IN THE SUPREME COURT IN AND FOR
THE STATE OF FLORIDA

CASE NO. 92,697

ROGER V. BARTH,

Petitioner/Appellant

vs.

VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC.
AND AZAD INTERNATIONAL, INC.,

Respondents/Appellees

On Review From The Third District Court Of Appeal
Decision Case No. 97-681

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondents, VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC., and AZAD INTERNATIONAL, INC., make the following additions and corrections to the Statement of the Case and Facts provided by Petitioner, ROGER V. BARTH.

THE UNDERLYING TRANSACTION

Petitioner, ROGER V. BARTH ("BARTH"), is an attorney who, in early 1982, began representing Glenn Turner in Turner's federal income tax litigation with the United States. (T. 122-24).[1] A central issue in that litigation was the priority of various liens, tax certificates, judgments and other claims on Turner's properties, including "The Castle" -- a 60 acre estate Turner had built for his family near Orlando. (T. 126-127; 141).

In 1986, as Turner's financial problems worsened, he began looking for someone interested in acquiring The Castle, and told Respondent, VICTOR KHUBANI ("KHUBANI"), about the impending sale of the property for unpaid real estate taxes. (T. 162; 791). Turner told KHUBANI that he could acquire The Castle by buying the outstanding tax certificates. (T. 791-792).

Turner arranged a meeting at the office of his attorney, BARTH, attended by Turner, BARTH, attorney Paul Richter,[2] KHUBANI and KHUBANI's two sons. (T. 163; 796). At that time, Turner owed

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1/ The designation “T.” references the trial transcript. The designation “R.” is to the other portions of the Record on Appeal.

2/ Paul Richter served as BARTH’s trial counsel in this matter and is his counsel on this appeal.

BARTH and Richter a considerable amount of attorneys' fees. (T. 165-166). As BARTH testified:

> The purpose of Mr. Turner arranging this meeting between Mr. Khubani and me and himself was to try to work out a way where I could make a fee on this, because Mr. Turner knew he couldn't pay everything he owed to me and the other attorneys.

(T. 165-166).

At that meeting, BARTH and Richter explained to KHUBANI that he would have to do only three things to acquire The Castle -- buy the outstanding tax certificates and force a tax sale, pay off a federal tax lien which held second priority, and buy a judgment held by Genetic Laboratories against Turner, which held third priority. (T. 796-797). As part of the plan, Turner, his present wife and his former wife would sign necessary documents to waive any homestead rights they held with respect to The Castle. (T. 166).

BARTH explained that there would be a fee to be paid to him of $300,000 in the transaction (T. 166). KHUBANI testified:

> So I said, "And your fee will be $300,000?" He said, "That is correct. And Mr. Khubani, you have a hell of a good deal here. You're going to make $2 million before you'll give me $300,000." I said, "That's a deal." I shook hand with him.

(T. 800).[3]

Two days after the Washington meeting, BARTH wrote to KHUBANI's Florida attorney, Morton Brown of Shea & Gould, and sent

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3/ KHUBANI is not a native-speaking American, having been born in India in 1932. He emigrated to the United States 26 years later. (T. 781).

him a draft agreement memorializing the understanding,[4] and providing for KHUBANI to pay BARTH $300,000 on behalf of himself and Turner's other lawyers. (T. 170; 316; 683-684; Def. Ex. M). This draft, the only one created by BARTH, specifically referenced the $300,000 as moneys owed by Turner to BARTH and the other attorneys. (T. 317). BARTH subsequently realized that characterizing the fee in this way would cause the Government to consider it a payment of a Turner debt over which the Government's lien had priority, so this wording was deleted from subsequent drafts at BARTH's request. (T. 318).

KHUBANI's counsel was troubled by the proposed transaction, but KHUBANI responded that BARTH had assured him he would either acquire The Castle or make a substantial amount of money. (T. 689-690; 714). KHUBANI repeated BARTH's statement that the other liens and claims, "were all behind him and he was not to look back." (T. 802).

What KHUBANI was not to "look back" at was a second IRS lien in an amount somewhere between $8 and $10 million which had been given fourth priority right behind the Genetic judgment; the fact that the Government was attempting to knock the Genetic judgment out of its third priority position; and the fact that the government had called into question The Castle's "homestead" status. (T. 238). KHUBANI was presumably also not to "look back" at the fact that the Genetic judgment was only against Glenn Turner

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4/ BARTH's initial draft reflected KHUBANI and Turner as the parties to the agreement. (T. 170).

and not against his former wife, Alice Flynn, so that his recovery on this judgment via The Castle property — which was owned by Turner and Flynn — would be limited to Turner's one-half undivided interest. (T. 300; 531).

Both Brown and Jay Schwartz, KHUBANI's litigation counsel in the ensuing dispute with the United States over lien priority, confirmed that the deal between KHUBANI and BARTH was structured so that BARTH and Richter would receive $300,000 only if KHUBANI acquired The Castle or made about $2 million in the satisfaction of the Genetic judgment. (T. 167; 679; 682; 701; 753; 755).

Following BARTH's initial draft agreement, there were discussions between BARTH and Ethan Minsky, an associate at Shea & Gould and, throughout the next several months, an ensuing series of further drafts changing various terms of the agreement, although always referring to the payment to be made to BARTH as an "attorney's fee." (T. 182-188; Pl. Ex. 1).

On June 1, 1986, KHUBANI purchased the first of the tax certificates encumbering the property. (T. 499). He subsequently purchased the remaining tax certificates and the Genetic judgment.[5] (T. 269; Pl. Ex. 18). Thereafter, the Government scheduled KHUBANI's deposition. (T. 477; 504). When BARTH and Richter learned that KHUBANI's deposition was to be taken by the

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5/ Some of the transactions at issue were accomplished through Respondent, KHUBANI ENTERPRISES, INC., and the Genetic judgment purchase was made by Respondent, AZAD INTERNATIONAL, INC. (T. 256-267). For purposes of this Brief, VICTOR KHUBANI, individually, and these entities are referred to collectively as "KHUBANI."

Government, Richter specifically advised KHUBANI that he did not want him to answer any questions relating to the agreement with BARTH because "the Government might believe that money was money to pay Turner's attorneys fees that he owed Barth and Richter, and that they might attach it, take it, claim it, they might get it rather than Mr. Barth and Richter and the other attorneys who were involved in their representation of Turner." (T. 753-754).

On October 3, 1986, Minsky sent BARTH documents characterized in his cover letter as, "execution copies of the proposed Agreement . . ." (the "Agreement"), together with the affidavits that were to be executed by Turner and his former and present wife relating to the waiver of homestead. (T. 188).

Minsky confirmed that had he wanted the Agreement to be binding upon execution by BARTH, he would have had KHUBANI sign before sending it to BARTH. (T. 667). Brown also confirmed that neither he nor Minsky had authority to bind KHUBANI to an agreement. (T. 705).

BARTH apparently understood this, as in his October 15, 1986, cover letter forwarding the three copies of the Agreement signed by him, he stated:

> Enclosed are three signed copies of the Agreement. Note that Exhibits A and B need to be attached.
>
> Please return one executed copy of the Agreement to me.

(T. 204; Pl. Ex. 3).

BARTH never received an executed copy of this Agreement. (T. 207-208). BARTH, and only BARTH, testified that Minsky subsequently told him that KHUBANI had signed the Agreement, and

purportedly asked BARTH if Shea & Gould could hold the signed copies in their file because of a concern that if the agreement became known to the Government, it would start an inquiry into KHUBANI's involvement, and "this could cause difficulty, at least aggravation and expense for Mr. Khubani."[6] (T. 208-209). BARTH testified that he agreed. He at no time requested to see any confirmation that KHUBANI had signed the Agreement.

Minsky denied ever telling BARTH that KHUBANI had signed the Agreement. Minsky stated, "I didn't lie to Mr. Barth, and I would have no reason to. I have nothing to gain by it." (T. 664). Minsky also testified that he had specifically told BARTH that KHUBANI had not signed the Agreement as of late December, 1986 or early January, 1987. (T. 562). Brown also testified that he advised BARTH that KHUBANI had not signed the proposed Agreement. (T. 709). BARTH never discussed the lack of execution of the Agreement with KHUBANI, either before or after these discussions with Minsky and Brown.

KHUBANI, in fact, had not objected to BARTH's request for a written agreement, but had insisted that it include a guarantee that he had to either acquire The Castle or make the promised $2 million profit before being required to pay BARTH’s $300,000 fee -- a condition not included in the unsigned Agreement. (T. 803-804). He told both BARTH and Richter that he needed this guarantee, but

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6/ BARTH conceded on cross examination that it was in fact **his** interest in collecting the $300,000 that would be put in jeopardy should the Government learn of the agreement. (T. 310).

they advised him that they could not put that into an agreement because of "some legal problems" relating to Turner's dispute with the IRS. (T. 805-806; 838-839). KHUBANI, therefore, would not sign the Agreement, and told BARTH and Richter, "Listen, my deal is very simple, from the beginning to now. I get The Castle, I get the $2 million, or -- and you get my $300,000 period. I'm a man of my word and you will get the money if I get my Castle or $2 million. Simple as that." (T. 806).

Ultimately, KHUBANI got neither The Castle nor the $2 million profit. Rather than being sold at a Ch. 197, Fla. Stat. tax deed sale, as originally contemplated by the parties, The Castle was sold pursuant to Order of the United States District Court by receiver's sale under 28 U.S.C. §2001(b) which required a minimum bid of at least two-thirds appraised value — $1,132,000, rather than the $321,903 which would have been required in a state tax deed sale. (T. 356; 358; 370-376; 379; 386). If the property had been sold in a Ch. 197 tax deed sale, KHUBANI, as the holder of the tax certificates, would have been entitled to credit bid. The District Court Judge refused to allow KHUBANI to make a credit bid. (T. 531). And, since the purchased Genetic judgment only applied to Glenn Turner's half interest in the property, KHUBANI would realize only one half of the amount remaining after the tax certificates and first federal tax lien were paid. (T. 533). Although KHUBANI bid on the property, it was ultimately sold to a third party for $1,807,000. (T. 833-834; Pl. Ex. 9).

Because there was no showing of a waiver of homestead at the time of the Genetic judgment, and because the whole issue of whether The Castle actually had homestead status was disputed, the United States was aggressively contesting the priority of the Genetic judgment over the second federal tax lien. (T. 499; 509; 759-764). On November 14, 1988, the United States and KHUBANI entered into a settlement agreement under which, rather than obtain ownership of The Castle or realize a $2 million profit, KHUBANI ended up with $424,795.68, less the substantial attorneys fees, the costs of borrowing to buy the Genetic judgment and the other costs he had incurred in the transactions. (T. 273; 388).

BARTH, nonetheless, made demand for the $300,000, which was refused by KHUBANI on the basis that the conditions precedent to payment -- acquisition of title to The Castle or a $2 million profit -- had not been realized. BARTH thereafter filed suit. (R. 1-24).

THE LITIGATION

BARTH originally sued both KHUBANI and attorney Minsky, but voluntarily dismissed Minsky on the eve of trial, thus eliminating Count II of his Amended Complaint in its entirety and eliminating Minsky as a defendant in Court III. (R. 1-24; 554-555).

In Count I of his Amended Complaint, BARTH alleged breach of contract by KHUBANI. (R. 74-77). As confirmed at trial, BARTH's claim was premised entirely upon his argument that the proposed unsigned “Agreement” constituted the operative contract between the parties. (R. 74-77). BARTH did not file a *quantum meruit* claim

nor any other claim asserting entitlement to payment on any basis other than the unsigned Agreement.

In Count III BARTH alleged alternatively that, if the written Agreement was not found to be enforceable, he had been defrauded by Minsky telling him that document had been signed. (R. 80-83).

DISPOSITION OF THE FRAUD CLAIM

At the close of BARTH's case, the Court granted Respondents' motion for directed verdict on the fraud claim. (T. 449-450). The Third District Court of Appeal ultimately reversed this ruling, holding that BARTH had established a prima facie case of fraud which was not barred by the economic loss rule. **Barth v. Khubani**, 705 So. 2d 72, 73 (Fla. 3d DCA 1997).

THE BREACH OF CONTRACT CLAIM

The case went to the jury solely on the breach of contract claim, based upon BARTH's contention that the unsigned "Agreement" constituted a valid and binding agreement between the parties which required Respondents to pay his $300,000 fee. (App. 1). In their Answer, Respondents raised the affirmative defense that, "Plaintiff has failed to comply with conditions precedent required under the terms of the agreement between the parties." (App. 2). This was premised on Respondents' chief contention that the actual understanding between the parties was **not** as set forth in the unsigned "Agreement." The bulk of the testimony and evidence presented during the five day trial was directed toward this primary issue of whether the unsigned "Agreement" was the operative

agreement which set forth the terms under which BARTH was entitled to the $300,000.00 fee.

Respondents also pleaded as a separate affirmative defense that BARTH's cause of action was barred by the statute of frauds since it was an agreement to pay the debt of another -- the legal fee owed to BARTH and Richter by Turner. (App. 2).

RULINGS ON THE STATUTE OF FRAUDS DEFENSE

At the close of his own case, BARTH moved for a directed verdict seeking to have the statute of frauds defense stricken. His motion was denied. (T. 468).

At the charge conference, Respondents submitted a statute of frauds jury instruction taken directly from Florida Forms of Jury Instruction § 31.01 (Matthew Bender 1996):

> A contract under which one party assumes the responsibility to pay for a debt or liability incurred by another is invalid unless it is in writing.
>
> The issue that you must determine is whether defendant made a promise to satisfy the plaintiff directly and unconditionally for defendant's own account, or whether defendants made a promise to pay plaintiff money owed to plaintiff by Glenn Turner.
>
> If the greater weight of the evidence shows that the defendant made a promise to pay Glenn Turner's debt, then you should find that the contract is invalid because it was not in writing. However, if the greater weight of the evidence shows that the defendant promised to pay plaintiff unconditionally, then you should find that the contract is valid or go on to consider defendant's other defenses.

(T. 1039). Petitioner made the following objection to this instruction:

> MR. BURSTEIN: We can't really agree to this, Your Honor. The second paragraph talks about a promise to satisfy plaintiff directly and unconditionally. That is the defendant's words, for defendant's own account.
>
> The evidence here is that the contract had conditions to it and that there was — essentially this is my argument on the directed verdict. This is a separate agreement. There was an exchange of consideration. So it was an independent contract.
>
> THE COURT: I understand.
>
> MR. BURSTEIN: It is not really a contract that comes within the rule here. Moreover, there is nothing in here, Your Honor, about open court admissions or sworn admissions of an existence of a contract which takes it out of the statute of frauds, and there is nothing in here also about substantial or part performance.
>
> THE COURT: This has been a substantial defense. In fact, the 300,000 was intended to have Glenn Turner's debts to the plaintiff paid by the defendant.
>
> MR. STETTIN: Right.
>
> THE COURT: That has been an underlying theme, so I'm going to grant it, and if the jury understands it --
>
> MR. BURSTEIN: We'll note an objection, Your Honor.

(T. 946-947).

Petitioner did not suggest, request nor provide any different or additional language to be included in the instruction, and never requested that language be added to the instruction setting forth the "leading object" or "main purpose" rule of law now argued -- ***to wit***, that even if the effect of an agreement is to pay a debt of another, it is not covered by the statute of frauds if the promisor

derives a direct benefit from the promise. (Petitioner's Initial Brief on the Merits at p. 23).

THE VERDICT FORM

The verdict form was agreed to by the parties, and asked the jury the following questions:

> QUESTION 1:
> Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth and Khubani Enterprises, Inc.?
>
> QUESTION 2:
> Do you find that the document called "Agreement", Plaintiff's Exhibit 3, evidences an enforceable contract between Mr. Barth and Victor Khubani?

(App. 3). The jury answered "NO" to both Questions 1 and 2, and judgment was entered for Respondents accordingly.

THE APPEAL

On appeal to the Third District Court of Appeal, Petitioner did not raise any issues involving the central theory of defense that the unsigned “Agreement” was not the actual agreement between the parties. Petitioner’s appellate argument related solely to the second affirmative defense, alleging it was error to give the statute of frauds jury instruction.

The Third District held:

> [W]e find that the plaintiff did not properly preserve the statute of frauds issue for review on appeal. Because a general verdict form was submitted to the jury, it is unclear whether the jury found the underlying contract to be unenforceable because it was barred by the statute of frauds, because the plaintiff had failed to perform the conditions precedent, or because no valid contract existed. Therefore, in the absence of an objection to the use of the general verdict form, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to demonstrate prejudice.

Barth v. Khubani, 705 So. 2d at 73. Petitioner now argues this portion of the Third District's holding conflicts with decisions of the First, Second and Fourth District Courts of Appeal and should not be upheld by this Court.

SUMMARY OF ARGUMENT

The "two issue rule" has consistently and properly been applied to require that special verdict interrogatories be used where distinct and independently pleaded affirmative defenses have been raised, and the perceived error is relevant to only one of those affirmative defenses. This was the basis of the Third District's holding. Petitioner's characterization of that holding as adopting a much broader interpretation of the "two issue rule" which would require each and every factual element of every claim and every defense to be separately set forth is inaccurate and unnecessary.

Application of the "two issue rule" in this context makes good sense. Requiring special verdict interrogatories for the pleaded affirmative defenses as well as the pleaded claims does not make the process unduly complex or burdensome, but instead both ensures that appellate review is limited to those issues relevant to the verdict, and facilitates and assists the jury in understanding the issues it is to consider in rendering that verdict. It certainly creates no undue burden on counsel who are presumably aware of the pleaded claims and affirmative defenses well before trial, and can prepare the verdict form accordingly as part of their trial preparation.

There is no conflict between Fla.R.Civ.P. 1.470 and the "two issue rule." The former requires that objection be made to a jury instruction in order to preserve the right to raise the perceived error in that instruction on appeal. The latter ensures that the perceived error that is raised on appeal did in fact affect the jury's ultimate decision.

Contrary to Petitioner's contention, and assuming one ignores Petitioner's failure to comply with the "two issue rule," it was not error for the court to give the statute of frauds jury instruction. It was for the jury to decide, based on the facts adduced at trial, whether in fact the agreement at issue was one to pay the debt of another. The instruction itself, taken directly from Florida Forms of Jury Instruction, accurately set forth the law on the statute of frauds. Had Petitioner wished to have different or additional language included in that instruction, he could and should have provided the court with such additional language. He did not.

LEGAL ARGUMENT

I.
THE "TWO ISSUE RULE" APPLIES TO AFFIRMATIVE DEFENSES

A.
CASES HAVE CONSISTENTLY APPLIED THE "TWO ISSUE RULE" TO INDEPENDENT AFFIRMATIVE DEFENSES WHICH, EACH ALONE, WOULD SUPPORT THE JURY VERDICT.

All Florida cases in all of the District Courts of Appeal have ruled on the "two issue rule" consistent with this Court's pronouncement in **Colonial Stores, Inc. v. Scarbrough**, 355 So. 2d 1181, 1186 (Fla. 1978):

> [W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found **as to one of two issues** submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced.

(emphasis added); **Whitman v. Castlewood International Corp.**, 383 So. 2d 618 (Fla. 1980). In **First Interstate Development Corp. v. Ablanedo**, 511 So. 2d 536, 538 (Fla. 1987), this Court further stated that the rule applies where there are "two theories of liability, but where a single basis for damages applies."

By the same token, the rule has been consistently applied where, as here, there are two pleaded "theories of nonliability" – that is, affirmative defenses – each of which, independently, would sustain the jury verdict. **Treal Group, Inc. v. Custom Video Services, Inc.**, 682 So. 2d 1230 (Fla. 4th DCA 1996); **Comreal v. Hatari Imports, Inc.**, 559 So. 2d 1175 (Fla. 3d DCA 1990); **Rosenfelt v. Hall**, 387 So. 2d 544 (Fla. 5th DCA 1980).

Thus, in **Treal Group, Inc. v. Custom Video Services, Inc.**, 682 So. 2d 1230 (Fla. 4th DCA 1996), the lessor sued for breach of a commercial lease. The tenant defended, alleging that the lease was invalid and, alternatively, that there had been nonperformance by the lessor of a lease condition. After a jury verdict for the tenant, the lessor opposed the grant of attorney's fees to the tenant (based on the lease's "prevailing party" provision), arguing that the verdict must have been based on the defense that the lease was invalid. The lower court agreed and denied the tenant's fee recovery. The Fourth District reversed, holding:

> Because both issues were presented to the jury by [the tenant], and the jury could have found for [the tenant] on either ground, but entered a general verdict, the two-issue rule of *Odom* applies here.

682 So. 2d at 1231.[7]

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[7] **Odom v. Carney**, 625 So. 2d 850 (Fla. 4th DCA 1993), also involved only one claim, but the Fourth District nonetheless found the "two-issue rule" applicable. In that case, the jury returned a verdict for the plaintiff in a personal injury matter, awarding $20,000.00. Since the verdict form did not distinguish as to what damages were awarded for medicals as opposed to lost earnings, the "two-issue rule" barred the defendant's subsequent motion for set-off of PIP benefits.

Of equal interest is the Fourth District decision in **Barhoush v. Louis**, 452 So. 2d 1075 (Fla. 4th DCA 1984), *rev. dismissed*, 458 So. 2d 271 (Fla. 1984), a medical malpractice action in which the jury had returned a $1.8 million plaintiff's verdict. The jury had been instructed on various aspects of potential damages, both tangible and intangible. The defendant's appellate arguments related solely to an expert witness who had testified as to the economic, but not the intangible, damages. The Fourth District held that, while this did not present a "classic application of the two issue rule," the principle had analogous application and precluded the defendant from obtaining a reversal. "Had defendant requested the itemized verdict to which he was entitled, the problems relating to the effect of Dr. Goffman's testimony

Similarly, in **Rosenfelt v. Hall**, 387 So. 2d 544 (Fla. 5th DCA 1980), the plaintiff brought a statutory claim of injury by a dog (§767.01, Fla. Stat.). Defendants raised an affirmative defense of provocation and an instruction was given on this defense. After verdict was returned for the defense, the trial judge granted a new trial based on his belief that the provocation defense did not apply. In quashing and remanding for entry of a judgment for the defendants, the Fifth District noted that, even if the provocation instruction had been erroneous, the motion for new trial still should have been denied since a general verdict form had been used and there was no way of knowing whether this defense was the basis of the jury's verdict.

And, in **Comreal v. Hatari Imports, Inc.**, 559 So. 2d 1175 (Fla. 3d DCA 1990), a brokerage commission suit, two independent issues were raised by Comreal by way of defense -- that the brokerage contract was not an exclusive right to sell agreement and that, in any event, the contract had been terminated. After a general verdict was returned for Hatari, the Third District rejected Comreal's appeal, holding that Comreal's failure to object to the use of the general verdict form required affirmance under the "two issue rule."

These cases are all in accord with the need to include special interrogatories relating to independent affirmative defenses to preserve an issue for appeal germane to only one of

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would have been clarified." 452 So. 2d at 1077.

those pleaded defenses. That is precisely the rule applied by the Third District in this matter, and its' holding is not in conflict with existing case law. As noted above, the Third, Fourth, and Fifth District Courts of Appeal have ruled consistently on this issue. The First and Second District Courts of Appeal simply have not examined this issue.

B.
CASES CITED BY PETITIONER DO NOT EXAMINE THE "TWO ISSUE RULE" IN THE CONTEXT OF INDEPENDENT AFFIRMATIVE DEFENSES.

Petitioner confuses two issues -- it is much different to say that specifically pleaded separate and independent affirmative defenses should be set forth by way of special verdict interrogatory for appellate purposes than to say that every single factual element of every claim and defense has to be so delineated to preserve rights on appeal. All of the cases cited by Petitioner deal with the latter, not the former, situation. *See e.g.*, **Davidson v. Gaillaru**, 584 So. 2d 71 (Fla. 1st DCA 1991), *rev. denied*, 591 So. 2d 181 (Fla. 1991); **A.G. Edwards & Sons, Inc. v. Weinreich**, 572 So. 2d 993 (Fla. 2d DCA 1990); **LoBue v. Travelers Insurance Company**, 388 So. 2d 1349 (Fla. 4th DCA 1980), *rev. denied*, 397 So. 2d 777 (1981).

The Fourth District's recent decision in **Charlemagne v. Francis**, 700 So. 2d 157 (Fla. 4th DCA 1997), *rev. dismissed,* 703 So. 2d 476 (Fla. 1997), is not at odds with these decisions, but rather stands for a different proposition – that the "two issue rule" does not apply to a fundamental error which affects the entirety of a plaintiff's legal claim and relates to a nonpleaded issue.

In **Charlemagne**, suit was brought for common law negligence and resulted in a jury verdict in favor of the defendant property owner. The Fourth District reversed, finding error in the trial court's giving of a jury instruction on § 83.51(4), Fla. Stat., which statutorily exculpates a landlord under certain conditions. The Court noted that (unlike the cases cited above and unlike the present case), the defendant **had not** raised the statutory defense as an affirmative defense, nor could it, since it was not a defense to a common law negligence action.[8] As opposed to the affirmative defenses that were available to the defendant -- comparative negligence and negligence of others -- the statute had the effect of absolutely exonerating a landlord as opposed to allowing for allocation of fault. The Court held that it was error to instruct the jury on this inapplicable, nonpleaded statutory defense, and that this error affected the jury's consideration of **all** aspects of the tenant's negligence claim so that reversal was proper.

Charlemagne, therefore, did not involve the issue of separate and independently pleaded affirmative defenses, but rather a judge's error in instructing on a non-pleaded issue having a potentially huge impact on the jury's consideration of **all** aspects of the plaintiff's legal theory of liability.

Of like import is **A.G. Edwards & Sons, Inc. v. Weinreich**, 572 So. 2d 993 (Fla. 2d DCA 1990). An erroneous jury instruction had been given to the effect that violation of Chapter 517, Fla. Stat.,

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8/ The statute applied only to exclude liability of the landlord if suit was brought for breach of statutory warranties. 700 So. 2d at 160.

constituted negligence *per se* under the facts of that case. Chapter 517 was, in actuality, not applicable, had not been raised as a separate theory of liability or as a legal defense, and clearly tainted the jury's consideration of the necessary proofs for **all** aspects of the negligence claim. The court found, "The manner in which the instruction was given so heavily emphasized a violation of chapter 517 as negligence per se that it could not fail to prejudice appellants to the extent that a new trial should be ordered." 572 So. 2d at 996. Again, the Court found that this erroneous instruction which related to a nonpleaded, nonapplicable defense affected all aspects of the plaintiff's claim, so that reversal was mandated.

Contrary to Petitioner's assertion, the Third District is in fact aligned with the other Districts in holding that the "two issue rule" should not be extended "to require a jury finding on every factual basis alleged in support of a theory of liability." **Emerson Electric Company v. Garcia**, 623 So. 2d 523, 524 (Fla. 3d DCA 1993).[9] That, however, is quite different from saying that separate and independent affirmative defenses, like separate claims, do have to be broken out on the verdict form to preserve for appeal a contention that error relating to only one of those defenses was prejudicial. The Third, Fourth and Fifth Districts

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9/ Petitioner correctly notes that the Third District did not cite to **Gonzalez v. Leon**, 511 So. 2d 606 (Fla. 3d DCA 1987), *rev. denied*, 523 So. 2d 577 (1988), as supporting its decision in **Barth**. It failed to so do because **Gonzalez** did not deal with the situation of two separate and distinct pleaded affirmative defenses.

have so held. There are no decisions of the First or Second District in conflict with this rule.[10] There is no "express and direct conflict" between the district courts of appeal on this issue nor should there be since, as discussed below, application of the "two issue rule" to separately pleaded affirmative defenses is supported by the same logic which requires the application of the rule to separately pleaded claims.

10/ There is language in the decisions of those Courts of Appeal indicating that their interpretation of the "two issue rule" is not as limited as Respondents represent. Thus, in **A.G. Edwards**, *supra*, the Second District cited the rule to apply where there are "two alternative causes of action **or issues**." 572 So. 2d at 996 (emphasis added).

II.
APPLYING THE "TWO-ISSUE RULE" TO SEPARATELY PLEADED AFFIRMATIVE DEFENSES IS PRACTICAL, EFFICIENT AND FURTHERS THE ADMINISTRATION OF JUSTICE.

A.
PETITIONER'S ARGUMENTS AS TO THE IMPACT OF THE "TWO ISSUE RULE" ON COURT PROCESSES ARE ERRONEOUS

The use of a special verdict is possibly one of the best judicial tools for ensuring that an appellate court is asked to re-examine only those issues that actually had an affect on the ultimate decision rendered below. As noted in Moore's Federal Practice § 49.02, the special verdict is certainly "more accurate that the general verdict, which has been said to be 'as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi.'"[11]

Providing the jury with a "road map" of the pertinent pleaded issues facilitates not only proper appellate review, but also better jury understanding of precisely what the jury is being asked to decide. Rather than confuse jurors, such practice ensures that they examine each pertinent specifically pleaded claim and defense before rendering their decision.[12]

11/ Citing to Sunderland, Verdicts, General and Special, 29 Yale LJ 253, 258 n.3 (1920)

12/ The use of special interrogatory verdicts, in fact, has been found to assist in eliminating much of the complexity involved in presenting the law of the case to the jury. As noted in Moore's Federal Practice, § 49.03[3]:

> Use of the special verdict eliminates the necessity for and use of complicated instructions on the law, which are normally concomitant of the general verdict. Complicated instructions have always been

Nor does such practice give "undue prominence" to "any one phrase or theory of the case." (Petitioner's Brief at p. 13). In fact, the converse could be argued -- if only the claims are delineated, the jury may not understand or may overlook the impact of the undelineated affirmative defenses. By using special interrogatories for both the claims and affirmative defenses, the jury is instead properly focused on **all** of the issues it should be examining in reaching its' verdict.

Respondents are hard pressed to see how the inclusion of the affirmative defenses would make the verdict form more "complex" — it would instead appear to make it simpler, as it keys the jurors to the issues that are to be considered. As to whether such inclusion leads to a lengthier verdict form (if that is truly such a critical factor), it would appear that the real difficulty with verdict form length occurs when a large number of claims are raised. By the time of trial, the affirmative defenses to each of those claims are generally pared to a reasonable amount.

Moreover, the length of the verdict form is really not that crucial. The critical issues are whether the verdict form facilitates the jury in reaching its verdict, and facilitates the appellate court in limiting its' review to the truly germane

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> ludicrous and unfair; ludicrous in that only the naive can believe lay juries are capable of absorbing all the legal elements involved; unfair in that lack of comprehension leads to confusion and ultimately, injustice.

issues. These two factors are far more important than the length of the document.

Nor does the use of the special verdict form as envisioned create any particular undue burden on counsel, as Petitioner argues. The difficulties most often experienced by trial counsel are the logistics involved in revising jury instructions in accord with charge conference rulings during the short window of time available between the end of that conference and the commencement of closing argument.

Drafting a verdict form, on the other hand, is not a particularly difficult or time consuming task. Petitioner cites with approval this Court's observance in **Colonial Stores** that it is not difficult for counsel to request special interrogatories in a case with multiple counts, since those counts are "known by the time trial commences." (Petitioner's Brief at p. 14). Similarly, affirmative defenses are known before trial commences – in fact, they are known from the time the pleadings are closed – so that the verdict form can be drafted well ahead of time. If a claim or defense is then dropped or dismissed in the course of trial, it would not be a very difficult task to make the necessary

deletions.[13] Proper trial preparation, therefore, would obviate any purported "logistical nightmares" as foreseen by Petitioner.

Respondents are at a loss to understand Petitioner's claim that applying the "two issue rule" to pleaded claims and defenses "discourage[s] trial courts from correcting errors." (Petitioner's Initial Brief at p. 15-16). A jury verdict should be upheld if it can be upheld on any of several bases presented at trial. And if, in fact, the court's error permeated the entire case, the verdict would be reversed whether the "two issue rule" came into play or not. *See e.g.*, **Charlemagne v. Francis**, *supra*; **A.G. Edwards & Sons, Inc. v. Weinreich**, *supra*.

It would appear that Petitioner's argument goes more to confirming that the use of general verdicts should be discouraged, since they can lead to affirmance or reversal on a basis which actually played no part in the jury's decision, than to limiting the "two issue rule" as Petitioner desires.

13/ BARTH's position appears to be that, even though the statute of frauds was a pleaded affirmative defense which had not been dismissed before trial, he could not have predicted that the court would give a jury instruction on this defense and could not have known that he should include the issue on his verdict form. This makes little sense. Additionally, BARTH's motion for directed verdict on the statute of frauds issue had been denied the day before the verdict form had to be finalized. Even if BARTH somehow did not realize before this denial that this defense would go to the jury, he certainly knew then. There was no reason why he couldn't edit his proposed verdict form that evening to take care of this issue.

B.
THE "TWO ISSUE RULE" DOES NOT CONFLICT WITH FLA.R.CIV.P. 1.470

Fla.R.Civ.P. 1.470(b) addresses the need to make objection to a jury instruction in order to preserve rights on appeal from an alleged error in that instruction. It does not address, and has no bearing on, the separate and additional need for litigants to ensure that the appellate court is asked to consider only those errors (including jury instruction errors) relevant to the final verdict by use of special interrogatories. These two requirements on litigants are concomitant, not conflicting, and their use together does not require any amendment of court rules or other "drastic changes" in trial practice; in fact, their use requires no changes at all.[14]

Respondent confuses two different issues -- an objection must be made to an individual jury instruction in order to preserve a perceived error in that instruction, and a special verdict form must be used in order to be able to determine whether that perceived error in fact affected the jury's ultimate decision.

If Petitioner's interpretation is correct, then even what Petitioner agrees is the proper use of the "two issue rule" -- *ie.*,

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14/ Petitioner makes several unsupported assumptions in his argument on this point, including that there was ever any consideration of the alleged conflict between these two rules by the experts who participate in the Court rule amendment process, or a deliberate choice not to "press for adoption of changes to rules." (Petitioner's Initial Brief at p. 16). Petitioner fails to consider that this was never considered by the experts because there is no conflict, and no need for any amendment to the present rules in order to continue to uphold the "two issue rule."

to separate different claims (on each of which the jury would presumably have been instructed) -- would be improper where the appellant had complied with the requirements of Fla.R.Civ.P. 1.470. Again, it is precisely to determine whether the improper jury instruction was the basis for the jury's verdict that the special verdict must be employed.

Florida cases confirm that these two rules are not in conflict, and that the "two issue rule" applies even when the underlying contention of error involves a jury instruction. *See e.g.*, **Penske Truck Leasing Co., LP v. Moore**, 702 So. 2d 1295 (Fla. 4th DCA 1997); **Jacksonville Racing Association, Inc. v. Harrison**, 530 So. 2d 1001 (Fla. 1st DCA 1988); **Middleveen v. Sibson Realty, Inc.**, 417 So. 2d 275 (Fla. 5th DCA 1982), *rev. denied*, 424 So. 2d 762 (Fla. 1982); **Pfister v. Parkway General Hospital, Inc.**, 405 So. 2d 1011 (Fla. 3d DCA 1981), *rev. dismissed*, 413 So. 3d 876 (Fla. 1982).

The case Petitioner cites from South Carolina in support of its' argument actually supports Respondents' contention that separate defenses should be delineated under the rule. In **Anderson v. South Carolina Department of Highways and Public Transportation**, 322 S.C. 417, 472 S.E. 2d 253 (1996) (Petitioner's Initial Brief at p. 17 n.11), the court, in refusing to extend the rule to require each element of a claim to be broken out, felt compelled to note as to affirmative defenses:

> It should be noted that although cases generally have discussed the "two issue rule" in the context of appellate treatment of general jury verdicts, the rule is applicable

> under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue rule" if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

472 S.E.2d at n. 1. (emphasis added) Thus, the South Carolina court recognized the distinction between having to include every element of every claim and affirmative defense on the verdict form and the reasonable requirement of setting forth each separate claim and affirmative defense.

Petitioner's discussion of Fed.R.Civ.P. 49(b) is convoluted. By promulgating that rule, the Federal courts have authorized the use of a special verdict to an even greater extent than it is presently used in Florida under either Petitioner's or Respondents' interpretation of the rule.[15] If anything, the decisions cited by Petitioner which have applied Rule 49(b) confirm how beneficial the courts perceive the use of a special verdict to be. (Petitioner's Initial Brief at n. 11).

Thus, in **Hay v. City of Irving, Texas**, 893 F.2d 796, 799 (5th Cir. 1990), special interrogatories were used, and the Fifth Circuit noted their value since they obviated the problems endemic to the use of a general verdict and allowed the Court to uphold that portion of the final judgment which was not affected by the error.

15/ It appears the Federal courts do not agree that the use of such a verdict results in undue confusion and complexity.

Asbill v. Housing Authority of Choctaw Nation of Oklahoma, 726 F.2d 1499 (10th Cir. 1984), is most interesting, because the rule that was discussed in that case would mandate upholding the Third District's decision herein whatever this Court should determine are the proper limits of the "two issue rule." In **Asbill**, two constitutional claims were raised relating to the discharge of a government employee – due process and violation of First Amendment rights. The court found that the plaintiff had failed to show a liberty deprivation sufficient to support the due process claim, but that there was some evidence supportive of the First Amendment claim. The court bemoaned the fact that a general verdict form had been used, and further noted that this did not mean that a general verdict could not be upheld in certain instances where one of two claims was found to have been unsupported:

> As with all errors committed at trial, a litmus test for reversal is whether the appellant was thereby unjustly prejudiced. See Fed.R.Civ.P. 61; 28 U.S.C. § 2111 (1976). A general verdict may be upheld if it appears that the errors committed were not "vital," or prejudicial to the "substantial rights" of the objecting party. *See* **Wilmington Star Mining Co. v. Fulton**, 205 U.S. 60, 79, 27 S.Ct. 412, 419, 51 L.Ed. 708 (1906).

The Court stated that if the plaintiff's First Amendment claim had been "strongly and clearly supported by the record," the Court could have affirmed the judgment under the harmless error theory.

In the instant case, the main defense raised by Respondents to Petitioner's claim -- that the unsigned "Agreement" was not the actual agreement between the parties -- was the issue on which

virtually all of the evidence was presented and one which was certainly “strongly and clearly” supported by the record. Thus, even if this rule applied in Florida, the present decision is entirely sustainable.[16]

III.
THE STATUTE OF FRAUDS INSTRUCTION WAS NOT ERRONEOUS AS A MATTER OF LAW

Petitioner’s issue with respect to the statute of frauds instruction was a factual one -- he contended that since there was evidence that the "leading object" of KHUBANI’s promise to pay the $300,000 was an alleged "valuable consideration of direct pecuniary value" to him, it fell outside of the statute.

The evidence presented to the jury was more than sufficient for the jury to find that, assuming *arguendo* an agreement had existed between BARTH and KHUBANI, the $300,000 to be paid to BARTH was solely to pay off the debt owed to him by Turner, and that BARTH was not furnishing KHUBANI with any new, real consideration in exchange for this agreement. For example, it could have been determined from the testimony that, because KHUBANI was supposed to make such a large profit from the purchase of the tax certificates and the judgment, he gratuitously agreed to take care of Turner's debt upon receipt of that profit; or, if one accepts BARTH's theory

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16/ The third case cited by Petitioner, **Kinnel v. Mid-Atlantic Mausoleums, Inc.**, 850 F.2d 958 (3d Cir. 1988), involved an extremely detailed special verdict form which omitted one of the defendants. There was **no** basis under the jury’s findings, therefore, to hold that defendant liable, and the court so found, holding that Fed.R.Civ.P. 49(a) did not authorize the district court to find that the jury’s “intention” was to include that defendant and thus enter judgment against him. This is off point to the proposition for which it is cited.

of the case, that there was no performance required of BARTH before KHUBANI's payment obligation became operative.

This was clearly an issue of fact on which the jury had to be instructed and was much different from those cases cited by BARTH where either an owner promises to pay a subcontractor or materialman to protect his own property,[17] or one in which the agreement to pay third parties is part of a settlement agreement between two litigants.[18]

Additionally, this issue arose at all only by virtue of BARTH's failure to propose language to be included in the statute of frauds jury instruction that would have remedied his concerns now raised on appeal.[19] Petitioner could easily have proposed that the language set forth in the cases now cited by Petitioner be included in the instruction. Instead, Petitioner simply objected to the standard Florida Forms of Jury Instruction (Matthew Bender 1996) jury instruction. When this objection was overruled,

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17/ **Jim & Slim's Tool Supply, Inc. v. Metro Communities Corporation**, 328 So.2d 213 (Fla. 2d DCA 1976); **Al Booth's, Inc. v. Boyd-Scarp Enterprises, Inc.**, 518 So. 2d 422 (Fla. 5th DCA 1988); **J.F. Hoff Electric Co., Inc. v. Goldstein**, 560 So. 2d 419 (Fla. 4th DCA 1990).

18/ **Moore v. Chapman**, 351 So. 2d 760 (Fla. 1st DCA 1977).

19/ It is arguable that the wording of the instruction already achieved this, in that the court instructed the jury that the issue to be determined was "whether defendants made a promise to satisfy the plaintiff directly and unconditionally for defendant's own account, or whether defendants made a promise to pay plaintiff money owed to plaintiff by Glenn Turner." (T. 1039).

Petitioner failed to provide the Court with any alternative or additional language to the instruction that would be given.

Thus, not only did Petitioner agree to the verdict form which failed to break out the statute of frauds theory at issue, but he also failed to provide the Court with a statute of frauds jury instruction including language which would have addressed the concerns he now raises. (T. 945-947).

CONCLUSION

The facts and law set forth above confirm that the Third District Court of Appeal correctly applied the "two issue rule" to Petitioner's statute of frauds appellate issue. This Court, therefore, should affirm the Third District's decision on that issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of November, 1998 to BERNARDO BURSTEIN, ESQ., Akerman, Senterfitt & Eidson, P.A., Sun Trust International Center, One Southeast Third Avenue, 28th Floor,

Miami, FL 33131 and PAUL S. RICHTER, ESQ., Richter, Miller & Finn, 1019 Nineteenth Street, N.W., Suite 650, Washington, D.C. 20036.

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