by JUPITER in the court below as recited by the district court of appeal to the effect that its notice of appeal reached any issue involved in a prior jury verdict, whether or not enunciated in the final judgment appealed, simply is not supported by existing Florida law. Juries may determine multiple and numerous facts involving multiple and numerous claims between multiple and numerous parties. Jury verdicts simply are not sufficient to form a predicate for an appeal, and it is only a final judgment which may be reviewed. A jury verdict is merely a document rendered by a jury and does not have anything to do with the entry or rendition of a judgment which is a judicial act and which is necessary to support appellate review. It is submitted that even if the language in the opinion on rehearing of the district court of appeal below with reference to "spirit of a rule" or "fairness" is necessarily limited to litigation involving only two parties. It certainly does not or should not be broadly applied in a "limbo" fashion when there are separate and independent claims and separate and independent parties, and separate and independent final judgments involved. There simply would never be finality under these circumstances if the position of JUPITER and that suggested by the district court of appeal below is adopted by this court.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth herein, the District Court of Appeal, Fourth District, should be directed to dismiss the appeal as it pertains to BURG.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of April, 1986, to: Kathryn M. Beamer, Esq., SCHULER & WILKERSON, P.A., Attorneys for JUPITER, Suite 4-D, 1615 Forum Place, West Palm Beach, FL 33401; Edna L. Caruso, Esq., EDNA L. CARUSO, P.A., Attorney for BROCARD, Suite 4B-Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; Jose G. Rodriguez, Esq., Attorney for BROCARD, Suite F, 328 First Street, West Palm Beach, FL 33401; Kenneth P. Carman, Esq., KUVIN & CARMAN, P.A., Attorneys for BURG, P.O. Box 350276, Fort Lauderdale, FL 33335; and to W. Chester Brewer, Jr., Esq., EASLEY, MASSA & WILLITS, P.A., Attorneys for BURG, Suite 800, Forum III, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401.

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