IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,081

THOMAS FRAZIER,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC., a corporation,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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I
ARGUMENT

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

It is very difficult to respond to a brief like Seaboard's, which does not argue any of the relevant points, by addressing the reasoning presented in our initial brief, but simply states its own position in wholly-conclusory terms, as if it were written in stone--and thus must be taken as gospel--requiring no defense. That is not what appellate advocacy is all about, and it leaves us no choice but largely to repeat our substantive position, emphasizing that Seaboard has not bothered to rebut it.

I. Frazier's Timely Appeal of the Final Judgment Was Sufficient to Place at Issue the Prior New-Trial Order.

We refer the Court to pages 3-9 of our initial brief. The central argument here is that a new-trial order is ***not*** a final order, but nevertheless "is appealable [as if it were a final order] as a matter of substantive law though technically neither interlocutory nor final . . . ." *Bowen v. Willard*, 340 So.2d 110, 111-12 (Fla. 1976), *citing Clement v. Aztec Sales, Inc.*, 297 So.2d 1, 2 (Fla. 1974). *Bowen* holds that a new-trial order should be ***treated*** as final "to the extent possible," 340 So.2d at 112--and thus the question is whether the new-trial order ***should*** be treated as final within the peculiar circumstances of this case.

To answer that question, we looked at the policies underlying the *Bowen* rule. We discovered that the rule was prescribed both to prevent "duplicative appeal procedures," and to further "the public policy that procedural practices shall not frustrate substantive rights . . . ." We argued that neither purpose would be served by treating the new-trial order as final in the particular context of this case, in which that order was entered before the trial court had ruled upon the alternative motion for judgment in accordance with a prior motion for directed verdict, which the trial court was ***required*** to rule on despite its acceptance of the motion for new trial. In that context, it would ***not*** prevent

"duplicative appeal procedures" to treat the new-trial order as a final order, because it is entirely conceivable that one or the other party would file a ***second*** appeal of the trial court's subsequent disposition of the motion for judgment in accordance with the prior motion for directed verdict. Similarly, it would not serve *Bowen*'s interest in preventing procedural practices from frustrating substantive rights to require Frazier to appeal the new-trial order before disposition of the alternative motion for judgment, since the full extent of his rights at the trial level had not yet been determined, and since enforcement of such rule would indeed exalt procedure over substance. Thus, we argued, although *Bowen* is right that new-trial orders should be treated as final "to the extent possible," it is not "possible" to treat the new-trial order as final in this case, because to do so would turn the *Bowen* rule on its head, violating the two important policies which motivated the creation of that rule in the first place.

Incredibly, Seaboard's brief does not directly address ***any*** of these arguments. It simply asserts (brief at 5-6) that Rule 9.110(h), Fla. R. App. P., "is dispositive" of the case, because that rule requires a separate notice of appeal for every final order, and because *Bowen* says that a new-trial order should be treated as final. That is the starting point from which our brief began, but Seaboard's brief remains at that starting block, ignoring our challenge down the stretch. Seaboard does acknowledge (brief at 7) that the *Bowen* rule was designed to prevent duplicative appeal procedures; and it does assert (brief at 8)--without any reasoning whatsoever--that the appropriate way to avoid delays and procedures is to require "parties to comply with the timeliness requirement set out in the rules of appellate procedure"--but Seaboard does not explain how either of these policies would be furthered by its position in the instant case. To the contrary, it is Seaboard which is advocating duplicative appeals in this case, for the reasons already outlined, and it is Seaboard's position which would create administrative delays by requiring more than one appeal. It is not enough for Seaboard to simply quote back to us

the underlying principles which motivated the *Bowen* rule. Seaboard's job was to explain how those policies would be served by the district court's decision in this case.

As we have demonstrated, those policies would directly be undermined by approval of that decision, and that is why the decision makes no sense. In the peculiar circumstances of this case, the policies motivating *Bowen* would best be served by ***not*** treating the new-trial order as final, but by instead permitting Frazier's single appeal of the final judgment to invoke that order, and any other which he might challenge, for the district court's review.

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.

We refer the Court to our initial brief at pages 9-11. The central argument is that if *Bowen* is to be taken literally, and a new-trial order should be treated as final whenever "possible," then it is certainly "possible" to permit a motion for rehearing of a new-trial order to toll its rendition--just like any other "final" order. As we noted (brief at 9-10), there is certainly nothing in the appellate or civil-procedure rules which forbids such a motion for rehearing. To the contrary, "it is well established that a trial court has the inherent discretionary power to reconsider any order entered prior to rendition of the final judgment in the cause."[1/] The only question is whether such a motion should toll rendition of the new-trial order, and since *Bowen* commands that a new-trial order is to be treated as final, permitting appellate scrutiny of that order, then it should also be tolled by a motion for rehearing, just like any other "final" order, to give the trial court one last opportunity to reassess it.

1/ *Arnold v. Massebeau*, 493 So.2d 1 (Fla. 5th DCA 1986), *citing North Shore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla. 1962), *Commercial Garden Mall v. Success Academy, Inc.*, 453 So.2d 934 (Fla. 4th DCA 1984), *Associated Medical Institutions, Inc. v. Imperatori*, 338 So.2d 74 (Fla. 3rd DCA 1976), *and Rubin v. Baker*, 276 So.2d 532 (Fla. 3rd DCA 1973).

Indeed, as we noted (brief at 10), it was the very presumptive finality of a new-trial order which led the district court to conclude that it had to be appealed as a final order notwithstanding the pendency in the trial court of the alternative motion for judgment in accordance with the prior motion for a directed verdict. It would be ironic, we argued, if that very concept of "finality" should defeat our contention that the new-trial order was placed at issue by Frazier's appeal from the final judgment, while at the same time the very same concept of "finality" should be rejected relative to the power of a motion for rehearing to toll its rendition. Those two conclusions are directly contradictory, and one of them has to give.

In response to all of this, Seaboard again offers only conclusory assertions. It cites two district-court decisions declaring that a new-trial order may not be the subject of a motion for rehearing (brief at 5); and it asserts that "there is nothing in the Bowen opinion authorizing the treatment of orders granting new trial as final orders for purposes of rehearing . . ." (brief at 6). That is all that Seaboard says on the point. It does not ***answer the argument***--that if a new-trial order is to be treated as final wherever "possible," it should be treated as final for the purpose of its amenability to a motion for rehearing--just like any other "final" order. It is certainly "possible" to do that, and *Bowen* says that new-trial orders should be treated as final to the extent "possible." Seaboard does not even attempt to answer the point.

II
CONCLUSION

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

III
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of October, 1986, to: J. W. PRICHARD, JR., ESQ., 501 West Bay Street,

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Respectfully submitted,

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