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JAN 17 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,205

KEENE BROTHERS TRUCKING, INC.

versus

PATRICIA PENNELL and
RANDY PENNELL, her husband.

RESPONDENTS' JURISDICTIONAL BRIEF

On Review From the District Court of
Appeal, Second District of Florida

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STATEMENT OF CASE AND FACTS

Patricia Pennell and her husband, Randy Pennell, brought a personal injury action against Keene Brothers for injuries sustained for injuries sustained by Patricia on her job. A:2.

The case was tried to the jury from February 19 to February 22, 1990. A:2. On February 22, 1990, the jury returned a verdict for Patricia Pennell.

After reception of the verdict, Keene Brothers' counsel noted that one of the jurors, an accountant named Donald Duke, had taken a book into the jury room. Mr. Duke acknowledged that he had used the book to aid in calculating the present value of the damage award. A:5. Keene Brothers' counsel immediately requested and was granted a mistrial on the ground of juror misconduct. A:3.

On March 16, 1990, twenty-two days after rendition of the jury verdict, Keene Brothers filed its "Defendant's Motion for New Trial or, in the Alternative, Remititur or Motion for Judgment Notwithstanding the Verdict". A:3. In this motion, Keene Brothers not only raised the issue of juror misconduct, but raised four additional grounds for entry of an order granting a new trial or remittitur, or for a judgment notwithstanding the verdict. A:3.

On March 23, 1990, the trial court rendered its "Findings and Order on Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict". A:3-4. The trial court granted Keene Brothers'

Motion for New Trial on the ground that one of the jurors had access to and had utilized a financial accounting book in the jury room. A:4. The trial court next denied Keene Brothers' Motion for New Trial on each of the other grounds. A:4. The court then granted Keene Brothers' Motion for Judgment Notwithstanding the Verdict. A:4.

Pennell, on appeal, argued that the Trial Court lacked the requisite jurisdiction to enter a Judgment Notwithstanding the Verdict. A:4.

The district court held that the trial court had no authority to simultaneously grant a new trial and enter a judgment notwithstanding the verdict in the same order. A:4-5. The judgment notwithstanding the verdict was reversed. A:5.

The district court then affirmed the order granting new trial and held that, as a matter of law, a juror's reference to an accounting book in the calculation of the present value of the damage award could not be harmless error. A:5.

The new trial was limited to damages only as "the accounting book was referred to for purposes of determining present value relating to the amount of damages alone". A:6.

SUMMARY OF THE ARGUMENT

The trial court granted Keene Brothers' motion for new trial (on the ground of juror misconduct) and also entered a judgment notwithstanding the verdict in the same order. The grant of both motions was not made upon the express condition that one order would be effective only if the other were reversed on appeal -- a limitation mandated by this court in Frazier v. Seaboard Systems Railroad, Inc., 508 So.2d 345 (Fla. 1987). The ruling of the Second District was consistent with Frazier and Keene Brothers' Petition for Review should be denied.

Estate of Busing v. Brohan, 567 So.2d 6 (Fla. 4th D.C.A. 1990) is factually distinguishable from the instant case. In Busing, the trial court did not receive a valid jury verdict.

In the instant case, the jury verdict was valid on its face and the order of mistrial was entered after reception of the jury verdict. It is this fact that factually distinguishes this case from Busing and which requires that this court deny Keene Brothers' Petition for Review. Busing is consistent with the general rule that a mistrial order entered after rendition or reception of a valid jury verdict is considered to be an order granting a new trial and is reviewable. Sponenberg v. Strasser, 504 So.2d 64 (Fla. 4th D.C.A. 1987). State ex rel Sebers v. McNulty, 326 So.2d 17, 18 n.1 (Fla. 1975); Gibson v. Troxel, 453 So.2d 1160 (Fla. 4th D.C.A. 1984): Florida

Department of Transportation v. Weggies Banana Boat, 545 So.2d 474 (Fla. 2d D.C.A. 1989).

ARGUMENT I

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL WES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN FRAZIER v. SEABOARD SYSTEMS RAILROAD, INC., 508 So.2d 345 (FLA. 1987)

The ruling of the Second District is consistent with this court's ruling in Frazier v. Seaboard Systems Railroad, Inc., 508 So.2d 345 (Fla. 1987).

The relevant portion of this Court's decision in Frazier provides, at page 346-347:

* * *

> By their very nature, a new trial order and an order for J.N.O.V. are mutually inconsistent and may not be granted simultaneously. At most, the Court may grant one and alternatively grant the other on the express condition that the latter only becomes effective if the former is reversed an appeal.
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> * * *
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> If the trial court grants the motion for new trial, this order should provide that it becomes effective only if the judgment notwithstanding the verdict should be reversed on appeal.

This is precisely what the trial court failed to do. Instead of granting the Judgment N.O.V. and alternatively granting the Motion for New Trial on the condition that the new trial order would become effective only if the Judgment N.O.V. was reversed on appeal, the court granted both motions.

The trial court first granted Keene Brothers' Motion for New Trial [Keene Brothers' Appendix, pg. A:12], and then granted Keene Brothers' Motion for Judgment Notwithstanding the Verdict. Keene Brothers' Appendix, pg. A:14.

The Second District recognized that, in light of this Court's ruling in Frazier, the trial court erred in simultaneously entering a Judgment N.O.V. and Order granting a new trial.

The ruling of the Second District is consistent with Frazier and the Petition for Review should be denied. The ruling of the second district does not conflict with the other cases cited by Keene Brothers at pages 6 and 7 of its jurisdictional brief. In Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 n.1 (Fla. 1981), the trial court granted a Judgment N.O.V. and, alternatively, granted a motion for a new trial on the express condition that the new trial order would only become if the Judgment N.O.V. was reversed on appeal. This, of course, is completely consistent with Frazier and with the ruling of the Second District in the instant case.

Similarly, in both Ligman v. Tardiff, 466 So.2d 1125, 1126 and Reames v. Vaughn, 435 So.2d 879, 880-881 (Fla. 1st D.C.A. 1983), the trial courts entered directed verdicts which provided that, if the directed verdicts were reversed on appeal, a new trial would be granted.

In Navarro v. City of Miami, 402 So.2d 438 (Fla. 3d D.C.A. 1981), the trial court entered a judgment notwithstanding the verdict, but declined *to* rule an the motion for new trial. In Diamond v. Rosenfeld, 511 So.2d 1031, 1037 (Fla. 4th D.C.A. 1987) and Kilburn v. Davenport, 286 So.2d 241, 244 (Fla. 3d D.C.A. 1973), the trial court granted a judgment notwithstanding the verdict, and did not rule on the motion for new trial. Finally, in Stupp v. Cone Bros. Contracting Co., 135 So.2d 457 (Fla. 2d D.C.A. 1961), the trial court denied both motions.

In summary, none of the cases cited by Keene Brothers expressly and directly conflict with the ruling by the district court below.

ARGUMENT II

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN ESTATE OF BUSING, 567 So.2d 6 (FLA. 4TH D.C.A. 1990)

Estate of Busing v. Brohan, 567 So.2d 6 (Fla. 4th D.C.A. 1990) may be easily distinguished on its facts. In Busing, the Trial Court rejected the initial jury verdict and sent the jury back for further deliberation because of an apparent legal inconsistency. Busing, supra, at pg. 7. The jury returned a second verdict which the Trial Court again concluded was inappropriate. Id. The Court sent the jury back a third time and, upon return of the third verdict, the Trial Court granted a mistrial on the ground of jury confusion. Id. It is significant that at no time did the trial court receive a valid verdict.

Upon post-trial motions, the Court entered a final judgment on the initial verdict! Id. The Fourth District reversed the final judgment on the ground of jury confusion. However, the Fourth District's opinion in Busing cannot be extended to provide that a mistrial entered after receipt of a valid jury verdict renders the entire proceedings "nugatory"'.

In Weggies Banana Boat, 545 So.2d 474 (Fla. 2d D.C.A. 1989), the Second District, fallowing this court's holding in State el rel Sebers v. McNulty, 326 So.2d 17, 18 n.1 (Fla.

1975), held that an order of mistrial entered after the jury returns its verdict is treated as an order granting a new trial and is thereby reviewable. See, Gibson v. Troxel, 453 So.2d 1160 (Fla. 4th D.C.A. 1984); A & P Bakery Supply and Equipment Company v. H. Hexter & Son, Inc., 149 so.2d 883 (Fla. 3d D.C.A. 1963); and Sponenberq v. Strasser, 504 So.2d 64 (Fla. 4th D.C.A. 1987).

Sponenberq is factually similar to Busing. In Sponenberg, the jury could not determine how to reduce a damage award to present value. The trial court declared a mistrial and ordered a new trial on all issues. Sponenberq, supra, at pg. 65. The Fourth District held that it did not have jurisdiction to entertain the appeal:

> . . . The appellate issue here is the right to appellate review of an order granting a mistrial. Generally speaking, an order of mistrial is not reviewable on appeal unless made after rendition or reception of a valid jury verdict; whereupon it is, in essence, an order granting a new trial and, thus, reviewable under Florida Rule of Appellate Procedure 9.110(A)(3). Gibson v. Troxel, 452 So.2d 1160 (Fla. 4th D.C.A. 1984).
>
> (emphasis supplied)

Sponenberg v. Strasser, supra, at pg. 65.

That is the key. In Sponenberg and in Busing, there was no valid jury verdict.

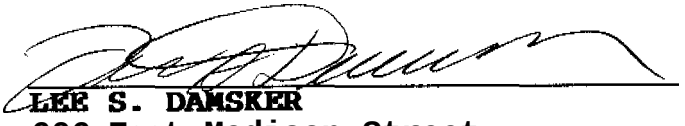
In the instant case, the jury was not confused and returned a verdict that was regular on its face, After reception of the verdict, the Court granted a mistrial on the ground of juror misconduct but, where the motion was not made until after reception of the jury verdict, such an order is considered to be an order granting a new trial. The proceedings are not "nugatory" and axe reviewable. Busing should be limited to its facts, i.e., that when a jury fails to return a proper verdict because of its confusion, an order of mistrial requires the matter to proceed ab initio. Sponenberg V. Strasser, supra.

The ruling of the Second District is consistent with the court's ruling in State el rel Sebers v. McNulty, supra, and the decisions of the fourth district in Sponenberg V. Strasser, Supra and Estate of Busing V. Brohan, supra, and Keene Brothers' Petition for Review should be denied.

CONCLUSION

Keene Brothers' Petition for Review should be denied.

MANEY, DAMSKER & ARLEDGE, P.A.



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CERTIFICATE OF SERVICE

I EIEREBY CERTIFY that a true and correct copy of the *foregoing* Respondent's Jurisdictional Brief has been forwarded this 16th day of January, 1992 via U.S. Mail, postage prepaid, to the following:

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