SUPREME COURT OF FLORIDA

JENNY POOLE, etc.,	*	
	*	
Petitioner,	*	
	*	Supreme Court Case No. 85,232
v.	*	Fifth DCA Case No. 93-01839
	*	Circuit Court Case No. 91-2434-CA
VETERANS AUTO SALES AND	*	
LEASING COMPANY, INC.,	*	
	*	
Respondent.	*	
	*	

* * * * * * * * * * * * * *

Petition from the Fifth District Court

PETITIONER'S REPLY BRIEF

MICHAEL S. HERRING, ESQ.
FLA BAR #:0486078
Michael S. Herring, P.A.
1101 West First Street
Sanford, Florida 32771
(407) 323-6700
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

FLORIDA RULES

ARGUMENT

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO FIRST POINT ON APPEAL

The district court erred by applying the wrong standard of review in finding an abuse of discretion of the trial court's authority to grant new trial.

While Veterans correctly identifies the issue as whether the trial court abused its discretion by granting a new trial, Veterans also suggests a reasonable person standard of review of the additur portion of the order. While Veterans concedes she initially misapprehended the law in suggesting the district court affirm the additur in her appellee brief, under the mandatory language of Section 768.74(4), Fla. Stat., Veterans' Notice of Rejection of Additur eliminated **any** increase to the verdict and required a new trial on damages.

Adopting a reasonable person standard of review of an additur/remittitur order (assuming such an order rejected by the party against whom it operated was a proper subject of review) would discourage trial counsel from moving for such relief. Motions for new trial under Rule 1.530, Fla. R. Civ. P., would be the preferred remedy due to the higher threshold for reversal. Trial judges inclined to increase or decrease a damages award would be discouraged from doing so, knowing their chance of reversal under the standard proposed by the district court would be greater than having simply granted a new trial on damages.

Additionally, adoption of a reasonable person standard of review would circumvent the legislative intent to grant trial courts broad discretion. Section 768.74(6) provides:

> "It is the intent of the Legislature to vest the **trial courts** of this state with the **discretionary** authority to review the amounts of damages award by a trier of fact in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the **reasonable** actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of this state." (emphasis added)

The language in the last sentence of Subsection (6), "... a review by the courts in accordance with the standards set forth in this section...", relates to the trial courts and not to the appellate court. Otherwise, the trial court's discretionary authority to review the amount of damages set forth in the first sentence of that subsection becomes meaningless.

The legislative intent "to vest the trial courts of this state with discretionary authority to review", set forth in the first sentence of 768.74(6), seems to contradict Judge Harris's comments on Page 6 of the specially concurring opinion:

> "...This indicates the legislature, in the final analysis, intended that if the jury's verdict is supported by the record then the trial judge should not interfere with it - regardless of the judge's independent opinion as to the amount of damages and even if a reasonable person might agree with the judge..."

The statute requires the trial judge to review the record and compare it to the criteria. If a reasonable person can agree with his decision to increase/decrease a verdict, there is no abuse of discretion.

Veterans suggests the district court is in the same position as the trial judge as to whether the record supports the jury's verdict. Logic and the law support the view that the trial court is in a better position to review the adequacy/excessiveness of the award. See Castlewood International Corp. v. LaFleur, 322 So 2d 520, 1522 (Fla. 1975), and Pyms v. Meranda, 98 So 2d 341, 343 (Fla. 1957).

Here, the trial judge indicated he was shocked when he heard the verdict (R. 8, 471).

In Bennett v. Jacksonville Expressway Authority, 131 So 2d 740 (Fla. 1961), the trial court granted a new trial order on damages based on the inadequacy of the verdict. There, this court reversed the district court of appeals' reinstatement of the verdict. Although the trial judge commented, "the trial was as free from error as it could be" and that the jurors were not improperly motivated or influenced, he also said that the verdict was "nonetheless shocking to the court ..." 131 So 2d at 742.

In weighing who was in the best position to determine whether the court's conscience should have been shocked, Chief Justice Thomas stated:

> " ... It seems to us that such a conclusion would be a bit difficult to draw from cold type inasmuch as conscience is the "idea and feelings within a person that warn him of what is wrong." Thorndike-Barnhart

> Directory. It has also been variously defined "inward knowledge, consciousness; in most thought, mind ... consciousness of right or wrong; moral sense." The Oxford English Dictionary." 131 So 2d at 743.

The Bennett court focused upon whether the "broad discretion rule" or the "substantial evidence rule" should prevail in judging the correctness of a ruling on a motion for a new trial. There, the court announced unequivocal adherence "to the early rule placing in trial court's broad discretion of such firmness that it [the ruling] would not be disturbed except on clear showing of abuse". 131 So 2d at 743.

Interestingly, the trial judge in Bennett ordered additur, however, at the time, the trial court's authority to increase a verdict was unrecognized based on the holdings in Sarvas v. Folsum, 114 So. 2d 490 (Fla. 1st DCA, 1959); State Road Department of Florida v. Cox, 118 So. 2d 668 (Fla. 3rd DCA, 1960); and Wohlfiel v. Morris, 122 So. 2d 235 (Fla. 2nd DCA, 1960), and in the absence of the present remittitur/additur statutes.

Veterans cites to Griffis v. Hill, 230 So 2d 143 (Fla. 1969), for the proposition that since reasonable minds could differ as to whether the verdict was reasonable, there was abuse of discretion. Those facts are distinguishable. In Griffis, the supreme court affirmed the district court's reversal of the trial court's **denial** of a motion for new trial. Had the trial judge in this case denied Poole's motion for additur and alternative motion for new trial, the Griffis standard of review (reasonable person) would have been applicable. Under those circumstances, the appellate court would have reviewed the verdict and not the

discretionary order granting a new trial on damages. Since the focus of review in this case should have been whether the trial court abused its discretion in granting the order, the reasonableness standard was applicable and the burden was on Veterans "to make error clearly appear." Cloud v. Fallis, 110 So 2d 669, 673 (Fla. 1959).

Likewise, in Dyes v. Spick, 606 So 2d 700 (Fla. 1st DCA 1992), the reasonable person standard was applied because the trial court denied the motion for new trial as to damages.

Contrary to Perenic v. Castelli, 353 So 2d 1190 (Fla. 4th DCA 1977), and Nordin v. Gregory, 566 So 2d 60 (Fla. 5th DCA 1990), cited by Veterans, the supreme court in Smith v. Brown, 525 So 2d 868, 870 (Fla. 1988) (cited to in Judge Harris's concurring opinion), stated:

> "The trial judge should only intervene when the manifest weight of the evidence dictates such action. However, when a new trial is ordered, the abuse of discretion test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion." Smith, 525 So 2d at 870.

In Perenic, 353 So 2d at 1192, the court noted that the weight to be given conflicting evidence, especially where the credibility of a witness is at issue, is a question for the jury and never for the court. 353 So 2d 1190 (emphasis added). While Poole does not dispute this maxim, Veterans' trial counsel established no conflicts or credibility disputes. None of the children were cross-examined. They each expressed their feelings about the loss of their mother. Scott Pritchard

bolstered the testimony of the two younger children and was not cross-examined. Veterans ordered no independent medical examination of the children and, otherwise, presented no psychological testimony to refute that of Dr. Meyer.

Contrary to Veterans' contention, Poole did not argue the trial judge's order was too unspecific. She did, however, address Judge Harris's observation set forth in the footnote on Page 1 of his concurring opinion. The Motion to Relinquish Jurisdiction to the trial court, invited the district court to follow Rule 1.530(f), Fla. R. Civ. P., and Prime Motor Inns, Inc., v. Waltman, 480 So 2d 88 (Fla. 1985), if it could not discern the trial court's grounds.

Veterans suggest that if the trial judge's order granting new trial lacks specificity, Plaintiff should bear the risk of reversal. To the contrary, Rule 1.530(f), Fla. R. Civ. P., requires remand with instructions to recite specific grounds.

Here, while the trial judge did not state his specific grounds for granting a new trial in the actual new trial order, the post-trial hearing transcripts and Order Granting Additur and Alternative New Trial (R. 5, 826-830) make clear that he specifically compared the criteria set forth in Section 768.74(5)(a-e), Fla. Stat., with his memories, notes and reflections of the actual trial in concluding the jury's award was inadequate.

The majority decision (as clarified by the specially concurring opinion) makes clear the wrong standard of review was employed by the district court in

finding an abuse of discretion. Further, the opinion indicates the trial judge's reasons for his findings were discernible from the record.

This court is respectfully urged to compare the record with the additur/new trial order, find that a reasonable person could agree with the trial judge, quash the district court's decision and reinstate the trial court's order granting new trial as to damages. Alternatively, this case should be remanded to the district court with instructions to review applying the reasonableness test in determining whether the trial judge abused his discretion in granting a new trial as to damages. Finally, if this court cannot clearly discern the trial court's reasoning from its written orders and the record, the case should be remanded to the trial court with instructions to recite specific grounds and, thereafter, review by the district court applying the reasonableness test.

ARGUMENT

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO SECOND POINT ON APPEAL

Section 768.74 is constitutional as applied.

In Smith v. Department of Insurance, 507 So 2d 1080, 1092 (Fla. 1987), this court found the remittitur/additur portions of the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida constitutional based upon the substantial similarity to Section 768.043, Fla. Stat., which was previously held constitutional in Adams v. Wright, 403 So 2d 391 (Fla. 1981). The Supreme Court held, in pertinent part, Section 768.043, Fla. Stat., did not abridge the right to a jury trial. There this court stated:

> "...the statute clearly provides for a new trial in the event the party adversely affected by the remittitur or additur does not agree with the remittitur or additur. In other words, the complaining party need not accept the decision of the judge with respect to remittitur or additur. The party may have the matter of damages submitted to another jury..." 403 So 2d at 395.

After additur/remittitur is granted, the affected party can reject it and, if so, the court must grant a new trial on damages. While the party favored by the verdict is denied that verdict and thus a trial by that particular jury, they are nonetheless given a new trial by a new jury. Section 59.04, Fla. Stat., provides the aggrieved party the right to appeal without waiting for final judgment.

If this court follows Veterans' suggestion and holds Section 768.74, Fla. Stat., unconstitutional as applied, then it must also hold Section 768.043 unconstitutional.

Also, if as Veterans contends, at common law the trial court lacked authority to order a new trial based upon the inadequacy of the verdict and whether a particular procedure abridges the right to a trial by jury is determined as of the time of the adoption of the original Florida Constitution, Rule 1.530 Fla. R. Civ. P., should also be ruled unconstitutional. This interpretation of the statutes and applicable rule would leave a party aggrieved by an inadequate verdict without redress.

Poole suggests Veterans' reliance on BJY v. MA, 594 So 2d 816 (Fla. 1st DCA 1992) is misplaced. BJY dealt with whether the requirement of a bench trial in a paternity action abridged the right to a jury trial contrary to Article I, Section 22, of the Florida Constitution. To the contrary, Sections 768.74 and 768.043, Fla. Stat., specifically require a new trial if the option of additur/remittitur is rejected.

Contrary to Veterans' implication that in Arab Termite and Pest Control of Florida, Inc., v. Jenkins, 409 So 2d 1039 (Fla. 1982), the district court found the new trial order was supported by the record, the Supreme Court specifically found the district court did not determine whether the trial court's decision was affirmatively suppported by the record (i.e. the manifest weight of the evidence) or by findings in the judge's order. Jenkins, Id at 1043. Here, as in Jenkins, the appellate court applied the wrong standard of review. On review after remand,

(using the proper standard) the district court found no abuse of discretion. Jenkins v. Arab Termite and Pest Control of Florida, Inc., 422 So 2d 922 (Fla. 2d DCA 1982), rev. denied, 434 So 2d 887 (Fla. 1983).

In addition, Poole dissents from Veterans' view that the "entire record" supports the jury's decision. Medical expenses and support and service awards were not found to be supported by the record by either the trial court or the district court.

Section 768.043 is a remedial statute "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." Adams v Wright, 403 So 2d at 394. Likewise, Section 768.74, Fla. Stat., is a remedial statute designed to protect the substantive rights of litigant to which the section applies. Smith v. Department of Insurance, Supra at 1092.

Holding the additur/remittitur statutes unconstitutional would eliminate two effective tools intended to provide judicially economical remedies against "runaway" juries and undermine the legislature's attempt to solve the commercial insurance liability crisis observed in Smith v. Department of Insurance, 507 So 2d at 1084-1085.

Veterans' suggest Section 768.74, Fla. Stat., is unconstitutional as applied because the standard of review is too vague and the trial judge can arbitrarily increase the verdict because he disagrees with the amount and, in effect, coerce the party benefitted by the verdict to accept the court's suggestion or face a new trial on damages. Because the standard of review of the new trial order requires

a higher threshold for reversal, parties faced with this decision will be more inclined to accept the suggestion and forego an appeal unless they are sure they can show clear abuse.

The additur/remittitur statues are applied in a similar manner to a Rule 1.530 Motion for New Trial based on inadequacy of damages. Both statutes and the rule have foundational requirements. The statutes mandate consideration of their criteria before a finding of inadequacy/excessiveness and Rule 1.530 requires a similar finding that the award was against the manifest weight of the evidence or was based on considerations outside the record. Poole contends a finding that any of the statutory criteria are applicable is tantamount to a finding that the verdict is against the manifest weight of the evidence.

Both Sections 768.74 and 768.043 require proper motion and if granted, a specific order stating the court's reasons for reaching its conclusion. If after comparing the criteria with its independent review of the record, the trial court decides to grant all or part of the relief moved for, it must identify which areas of the itemized verdict are defective, why it reached its conclusion and the party benefitted by the verdict may then reject all or some of the court's suggestions. The trial court's conclusion must be supported in the record. All rejected portions are subject to new trial under Section 768.74(4) and 768.043(1). All accepted portions bind the party favored by the verdict. See Dargis v. Maguire, 156 So 2d 897 (Fla. 3rd DCA 1963). The standard of review of the altered parts of the

verdict which were rejected (or accepted) is the reasonableness test, the logic being the scope of review is the propriety of the order, not the verdict.

Normally an additur/remittitur which is accepted by the party favored by the verdict will not be appealed, but when a moving party receives less relief than sought, the scope of review is the reasonableness test. If the trial court refuses to grant any relief, the standard of review is the reasonable person test because the focus is on the propriety of the verdict.

In Zerwick v. State Commission on Ethics, 409 So 2d 57 (Fla. 4th DCA 1982), the first district affirmed the circuit court's upholding of the constitutionality of Section 112.313(7)(a), Fla. Stat., against a vagueness challenge. There the court stated:

> "The test to determine whether a statute is unconstitutionally vague is whether persons of common understanding and intelligence must necessarily guess at its meaning. State v. Rodriguez, 365 So. 2d 157 (Fla. 1978). Legislative enactments are presumed constitutional and doubts as to the validity of a statute are to be resolved in favor of a finding of constitutionality. Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976). Moreover, a less stringent standard as to vagueness is used in examining non-criminal statutes, though minimal constitutional standards for definiteness must still be met. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). Zerwick, Id at 60.

The criteria contained in 768.74(6) adequately apprises a person of common understanding and intelligence of the standard of review and, otherwise, Sections 768.74 and 768.043 are consitutionally sound if applied as intended by the legislature.

ARGUMENT

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO THIRD POINT ON APPEAL

The trial judge was correct in entering Partial Summary Judgment as to Ownership, and the district court was correct in affirming same.

Poole filed her Motion for Summary Judgment on August 3, 1992 (R. 1, P. 173). Veterans filed no Affidavit in Opposition to Poole's assertion of undisputed facts prior to the hearing of September 23, 1992, **nor is there a record of the hearing** of that date. Veterans did not file its own Motion for Summary Judgment alleging Bullock to be the owner. More than a month after the ruling, Veterans filed an untimely Motion for Rehearing and Affidavit in Opposition (R. 2, P. 331-332).

Despite Veterans' claim that financing was to be arranged through Veterans Finance Company, Inc., it is undisputed that there were no negotiations between Bullock and anyone from Veterans Finance. There was no credit application, written retail installment sale contract or conditional sale contract signed by Bullock. To the contrary, the unaccepted Used Car Order, while implying a credit transaction, is silent as to the potential lender and the terms of credit.

Without a written financing agreement or written assignment, Veterans Finance Company could not become a "holder" under Section 520.02(5), Fla. Stat., due to the writing requirement of Section 520.07(1)(a), Fla. Stat., and the unenforceability feature of Section 520.13, Fla. Stat.

Based on the arguments and authority presented during hearing on September 23, 1992, the trial court found the accident occurred on September 7, 1989; the Used Car Order dated September 5, 1989, was not accepted in writing by either the Dealer or its authorized representative prior to the accident; Veterans was engaged in the business of selling motor vehicles to retail buyers in retail installment transactions; Bullock was a retail buyer; [Bullock] was neither presented with nor signed a written Retail Installment Sales Contract or a conditional Sales Contract; there is nothing in the record evidencing any purported oral agreement as to financing terms and any such oral agreement would be void and unenforceable pursuant to Section 520.07, Fla. Stat. and Section 520.13, Fla. Stat.; despite Bullock having possession of the vehicle on the date of accident, due to the lack of a mutually binding enforceable Contract, either written or oral, beneficial ownership of the subject vehicle remained in the Defendant. The trial court ruled that as of September 7, 1989, Veterans owned the vehicle (R. 2, P. 278-280).

Veterans requested the successor Trial Judge to reconsider the Order Granting Partial Summary Judgment as to Ownership (R. 2, P. 318-322) which was denied on March 5, 1993 (R. 3, P. 409-410).

The thrust of Poole's Motion for Partial Summary Judgment as to Ownership was twofold. First, by the terms of the Buyers Order submitted by the dealer, the contract would not be binding until signed by the dealer or its authorized representative; and second, without a written conditional sales contract or retail

installment sales contract, the sale of an automobile between a motor vehicle dealer and a consumer, calling for deferred payments, could not legally occur by oral agreement.

The undisputed facts revealed Bullock was given possession of the vehicle on or about August 23, 1989, to test the car (R. 2, P. 285). Two days prior to the accident she was requested to sign some papers on the car. The primary document was a printed "Used Car Order" which she signed (R. 1, P. 178-179). The face of the Used Car Order reflected a total cash price of $2,093.50, a deposit of $300.00 and the balance of $1,793.50 to be financed. The portions of the Order concerning financing the car, interest rate, number of payments, amount of each payment, and commencement date were blank. Subsequent to the hearing, Veterans claimed there had been an **oral** agreement between Bullock and Veterans whereby Veterans Auto Sales and Leasing Co., Inc., agreed to sell the car to Bullock and deduct payments from Bullock's paycheck on a weekly basis (R. 2, P. 287). Bullock specifically disputed reaching such an agreement (Supp. R. II, P. 286).

Despite Veterans belief that its manager, Gene Simon, established a common law sale, Simon could not recall any specific conversations with Bullock prior to her [supposedly] purchasing the 1982 Pontiac Firebird (R. Simon Depo, P. 55). Simon thought Bullock signed mortgage papers and conceded she would have to if she were financing the car (R. Simon Depo, P. 66). After the accident, Simon admits Veterans got the car back (R. Simon Depo. P. 69) and showed police authorities the title to do so (R. Simon Depo. P. 71).

Section 320.27(c), Fla. Stat., in pertinent part, provides:

> "Motor vehicle dealer" means any person engaged in the business of buying, selling or dealing in motor vehicles ...

Section 320.27(9)(i), Fla. Stat., requires a dealer to provide a customer with:

> " ... a copy of any bona fide written, executed sales contract or agreement of purchase connected with the purchase of the motor vehicle purchased by the customer or purchaser."

It is clear that the legislature imposes a statutory duty upon licensed motor vehicle dealers to evidence all sales of motor vehicles with a bona fide written, executed sales contract or agreement of purchase.

The Motor Vehicle Sales Finance Act, Section 520.02(12), Fla. Stat. states: ..."Motor Vehicle Retail Installment Seller" or "Seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions." According to Section 520.02(13):

> "Retail installment transaction means any transaction evidenced by a retail installment contract entered into between a retail buyer and a seller wherein the retail buyer buys a motor vehicle from the seller at a deferred payment price payable in one or more deferred installments."

Section 520.02(11) further provides:

> "Retail Installment Contract" or "Contract" means an agreement entered into in this state, pursuant to which the title to **or a lien upon the motor vehicle**, which is the subject matter of a Retail Installment transaction, is retained or taken by a seller from a retail buyer as security, in whole or in part, for the buyers obligation."

Veterans submitted a proposal which, if completed as to all essential terms, including terms of financing, and accepted in writing by the dealer or its duly authorized representative, a binding contract would have existed and beneficial ownership would have passed prior to the accident.

Because the purported oral agreement to finance the vehicle was never reduced to writing, completed as to all essential provisions and signed by both the buyer and seller, Section 520.07(1)(a), and Section 520.13 render the alleged oral terms of payment void and unenforceable. With "void" terms of payment, an essential element was lacking and no binding contract was formed.

Black's Law Dictionary defines Void:

> "...Null; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended." Black's, Law Dictionary, (5th ed. 1979)

In City of Miami Beach v. Galbut, 626 So 2d 192 (Fla. 1993), this court was called upon to construe an antinepotism statute and there reiterated:

> "It is well settled that where a statute is clear and unambiguous, as it is here, a court will not look behind the statute's plain language for intent (citations omitted) . . .
>
> A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or ridiculous result." (citations omitted) 626 So 2d at 193.

To construe Section 520 as mandating a written agreement as to financing, and without same the terms of financing supposedly agreed upon have no legal force or binding effect is not an unreasonable or ridiculous construction of the

statutes. To construe Section 520(10), as Veterans suggests, that the dealer's failure to secure a written financing agreement with the consumer somehow renders the statute nonapplicable would lead to an unreasonable and ridiculous result. The clear language of the statute prohibits these types of sales from being consummated on a handshake.

In James Register Construction Company v. Bobby Hancock Acoustics, Inc., 535 So 2d 339 (Fla. 1st DCA 1988), the Court said an unsigned written subcontract agreement can be enforced where the parties act as if they are under contract except:

> A. "...Where a contract is required by Statute; or
>
> B. Where the parties intend that the contract shall not be binding until it is signed..."
>
> James Register Construction Co. Id at 340 (citing to 11 Fla. Jur. 2d Contracts, Sec. 79 (1979).

Here, the oral "retail installment contract" or "contract" was required by statute to be in writing, and the plain language of the buyer's order printed on a form supplied by Veterans required complete execution in order to be binding.

In Meekins-Bamman Prestress, Inc., v. Better Construction Company, Inc., 408 So 2d 1071 (3rd DCA 1982), the Court held that

> "... [a] Document specifically conditioning contractual effectiveness of a proposal by the projected seller upon the seller's own subsequent approval, constitutes no more than a solicitation to the prospective buyer to make an offer."

The contractual facts in Meekins-Bamman Prestress, Inc. are on point with the facts of the case at Bar except in Meekins, the projected seller's salesman (lacking expressed authority to contract) actually signed the proposal.

Meekins cites Knickerbocker Fine Cars v. Peterson, 118 So 2d 639 (Fla. 3rd DCA 1960), for the proposition that where the language of an instrument states "This Order is not binding unless authorized by an officer of the company" and the offer is never subsequently accepted by the dealer or its authorized representative, the "Order" was never a contract; only an offer to buy which was never accepted. Knickerbocker, 118 So 2d at 640-641.

In Orbit Construction Company v. Trial Development Corporation, 198 So 2d 341 (Fla. 2nd DCA 1967), the Court held that where the contractor was asked by the hotel owner to make an estimate for repairs and renovations of the hotel and hotel owner agreed to enter into a written contract for the work at a later date subject to financing requirements, the oral agreement was wholly wanting in mutuality and definiteness of obligations and did not ripen into a contract. The Orbit Court quoted Mann v. Thompson, 100 So 2d 634 (Fla. 1st DCA, 1958), where the Mann Court said:

> "...the kernel of this issue necessarily concerns the existence or non-existence of a valid and binding contract. So long as any essential matters remain open for further consideration, there is no completed contract. In order to create a contract it is essential that there be reciprocal assent to a certain and definite
> proposition. When the parties intend that their negotiations be reduced to a formal writing, there is

no binding contract until the writing is executed..."
Mann 100 So 2d at 637.

Veterans' form buyers order makes clear their intent was not to be bound unless it (the buyers order) was accepted in writing by the dealer or its authorized representative.

Whether beneficial ownership of an automobile has actually passed depends on a determination of the legal rights under the agreement to purchase between the buyer and the seller. Cox Motor Company v. Faber, 113 So 2d 771 (Fla. 1st DCA 1959).

Interpretation of an ordinary automobile contract to purchase subject to conditions delineating rights of respective parties is a question of law when there are no apparent ambiguities in the contract. Cox Motor Company, Id at 773. See also: Berman v. Gables Lincoln-Mercury, Inc., 108 So 2d 53 (Fla. 3rd DCA, 1959). Whether language is ambiguous is a question of law. Hancock v. Brumer, Cohen, et al., 580 So 2d 782 (Fla. 3rd DCA, 1991).

In Cox Motor Company, supra, the Court held that beneficial title of an automobile passed to the purchaser where the dealer accepted the "Retail Buyers Order" and gave possession to the purchaser despite words to the effect"... the purchaser acquires no right, title or interest... until... a satisfactory deferred payment agreement is executed... the terms of which shall be controlling." The pertinent facts, as distinguished from the instant case, reveal the contract was entitled "Retail Buyers Order", which specifically provided that the purchaser agreed to purchase, under the terms and conditions set forth therein, the

automobile above-described; that such terms and conditions comprised the entire agreement and no other agreement of any kind, verbal understanding or promise whatsoever would be recognized and that said order was not binding on the Defendant dealer until accepted by the dealer in writing. The **contract was accepted by the dealer's sales manager on behalf of the dealer and the [written] contract further provided that the purchase price should be $50.00 in cash, execution of a note for $45.00 and the balance in twelve (12) monthly installments. Further facts revealed that purchaser paid the $50.00 at that time and made a further cash payment of $15.00.** (emphasis added) Cox Motor Company at 772.

Here, the Used Car Order was never accepted in writing; financing terms were not agreed upon in writing; and possession of the vehicle had been given to Bullock, an employee of the dealership, by the General Manager who told her to drive the car to make sure it was what she wanted (Supp R. II, P. 200). Bullock concedes she was considering buying the car (Supp R. II, P. 288). A "deposit" was held by Veterans and no further sum was submitted (R. 1, P. 178), (Supp R. II, P. 269), (Supp R. II, P. 199) and (Supp R. II, P. 292-293).

The face of the Used Car Order in this case mandates "... all transactions are subject to finance company or bank approval..." Thus, financing was considered an essential term of the transaction. It also sets forth "...all promises, statements, understandings or agreements of any kind pertaining to this contract not specified herein are hereby expressly waived." (R. Vol. 1, P.179).

In Huskamp Motor Company v. Hebden, 104 So 2d 96 (Fla. 3rd DCA 1958), as a matter of law, beneficial ownership did not pass where the contract provided it was invalid **unless signed and accepted by the dealer and approved by a responsible finance company as to deferred payment balance.** There, the would-be buyer executed a Power of Attorney and credit information form but had an accident in his trade-in before financing approval.

Veterans now urges this court to grant it a Summary Judgment despite its failure to file its own motion, any affidavit in opposition to Poole's motion, or make a record of the proceedings, and without the trial court having taken such action on it's own motion. Poole suggests Veterans has misread Carpenter v. Shields, 70 So 2d 573 (Fla. 1954), and John K. Brennan Co. v. Central Bank & Trust Co., 164 So 2d 525 (Fla. 2nd DCA 1964), as well as Rule 1.510 Fla. R. Civ. P., in that neither case nor the cited rule provides authority to an appellate court to grant Summary Judgment in favor of a non-moving party in the absence of such relief having been granted by the trial court. Although R. 1.510(b) Fla. R. Civ. P., provides "...A party against whom a claim,...is asserted... may move for a Summary Judgement... at any time...". Rule 1.010 Fla. R. Civ. P., provides "These rules apply to all actions of a civil nature and all special statutory proceedings in Circuit Courts and County Courts...".

While the trial court is not wholly without authority to grant Summary Judgment for the non-moving party, the better practice is to require a timely

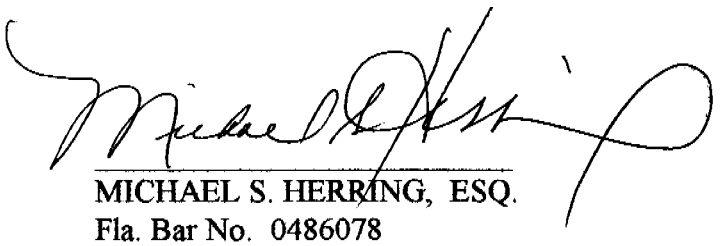
Motion. First Union National Bank v. Maurer, 597 So 2d 429, 431 (Fla. 2nd DCA 1992).

Finally, Poole generally cites to Epperson v. Dixie Insurance Co., 461 So 2d 172, 175 (Fla. 1st DCA 1984), for the proposition that since Veterans filed no motion at the trial level and thus failed to comply with R. 1.510(c), Fla. R. Civ. P. (requiring statement of specific grounds), the matter was not presented to the trial court and thus is not properly before this court on appeal.

In conclusion, Veterans concedes there was never a binding written contract of sale and no written financing agreement. Florida law requires these types of transactions to be in writing. The licensed dealer now relies upon an alleged "oral contract" after specifically conditioning the existence of a "contract" upon a mutually binding written instrument. To legitimize any such "oral contract" under these undisputed facts would be incongruent and create a legal paradox. If (Bullock) were to have reneged on the purported oral terms of payment, Veterans would have undoubtedly pointed to the blank space for dealer acceptance and claimed "no contract". The trial court and district court were both correct in concluding that after reviewing all issues of disputed material facts in a light most favorable to Veterans, as a matter of law, on the date of the accident, beneficial as well as legal title was in Veterans.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief has been furnished by mail this 8th of June, 1995 to DAVID C. BEERS, ESQUIRE, Beers, Jack, Tudhope & Wyatt, P.A. , P.O. Box 948600, Maitland, Florida 32794-8600; CHARLES R. STEPTER, JR., ESQUIRE, 170 East Washington Street, Orlando, Florida 32801; and ABBOTT M. HERRING, JR., ESQUIRE, 1302 McGowen, Houston, Texas 77004.



MICHAEL S. HERRING, ESQ.
Fla. Bar No. 0486078
1101 West First Street
Sanford, Florida 32771
(407) 323-6700
Attorney for Petitioner/Plaintiff