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IN THE SUPREME COURT OF FLORIDA

KEENE BROTHERS TRUCKING, INC.,

Petitioner,

versus CASE NO. 79,205

PATRICIA PENNELL and
RANDY PENNELL,

Respondents.

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Patricia Pennell and Randy Pennell challenge a post-trial Order granting Keene Brothers Trucking, Inc. a Judgment Notwithstanding the Verdict and a new trial. R:1487-1494; R:1512-1513.

The Respondents, who were the Plaintiffs below, are Patricia Pennell **and** her husband, Randy Pennell. Pat Pennell, a dump truck driver, was injured on the job when another dump truck driver carelessly threw a log from the rear of his truck, striking her on the back of the neck. R:280; R:510. Randy Pennell has a claim for loss of consortium. R:1307.

The Plaintiff/Respondent shall be referred to as **"Pat** Pennell" or **"Pennell"** or collectively as **"The** Pennells". The Defendant/Petitioner, Keene Brothers Trucking, Inc., shall be referred to as "Keene Brothers".

Pat Pennell's employer, Florida Fill Truckers, shall be referred to as "Florida Fill".

The Petitioner's Statement of the Case and Facts is accurate, but the Respondent has deemed it necessary to file a separate Statement of the Case and Statement of the Facts in order to provide a more complete picture of the proceedings below.

STATEMENT OF THE CASE

Pat Pennell and her husband, Randy, brought an action for damages against Keene Brothers on June 9, 1987. R:1085-1086.

Keene Brothers answered and raised, as one of its affirmative defenses, worker's compensation immunity. R:1089. Keene Brothers asserted that Pat Pennell was an employee of Florida Fill Haulers, a subcontractor of Keene Brothers and was covered by Keene Brothers' worker's compensation insurance at the time of the accident. R:1089.

This case was tried to the jury from February 19 to February 22, 1990. R:1-1078. The jury was presented with an interrogatory verdict which asked the jury:

1. Whether Florida Fill was a subcontractor for Keene Brothers at the time of Pat Pennell's injury;
2. Whether Pat Pennell and Bennie Cobb, the employee of Keene Brothers, were working under the same contract or job for Keene Brothers at the time of Pat Pennell's injury. R:1403-1405.

The jury resolved these issues in Pat Pennell's favor, holding that Florida Fill was not a subcontractor of Keene Brothers on the work that Pennell was engaged in at the time of her injury and that Pat Pennell and Bennie Cobb were not working on the same contract at the time of her injury. R:1403-1405.

The jury also found that there was negligence on the part of

Keene Brothers' employee, Bennie Cobb, which was the legal cause of injury to Patricia Pennell **and** that Patricia Pennell was ten percent comparatively negligent. R:1403-1404.

The "total damages" sustained by Patricia Pennell were $600,000.00 and the "total damages" sustained by her husband, Randy, were $225,000.00. R:1404-1405.

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. R:1432. Juror Duke acknowledged that he had referred to page 450 of "Introduction to Financial Accounting" during deliberations. R:1432-1433.

The following colloquy then occurred:

> 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. Had we not looked at that, it might have been.

MR. **ALLEN** [sic] [DEFENSE COUNSEL]: Your Honor, I respectfully request a <u>mistrial</u>?

THE COURT: <u>Granted</u>.

MR. ALLEN [sic]: Thank you, Your Honor.

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

(emphasis supplied)

The following day, February 23, 1990, the Pennells served their Motion to Reinstate Verdict. R:1422-1425. (This motion was filed of record on March **1,** 1990). **R:1422.**

Keene Brothers filed its Response in Opposition to Plaintiffs' Motion to Reinstate Jury Verdict on March 1, 1990. R:1415-1417.

The Motion to Reinstate Verdict and the Defendant's response both related to the Trial Court's Order granting a new trial because of juror misconduct. R:1415-1417; R:1422-1425.

On March 16, 1990, twenty-two days after the return of the jury verdict, Keene Brothers filed its "Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict". R:1480-1486. In this motion, Keene Brothers not only raised the issue of juror misconduct but raised four additional grounds for the entry of an Order granting new trial, for remittitur or for a judgment notwithstanding the verdict, *to* wit: the size of the jury verdict was excessive; the

Pennells' counsel made prejudicial statements in the closing argument; new evidence **was** raised by Pat Pennell for the first time at trial; the verdict was contrary to the manifest weight of the evidence. **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". **R:1487-1494.**

In this Order, the Trial Court reduced to writing its February **22, 1990** Order granting 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. **R:1491.**

In addition, the Court granted Keene Brothers' Motion for Judgment Notwithstanding the Verdict and held that the "overwhelming weight of the evidence" established that Florida Fill was a subcontractor of Keene Brothers on the date of Pat Pennell's injury. **R:1492-1494.**

The Trial Court denied the additional grounds of Keene Brothers' Motion for New Trial, that is, that the verdict was excessive or that prejudicial statements were made by Plaintiffs' counsel during closing argument or that new evidence was raised for the first time at trial. **R:1491-1492.**

The Pennells' Motion to Reinstate Verdict was also denied. **R: 1491.**

Patricia Pennell **and** Randy Pennell **filed** their Notice **of** Appeal on April **18, 1990. R:1512.**

Keene Brothers served and filed its Notice of Cross-Appeal on May 1, 1990. R:1598.

The District Court of Appeal for the Second District reversed the Judgment Notwithstanding the Verdict. **The** District Court also reversed the Order Granting New Trial due to juror misconduct as to the issue of liability and affirmed as to the issue of damages and remanded the proceedings to the Trial Court. *Pennell* v. Keene ***Brothers*** Trucking, Inc., 589 So.2d 965 (Fla. 2d D.C.A. 1991).

Keene Brothers served **its** Petition for Review on January 3, 1992. The Pennells served their Cross-Petition for Review on January 7, 1992.

On July ***8***, 1992, this Court granted Keene Brothers' Petition for Review and denied the Pennells' Petition for Review.

STATEMENT OF FACTS

This is an appeal from a Judgment N.O.V. or, in the alternative, an Order granting a new trial entered in favor of the Defendant in a personal injury action.

The Plaintiff, Pat Pennell, was injured on the job and the Defendant, Keene Brothers, raised the defense of worker's compensation immunity. R:1089. The relationship of the parties is important.

A: THE PARTIES:

The Defendant was Keene Brothers Trucking, Inc. R:1085-1086. Keene Brothers was a corporation formed in 1978. R:698-699. Its sole shareholder is Robert Keene. R:699.

In November or December of 1983, Robert Keene found it desirable, for tax purposes, to form a separate entity, a sole proprietorship named Florida Fill Haulers. R:700; R:745.

Keene Brothers did site preparation evacuation work. It had clearing and grading equipment in addition to dump trucks. R:702.

Florida Fill Haulers only had dump trucks. R:702.

In 1983, Keene Brothers bought thirteen dump trucks, eight of which were subsequently leased to Florida Fill Haulers. R:700; R:701.

Florida Fill's dump trucks were painted red and were numbered K1 through K8. R:701. Keene Brothers' trucks were numbered K9 through K13 and were painted white. R:701; R:746.

Keene Brothers and Florida Fill were headquartered in the same building. R:709.

Florida Fill would bill Keene Brothers for jobs they performed for the corporation. **R:708;** R:710. Florida Fill also did work for other customers. R:732-733.

However, the billing was somewhat flexible. The corporation that needed money was the one that received the billing. R:947.

It is undisputed that Pat Pennell was a dump truck driver employed by Florida Fill. **R:272;** R:500. After her injury, she received worker's compensation benefits from Florida Fill. R:597; R:622.

B. <u>THE ACCIDENT</u>:

On November ***28***, 1984, Pat Pennell was driving **her** red Florida Fill dump truck; it was numbered K6. **R:501;** R:512.

She arrived at work at approximately 7:00 a.m. and was directed by her supervisor, Al Wise, to take a **load** of fill dirt to a location in south Tampa. R:501.

Pat Pennell returned to Keene Brothers to pick up another load of fill dirt and was then directed by Al Wise to pick up a load of trash instead. R:501.

Pat Pennell testified that she picked up a load of trash from the Lavoy School job and returned to Keene Brothers. R:501; R:503. The Lavoy School job was not a Keene Brothers job. R:545. She was not working for Keene Brothers that day. R:546-547; R:572.

As an employee of Florida Fill, Pat Pennell was required to

keep time records showing what jobs she worked on and pit tickets which she would pick up when she obtained a load of fill dirt from her employer. She kept these tickets on a clip board in her truck. When she returned to work approximately one month later to pick up her job tickets, they were missing. **R:563.**

Pennell had difficulty in dumping the trash; something was lodged in the truck bed. R:503. Al Wise helped her dislodge the load and accompanied her across the street to the field owned by Keene Brothers where she was going to dump the trash. **R:503-504.** Pat Pennell finally dumped her load of trash and Al Wise told her to get out of the truck to make sure that all of her load had been dumped. **R:504-505.**

At this time, Bennie Cobb, an employee of Keene Brothers, had parked his dump truck near Pennell's truck. **R:505; R:508.** Bennie Cobb also had problems with his load of trash and he went into the truck bed to remove an eight or nine foot log. Without looking, Bennie Cobb threw the log over the side of his truck bed and struck Pat Pennell on the back of her neck. R:510.

Pat Pennell was taken to the hospital and treated. **R:512.** She complained of neck pain and was seen by Dr. Lynch for three or four weeks. Lynch then referred her to Dr. Antonio Castellvi, an orthopedic surgeon. R:597.

Dr. Castellvi said that Pat Pennell had a bone pressing against a nerve. R:597. Dr. Castellvi recommended that Pat Pennell have a cervical fusion; if she did not have the surgery, she could become a paraplegic. R:639; R:640.

Pat Pennell was reluctant to have surgery. R:641. The ligaments that kept her vertebrae stable were damaged. **R:654.** She was placed in a hard collar to see if the ligaments would heal. **R:641. Dr.** Castellvi sent Pat Pennell for a second opinion. **R:641.**

Pennell returned in January or February of 1985 and x-rays taken at that time showed abnormal motion of the spine.

She underwent surgery at **St.** Joseph's Hospital. **R:642.**

After the surgery, Pat Pennell has myofascitis, which is pain in the shoulders and at the base of the neck. **R:644.**

She originally took muscle relaxants and anti-inflammatory drugs, but they caused her ulcers. **R:645; R:652.**

Pat Pennell will continue to need physical therapy at least ten days to two weeks every two or three months for the rest of her life. **R:654.**

She has permanent limitations of lifting greater than thirty pounds at any time, and no repeated lifting of over ten pounds, and no repeated bending, stooping or squatting. R:647. She is now restricted to light duty work. **R:367.**

Pat Pennell wanted to return to work driving dump trucks. R:523-524. Dr. Castellvi said that she could, but he didn't think that she would be able to do that kind of work anymore. **R:523-524.**

Pat Pennell did return to work as a truck driver after the surgery, but **she** was in a great deal of pain. **R:518; R:519; R:523.** She finally had to leave truck driving. **R:524.**

After a year of looking for another job, **she** obtained a

secretarial job at a welding shop. She missed a great deal of work because of her pain and was fired for absenteeism. **R:524-525.** Other jobs and working in her husband's seafood business did not **work out. R:526-528.**

Ms. Pennell's tenth grade education, coupled with her physical limitations, bars her from all but five percent of the **jobs** available in Hillsborough County. **R:373.** The type **of** jobs that she has the potential for is quite limited. **R:374.**

At trial, Dr. Hartley Mellish, an economist, testified for the Plaintiff. **R:428.**

Dr. Mellish testified that Patricia Pennell's lost wages up to the time of trial totaled **$60,184.00. R:448.** Ms. Pennell's future economic losses, reduced to present value, would range from **$252,244.00** to **$444,964.00,** depending upon what wage Ms. Pennell would have earned. **R:454; R:455.**

Dr. Mellish testified that the value of Ms. Pennell's lost household services, reduced to present value, would range from **$530,738.00** to **$578,987.00. R:453.**

Finally, **Dr.** Mellish testified that Ms. Pennell's future medical expenses, reduced to present value, would be **$137,943.00.** R: **458.**

Therefore, Mellish's unrebutted testimony was to the effect that Patricia Pennell's damages would range from **$980,000.00** to over **$1,200,000.00,** reduced to present value. **R:448-454.**

SUMMARY OF THE ARGUMENT

This is an appeal from the Trial Court's order granting the Defendant a new trial and a judgment notwithstanding the verdict in a personal injury action.

The Trial Court lacked the requisite subject matter jurisdiction to enter a judgment notwithstanding the verdict.

The jury verdict was returned on February 22, 1990. Before the jury **was** discharged, it was established that one of the jurors had consulted a financial accounting book during deliberations. Keene Brothers immediately moved for and was granted a new trial on the basis of jury misconduct. R:1434.

It was not until March 16, 1990, twenty-two days after the verdict was returned that Keene Brothers served its "Defendant's Motion for New Trial or, in the Alternative, Remittitur, or Motion for Judgment Notwithstanding the Verdict". R:1480-1486. This motion was untimely and the Trial Court lacked the subject matter jurisdiction to consider any of the grounds contained therein, other than juror misconduct. ***culpepper*** v. *Britt*, 434 So.2d 31, 32 (Fla. 2d **D.C.A.** 1983); *Bescar* Enterprises, Inc. v. Rottenberger, 221 So.2d 801 (Fla. 4th **D.C.A.** 1969).

Keene Brothers failed to preserve its challenge to the sufficiency of the evidence. Reene Brothers did not move for a directed verdict at the conclusion of the Pennells' case [R:697] and did not renew their Motion for Directed Verdict at the conclusion of all of the testimony. R:966-970.

In addition, the verdict **was** supported by substantial, competent evidence.

Therefore, the judgment notwithstanding the verdict should be reversed.

The Trial Court abused his discretion in granting a new trial on the issue of juror misconduct. At trial, Dr. Hartley Mellish, an economist, testified regarding the economic damages sustained by the Pennells. **R:438-465.** He reduced these damages to a present monetary value and explained the methodology he used to accomplish such a reduction. **R:440-459.**

Although one **of** the jurors consulted a Present Value Table during deliberations, Keene Brothers was not prejudiced. There is no prejudice where the information conveyed by unauthorized materials merely duplicates evidence which **was** properly presented at trial. *Bottoson* v. *State,* **443** So.2d **962, 966** (Fla. **1983);** *United States* v. *Dynalectric*, 859 **F.2d** 1559, 1582 (11th Cir. 1988).

Further, there was no prejudice as the "total damages" awarded by the jury to both of the Pennells totaled less than the amount of economic damages calculated by Dr. Mellish. This does not even take into consideration the non-economic damages, such as pain and suffering, mental anguish and loss of capacity for the enjoyment of life. **R:1392.** The verdict **was** supported by competent, substantial evidence and should be reinstated. ***Compare*** *Plazza* v. ***Patio Concrete,*** 567 So.2d 908 (Fla. 2d **D.C.A.** 1990).

Even if this Court should determine that Keene Brothers **was** prejudiced by the jury's consideration of the Present Value Table

during its deliberations, the Order Granting New Trial should be limited only to the issue of damages. The Present Value Table could in no way affect the issues of liability.

ARGUMENT ONE

THE RULING OF THE DISTRICT COURT WAS CONSISTENT WITH FRAZIER v. SEABOARD SYSTEMS RAILROAD COMPANY, 508 So.2d 408 (FLA. 1987) [RESPONSE TO PGS. 8-16 OF PETITIONER'S INITIAL BRIEF]

The decision of the District Court is unusual for after first identifying the contentions of Pennell and Keene Brothers, the Court neither discussed nor resolved these contentions and outlined an entirely independent ratio decidendi. *Pennell v. Keene Brothers Trucking, Inc.*, 589 So.2d 965, 967 (Fla. 2d D.C.A. 1991). The District Court held at page 967:

> 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. The order granting a new trial is a final, appealable order. See, *Fla.R.App.P. 9.110(a)(3) (1990).*
>
> * * *

The Pennells agree with that statement, but contend that the Trial Court granted Keene Brothers' Motion for New Trial on the ground of juror misconduct on February 22, 1990 and, absent a timely motion (served within ten days of the return of the verdict), the Court lacked subject matter jurisdiction to grant either a new trial or a judgment N.O.V. on any other ground.

However, the next sentence of the opinion makes it clear that the District Court is referring to the Trial Court's March 23, 1990

"Findings and Order on Defendant's Motion for New Trial, or in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict".

The problem with the March 23, 1990 Order is that, although it purports to grant Keene Brothers' Motion for Judgment Notwithstanding the Verdict and its Motion for New Trial in the alternative, the order itself does not provide that the Motion for New Trial was granted on the condition that the new trial order would be effective only if the judgment N.O.V. was reversed on appeal. The Court granted both motions.

As this Court held in ***Frazier v.*** Seaboard ***Systems Railroad, Inc., 508*** **So.2d 345, 346-347 (Fla. 1987):**

* * *

> 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 on **appeal.**
>
> * * *
>
> 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. The Trial Court granted both motions, which was clearly improper.

That being said, if this Court should determine that the Trial

Court's order was properly granted in the alternative, the Pennells request that this Court address the other defects inherent in the March 23, 1990 order.

ARGUMENT TWO

THE TRIAL COURT ERRED IN GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT

A. The Trial Court Lacked the Requisite Subject Matter Jurisdiction to Enter a Judgment Notwithstanding the Verdict

The chronology of the post-trial motions is as follows:

	Date	Event
1.	February 22, 1990	Jury verdict was received. R:1403-1405.
2.	February 22, 1990	Keene Brothers moved for and was immediately granted a new trial on the basis of juror misconduct. R:1434.
3.	February 23, 1990	Pat Pennell and Randy Pennell serve their Motion to Reinstate Jury Verdict. R:1422-1425.
4.	March 1, 1990	Keene Brothers files its Response in Opposition to Plaintiffs' Motion to Reinstate Jury Verdict. R:1415-1417.
5.	March 16, 1990	Keene Brothers serves its "Defendant's Motion for New Trial or, in the Alternative, Remittitur, or Motion for Judgment Notwithstanding the Verdict". R:1480-1486.
6.	March 23, 1990	"Findings and Order on Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict" rendered by the Court [granting Keene Brothers' Motion for Judgment Notwithstanding the Verdict and granting, in part, Keene Brothers' Motion for New Trial.] R:1487-1494.

The jury's verdict was received on February 22, 1990. R: 1403-1405. Rule 1.480(b) of the Florida Rules of Civil Procedure provides that "within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside . . ."

Keene Brothers' "Defendant's Motion for New Trial, or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict" was served on March 16, 1990, twenty-two days after reception of the verdict herein was clearly untimely. *Culpepper v. Britt*, 434 So.2d 31, 32 (Fla. 2d D.C.A. 1983); *Bescar Enterprises, Inc. v. Rottenberger*, 221 So.2d 801 (Fla. 4th D.C.A. 1969). *See, Howard v. Farm Bureau Insurance Company*, 467 So.2d 442 (Fla. 5th D.C.A. 1985).

The Trial Court did not have the requisite subject matter jurisdiction to enter a judgment notwithstanding the verdict.

B. Keene Brothers Failed to Preserve the Issue of the Sufficiency of the Evidence

In paragraph six of its "Findings and Order on Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict", the Trial Court held that the "overwhelming weight of the evidence supports the judgment notwithstanding the verdict in favor of the Defendant . . ." R: 1494.

Significantly, Keene Brothers did not preserve the issue of the sufficiency of the evidence.

Keene Brothers did **not** move for a directed verdict at the conclusion of the Pennells' case [R:697] and did **not** move for a directed verdict at the conclusion of all of the testimony. R:966-970. The failure to move for a directed verdict before the case was submitted to the jury waives the right to make that motion. *Prime Motor Inns, Inc. v. Waltman*, 480 So.2d 88, 90 (Fla. 1985); *6551 Collins Avenue Corp. v. Millen*, 104 So.2d 337 (Fla. 1958); *Grossman v. Florida Power & Light company*, 570 So.2d 992, 993 (Fla. 2d D.C.A. 1990).

C. The Verdict was Supported by Substantial, Competent Evidence

The verdict was supported by substantial, competent evidence. The Interrogatory Verdict Form, after first asking whether or not Keene Brothers' employee, Bennie Cobb, was negligent then queried:

> 2. Was Florida Fill Haulers a subcontractor for Keene Brothers, Inc. on the work that Patricia Pennell was engaged in at the time of her injury on November 28, 1984?
>
> YES _____ NO __x__
>
> 3. Were Bennie Cobb and Patricia Pennell engaged on the same job or contract work at the time of Patricia Pennell's injury on November 28, 1984?
>
> YES _____ NO __x__
>
> R:1403-1404.

In Keene Brothers' Response to Request for Admissions, which were read to the jury, Keene Brothers admitted that on the day of

Pat **Pennell's** injury, Bennie Cobb was working for **Keene** Brothers on the U-Haul job. R:273; **R:1120.**

Keene Brothers also admitted that Pat Pennell was employed by Florida Fill on the date of the accident. R:272; R:968.

Keene Brothers also admitted that:

> **(a)** Keene Brothers did not have any contract work for any job site owned by the School Board of Hillsborough County on the date of the accident;
>
> **(b)** Keene Brothers did not have any contract work for the job site Lavoy/Roland Park Campus job site on the date of the accident;
>
> **(c)** Keene Brothers did not[1] **"sublet"** to Florida Fill contract work for any job sites owned by the Hillsborough County School Board on the date of the accident;
>
> **(d)** Keene Brothers did not sublet to Florida Fill Haulers any part of the contract work for the Lavoy/Roland Park Campus job site on the date of the accident.
>
> **R:273-274.**

These admissions narrowed the issues. The disputed issues of fact were whether Patricia Pennell was working on the U-Haul job with Bennie Cobb on the date of the accident and/or whether she was working on the Lavoy/Roland Park School job.

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1 The record does not **contain** the word **"not"**, but the written Request for Admissions filed September 7, 1989 includes this word. **R:1266-1267.**

Bennie Cobb testified at trial that he and Pat Pennell were not working on the same job on the date of the accident. R:282.

Pat Pennell testified that she and another driver, Ricky Eley, were working on the Lavoy/Roland Park School job on the date **of** the accident. **R:502.** Rickey Eley **was** driving truck number K2 and Pat Pennell was driving truck number **K6.** However, at trial, the job tickets for truck numbers **K2** and K6 **on** the date of the accident were missing. They had **"disappeared"** from Keene Brothers. There were no daily time sheets for Ricky Eley or Patricia Pennell on the date of the accident. R:741; R:745; R:935. In other words, the very records that could have proved what job Pat Pennell was working on on the date of her accident had disappeared. Pat Pennell had a job ticket for every job she did. R:511. **Her** job tickets were left on a clipboard in her truck. R:513. When she returned to work, her job tickets were missing. R:513; R:563.

Pat Pennell **testified** that her supervisor told her to go to the Lavoy/Roland Park Campus to pick **up** a load of trash. R:554; R:502.

There was a construction **job** at the Lavoy/Roland Park School which started in May of 1984 and ended on December 13, 1984. R:788. The draw certificates showed that some site work had been done around November ***28***, 1984. R:801.

Certainly, Keene Brothers presented testimony that neither Keene Brothers nor Florida Fill had a **job** at the Lavoy/Roland Park School campus on the date in question. R:713. However, Florida Fill Haulers had **jobs** of their own that were not involved with

Keene Brothers. **R:733.** If there **was** a job for Florida Fill Haulers that was not a Keene Brothers job, Keene Brothers might not have the records of it. **R:730; R:741.**

The jury may have decided that the fact that Pat Pennell and Ricky Eley's daily time sheets had "disappeared", the fact that Pat Pennell's job tickets on the date in question were "missing", and the fact that there was some site preparation work being done at the Lavoy/Roland Park School Campus on the date in question were more than just **coincidences**The testimony was hotly disputed but the jury resolved those disputes in Pat Pennell's favor. There was substantial, competent evidence to support the jury verdict.

ARGUMENT THREE

THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL

A. A "Mistrial" Entered after the Reception of a Valid Jury Verdict is an Order Granting a New Trial and is Reviewable [Response to pages 17-19 of Petitioner's Brief]

As noted in the Statement of the Case and Statement of Facts, after return of the jury verdict, Keene Brothers' counsel advised the Judge that one of the jurors had a book with him in the jury room. After a brief inquiry of the jury, the Court immediately granted Keene Brothers' Motion for Mistrial.

Keene Brothers, citing *Estate of Busing v. Brohan*, 567 So.2d 6 (Fla. 4th D.C.A. 1990), cert. den., 581 So.2d 163 (Fla. 1981), states that a mistrial is equivalent to no trial at all. Therefore, there is no jury verdict to reinstate. Petitioner's Brief, pgs. 17-19.

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 page 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 ***Florida Department*** of ***Transportation v. Weggies Banana Boat,*** **545 So.2d 474 (Fla.** 2d **D.C.A.** 1989), the Second District, following this Court's holding in ***State*** **ex *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 ***Sponenberg v. Strasser,*** 504 So.2d 64 (Fla. 4th D.C.A. 1987).

Sponenberg 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. ***Sponenberg, supra,*** at page *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 page 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 are 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 ex rel Sebers v. McNulty, supra.***

B. The Trial Court Abused its Discretion in Granting a New Trial on the Issue of Juror Misconduct

The parties selected a jury that was well experienced in reviewing records. Donald **E.** Duke was an accountant. He had worked as an accountant for North American Van Lines and for Rowmack and Associates. R:27; R:28; R:110. Juror Ralph M. Jackson

was a warehouse manager for ARA Cory, a refreshment service for offices. **R:63.** He kept track of records and product that went in and out of the warehouse. It was his job to make sure that accurate records were kept. R:63. Juror Willette R. Jones was a settlement clerk for Coca-Cola. She **"settles"** truck driver routes. She "matches the cans with the cash". R:75.

Juror Ralph G. Laubecher was a career military man who now works for a company that does complex battle simulations using computers. R:75.

After the jury returned its verdict in favor of Patricia Pennell and Randy Pennell, defense counsel noticed that juror Donald Duke, the accountant, had taken a book with him into the jury room. **R:1432-1433.** The Court **inquired** of Mr. Duke what had been referred to in the book. Mr. Duke responded that he looked at page 450 in a book entitled **"Introduction** to Financial Accounting". **R:** 1432-1433.

Juror Ralph G. Laubecher, the computer simulation expert, then interjected:

> He may have looked at it, but none of us looked at that book.
>
> **R: 1433.**

The following exchange then took place:

> **[PENNELLS' COUNSEL]: Is** it that you used that book to reduce the value of the verdict for the value of the award?

> [DONALD DUKE]: *Yes.*
>
> [PENNELLS' COUNSEL]: So it resulted in a reduction of what you would have given had you not looked at that?
>
> [DONALD DUKE]: 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: 1434.**

The Trial Court has broad discretion to grant a new trial on proper grounds. Cloud v. *Fallis*, 110 So.2d 669 (Fla. 1959). On appeal, the Court's discretion can only be overturned if it amounts to an abuse of discretion. ***Crown** Cork **and Seal Company v. Vroom,*** **480** So.2d 108 (Fla. 2d D.C.A. 1985). However, the record must affirmatively show the impropriety of the verdict or there must be an independent determination by the Trial Judge that the jury was influenced by considerations outside the record. ***Fitzgerald v. Molle-Teeters, 520*** So.2d 645, 648 (Fla. 2d D.C.A. 1988).

Perhaps the best "shorthand test" for review of an order granting a new trial is set forth in Judge Altenbernd's concurring opinion in ***Hawk v.*** Seaboard ***System Railroad, Inc.,*** 547 So.2d 669, 673 n.2 (Fla. 2d D.C.A. 1989):

* * *

> An appellate court should approach the task by giving the trial judge the full benefit of the

> doubt, while requiring this appellate act of faith to be supported by some proof within the record which reasonably suggests that the jury went astray.

Here, there is nothing in the record which establishes that the jury "went astray" and the Trial Court did abuse his discretion in granting a new trial on the basis that the jury reviewed a present value table during deliberations.

The parties knew that Juror Donald Duke was an accountant. Because there were certain records that were important in the determination of this case, it may very well have been the reason that Mr. Duke, as well as the other jurors who deal with business records, were selected. Although jurors are only to consider the evidence introduced at trial, jurors are not required to leave their knowledge and experience at the jury room door. ***See*** *Edelstein* ***v.*** *Roskin*, *356* **So.2d 38**, 39 (Fa. **3d** D.C.A. 1978); compare *Brantley* ***v.*** *Tampa General Hospital,* ***Division of*** *the Hillsborough County Hospital and Welfare* ***Board,*** 315 So.2d 233, 234 (Fla. 2d D.C.A. 1975).

There is nothing in this record which would establish a "reasonable possibility" that Keene Brothers' rights were prejudiced. **See**, Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97,100 n.1 (Fla. 1991). R:1431-1434. Absent a showing of prejudice, the fact that Juror Duke referred to a Present Value Table should make no difference than if a jury used a multiplication table or a calculator. See, ***e.g.,*** *Doutre* v. *State*, 539 So.2d 569 (Fla. 1st D.C.A. 1989); Bottoson ***v.*** *State*, 443 So.2d 962, 966 (Fla. 1983); *White* v. *State*, 462 So.2d *52*, 53 (Fla. **1st**

D.C.A. 1984); *but see Grissinger v. Griffin,* 186 So.2d 58, 59 (Fla. 4th D.C.A. 1966); *Smith v. State,* 95 So.2d 525 (Fla. 1957).

The facts in this case are analogous to the circumstances in *Ortega* v. *Perrini and Sons, Inc.,* 371 So.2d 203 (Fla. 2d D.C.A. 1979). In that case, the Trial Court granted the Defendant's Motion for New Trial following a jury verdict in favor of the Plaintiffs.

The record revealed that the only mater not in evidence which may have been considered by the jury was one juror's knowledge of wages paid to persons engaged in the Plaintiff's occupation. *Ortega* v. *Perrini and Sons, Inc., supra* at page 204.

The juror in question was from **"rural Wauchula".** This Court commented that it is not unusual that a juror from rural Wauchula "would bring to its deliberation some idea of the wages of a foreman of grove pickers". Id. This Court noted that the record showed that the Plaintiff's earnings prior to the accident were in evidence. Id.

The unrebutted testimony of Dr. Harvey Mellish was that Pennell had sustained the following economic losses:

1.	Past economic losses	**$60,184.00**	**R:** 448
2.	Future economic losses (reduced to prevent value)	$252,244.00 to $444,964.00	R:455
3.	Value of lost household services (reduced to present value)	**$530,738.00** to **$578,987.00**	**R:453**

4. Future medical expenses (reduced to present value) $137,943.00 **R:** 458

TOTAL $981,109.00 to **$1,222,078.00**

Even if the juror's consultation of a present value table was improper, how was Reene Brothers prejudiced?

There is no prejudice where the information conveyed by the unauthorized materials merely duplicated evidence that had been properly presented to the jury at trial. *Bottoson* v. ***State,*** 443 So.2d 962, 966 (Fla. 1983); ***United States*** v. ***Dynalectric,*** **859** F.2d 1559, 1582 (11th Cir. 1988).

Dr. Mellish had already reduced these future losses to their present monetary value. R:440. At trial, he testified extensively on the method that he used to reduce future losses to present value and he was carefully cross-examined. R:440-459; R:464-485.

The record does not establish that Juror Duke's present value table contradicted Dr. Mellish's testimony.

Dr. Mellish testified that Patricia Pennell's damages, reduced to present value, ranged from $981,109.00 to $1,222,078.00.

The jury awarded Patricia Pennell $600,000.00 in "total damages" and her husband, Randy, $225,000.00 in "total damages". Even combining these awards, the total would be $825,000.00 in **"total** damages".

This is less than the amount of <u>economic damages</u> calculated by Dr. Mellish. This does not take into consideration non-economic damages, such as pain and suffering, mental anguish and loss of capacity for the enjoyment of life. R:1392. The verdict was

supported by competent substantial evidence and should be reinstated. *compare Piazza* v. *Patio* Concrete, *Inc.*, 567 So.2d 908 (Fla. 2d **D.C.A.** 1990).

When you couple the fact that the jury awarded the Pennells less than the amount of economic damages set forth in the expert testimony with the fact that juror Duke used the present value table to reduce the amount of damages awarded, it is hard to see how Keene Brothers could be prejudiced. **R:1431-1434.**

Finally, even if this Court should determine that juror Donald Duke's reference to a Present Value Table somehow contaminated the jury, the Trial Court erred in granting a new trial on all issues. The present value table could only have effected the jury's calculation of damages and had absolutely nothing to do with the jury's finding of liability. Under these circumstances, the Trial Court erred in granting a new trial on the issue of liability.

C. The Trial Court Lacked the Subject Matter Jurisdiction to Grant a New Trial on the Ground that the Verdict was Contrary to the Manifest Weight of the Evidence

The Trial Court did not grant a new trial on the ground that the verdict was against the manifest weight of the evidence. The Trial Court granted a Judgment Notwithstanding the Verdict on this ground.

Assuming arguendo that the March 23, **1990** Order can be construed as granting Keene Brothers' a new trial on the ground that the verdict was against manifest weight of the evidence,

Keene Brothers failed to timely invoke the subject matter jurisdiction of the Court. Rule 1.530(b) of the Florida Rules of Civil Procedure provides:

> (b) Time for motion. A motion for new trial or for rehearing shall be served not later than ten days after the return of the verdict in a jury action. . . A timely motion may be amended to state new grounds under the discretion of the Court at any time before the motion is determined.

Keene Brothers moved for a new trial on the ground of juror misconduct moments after the verdict was returned. The Trial Court immediately determined this motion in Keene Brothers' favor. This ruling was made on the record and was final for all but appellate purposes. ***Becker*** v. ***King,*** *307* **So.2d** *855* (Fla. 4th **D.C.A.** 1975). The March **23,** 1990 "Findings and Order" reduced to writing the Court's February 22, **1990** order granting a new trial for juror misconduct. It was a purely ministerial act accomplished after jurisdiction to entertain new proceedings had terminated. ***Knott v. Knott*, 395 So.2d 1196, 1198** (Fla. 3d **D.C.A. 1981).**

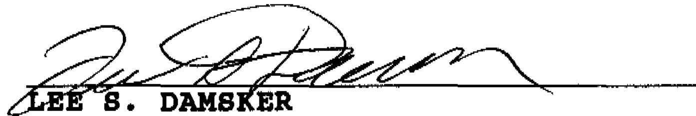
The Pennells' Motion to Reinstate Jury Verdict was an unauthorized Motion for Rehearing of the February **22, 1990** Order Granting New Trial. *Frazier* ***v.*** Seaboard ***Systems*** Railroad, **508** So.2d 345 (Fla. 1987); Owens v. ***Jackson,*** 476 So.2d **264** (Fla. 1st **D.C.A.** 1985). Therefore, the Pennells' Motion to Reinstate Verdict did not suspend rendition of the verdict and Keene Brothers' "Defendant's Motion for New Trial, or, in the Alternative, for

Remittitur, or Motion for Judgment Notwithstanding the Verdict" was untimely when it was served twenty-two days after return of the jury verdict. *Culpepper v. Britt*, 434 So.2d 31 (Fla. 2d D.C.A. 1983).

CONCLUSION

The decision of the District Court of Appeal for the Second District reversing the Judgment Notwithstanding the Verdict should be affirmed. The decision of the District Court of Appeal for the Second District reversing the Order granting a new trial on the issue of liability should also be affirmed. The ruling affirming the Order granting a new trial as to the issue of damages should be quashed and this cause remanded to the Trial Court with instructions to enter a final judgment upon the jury verdict.

MANEY, DAMSKER & ARLEDGE, P.A.



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