047 DA. 1-7-93

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 REPLY BRIEF

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RESPONSE TO ARGUMENT I

THE ORDER OF THE LOWER TRIAL COURT WAS CONSISTENT WITH FRAZIER V. SEABOARD SYSTEMS R.R. INC., 508 SO. 2D 345 (FLA. 1987)

[Response to Pages 15-17 of Respondents' Brief on the Merits]

The lower trial court issued its March 23rd Order **first** granting Keene Brothers' Motion for Judgment Notwithstanding the Verdict and then, in the alternative, granting the Motion for New Trial. The Order reads:

> 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. The Order clearly grants a Judgment Notwithstanding the Verdict **first;** and, then, only in the alternative, does the lower trial court grant a new trial. Pennells' argument and the Second District Court of Appeal simply fail to acknowledge the existence of this express and clear Order of the lower trial court.

Pennells speciously admit that the March 23rd Order **"purports** to grant Keene Brothers' Motion for Judgment Notwithstanding the Verdict and its Motion for New Trial in the alternative." What do Pennells mean **by** the word "purports"? The Order expressly and clearly stated **"OR IN THE ALTERNATIVE"!** Pennells' use of the word "purports" is disingenuous at best.

Pennells argue the lower trial court failed to annotate its March 23rd Order, explaining that the Motion for New Trial would only become effective if the Order

Granting Judgment Notwithstanding the Verdict was reversed on appeal. Granted, the lower trial court did not elaborate upon the meaning of its March 23rd Order explaining the obvious meaning of the phrase **"or in the alternative."** To require such a redundant and unnecessary explanation, where the trial court has already stated "or in the alternative," would **be** wholly inconsistent with this Court's admonition in Simsson v. State, 418 So. 2d 984, 986 (Fla. 1982), cert. denied, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed. 2d 1004 (1983) that to place form over substance would seriously hinder the administration of justice and the courts should seek to avoid, not foster hypertechnical applications of the law. Id. at 986. When ruling upon the order of the lower court, an appellate court should look to the intended effect of that order and consider substance over form. State v. Saufley, 574 So. 2d 1207, 1208-09 (Fla. 5th DCA 1991).

When considering the substance of the lower trial court's March 23rd Order, its intended effect was clearly and succinctly stated; the Motion for Judgment Notwithstanding the Verdict would **be** granted and in the alternative, the Motion for New Trial **be** granted, obviously only if the prior Order granting the Judgment Notwithstanding the Verdict was reversed on appeal. Otherwise, there would be absolutely no reason for granting the new trial in the alternative! Why else would the trial court have expressly stated that the motions were granted "in the alternative," if it were not that court's intent that they be mutually exclusive?

Moreover, there is no dispute that the March 23rd Order **first** granted the Motion for Judgment Notwithstanding the Verdict **before** granting the Motion for a

New Trial. Even if Pennells' argument was valid, the Order granting the Judgment Notwithstanding the Verdict having been granted first, moots the Order granting a New Trial, not the reverse that Pennells argue to this Court should be the case.

RESPONSE TO ARGUMENT II

THE LOWER TRIAL COURT DID NOT LACK THE REQUISITE SUBJECT MATTER JURISDICTION TO ENTER A JUDGMENT NOTWITHSTANDING THE VERDICT

[Response to Pages 18-19 of Respondent's Brief on the Merits]

1. On February 22, 1990, the Lower Trial Court Granted a Mistrial

The issue of the lower trial court's subject matter jurisdiction to enter the Judgment Notwithstanding the Verdict was extensively argued in the parties' briefs presented to the lower District Court. In response to those arguments, and in its written opinion, the District Court implicitly found the lower trial court did have subject matter jurisdiction to enter the Judgment Notwithstanding the Verdict. This is clear because the District Court did not reverse the Judgment Notwithstanding the Verdict on grounds the trial court lacked subject matter jurisdiction; instead, the trial court was reversed because the Judgment Notwithstanding the Verdict was allegedly granted after the Motion for New Trial had been granted but not in the alternative. A.19-20. Why would the Second District Court of Appeal address this issue if the District Court believed the trial court lacked jurisdiction to issue such an Order?

After February 22, 1990, when the Court originally granted Keene Brothers' Motion for Mistrial, this case was simply waiting to be retried. The lower court issued

no other orders until it issued its March 23, 1990, Order. R. **1487.** Because the trial court had granted **a** mistrial, there were no post-trial motions for either party to file. Perry v. State, 200 So. 525 (Fla. 1941) (the granting of a mistrial effectively stops **the** proceedings); Gibson v. Troxel, 453 So. 2d 1160 (Fla. 4th **DCA** 1984) (jury verdict received after order granting mistrial was a nullity). The trial court's having declared the mistrial effectively stopped the trial proceedings. Id.

After the Court granted the mistrial, but prior to its March 23rd Order, a hearing **was** held on March 16, 1990. There, the lower court stated its intention to revisit its earlier mistrial Order and its willingness to grant a Motion for Judgment Notwithstanding the Verdict or in the alternative New Trial. R.1528-I558. On that same day, Keene Brothers served its Motion for Judgment Notwithstanding the Verdict or in the alternative New Trial. R.480. The Pennells never objected to Keene Brothers' Motion as untimely, no doubt because they knew it was not. In fact, the Pennells expressly stated in their earlier Motion to Reinstate the Verdict:

> Until the entry of final judgment, this court [trial court] has inherent jurisdiction to change its own [mistrial] order.

R.1422 and 1438.

The law is absolute and abundant in support of the lower court's right to vacate its own interlocutory orders. Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825 (Fla. 1924); Bravo Elec, Co., Inc. v. Carter Elec. Co., 522 So. 2d 480 (Fla. 5th **DCA** 1988); Holman v. Ford Motor Co., 239 So. 2d 40, appeal after remand, Arenson v. **Ford** Motor Co., 254 So. 2d 812 (Fla. 1st DCA 1971). Interlocutory orders are those

which do not finally determine or complete the action. Saul v. Basse, 399 So. 2d 130 (Fla. 2nd DCA 1981); Donaldson Eng'g, Inc. v. City of Plantation, 326 So. 2d 209 (Fla. 4th DCA 1976); Cruden v. State Bank of Apopka, 136 So. 2d 357 (Fla. 2nd DCA 1961); Nowlin v. Pickren, 131 So. 2d 894 (Fla. 2nd DCA 1961). The test of whether an order is final is whether it disposes of the pending action, leaving nothing further to be done but the execution of judgment and, therefore, is appealable as a Final Order. Gore v. Hansen, 59 So. 2d 538 (Fla. 1952).

An Order granting a mistrial is clearly an unreviewable interlocutory order. Gore, 59 So. 2d 538 (Fla. 1952); Atlantic Coast Line R.R. Co. v. Boone, 85 So. 2d 834 (Fla. 1956); Sponenberg v. Strasser, 504 So. 2d 64 (Fla. 4th DCA 1987); Gibson, 453 So. 2d 1160 (Fla. 4th DCA 1984). By issuing its Order granting the Motion for Judgment Notwithstanding the Verdict or in the Alternative New Trial, the trial court actually vacated its prior Mistrial Order. Also, by this action, the lower court deemed the verdict filed only as an exhibit on February 22[1] to be rendered as of March 23. This was the obvious intent of the lower court.

Pennells cite three cases in support of their proposition that Keene Brothers' motion was untimely: Howard v. Farm Bureau Ins. Co., 467 So. 2d 442 (Fla. 5th

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[1]It appears that in this case, as in Sponenberg, the verdict form was filed merely as an exhibit. This conclusion stems from the fact that there was no assertion on the record, by either the court or the parties, requesting the verdict be filed. Instead, it appears the verdict form was folded, placed into an envelope that was itself marked with the word "Exhibit." R. 1402. Apparently at 5:51 p.m. the clerk of the trial court took the verdict form out of the envelope marked "Exhibit," stamped the verdict form itself as filed at 5:51 p.m., but failed to return the verdict form back inside the envelope that was marked as "Exhibit." As the record reveals, the envelope (R. 1402) which immediately precedes the folded verdict form (R. 1403) is empty.

DCA 1985); Culpepper v. Britt, 434 So. 2d 31 (Fla. 2nd DCA 1983); and Bescar Enter., Inc. v. Rotenberger, 221 So. 2d 801 (Fla. 4th DCA 1969). These cases measure the time for timely service of a Motion for New Trial or in the Alternative, Judgment Notwithstanding the Verdict from when the verdict was rendered. These cases all are based upon the premise that the jury verdict was rendered more than ten (10) days before the post-trial motion was served. In the instant case, the jury verdict was not rendered until March 23 when the lower court vacated its Mistrial Order by granting Keene Brothers' Motion for Judgment Notwithstanding the Verdict or in the Alternative New Trial. If anything, Keene Brothers' motion served on March 16, was premature. See In Re Estate of Zimbrick, 453 So. 2d 1155 (Fla. 4th DCA 1984) (Appellant's motion for rehearing, filed prior to rendition to the trial court's order, was "timely" within the meaning of Rule 9.020(g), Florida Rules of Appellate Procedure). See also, Kirkland v. State, 511 So, 2d 441 (Fla. 1st DCA 1987) (no impediment to treating motion for rehearing as an authorized, premature motion, tolling the time for filing a notice of appeal),

Arguably, in the best of all possible worlds, on March 16, the trial court should have issued an order vacating its February 22 Mistrial Order. Simultaneously, it also should have acknowledged that the verdict filed at 5:51 P.M. on February 22 is deemed rendered as of March 16. Then, as of March 16, Keene Brothers would have had ten (10) days in which to serve its post-trial motions, including but not limited to its Motion for New Trial, or in the Alternative, Remittitur or Motion for Judgment

Notwithstanding the Verdict. Apparently, this did not occur.[2] Instead, in the instant case, the trial court never expressly vacated its Mistrial Order until it granted Keene Brothers' Motion for Judgment Notwithstanding the Verdict or in the Alternative New Trial on March 23.[3]

Clearer records for appeal have existed. Nonetheless, with little effort, upon examination the record reveals itself as being substantively no different than the pristine version given above. A trial court grants a mistrial. Subsequently, that trial court decides to vacate that Mistrial Order and enter an Order granting a Judgment Notwithstanding the Verdict or in the Alternative New Trial. This is exactly what the trial court did.

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[2]Actually there was a hearing on Pennells' Motion to Reinstate the Verdict on March 16 at which time the trial court may have de facto vacated its February 22 Mistrial Order. Although there is no transcript of that hearing and no written order directly stemming from that hearing; in Keene Brothers' "Memorandum in Support of Defendant's Motion for New Trial, Remittitur or Motion for Judgment Notwithstanding the Verdict" it is stated:

> ...a hearing was held on March 16, 1990 when this court [lower court] deemed the Motion for Mistrial to be a Motion for New Trial, and following the hearing on March 16, 1990 the Defendant [Keene Brothers] hand delivered a written Motion for New Trial to Plaintiffs' [Pennells'] counsel and set this matter to be heard before this court [lower court] on March 19, 1990.

R. 1469 (emphasis supplied).

[3]Keene Brothers' Motion for Judgment Notwithstanding the Verdict, Remittitur or in the Alternative Motion for New Trial was served on March 16. Therefore, it was timely whether the February 22 Mistrial Order is deemed vacated on March 16 or March 23.

2. Even if the February 22 Mistrial Order is Treated on Appeal as a New Trial Order, the Lower Court Retained Jurisdiction to Grant a Judgment Notwithstanding the Verdict or in the Alternative New Trial.

Even if this court were to assume, **solely** for argument sake, that the February 22, Mistrial Order was actually **a** New Trial Order, the lower court still retained subject matter jurisdiction to issue its March 23 Order granting Judgment Notwithstanding the Verdict or in the Alternative New Trial.

The case of Pruitt v. Brock, 437 So. 2d 768, 770 (Fla. 1st **DCA** 1983) held that for purposes of the I-year limitation in Rule 1.540(b), the service of a timely Motion for Rehearing pursuant to Rule 1.530(b), tolls operation of the judgment until an order is filed disposing of the motion. Id. at **775.** In Pruitt the issue was whether Defendant's Motion for Relief from Judgment was timely made. In addressing the issue, the court first asked whether the motion must be made within one year of the order granting relief to the Plaintiff, If this was not required, then whether a timely Motion for Rehearing operates to toll the time in which the Motion for Relief from Judgment must be filed. Id. at 771. In reaching its holding, the Pruitt court stated:

> Our conclusion in this regard is influenced by the generally recognized test for determining the finality of a judgment, which is 'whether the judicial labor is at an end.' Slatcoff v. Dezen, 72 So. 2d 800, 801 (Fla. **1954).** Financial Int'l Life Ins. Co. v. Beta Trust Corp., 405 So. 2d 306 (Fla. 4th DCA 1981); The Travelers Indem. Co. v. Walker, 401 So. 2d 1147 (Fla. 3rd DCA 1981); Palardy v. Igrec, 388 So. 2d 1053 (Fla. 4th DCA **1980).** As we have previously observed:
>
> > The traditional test usually employed by the courts of this state in determining the finality of an order, judgment, or decree is whether the order in question marks the end of the judicial labor in the case, and nothing further remains to

> be done by the court to fully effectuate a determination of the causes between the parties directly affected.
>
> Hotel Roosevelt Co. v. City of Jacksonville, 192 So. 2d 334, 338 (Fla. 1st DCA 1966). Chan v. Brunswick Corp., 388 So. 2d 274, 275 (Fla. 4th DCA 1980) (order final when all judicial labor required or permitted is complete).

Id. at 773-774 (emphasis in the original).

The Pruitt court went on to state that had the defendant sought to appeal the trial court's decision denying his Motion for Rehearing, "the time for filing his Notice of Appeal would have commenced upon the rendition of the denial of his motion." Id. at 774 (emphasis in the original). The Pruitt court concluded by stating:

> We therefore hold that service of a timely Motion for Rehearing pursuant to Rule 1.530 tolls the commencement of the 1-year period of limitation in Rule 1.540(b) until such time as that Motion is disposed of by the filing with the Clerk of the trial court of an Order disposing of the Motion for Rehearing, thus marking the end of all required or permitted judicial labor at the trial level.

Id. at 775.

In the instant case, the trial court never filed a Mistrial Order. Pursuant to Pruitt it did not dispose of that motion and thus retained jurisdiction until it did so. According to Pruitt, the lower court retained jurisdiction to "exercise complete control over the case" and "alter or change its decision accordingly." Pruitt, 437 So. 2d 768, 773 (Fla. 1st DCA 1983). Looking to the rationale and holding of Pruitt, the instant Motion for Mistrial (New Trial) was not disposed of until the lower court Order, which granted Keene Brothers a Judgment Notwithstanding the Verdict or in the Alternative New Trial, was filed on March 23, 1990. Applying the holding in Pruitt to the facts

in the instant case, it is clear that Keene Brothers' Motion for New Trial, or in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict was timely served.

Obviously, the lower court did not consider Keene Brothers' February 22 Motion for Mistrial (New Trial) to be finally disposed as of that date. On March 16 the lower court held a hearing on the propriety of that motion and its granting of the mistrial. R. 1528. On March 19 the lower court heard extensive oral argument for and against Keene Brothers' Motion for Judgment Notwithstanding the Verdict, Remittitur, or in the Alternative Motion for New Trial. R. 1528-1559. Never did the Pennells argue that the trial court was wasting everyone time because it lacked subject matter jurisdiction.

RESPONSE TO ARGUMENT II B

KEENE BROTHERS PRESERVED THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE

[Response to Pages 19-20 of Respondents' Brief on the Merits]

In their Brief on the Merits, Pennells assert that Keene Brothers did not move for a directed verdict at the conclusion of Pennells' case and did not move for a directed verdict at the conclusion of all testimony. Respondents' Brief on the Merits page 20. They assert that such failure waived the right to later move for Judgment Notwithstanding the Verdict. Id. It is Pennells, however, not Keene Brothers, who have waived the right to argue this issue.

Pennells never raised this issue before the trial court. When they filed their Initial Brief to the Second District Court of Appeal, the Pennells made no mention that Keene Brothers had failed to move for a directed verdict and, therefore, waived the right to later move for Judgment Notwithstanding the Verdict. Pennells' first mention of this argument occurred in their Reply Brief to the Second District Court of Appeal. Reply Brief of Appellants, page 9. Because Pennells did not raise this issue until filing their Reply Brief, they waived the right to argue it on appeal. Mestre Rental Co. v. Resources Recovery (Dade County), Inc., 568 So. 2d 1344 (3rd DCA 1990) (arguments presented for first time in appellant's reply brief cannot be considered on appeal); Coluccia v. Greenfield, 547 So. 2d 224 (3rd DCA 1989) (appellate court cannot consider matters which are raised for the first time on appeal in an appellant's reply brief). See also, Universal Underwriters v. Morrison, 574 So. 2d 1063 (Fla. 1990) (by implication) (court examined record to determine whether respondent's argument was waived by failure to raise the issue at either the trial level or before the District Court of Appeal).

Pennells also failed to note that at the conclusion of the Pennells' case in chief, the Court reserved ruling on Keene Brothers motion for a directed verdict by automatically reserving ruling on all motions. The Court stated as follows:

THE COURT: You are going to rest.

MR. DIECIDUE: Yes, Sir, I am.

THE COURT: I reserve on motions until you get everything on record.

R.696.

Later, at the conclusion of **all** evidence, the Court stated:

> THE COURT: Okay. Now is the time to get your stuff on the record. You can pretend we're doing your motions after Mr. Diecidue rest there. ***So*** **go** ahead, Mr. Sawyer.

R. 966. At that time, Keene Brothers moved for directed verdict. Id. Obviously, based on the Court's statements, all motions, whether for directed verdict or otherwise, were reserved by the Court until the conclusion of all evidence. It was not necessary, therefore, for Keene Brothers to orally announce its Motion for Directed Verdict when the Court had already indicated it was reserving on all motions, including Motions for Directed Verdict. Thereafter, at the close of all evidence, counsel for Keene Brothers moved for and renewed its Motion for Directed Verdict **as** indicated above.

RESPONSE **TO** ARGUMENT **II C**

THE VERDICT WAS NOT **SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE**

[Response **to Pages** 20-23 **of** Respondents' Brief on the Merits]

In their Initial Brief to the Second District Court of Appeal, Pennells neither briefed nor argued that the lower trial court was substantively in error in granting the Judgment Notwithstanding the Verdict. The Pennells tried to introduce this substantive argument into these appellate proceedings in their Reply Brief, but the

Second District Court of Appeal during oral argument expressly noted that the substantive correctness or incorrectness of the Judgment Notwithstanding the Verdict was **not** an issue on appeal. This is why the Second District Court of Appeal in its published decision never addressed the substantive merits of the Judgment Notwithstanding the Verdict. The only issue on appeal against the Judgment Notwithstanding the Verdict was that of jurisdiction, The Pennells abandoned and waived any argument on the substantive correctness or incorrectness of the Judgment Notwithstanding the Verdict. Polvalvcoat Corp. v. Hirsch Dist. Inc., 442 So. 2d 958 (Fla. 4th DCA **1983)** (failure to raise issue in appellant's brief and oral argument waived issue). See also Universal Underwriters v. Morrison, 574 So. 2d 1063 (Fla. 1990) **(by** implication) (court examined record to determine whether respondent's argument was waived by failure to raise the issue at either the trial level or before the District Court of Appeal).

RESPONSE TO ARGUMENT III

A "MISTRIAL" ENTERED AFTER THE ANNOUNCEMENT OF AN INVALID JURY VERDICT IS NOT AN ORDER GRANTING A NEW TRIAL AND IS NOT REVIEWABLE

[Response to Pages 24-26 of Respondents' Brief on the Merits]

The Pennells assert that the **"key"** to this issue is the determination of whether the Court received **a** valid jury verdict. Respondents' Brief on the Merits, page 26. The Pennells **assert** that when a trial court grants a "mistrial" after reception of a valid jury verdict, the Court is actually granting a new trial. Respondents' Brief, **page** 25.

Pennells cite several cases, including Estate of Busing v. Brohan, 567 So. 2d 6 (Fla. 4th DCA 1990), cert. denied, 581 So, 2d 163 (Fla. 1991), for the proposition that when a Court grants a mistrial after return of a verdict, it is actually granting a mistrial if, and only if, the verdict returned is invalid. Respondents' Brief on the Merits, pages 24-26. The Pennells assert that if the Court grants a "mistrial" after return of a valid jury verdict, the Court is actually granting a new trial. Keene Brothers agrees, but asserts that the verdict announced by the jury in the instant case was invalid.

First, the verdict was not accepted by the trial court. Instead, the Court granted a mistrial and subsequently granted a new trial on the grounds of juror misconduct. R. 1435; R. 1487-1494.

Second, on appeal to the Second District Court of Appeal, the trial court's decision that the verdict was invalid was affirmed in part when the District Court granted a new trial on the issue of damages. Pennell v. Keene Brothers Truckinu, Inc., 589 So. 2d 965 (Fla. 2nd DCA 1991). Thus, the verdict was declared invalid.

Third, even in their own Brief on the Merits, the Pennells do not assert the verdict was valid. Instead, they assert the verdict was "regular on its face." Respondents' Brief, page 26.

Clearly, the verdict announced by the jury in the instant case was not a valid verdict. As such, when the Court granted a mistrial, it was in fact granting a mistrial and not a new trial. Therefore, based on the reasoning of Busing, the trial was a nugatory proceeding and the District Court did not have jurisdiction to reinstate the

jury verdict either in whole or in part. Estate of Busing at 7.

THE LOWER TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A NEW TRIAL ON THE ISSUE OF JUROR MISCONDUCT

[Response to Pages 26-34 of Respondent's Brief on the Merits]

As indicated by the Pennells' Brief on Jurisdiction, and this Court's Order accepting jurisdiction and setting oral argument, the Pennells requested and this Court expressly **DENIED** jurisdiction to present argument on this issue. As such, Keene Brothers has filed a Motion to Strike this portion of Pennells' Brief and presents no reply. Nonetheless, see Answer Brief of Appellee, Keene Brothers, pages 34-43, which was Keene Brothers' Brief before the Second District Court of **Appeal** in opposition to this issue and argument. Id.

CONCLUSION

The trial court properly granted **a** Judgment Notwithstanding the Verdict and, alternatively, New Trial. Because there are no other issues properly before this Court, based upon the above, the Second District Court of Appeal's decision is reversed, and the trial court's Order granting Judgment Notwithstanding the Verdict reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by UPS Next Day Air, this 9th day of October, 1992, to:

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