IN THE SUPREME COURT OF FLORIDA

CASE NO. 79-205

KEENE BROTHERS TRUCKING, INC.

Petitioner

vs.

PATRICIA PENNELL and RICHARD PENNELL, her husband

Respondents

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On June 9, 1987, PATRICIA PENNELL and her husband, RICHARD (hereinafter "Respondent"), brought an action for damages against KEENE BROTHERS TRUCKING, INC. (hereinafter "Petitioner"). R. 1085-1086. The case was tried to a jury from February 19 to February 22, 1990. R. 1-1078. At the conclusion of the trial, the jury found Petitioner negligent and awarded damages in favor of Respondent. R. 1401-1405.

After the jury announced its verdict in open court, the jury was polled to ascertain the unanimity of the verdict. R. 1448-1450. After the polling, but before the discharge of the jury, Petitioner requested a bench conference. R. 1450. During this conference, Petitioner brought to the trial court's attention that one of the jurors had access to unauthorized materials in the jury room. The jury was questioned as follows:

> THE COURT: All right. Mr. Duke, can we have a look at the page that you mentioned.
>
> JUROR NUMBER 6 [RALPH G. LAUBECHER]: May I state something, please, sir?
>
> THE COURT: Yes, Sir.
>
> JUROR NUMBER 6: He may have looked at it but none of us looked at that book.
>
> THE COURT: That's okay.
>
> JUROR NUMBER 6: Your Honor, the page in question is page 450.
>
> THE COURT: And what did you mean by -- I mean, what does it mean?

JUROR NUMBER 1 [DONALD E. DUKE]: The title of this page is, 'present value of a dollar'. We were specifically instructed to award **at** present -- present day.

THE COURT: Okay.

MR. DIECIDUE [PLAINTIFFS' COUNSEL]: It is that you used that book to reduce the value of the verdict or the value of the award?

JUROR NUMBER 1: Yes.

MR. DIECIDUE: So it resulted in a reduction of what you would have given had you not looked at that?

JUROR NUMBER 1: Yes. **Had** we not looked at that, **it** might have been.

[DEFENSE COUNSEL]: Your Honor, I respectfully request a mistrial?

THE COURT: Granted.

[DEFENSE COUNSEL]: Thank you, Your honor.

(Whereupon the proceedings were concluded.) R. **1432-1435.**

After questioning the jury and determining that unauthorized materials had been present in the jury room during deliberations and had been utilized by at least one of the jurors, Petitioner moved for and was granted a mistrial. R. 1452-1453. Immediately thereafter, on or before 1:00 P.M. the proceedings were concluded.' **R. 1412** and **R. 1523.**

At the time the proceedings were concluded, however, the verdict had not been

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'The Clerk of the lower court notes 12:40 P.M. as the time the Court recessed. R.1412. The trial transcript reflects 1:00 P.M. R. 1523. Petitioner believes this 20-minute discrepancy is immaterial to this case on appeal.

filed. The verdict was not filed until February 22nd at 5:51 P.M. R. 1402-1405. The record gives no indication that the verdict was filed at the direction of the Court or either counsel. As such, it appears it was filed by the Clerk at the Clerk's own initiative after the trial court declared a mistrial.

On February 23, 1990, Respondents served their Motion to Reinstate the Verdict. R. 1422-1425. Petitioner filed its Response in Opposition to Respondents' Motion on March 1, 1990. R. 1415-1417. On March 16, 1990, Petitioner filed its Motion for New Trial or, in the alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict. R. 1480-1486.

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 (hereinafter "March 23rd Order"). R. 1487-1494. The March 23rd Order stated:

> ORDERED AND ADJUDGED:
>
> The Defendant's Motion for Judgment Notwithstanding the Verdict is granted, or in the alternative, Motion for New Trial is granted as set forth below.

(emphasis supplied) R. 1487-1494; A. 12. Respondent appealed to the Second District Court of Appeal.

On November 6, 1991, the Second District Court of Appeal issued its published opinion and reversed the trial court's Order granting the Judgment Notwithstanding the Verdict. A. 16. The Second District Court of Appeal reinstated the jury verdict as to the issue of liability and granted a new trial only as to the issue of damages. A.

21. As the basis for its decision, the District Court stated:

> **In its final order,** the trial court **first** granted Keene Brothers' Motion for New Trial on the ground of juror misconduct. Upon **that order,** the case below was concluded. An order granting a new trial is a final, appealable order. **See** Fla. R. App. P **9.110(a)(3)** (1990). The trial court had no authority to simultaneously enter a judgment notwithstanding the verdict in the **same order.** 'By their very nature, a new-trial order and order for J.N.O.V. are mutually inconsistent and may not be granted simultaneously.' Citation Frazier v. Seaboard Svstems, R.R., Inc., 508 So. 2d **345 (Fla.** 1987). Accordingly, the Judgment Notwithstanding the Verdict is reversed.

(emphasis supplied) A. 19-20. Subsequently, the District Court denied Petitioner's Motion for Rehearing and Clarification. A. 52.

On July 8, **1992,** this Court accepted jurisdiction over this case as presented by Petitioner, This Court, however, denied review of Respondent's Cross-Notice to Invoke Discretionary Jurisdiction.

STATEMENT OF THE ISSUES

I. Whether the **Second** District Court of Appeal's published decision expressly and directly conflicts with the decision of this Court in Frazier v. Seaboard Systems R.R., Inc., 508 So. 2d 345 (Fla. 1987).

II. Alternatively, whether the present decision of the Second District Court of Appeal expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Estate of Busina v. Brohan, 567 So. 2d 6 (Fla. 4th DCA 1990), cert. denied, 581 So. 2d 163 (Fla. 1991).

SUMMARY OF THE ARGUMENT

On March **23, 1990,** the trial court rendered its written Order granting Petitioner's Motion for Judgment Notwithstanding the Verdict and alternatively granting Petitioner's Motion for New Trial. A. **15.** The Court expressly stated that each Motion was granted "in the alternative" to the other. A. 12. Despite the trial court having granted these Motions in the alternative, the Second District Court of Appeal reversed the trial court on the grounds that the Motions for Judgment Notwithstanding the Verdict and New Trial are mutually inconsistent and could not be granted simultaneously. The Second District Court of Appeal's published decision is expressly and directly in conflict with this Court's decision of Frazier v. Seaboard Svstems R.R., Inc., 508 So. 2d 345 (Fla. 1987). In Frazier, this Court expressly encouraged trial courts to rule simultaneously in the alternative on all motions for judgment notwithstanding the verdict and new trial. Such simultaneous, alternative rulings were encouraged to promote judicial economy by consolidating the two issues on appeal. Because the trial court's March 23rd Order granted the Motions for Judgment Notwithstanding the Verdict and New Trial in the alternative, the District Court should be reversed and the trial court's Order granting Petitioner's Motion for Judgment Notwithstanding the Verdict reinstated.

Additionally, even assuming arguendo that the March 23rd Order does not grant the Motion for Judgment Notwithstanding the Verdict alternatively with the Motion **for** New Trial, the District Court should be reversed and the Motion for Judgment

Notwithstanding the Verdict granted. The Second District Court of Appeal has held that because the trial court granted the new trial "first" in the actual written Order, and because these motions are mutually inconsistent, the "subsequent" granting of the Judgment Notwithstanding the Verdict is a nullity. Applying the Second District Court of Appeal's own rationale, the trial court's Order granting the Judgment Notwithstanding the Verdict should be reinstated and the Order granting the Motion for New Trial should be reversed. This is because the record clearly reveals that the trial court granted Petitioner's Motion for Judgment Notwithstanding the Verdict before it ruled upon the Motion for New Trial. Respectfully, the Second District Court of Appeal simply misreads the record.

In addition to the above conflict with this Court's published decision in Frazier, the Second District Court of Appeal's present published decision expressly and directly conflicts with the Fourth District Court of Appeal case of Estate of Busing, 567 So. 2d 6 (Fla. 4th DCA 1990), cert. den., 581 So. 2d 163 (Fla. 1991). In Estate of Busing, the Fourth District Court of Appeal held that an order declaring a mistrial vitiates a jury verdict. As a result, a trial court lacks jurisdiction to reinstate the jury verdict after the mistrial has been granted. By reinstating the jury verdict on the liability issue below, the Second District Court of Appeal is in express and direct conflict with Estate of Busing.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL'S PUBLISHED DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN FRAZIER V. SEABOARD SYSTEMS R.R., INC., 508 So. 2d 345 (FLA. 19871

A. THE DISTRICT COURT'S WRITTEN PUBLISHED DECISION

The trial court issued its March 23rd Order, granting Petitioner's Motion for Judgment Notwithstanding the Verdict. It also, in the alternative, granted Petitioner's Motion for New Trial. The trial court ruled on both motions simultaneously but granted them in the alternative. That Order reads in relevant part as follows:

> **ORDERED AND ADJUDGED:**
>
> The Defendant's Motion for Judgment Notwithstanding the Verdict is granted, or in the alternative, Motion for New Trial is granted as set forth below.

(emphasis supplied) A. 12. Clearly, the Court's March 23rd Order granted the Motion for Judgment Notwithstanding the Verdict, and **only** in the alternative granted the Motion for New Trial. The disjunctive "or" was used not the conjunctive "and". Nonetheless, the Second District Court of Appeal reversed the trial court's Order granting the Judgment Notwithstanding the Verdict. A. 21. The District Court then upheld the Order granting the new trial, but only as to the issue of damages. A. 21. The District Court then reinstated the jury verdict on the issue of liability. A. 21.

As grounds for its decision, the District Court stated that the Order granting the Judgment Notwithstanding the Verdict was reversed because it was granted simultaneously with the granting of the Motion for New Trial. Respectfully, the

Second District Court of Appeal erroneously states in its present published decision:

> In its final **order,** the trial court first granted Keene Brothers Motion for New Trial on the ground of juror misconduct. Upon that order, the case was concluded. An order granting a new trial is a final, appealable order. See Fla. R. App. P. 9.110(a)(3)(1990). The trial court had no authority to simultaneously enter a judgment notwithstanding the verdict in the **same order.** 'By their very nature, a new trial order and order for J.N.O.V. are mutually inconsistent and may not be granted simultaneously'. Frazier v. Seaboard Svstems R.R., Inc., 508 So. 2d 345 (Fla. 1987). Accordingly, the judgment notwithstanding the verdict is reversed.

(emphasis supplied) A. 19-20. The "final order" and "order" to which the Second District Court refers is the trial court's March 23rd Order. Respectfully, it appears that the District Court simply misreads this Order. There is no other rational explanation. The trial court did exactly what it was required to do by the standards imposed by this Court, as well as the standards espoused by the Second District Court of Appeal in its own published decision!

B. THIS COURT'S DECISION IN FRAZIER

In this Court's own Frazier v. Seaboard Svstems R.R., Inc., 508 So. 2d 345 (Fla. 1987), the case relied upon by the instant District Court, after an adverse jury verdict and entry of judgment, Appellee filed a Motion for New Trial and alternative Motion for Judgment Notwithstanding the Verdict. The trial court granted the Motion for New Trial, without expressly ruling on the alternative Motion for Judgment Notwithstanding the Verdict. Appellant filed a Motion for Rehearing which the Court denied. Appellant appealed the denial.

In reaching its decision, this Court stated that, by their very nature, a New Trial Order and an Order for Judgment Notwithstanding the Verdict are mutually inconsistent and may not be granted simultaneously. Frazier v. Seaboard Svstem R.R., Inc., 508 So. 2d at 346. This Court instructed that the trial court may, however, grant one motion and alternatively grant the other so that the latter becomes effective if the former is reversed on appeal. Id. In fact, this Court strongly encouraged trial judges to rule simultaneously on **alternative** Motions for New Trial and Judgment Notwithstanding the Verdict, in that one of the primary reasons for doing so is to promote judicial economy by consolidating the two issues on appeal. Id at 347.

In the instant case, the trial court did precisely what this Court recommended in Frazier. The trial court ruled simultaneously but in the alternative on Motions for Judgment Notwithstanding the Verdict and New Trial. Nonetheless, despite the trial court's conformance with the law as stated in Frazier, and as interpreted by the District Court in this very case, the District Court reversed the trial court on the grounds that its ruling in the alternative was somehow inconsistent with Frazier. Respectfully, the Second District of Appeal simply misreads the March 23rd Order.

The March 23rd Order granted the Motion Judgment Notwithstanding the Verdict **alternatively** to the Motion for New Trial. A. 12. The Order stated the Motion for Judgment Notwithstanding the Verdict was granted, "or in the alternative," the Motion for New Trial was granted. A. 12. The Order did not state that both Motions were granted together and both were to take effect. Obviously, the fact that the trial

court chose to use the language, "or in the alternative" expressly indicates the Court's intent that the Motion for Judgment Notwithstanding the Verdict be granted in the alternative to the Motion for New Trial, with the Motion for New Trial to be granted if, and only if, the Motion for Judgment Notwithstanding the Verdict is reversed on appeal. Why else would the Court have chosen to use the language "or in the alternative"? The March 23rd Order is clearly in conformance with Frazier as well as all law in the State of Florida published on this issue before and after Frazier. See, Winn Dixie Stores, Inc. v. Robinson, **472 So.** 2d **722,** 724 **(Fla. 1985)** (We find that it is preferable for the court to rule on a motion for new trial at the same time it grants a defendant's motion for directed verdict); Lopez v. Florida Power & Liaht Co., **501** So. **2d 1339, 1341** (Fla. 3rd **DCA 1987)** (The court properly framed its order in the alternative so that if the directed verdict were reversed on appeal a new trial would be granted); Diamond v. Rosenfeld, **511** So. **2d 1031, 1037 (Fla.** 4th **DCA 1987)** (We **feel** that it is appropriate to point out that the preferred approach when granting a motion for judgment notwithstanding the verdict in an action in which a motion for new trial has also been filed is to alternatively rule upon the motion for new trial as well); Favden v. Guerrero, **474** So. 2d 320 (Fla. 3rd DCA **1985)** (In the alternative the trial court granted a new trial on all issues [which] we approve and recommend such a procedure); Ligman v. Tardiff, **466** So. 2d **11**25, **1126** (Fla. 3rd DCA **1985) (It was** proper procedure for the trial court to rule on the motion for judgment notwithstanding the verdict as well as the alternative motion for new trial); Reams v. Vaushn, 435 so. 2d 879, **881** (Fla. 5th **DCA 1983) (It** was proper for the trial court to grant a

judgment n.o.v. and alternatively, to grant a new trial should the first order be reversed on appeal); Navarro v. City of Miami, 402 So. 2d 438 (Fla. 3rd DCA 1981) (We remand the cause to the trial court to rule upon the City's motion for new trial, which motion the trial court was apparently inclined to grant, but erroneously believed was mooted by the entry of the judgment n.o.v. Instead, a ruling on the motion for new trial should have been made as an alternative to the judgment entered); Kilburn v. Davenport, 286 So. 2d 241, 244 (Fla. 3rd DCA 1973) (A motion for new trial may be joined alternatively with the reserved motion for a directed verdict).

C. "IN THE ALTERNATIVE" IS THE EXACT LANGUAGE THIS COURT PRESCRIBES IN ITS RULE 1.480

In fact, the language of the March 23rd Order is the exact language this Court placed in the very rule from which the Motion for Judgment Notwithstanding the Verdict emanates. Rule 1.480(c) of the Florida Rules of Civil Procedure reads in relevant part as follows:

> **(c) Joined with motion for new trial.** A motion for a new trial may be joined with this motion [Motion for Judgment in accordance with Motion for Directed Verdict] or a new trial may be requested **in the alternative.**

(emphasis supplied) Id. Obviously, the phrase "in the alternative" standing alone was sufficiently clear for this Court to state it within the Rule itself without further elaboration.

Webster's, New Twentieth Century Dictionary, Unabridged, Second Edition

(1983) defines the term "alternative" as follows:

> Providing or necessitating a choice between two (or, loosely, more than two) things; something remaining to be chosen; that which may be chosen or omitted as one of two things, so that if one is taken, the other must be left; thus, when two things offer a choice of one only, the two things are called alternatives; the choice between two things; hence, any one of the things to be chosen.

(emphasis in the original). The lower trial court's Order was correct in form by the standards imposed by this Court, the standards imposed by the Second District Court of Appeal, and the standards imposed by Mr. Webster.

D. OTHER APPELLATE DECISIONS

The Second District Court of Appeal's published decision conflicts not only with the case law cited above, but it ignores its own long-standing law acknowledged in the case of Stupp v. Cone Bros. Contracting Co., 135 So. 2d 457 (Fla. 2nd DCA 1961). In Stupp, in addressing how a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial should be ruled upon, the Second District Court of Appeal stated:

> The reasoning back of the decisions in the federal cases seems to be that, by nature, a motion for new trial and a motion for judgment are separate and independent motions, each having its own function and oftentimes one motion will assign grounds which are not to be appropriately considered in connection with the other motion. Additionally, there are the considerations of expediting litigation, avoiding expenses and unwarranted delays, and avoiding piecemeal procedure in reaching final determination on appeal.
>
> We believe that the better course for this court to follow in resolving the question here is that prescribed and followed in the federal jurisdictions. In reaching this conclusion, emphasis is placed upon the fact that the Florida rule is literally adopted from the federal rule, as it

> relates to **alternative** post-trial motions. **Under this view both motions should be ruled** upon [alternatively].

(emphasis supplied) Id. at 461. In 30 years, the Second District Court of Appeal has never receded from that which it espoused in Stupp. See Bannister v. Hart, 144 So. 2d 853 (Fla. 2nd DCA 1962). As such, based on the law of Florida, including that of the Second District Court of Appeal, the instant District Court's decision should be reversed and the trial court's March 23rd Order granting Judgment Notwithstanding the Verdict affirmed.

E. THE JUDGMENT NOWITHSTANDING THE VERDICT WAS GRANTED FIRST

Assuming arguendo that the Second District of Appeal is correct and the trial court's March 23rd Order did grant both the Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial, but did not grant them in the alternative, the Second District Court of Appeal's instant decision is still incorrect and should be reversed,

In its opinion, the District Court asserts that the Motion for Judgment Notwithstanding the Verdict could not be granted because the trial court **first** granted the Motion for New Trial in that same Order. A. 19. The District Court concludes that because the trial court first granted the Motion for New Trial, it could not then grant the Motion for Judgment Notwithstanding the Verdict in that same Order. A. 20. The District Court opines that the two motions are mutually inconsistent and may not be granted simultaneously. A. 20. The District Court stated:

> In its **final** order, the trial court **first** granted Keene Brothers' Motion for New Trial on the ground of juror misconduct. Upon **that** order, the case was concluded. An order granting a new trial is a final, appealable order. See Florida Rule Appellate Procedure 9.110(a)(3)(1990). The trial court had no authority to simultaneously enter a judgment notwithstanding the verdict in the same order. 'By the very nature, a new trial order and order for J.N.O.V. are mutually inconsistent and may not be granted simultaneously'. Frazier v. Seaboard Systems R.R., Inc., 508 So. 2d 345 (Fla. 1987). Accordingly, the judgment notwithstanding the verdict is reversed.

(emphasis supplied) A. 19-20. By its own reasoning, the District Court should be reversed.

The District Court asserts that the trial court did not have authority to grant both Motions simultaneously in the same Order. A. 19-20. Ruling that the trial court granted Keene Brothers' Motion for New Trial first, the District Court concludes that because a Motion for New Trial is a final, appealable order, the trial court was without authority to enter a Judgment Notwithstanding the Verdict. A. 19-20. Applying this reasoning to the trial court's actual Order, it is clear that the portion of the lower Court's Order that should have been upheld on appeal was the portion granting the Motion for Judgment Notwithstanding the Verdict.

As clearly stated by the March 23rd Order, the trial court **first** granted the Motion for Judgment Notwithstanding the Verdict. Like an Order for New Trial, an Order granting Judgment Notwithstanding the Verdict is also a final, appealable Order. Kirby v. OMI Corp., 561 So. 2d 666 (Fla. 1990), review denied 574 So. 2d 141, cert. denied 111 S. Ct. 1108, 113 L. Ed.2d 217. Assuming then that the trial court did in fact grant both Motions "simultaneously," applying the District Court's own

logic to the actual ruling, the Order granting the Motion for Judgment Notwithstanding the Verdict should be affirmed because it was granted first. By the District Court's own reasoning, after first granting the Motion for Judgment Notwithstanding the Verdict, the case was concluded and the trial court was without authority to "simultaneously" grant a new trial in that same Order.

Therefore, if this Court is in agreement with the reasoning of the Second District Court of Appeal, that the trial court granted both Motions simultaneously and not in the alternative, then the Second District Court of Appeal must be reversed and the Motion for Judgment Notwithstanding the Verdict reinstated. On the other hand, if this Court disagrees with the reasoning of the Second District Court of Appeal, and agrees instead with Petitioner, that the trial Court granted the Motion for Judgment Notwithstanding the Verdict and then, and in the alternative, granted the Motion for New Trial, the Second District Court of Appeal must still be reversed and the Motion for Judgment Notwithstanding the Verdict reinstated. Either way, by either reasoning, the District Court Opinion is incorrect and the Motion for Judgment Notwithstanding the Verdict should be reinstated. To do otherwise and affirm the District Court's decision would be to read into the March 23rd Order what was not written and to reverse a trial court decision that was not made.

II. ALTERNATIVELY, THE PRESENT DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN ESTATE OF BUSING V. BROHAN, 567 SO. 2D 6 (4TH DCA 1990), CERT. DEN., 581 SO.2D 163 (FLA. 1991)

In Estate of Busing v. Brohan, 567 So. 2d 6 (Fla. 4th DCA 1990), Plaintiffs filed suit seeking damages for wrongful death and personal injuries. After the first verdict was returned, the trial court concluded the verdict was legally inconsistent. The jury then returned a second verdict and the Court again concluded the jury had misunderstood its comments following the initial jury verdict and sent the jury back. The jury then returned a third verdict and, based upon jury confusion, the trial court granted Plaintiffs' Motion for Mistrial and dismissed the jury. After the trial court entered an Order rescheduling the trial, Defendant filed various post-trial motions and advocated reinstatement of the verdict. The Court agreed and rendered a final judgment on the initial verdict.

On appeal, Plaintiff contended the trial court erred when it entered a final judgment based upon the jury's initial verdict. Plaintiff contended entering such final judgment was in error because the Court had granted a mistrial and dismissed the jury. The Fourth District Court of Appeal stated that the term "mistrial" applies to a case in which a jury is discharged without a verdict. The Court stated:

> In legal effect, a mistrial is equivalent to no trial at all, and is declared because of some circumstance indicating that justice may not be done if the trial continues. The word is not ordinarily used to indicate a mere

> erroneous ruling of law, but generally is used to specify some fundamental error in a trial as to vitiate the results.

Estate of Busing v. Brohan, 567 So. 6 (Fla. 4th DCA 1990) citing Long v. City of Opelika, 66 So. 2d 126 (Ala. App. 1953)

The Fourth District Court of Appeal also stated:

> It seems clear to us that the authorities cited coincide with the common understanding of the term 'mistrial' which is, that when a mistrial has been granted, it is the equivalent of declaring a proceedings void and without force or effect.

Estate of Busing at 7.

The Fourth District Court of Appeal concluded that the trial court did not reinstate the jury's initial verdict after it had discharged the jury. The Court reasoned that the order declaring the mistrial vitiated the jury's verdict and caused the trial to be a nugatory proceeding. There was, therefore, no jury verdict to reinstate.

The Second District Court of Appeal's opinion in the instant case expressly and directly conflicts with the rationale and holding of Estate of Busing. In the instant case, the Second District Court of Appeal states:

> At the conclusion of the trial, Keene Brothers' counsel noted that one of the jurors, an accountant named Donald Duke, had taken a book into the jury room. Juror Duke acknowledged that he had referred to page 450 of 'introduction to financial accounting' during deliberations. Keene Brothers' counsel asked for and was granted a **mistrial** based **on** juror misconduct.

(emphasis supplied) A. 18. Despite acknowledging that Petitioner was granted a mistrial before the jury was discharged, the Second District of Appeal reinstated the

jury verdict . A. 21. The District Court stated that although the presence of the accounting book in the jury room could not be held to be harmless, it also could not be held that the accounting book was used to determine liability. A. 21. The District Court concluded, therefore, that a new trial was proper on damages only and reinstated the jury verdict as to liability. A. 21. This reinstatement of the jury verdict after a mistrial was declared is error.

It is impossible to reconcile the Second District Court of Appeal's opinion with that of Estate of Busing. In Estate of Busing, the Fourth District Court of Appeal held that an order granting a mistrial vitiates the jury's verdict, which cannot be reinstated. Estate of Busing at 7. Clearly, if the Fourth District Court of Appeal is correct and the granting of a mistrial permanently vitiates the jury verdict, then the holding of the Second District Court of Appeal reinstating the jury verdict must be incorrect.

CONCLUSION

The Second District Court of Appeal reversed the trial court's Order granting Judgment Notwithstanding the Verdict for the following reasons:

1. Failure to comply with Frazier in granting the Judgment Notwithstanding the Verdict and New Trial simultaneously but not in the alternative; and

2. In granting the New Trial before granting the Judgment Notwithstanding the Verdict in the same Order, thus precluding the latter.

This Court should reverse the District Court and reinstate the trial court's Order granting Judgment Notwithstanding the Verdict for the following reasons:

1. The trial court's clear compliance with Frazier and Rule 1.480(c) in granting the Judgment Notwithstanding the Verdict and only in the alternative granting the New Trial; and

2. The trial court granted the Judgment Notwithstanding the Verdict "before" granting the New Trial.

This Court should note that this issue was neither raised, briefed, nor argued by either party on appeal. Even the Respondent did not believe this to be an issue. The Second District Court of Appeal raised this issue sua sponte without any assistance or direction from either party. After the District Court issued its opinion, Petitioner filed a timely Motion for Rehearing and Clarification, sincerely believing that

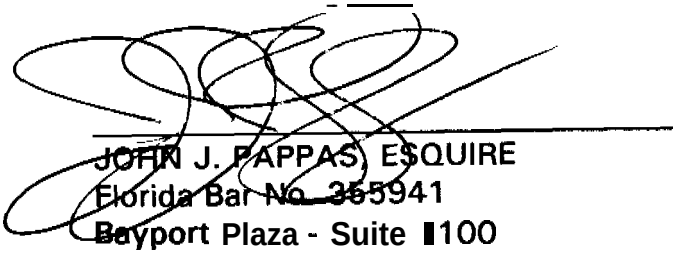
the District Court simply misread the subject Order. The District Court denied the Motion. Essentially, the Second District Court of Appeal threw out the trial court's Order granting the Judgment Notwithstanding the Verdict without the benefit of any argument or guidance from the parties. Respectfully, and regretfully, we sincerely believe the Second District Court of Appeal simply misreads the subject Order and therefore should be reversed, and the Order granting the Judgment Notwithstanding the Verdict reinstated.

Alternatively, the Estate of Busing case should be followed. That is, once a mistrial is declared before a jury is discharged, a jury **verdict** cannot be reinstated. Petitioner is entitled to a new trial on the issue of liability as well as on the issue of damages.

Therefore, this Court should reverse the District Court with instructions to affirm the trial court's Order granting Judgment Notwithstanding the Verdict, or, in the alternative, reverse and remand with instructions to affirm the trial court's Order granting a New Trial on the issue of liability as well as damages.

Respectfully submitted,

BUTLER, BURNETTE & PAPPAS



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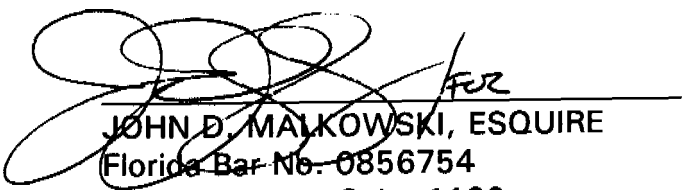

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CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, postage prepaid, this 30 day of July, 1992, to:

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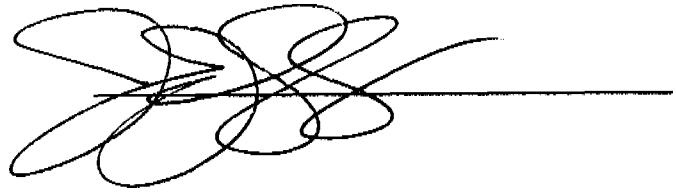

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