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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,081

THOMAS FRAZIER,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC., a corporation,

Respondent.

_____/

RESPONDENT'S REPLY BRIEF

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BY: J. W. PRICHARD, JR. and
THOMAS C. SULLIVAN

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STATEMENT OF THE CASE AND FACTS

Appellee (Hereinafter referred to as "Seaboard") agrees with Appellant (Hereinafter referred to as "Frazier") that the facts are succintly stated in the first paragraph of the District Court's opinion. Which reads as follows:

> Appellee moves to dismiss this cause for lack of jurisdiction because the notice of appeal was not timely filed. After an adverse jury verdict and entry of judgment, appellee filed a timely motion for new trial and alternative motion for judgment notwithstanding the verdict (J.N.O.V.). On December 5th, 1985, the trial court granted appellee's motion for new trial, without expressely ruling on the alternative motion for a J.N.O.V.. Appellant filed a motion for rehearing of that order ten days thereafter. The trial court denied appellant's motion for rehearing on January 9th, 1986. On February 6th, 1986, the trial court entered an order expressely denying Appellee's alternative motion for J.N.O.V.. Appellant filed the notice of appeal on February 7th, 1986. We agreed that the notice was not timely and dismissed the appeal.

With the exception of the quote from the District Court opinion, however, Seaboard disagrees with the characterization of the case found in Frazier's statement of the case and facts. As Frazier states in his brief, his statement of the case and facts is for the most part a summary of his argument. Seaboard finds this summary to be a misdirected and largely irrelevant discussion wherein Frazier focuses upon the difference between a "judgment" and the rendition of a new trial order, concluding that he could either treat the December 5th new trial order as a final order and appeal it directly, or treat it as a non final order and appeal it only after a ruling on Seaboard's

alternative motion for J.N.O.V.. The proper inquiry is not upon which words Frazier used to describe his efforts in his response to Seaboard's motion to dismiss the appeal, but upon the substance of what Frazier was in fact attempting to do, and whether that action is authorized by the Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

Frazier was required to file a Notice of Appeal of the December 5th, 1985, new trial order within thirty days. Frazier failed to do so, therefore his appeal is untimely. Frazier's argument that he was not required to file his Notice of Appeal until after Seaboard's alternative motion for J.N.O.V. had been ruled upon is misplaced, as the Rules of Appellate Procedure clearly indicate that while, in some instances, orders may be reviewed by a single notice, the notice must be timely as to each such order.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DISMISSING FRAZIER'S APPEAL AS UNTIMELY.

On December 5th, 1985 the trial court entered an order granting a new trial on the issue of the Plaintiff/Appellant's comparative negligence. On February 7th, 1986, Frazier filed his Notice of Appeal from the December 5th, 1985, order granting in part a new trial. Florida Rule of Appellate Procedure 9.110(b) states that the Notice of Appeal must be filed within thirty days of rendition of the order to be reviewed. Hence, on its face the Notice of Appeal appears to be untimely as it was not filed within thirty days of rendition of the December 5th order from which the appeal is taken.

The issue becomes whether the actions taken by Appellant Frazier and/or the trial court in the interim between the December 5th, 1985, order appealed from, and the February 7th, 1986, Notice of Appeal, tolled the running of the period in which Frazier was required to file his Notice of Appeal. These events were the filing by Frazier on December 16th, 1985, of a petition for rehearing directed to the order granting a new trial, the denial by the trial court on January 9th, 1986, of Frazier's motion for rehearing, and the entering by the trial court on February 6th, 1986, of an order denyng Defendant's motion for J.N.O.V. The District Court correctly held that these three events did not toll the time period for Frazier to file his Notice of Appeal from the December 5th order.

An order granting a new trial cannot be revisited by the trial court. Owen v. Jackson, 476 So.2d 264 (Fla.1st DCA 1985) (citing Fla.R.App.P. 9.020(g) and Fla.R.C.P. 1.530). The new trial order grants a substantive right and is not subject to modification. Huffman v. Little, 341 So.2d 268 (Fla.2nd DCA 1977). Furthermore, in the absence of fraud or a clerical error, once the motion for a new trial is determined it is not even subject to a motion for rehearing. Id. (citing cases). Therefore, Frazier's petition for rehearing, filed on December 16th, 1985, directed at the order granting the new trial, was a nullity. The trial court was without authority to reconsider its order granting a new trial, and neither Frazier's December 16th, 1985, petition for rehearing, nor the court's January 9th, 1986, order denying the petition tolled or affected in any way the limitations period for Frazier to file his Notice of Appeal from the December 5th, 1985 order.

The third intervening event between the order appealed from and the filing of the Notice of Appeal was the February 6th, 1986, trial court order denying Seaboard's motion for J.N.O.V. Frazier now argues, stemming from the fact that Seaboard filed simultaneously alternative motions for J.N.O.V. and for new trial, that the period for filing an appeal from the December 5th new trial order did not begin until the February 6th, 1986, order denying the J.N.O.V. was entered. Florida Rule of Appellate Procedure 9.110(h) is dispositive. It states:

> Scope of Review. The court may review any 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 to each such Order. (emphasis added).

Clearly, the fact that the Trial Court responded to one portion of Seaboard motion (the motion for a new trial) on December 5th, 1985, and the second portion of Seaboard motion (requesting in the alternative J.N.O.V.) on February 6th, 1986, does not mean that either party has more than thirty days to respond to the order rendered on December 5th. Frazier is only authorized by Rule 9.110(h) to notice an appeal from both orders with a single notice if that notice is timely filed as to each such order. Frazier has not met this requirement with regard to the appeal from the December 5th order.

To circumvent the requirements of the Florida Rules of Civil and Appellate Procedure, Frazier further argues that the December 5th, 1985 order granting in part the new trial is not a final order. In support of this argument he relies upon Bowen v. Willard, 340 So.2d 110 (Fla.1976), and some later cases which cite Bowen. In this case the Florida Supreme Court held that "appeals taken from new trial orders shall be treated as appeals from final judgements to the extent possible, and that the appellate courts of this state have the authority to deal with other appealable issues." Id.at 112. As the District Court of Appeal correctly found, however, there is nothing in the Bowen opinion authorizing the treatment of orders granting new trial as final orders for purposes of rehearing or otherwise affecting the untimeliness of Frazier's notice of appeal in the instant case.

The Florida First District Court of Appeal analyzed and explained the Bowen opinion in Martin v. Carlton, 470 So.2d 875 (Fla.1st DCA 1985). The court noted that in Bowen the Supreme Court was concerned with

> the duplicative appeal procedures and the unproductive time delays and expense involved when an order granting a new trial is reversed and the cause is remanded for the purely ministerial task of entering a formal final judgment before a challenge to that judgment can be made on appeal. The Supreme Court determined that, in this situation, no substantive right would be affected and held, therefore, that appeals taken from new trial orders should be treated as appeals from final judgments to the extent possible, and Appellate Courts have authority to deal with other appealable issues. 470 So.2d at 876.

The First District Court of Appeal in Martin went on to hold that it is not possible to extend the rule of Bowen beyond its facts, or to the facts facing the Martin court. Similarly, the Bowen holding cannot be stretched to apply to the facts of the instant appeal. Unlike Bowen, there was no reversal of an order granting a new trial. And, also unlike Bowen, the instant Appellate Court was not faced with the risk of causing unnecessary delay for a "purely ministerial task" of remanding so that a final judgment could be entered before a challenge to that judgment could be made on appeal. Therefore, Frazier should not be allowed to circumvent the rules of appellate procedure based upon an inappropriate application of the Bowen decision.

Finally, Frazier emphasizes in his brief the language of the Bowen court discouraging wasted judicial resources resulting from duplicative appeal procedures and unproductive generation of time delays. Like Frazier, Seaboard would seek to avoid such delays. Unlike Frazier, however, Seaboard respectfully submits that the appropriate way to avoid such delays is not by allowing untimely appeals premised upon creative applications of the Bowen case, but rather upon requiring parties to comply with the timeliness requirements set out in the rules of appellate procedure. The rules require that the December 5th, 1985 new trial order be appealed from within thirty days of that date. Frazier did not file his notice of appeal within thirty days, and therefore the appeal is untimely.

In reply to Frazier's brief, Seaboard argues the District Court did not err in dismissing Frazier's appeal as untimely. In response to the question certified to the Florida Supreme Court by the District Court of Appeal, Seaboard argues the question should be answered in the negative, at least in the context of the instant facts, for the reasons set forth above.

CONCLUSION

It is respectfully submitted that the opinion of the district court properly determined that Frazier's Notice of Appeal was not timely. The certified question should be answered in the negative and the District Court should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was expressed mailed this 16th day of October, 1986, to: BECKHAM, MCALILEY & SCHULZ, P.A., 3131 Independent Square, One Independent Drive, Jacksonville, Florida 32202; and JOEL S. PERWIN, ESQUIRE, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

Respectfully submitted,

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