IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,081

THOMAS FRAZIER,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC., a corporation,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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I
STATEMENT OF THE CASE AND FACTS

This is a petition to review the district court's dismissal of an appeal as untimely. The relevant facts are succintly stated in the district court's opinion, which we have attached at Tab A for the convenience of the Court:

> ~~After an~~ adverse jury verdict and entry of judgment, appellee [Seaboard] filed a timely motion for new trial and alternative motion for judgment notwithstanding the verdict (J.N.O.V.). On December 5, 1985, the trial court granted [Seaboard's] motion for new trial, without expressly ruling on the alternative motion for J.N.O.V. Appellant [Frazier] filed a motion for rehearing of that order ten days thereafter. The trial court denied [Frazier's] motion for rehearing on January 9, 1986. On February 6, 1986, the trial court entered an order expressly denying [Seaboard's] alternative motion for J.N.O.V. Appellant filed the notice of appeal on February 7, 1986 (opinion at 1-2).

Seaboard filed a Motion to Dismiss Appeal, on the ground that Frazier's motion for rehearing of the trial court's new-trial order did not toll its rendition, and thus that Frazier's appeal of the new-trial order was untimely because it was not filed within 30 days of that order. A copy of Seaboard's motion is attached at Tab B.

The district court issued an order to show cause, and Frazier's response to Seaboard's motion to dismiss the appeal is attached at Tab C. As the Court will note, Frazier at no time in that response raised any contention that rendition of the trial court's new-trial order had been tolled by his motion for rehearing. Instead, Frazier's sole response was that the trial court's ***judgment*** was not rendered until that court denied Seaboard's alternative motion for J.N.O.V. (in Florida, designated a motion for judgment in accordance with prior motion for directed verdict), and that Frazier's timely appeal of the judgment, as so rendered, placed at issue all of the trial court's prior orders, including its prior order granting Seaboard's motion for a new trial. Thus, we argued, although Frazier might have directly appealed the new-trial order, treating it as if it were a final order under the relevant appellate rules, in this particular context he also had the option of appealing it as a non-final order upon his timely appeal of the judgment

itself. The basis for this contention, and the policy arguments supporting it, are spelled out at length below.

In the district court's opinion granting Seaboard's motion to dismiss the appeal, the district court addressed Frazier's sole argument in only one paragraph (Tab at 2), holding that even though Frazier had timely appealed the final judgment, "[t]his appeal is from the order granting a new trial. It is not an appeal from the final judgment which is in appellant's favor." As the Court can see from Frazier's Notice of Appeal (Tab D), that is plainly wrong, since Frazier appealed not only the order granting Seaboard's motion for new trial, but the final judgment as well. The question, therefore, is whether Frazier's timely appeal of the judgment should be sufficient to place at issue the prior new-trial order--a question which the district court did not address at all. We will discuss that question at length below.

The remainder of the district court's opinion (Tab A at 2-3) is the district court's rebuttal of the argument which Frazier never made--that rendition of the new-trial order was tolled by Frazier's motion for rehearing of that order. At length, the district court attempts to rebut this argument, but is sufficiently uncertain of its conclusion that it certifies the question to this Court. Since the district court thus raised the issue *sua sponte* and certified it, we will address it, contending that if a new-trial order should be treated as final for all purposes, thus precluding its consideration even in a timely appeal of a final judgment, then it should also be considered as final for the purpose of its amenability to a timely motion for rehearing, which will toll its rendition. It would be ironic indeed if the presumptive finality of such an order were held to render Frazier's timely appeal of the judgment insufficient to place that order at issue, while at the same time such an order is considered non-final for the purposes of a motion for rehearing. That outcome would be both unjust and internally inconsistent, and yet that is the outcome sanctioned by the district court in this case.

II
SUMMARY OF THE ARGUMENT

We have summarized our position in the course of our statement of the case and facts. We will argue that Frazier's timely appeal of the final judgment was sufficient to place at issue the prior non-final new-trial order. In the alternative, we will argue that if the new-trial order must be treated as final in this particular context, then it should be treated as final for all purposes--so that a timely motion for rehearing would toll its rendition. Either way, Frazier's appeal was timely.

III
ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING FRAZIER'S APPEAL AS UNTIMELY.

II. Frazier's Timely Appeal of the Final Judgment Was Sufficient to Place at Issue the Prior New-Trial Order. We acknowledge that under Rule 9.110(h), Fla. R. App. P., Frazier was required to appeal the new-trial order within 30 days, assuming *arguendo* that it was not tolled by the motion for rehearing, ***if and only if*** that new-trial order was a "final order" within the meaning of that rule. On the other hand, under the same rule, if the new-trial order was not a final order, then Frazier's appeal of the final judgment, as rendered by the trial court's subsequent order denying Seaboard's motion for judgment in accordance with its prior motion for directed verdict, was sufficient to invoke this Court's jurisdiction to review the earlier new-trial order. Rule 9.110(h) provides as follows:

> (h) **Scope of Review.** The court may review any ruling or matter occurring prior to filing of the notice. Multiple final orders may be reviewed by a single notice, if the notice is timely filed as each such order.

Thus, Seaboard's position rests on the assumption that the trial court's new-trial order was a "final order" within the meaning of this sub-section of Rule 9.110. But neither Seaboard nor the trial court have cited any authority in support of that specific

position. We acknowledge that a new-trial order is ***not interlocutory*** in nature. *See Hoffman v. Jackson's Minit Markets, Inc.*, 313 So.2d 722 (Fla. 1975); *Clement v. Aztec Sales, Inc.*, 297 So.2d 1, 2 (Fla. 1974); *Huffman v. Little*, 341 So.2d 268, 269 (Fla. 2nd DCA), *cert. denied*, 348 So.2d 949 (Fla. 1977). But the fact that a new-trial order is ***not*** interlocutory does not necessarily mean that it ***is*** final, and this Court held directly to the contrary in *Bowen v. Willard*, 340 So.2d 110, 111-12 (Fla. 1976): "[T]he order granting a new trial . . . is appealable as a matter of substantive law though technically neither interlocutory nor final . . .", *citing Clement v. Aztec Sales, Inc., supra.*

This pronouncement is consistent with the current treatment of the appeal of new-trial orders under the appellate rules. Rule 9.130--entitled Proceedings to Review ***Non-Final*** Orders (our emphasis)--provides as follows in sub-section (a)(4):

> Non-final orders entered after final order on motions which suspend rendition are not reviewable; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in Rule 9.110. Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.

It is clear by the language of this sub-section, and by its inclusion as part of a rule dealing with the review of non-final orders, that an order granting a new trial--even if not interlocutory in nature--is nonetheless a non-final order, as *Bowen v. Willard* expressly holds.

This conclusion is further supported by reference to Rule 9.110, which is entitled "Appeal Proceedings to Review Final Orders of Lower Tribunals ***and*** Orders Granting New Trial in Jury and Non-Jury Cases" (our emphasis). The very title of the rule makes clear that an order granting a new trial is ***not*** a final order, or else the second half of the title of the rule would be entirely superfluous. And indeed, the Committee Notes to Rule 9.110 make very clear that, although a new-trial order may not be strictly interlocutory, it is not strictly final either:

> [This rule] applies where (1) a final order has been entered by a

> court or administrative agency; (2) a motion for a new trial in a jury case is granted; or (3) a motion for rehearing in a non-jury case is granted and the lower tribunal orders new testimony. It should be noted that certain other non-final orders entered after final order are reviewable under the procedure set forth in Rule 9.130. This rule does not apply to review proceedings in such cases.
>
> * * *
>
> This rule is intended to clarify the procedure for review of orders granting a new trial. Rule 9.130(a)(4) and 9.140(c)(1)(C) [criminal cases] authorize the appeal of orders granting a motion for new trial. Those rules supersede Clement v. Aztec Sales, Inc., 297 So.2d 1 (Fla. 1974), and are consistent with the decision there.

Under these pronouncements, and this Court's explicit declaration in *Bowen v. Willard*, there can be no question that a new-trial order is ***not*** a final order.

The next question, then, is whether a new-trial order should be ***treated*** as a final order for the purposes of Rule 9.110(h), which as we have noted requires that a notice of appeal be timely regarding every final order which it attempts to place at issue. The Committee Notes to Rule 9.110 point out that sub-section (h) was written to implement the declaration in *Bowen v. Willard*, 340 So.2d at 112, that "appeals taken from new trial orders shall be treated as appeals from final judgments to the extent possible . . . ." As the Committee Notes provide:

> Under section (h) of this rule the scope of review of the court is not necessarily limited to the order granting a new trial. The Supreme Court has held that "appeals taken from new trial orders shall be treated as appeals from final judgments to the extent possible . . . ." Bowen v. Willard, 340 So.2d 110, 112 (Fla. 1976). This rule implements that decision.

In *Bowen v. Willard*, the jury ruled for the plaintiff, but the trial court granted the defendant a new trial, while denying the defendant's alternative post-trial motion for a directed verdict. On review of the plaintiff's appeal of the new-trial order, the district court declined to entertain the defendant's cross-appeal of the trial court's denial of his motion for a directed verdict. After a number of intermediary proceedings, this Court

eventually held that although a new-trial order is not "technically . . . final," it should be treated as final for the purpose of permitting appellate review of other relevant orders--like the order of the trial court in that case denying the defendant's motion for directed verdict:

> It is consistent with the conversion of [a prior statute dealing with new-trial orders] from a statute to a court-appointed rule of procedure to now hold that appeals taken from new trial orders shall be treated as appeals from final judgments to the extent possible, and that the appellate courts of this state have the authority to deal with other appealable issues.

Bowen states that the rationale of the new rule was to prevent "duplicative appeal procedures," and to further "the public policy that procedural practices shall not frustrate substantive rights . . . ." Thus, *Bowen* held that the appeal of a new-trial order should be treated as an appeal of a final order, to the extent of placing at issue other relevant orders which the trial court may have entered at the same time.[1/]

However, *Bowen* provided only that new-trial orders should be treated as final "to the extent possible." Thus in *Martin v. Carlton*, 470 So.2d 875, 876 (Fla. 1st DCA 1985) (per curiam), the court affirmed a new-trial order, and therefore found it unnecessary to address the issues assigned by the defendant in cross-appeal of the final judgment. The court noted that the primary rationale for the *Bowen* decision--to avoid "duplicative appeal procedure"--is implicated when the new-trial order is reversed, thus placing at issue any alternative motion seeking the entry of judgment. But, acknowledging that *Bowen* counseled only a treatment of new-trial orders as final to the "extent possible," the court held that it was "not possible to review the issues raised on cross appeal," since the new-trial order was reversed, and the cause remanded for trial anyway. Thus, the

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[1/] *Accord, City of Tampa v. Jorda*, 445 So.2d 699, 700 (Fla. 1984); *Fincher Investigative Agency, Inc. v. Scott*, 394 So.2d 559, 559 n.1 (Fla. 3rd DCA), *review denied*, 402 So.2d 609 (Fla. 1981); *Royal Castle Systems, Inc. v. Fields*, 354 So.2d 947, 948 (Fla. 3rd DCA 1978) (per curiam).

court reached the common-sensical conclusion that a new-trial order should be treated as final only when the interests of judicial economy require the consideration of other matters.

The foregoing discussion informs the inquiry of whether or not a new-trial order should be treated as a "final order" for the purposes of Rule 9.110(h), providing that multiple final orders may be reviewed by a single notice of appeal if that notice is timely as to every such order. On the one hand, *Bowen* provides that a new-trial order should be treated as a final order to the extent possible. On the other hand, however, as *Bowen* acknowledges and the court recognized in *Martin v. Carlton*, a new-trial order should be treated as final only if doing so would serve the goal of judicial efficiency. The question, therefore, mindful of *Bowen*'s counsel that "procedural practices shall not frustrate substantive rights," is whether it would promote the ends of judicial efficiency to treat the new-trial order in this case as a final order for the purposes of Rule 9.110(h).

To answer that question, it is important to understand that despite its granting of Seaboard's new-trial motion, the trial court's judicial labor in the instant case was not over. Seaboard contended below (Tab B at 3) that because the trial court granted its new-trial motion, Seaboard's alternative motion for judgment in accordance with its prior motion for a directed verdict became irrelevant and moot. As Seaboard put it: "Furthermore, since a court obviously cannot grant both a new trial and a judgment notwithstanding the verdict in the same case, once the new trial was granted on December 5, 1985, there were no remaining issues to be ruled upon." That statement, made without any supporting authority, is absolutely wrong. To the contrary, this Court held in *Winn-Dixie Stores, Inc. v. Robinson*, 472 So.2d 722 (Fla. 1985), that even if the trial court grants a motion for a directed verdict, it should also rule alternatively on a new-trial motion, in case the appellate court reverses the directed verdict on appeal. *Accord, Kaufman v. Sweet Corp.*, 144 So.2d 515, 516 (Fla. 3rd DCA 1962), *cert.*

discharged, 156 So.2d 846 (Fla. 1963). That reasoning applies equally when the trial court is granting a new-trial motion. It should decide the alternative motion for a directed verdict, to place at issue on appeal the moving party's request for even greater relief than a new trial, so that the appellate court can review the trial court's adjudication of that relief, whether or not the appellate court would affirm the new-trial order. *See Reams v. Vaughn*, 435 So.2d 879, 881 (Fla. 5th DCA 1983); *Navarro v. City of Miami*, 402 So.2d 438 (Fla. 3rd DCA 1981) (per curiam). Thus, the trial court's new-trial order did not render moot Seaboard's alternative motion for judgment in accordance with its prior motion for a directed verdict. The precise opposite was true.

Thus, when Frazier suffered the new-trial order, the judicial labor on the post-trial motions was not at an end. Frazier might have appealed the new-trial order, but to do so would have created the possibility of a second appellate proceeding to review the trial court's subsequent order on the post-trial motion for a directed verdict. For if the trial court had granted that motion in the alternative, Frazier obviously would have wanted to appeal it; and even though the trial court denied the motion, Seaboard might have wanted to appeal the denial, in an attempt to obtain an outright judgment rather than simply a new trial. And these scenarios would present precisely the kind of bifurcated appellate proceedings which this Court explicitly attempted to avoid in *Bowen v. Willard.*

For this reason, under these unique circumstances, the new-trial order, while it might have been appealable at Frazier's discretion, should not be treated as a "final order" for the purposes of Rule 9.110(h). Since *Bowen* itself holds that a new-trial order, technically speaking, is ***not*** a final order; and since *Bowen* holds that a new-trial order should be treated as a final order only if that serves the interest of judicial economy; and since *Bowen* also recognized that form should not be exulted over substance in proper cases, the new-trial order in this case should not be treated as final for the purposes of sub-section (h). Instead, it should be treated as non-final under the provision of sub-

section (h) that "[t]he court may review any ruling or matter occurring prior to filing of the notice." That is the only interpretation which promotes the ends of judicial efficiency and economy, and which assures that the substance of the trial court's order will be reviewed on the merits, in preference to procedural technicalities.

For the foregoing reasons, Frazier's appeal of the final judgment, as rendered by denial of the motion for judgment in accordance with the prior motion for directed verdict, was sufficient to place the earlier new-trial order at issue on this appeal. As we have noted, under Rule 9.110(h), upon the timely appeal of a final judgment, "[t]he court may review any ruling or matter occurring prior to filing of the notice." In light of this language, the district court's reasoning on this point--that even if the appeal of the judgment was timely, "[t]his appeal is from the order granting a new trial. It is not an appeal from the final judgment which is in appellant's favor" (Tab A at 2)--is erroneous. As we have noted, Frazier did appeal the final judgment (Tab D), and upon that timely appeal, the appellate court "may review ***any ruling*** or matter occurring prior to filing of the notice" (our emphasis). There is no requirement that the judgment itself be adverse to the appealing party, and thus Frazier had a perfect right to appeal even a favorable judgment in order to place at issue some prior unfavorable non-final order. The motion to dismiss his appeal, therefore, should have been denied.

II. **If the Trial Court's New-Trial Order Must be Treated as a Final Order, Then Its Rendition Should be Tolled by a Timely Motion for Rehearing.** On this question, consistent with its rejection of our first argument, the district court acknowledged that "[u]nder Rule 9.110, Florida Rules of Appellate Procedure, appeals from orders granting new trial follow the same procedure as appeals from final orders" (Tab A at 2). At that level of generality, it would appear that the district court would conclude that like any other final order, a new-trial order should be properly subject to a motion for rehearing which tolls its rendition. There is certainly nothing in the appellate rules which

precludes such a conclusion. To the contrary, Rule 9.020(g) provides that a final order is not deemed rendered until disposition of a "timely motion for new trial or rehearing" "in the lower tribunal." And Rule 1.530, Fla. R. Civ. P., generally discussing motions for new trial and rehearing at the trial level, also says nothing inconsistent with this conclusion. Moreover, as we have noted, this Court expressly declared in *Bowen v. Willard*, 340 So.2d at 112, that "appeals taken from new trial orders shall be treated as appeals from final judgments to the extent possible . . . ." It is certainly "possible" to treat new-trial orders as final to the extent that their rendition is tolled by a timely motion for rehearing.

And yet, having just rejected Frazier's first argument on the ground that a new trial order ***should*** be treated as a final order requiring a separate notice of appeal, the district court in the next breadth concluded that a motion for rehearing of a new-trial order does not toll the appeal time, because "orders granting new trial are not themselves final orders, and there is no authorization for rehearing of an order granting new trial" (Tab A at 2). As for *Bowen*, the district court says that "[w]e find nothing in that decision . . . authorizing the treatment of orders granting new trials as final orders for purposes of rehearing or otherwise affecting the untimeliness of this notice of appeal" (opinion at 3). Nevertheless, in an abundance of caution, the district court certified the question to this Court.

It seems to us that the two conclusions reached by the district court are incompatible. If a new-trial order must be treated as final for the purposes of the rule requiring a separate appeal of that order--thus prohibiting a party from waiting until the rendition of a final judgment before raising an appeal embracing its propriety--it certainly should follow that such a new-trial order should be treated as final ***wherever*** possible--as *Bowen* itself commands--and thus as amenable to a motion for rehearing

which will toll its rendition. If a new-trial order is final in all other respects, there is no reason why it should not be final in this respect too.

Any other outcome would be is inherently unfair. It would permit what the district court accomplished in this case--to invoke the finality concept in one context to render the appeal untimely, while invoking a concept of non-finality, respecting the ***identical*** order, for the purpose of holding the appeal untimely in a different context. That is simply wrong. Either the new-trial order was non-final, in which case Frazier's appeal of the subsequent judgment was sufficient to place the prior non-final new-trial order at issue on appeal; or the new-trial order was final, in which case it was amenable to a motion for rehearing. One way or the other, the district court was wrong to hold the appeal untimely, and its opinion should be reversed.

IV
CONCLUSION

It is respectfully submitted that the opinion of the district court should be reversed, and the cause remanded for the district court's consideration of Frazier's appeal.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of September, 1986, to: J. W. PRICHARD, JR., ESQ., 501 West Bay Street, Jacksonville, Florida 32202.

Respectfully submitted,

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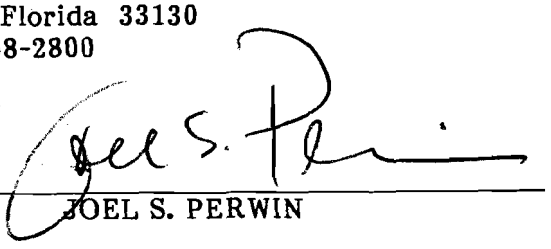
BY: 
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