

IN THE SUPREME COURT OF FLORIDA  
Tallahassee, Florida

CASE NO. 68,577

CLARENCE BARBE, III,  
Petitioner,

vs.

PIERRE VILLENEUVE, as Trustee for  
LEHMAN MANUFACTURING (CANADA) LTD.,  
and individually, LEHMAN  
MANUFACTURING (CANADA) LTD.,  
ATLAS YACHT SALES, INC., a Florida  
corporation, and ERNIE TASHEA,  
jointly and severally,

Respondents.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent Villeneuve raises various factual issues such as whether Tashea "transferred" title of the yacht to Barbe. Villeneuve quarrels with the trial court's factual findings and with the factual recitations in the opinion of the Fourth District. What Villeneuve neglects is that the Fourth District ruled against him on four out of five appellate issues holding that the trial court's findings were supported by competent, substantial evidence. The only issue on which the District Court agreed with Villeneuve was the technical application of the election of remedies doctrine. Thus, Villeneuve does not stand in a position of being able to contest the facts.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN  
APPLYING THE DOCTRINE OF ELECTION OF REMEDIES  
WHERE ALL OF THE CLAIMS WERE ENCOMPASSED  
WITHIN THE SAME SUIT AGAINST DIFFERENT PARTIES  
AND WHERE THE SUPPOSEDLY INCONSISTENT FACTS  
WERE ESTABLISHED BY A DEFAULT JUDGMENT?

Villeneuve starts by relying upon a 1935 case insisting on hypertechnical application of the election of remedies doctrine. This case and most of the arguments contained in Villeneuve's brief predate the modern practice of inconsistent pleadings on different theories of recovery. Obviously, if a hypothetical plaintiff sues a defendant in

two counts for negligence and intentional acts and takes a default, the theories are inconsistent but a single judgment can be entered which is not subject to being set aside on the election of remedies doctrine.

The more modern view is to look at the case on its own facts to determine whether there has really been a double recovery or prejudice to the party with standing to raise the issue.

In the instant situation, the facts supporting the claim against Villeneuve were established at the trial where Barbe and Villeneuve and various other witnesses testified before the court. The facts supposedly relied on in regard to the judgment against Tashea were established solely by default and should not be given the same weight.

Villeneuve argues repeatedly that no one forced Barbe to take a default. This is certainly true, but, the doctrine of election of remedies should not be used as a straitjacket to produce a result which is quite clearly inequitable and unjust.

The major points made by Barbe in his brief on the merits relate to whether Villeneuve was actually prejudiced

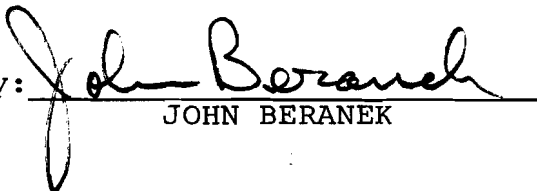
and whether Villeneuve or Barbe should have possession of the boat. In the opposing brief Villeneuve has been totally unable to meet the issue of actual prejudice. There is absolutely no demonstration or even a credible argument that Villeneuve has been prejudiced due to any election of remedies by Barbe.

Further, why should Villeneuve end up with possession and title of this boat when the circuit court and the district court have agreed that Barbe has been shown to be the rightful owner? Mr. Villeneuve has chosen not to answer this question. The opinion of the district court should be reversed and the judgment of the trial court reinstated in this regard.

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By:

  
JOHN BERANEK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 22<sup>nd</sup> day of October, 1986, to:

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