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 Appeals
Decision Case No. 97-681

PETITIONER'S INITIAL BRIEF ON THE MERITS

Bernardo Burstein, Esq.
AKERMAN, SENTERFITT & EIDSON, P.A.
Sun Trust International Center
One Southeast Third Avenue, 28th Floor
Miami, Florida 33131
(305) 374-5600
Fax No.: (305) 374-5095

and

Paul S. Richter, Esq.
RICHTER, MILLER & FINN
1019 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 467-6200
Fax No.: (202) 293-4395

Attorneys for Petitioner/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (cont)

STATUTES

OTHER

STATEMENT OF THE CASE AND FACTS

This appeal by Roger V. Barth ("Barth") arises out of a partially successful appeal by Barth to the Third DCA following denial of Barth's post-trial motion after an adverse jury verdict in a case which was submitted to the jury on plaintiff Barth's single breach of contract claim for a general verdict. The Third DCA reversed and remanded as to a separate fraud and misrepresentation claim which the trial court had erroneously dismissed at the close of Barth's case-in-chief and which was not submitted to the jury.[1] Barth v. Khubani, 705 So.2d 72 (Fla. 3d DCA 1997). The trial court's dismissal of the fraud and misrepresentation count left Barth with only a single remaining cause of action - a single count for breach of contract which was the sole matter ultimately submitted to the jury for a general verdict. R. 677. At the instruction conference with the trial court, Barth specifically objected to the "statute of frauds" instruction sought by the Khubani defendants. Tr. 946 (line 3) - 947 (line 1). Despite Barth's objections, the trial court gave the "statute of frauds" instruction which Barth contends was erroneous and prejudicial under the evidence. R. 565-606, Tr. 1039 (lines 5-22).

The Third DCA affirmed the judgment entered on the general verdict on the grounds that Barth had not made a proper objection or taken proper steps under the Third DCA's view of the "two issue rule" to preserve any issue relating to the "statute of

---

[1] The case has not yet been remanded to the trial court, but a new trial will be necessary in view of the Third DCA's ruling which reinstated Barth's fraud and misrepresentation claim.

frauds" instruction for appellate review. Barth, 705 So.2d at 73-74. The Third DCA found that appellate review was precluded because Barth did not attempt to isolate the trial court's instruction error by further objection or with special jury interrogatories. Barth contends that he was not required to do that, and that he did all that was necessary to preserve the matter for review.

Because the Third DCA applied the "two issue rule" in a fundamentally different manner than the way that rule is applied by three other DCAs which would have reached different results, Barth invoked the discretionary jurisdiction of this Court. This Court accepted jurisdiction on October 14, 1998, presumably to resolve the conflicting variants for the "two issue rule" which affect civil jury trial practice throughout Florida.

Barth contends that he made a proper objection to the trial court to preserve appellate review of the erroneous jury instruction in accordance with Fla. R. Civ. P. 1.470(b), and that the "statute of frauds" instruction given over his objection was erroneous and prejudicial under the evidence.[2] This Court should now reverse the judgment entered by the trial court and remand the case so that the breach of contract count can be re-tried

---

[2] At the beginning of the trial Barth submitted a written motion in limine directed to Khubani's alleged "statute of frauds" defenses, but the court denied that motion. R. 483-492, Tr. 82-85. At the close of Khubani's case, Barth moved to strike the alleged "statute of frauds" defense but the court denied that motion. Tr. 868-870. The erroneous and prejudicial nature of the "statute of frauds" instruction ultimately given is discussed in Part II of the Argument, pp. 19-26, infra.

together with the already reinstated fraud and misrepresentation count.

SUMMARY OF THE ARGUMENT

1. All prior decisions of this Court relating to the "two issue rule" which precludes appellate review of errors occurring at the trial level in certain circumstances arise only in the context of cases in which at least two separate causes of action are submitted to a jury.

2. This Court should reject the Third DCA's broad extension of the "two issue rule" to require special procedures relating to sub-questions of liability and defense in a case in which only a single cause of action is submitted to a jury for a general verdict. The "two issue rule" as it is followed in Florida has no applicability to sub-questions of liability and defense under a single cause of action which is submitted to a jury for a general verdict.

3. The "two issue rule" may have some proper, limited applicability to certain cases presenting questions involving distinct components of damages under a single cause of action. This case, however, does not present any such question for the Court to decide.

4. The Third DCA's attempted extension of the "two issue rule" to cases in which only a single cause of action is being submitted to a jury for a general verdict is neither necessary, practical nor efficient for the administration of justice, and will only lead to further problems if allowed to continue. Because of the broad implications of such a change, any change

should be made only through established processes for amendment of the Florida Court Rules.

5. It has not been the practice in Florida and the "two issue rule" in Florida has never required use of a special verdict interrogatories or forms to isolate and identify a jury's decision processes relating to sub-questions of liability and defense under a single cause of action which are affected by an erroneous jury instruction in order to preserve appellate review for the erroneous instruction.

6. The "two issue rule" in Florida has never required use of special verdict interrogatories or forms to isolate and identify a jury's decision processes relating to each element of liability and each element of defense for each cause of action submitted in order to preserve for appellate review jury instruction or other errors occurring during the trial.

7. Barth's objection at the instruction conference to the "statute of frauds" instruction which the trial court gave as part of its charge to jury on the single breach of contract count submitted was sufficient to preserve that instruction error issue for appellate review, and the "two issue rule" has no applicability. The "statute of frauds" instruction which the trial court gave to the jury over Barth's objection was erroneous and prejudicial under the evidence. Correction of that error requires reversal of the judgment entered by the trial court on the general verdict, and a remand of this case for a new trial for Barth's breach of contract claim.

ARGUMENT

I. THE THIRD DCA INCORRECTLY HELD THAT THE "TWO ISSUE RULE" BARS APPELLATE REVIEW IN THIS CASE IN WHICH ONLY A SINGLE CAUSE OF ACTION WAS SUBMITTED TO THE JURY FOR A GENERAL VERDICT

The Third DCA held that Barth did not properly preserve the "statute of frauds" instruction error for appellate review because Barth had not objected to a general verdict or requested special jury interrogatories when his single cause of action for breach of contract was submitted to the jury for a general verdict. Because the Third DCA could not determine why the jury had reached its general verdict, i.e., whether the jury had found the underlying contract to be unenforceable because it was barred by the statute of frauds, or because Barth had failed to perform the conditions precedent, or because no valid contract existed, the Third DCA found that appellate review was precluded under its view of the "two issue rule" because Barth was unable to demonstrate prejudice from the [erroneous] "statute of frauds" instruction. Barth at 73-74. In making this determination, the Third DCA found that the "two issue rule" applied even though only a single cause of action was being submitted to the jury.[3]

In fact, the record is clear that Barth did object in a timely manner at the instruction conference to the erroneous "statute of frauds" instruction as required by Fla. R. Civ.

---

[3] No objection to the use of the general verdict form was required if Barth is correct that the "two issue rule" does not bar appellate review under the facts of this case. As will be shown, no such objection to a general verdict is required under the "two issue rule" as described in the decisions of this Court or as interpreted and applied by the First, Second and Fourth DCAs which have rejected the approach now being required by the Third DCA and applied to Barth in this case. Barth did not object to a general verdict and did not request special jury interrogatories.

P. 1.470(b). Tr. 946 (line 3) - 947 (line 11). Barth contends that the Third DCA's basic reasoning and approach is flawed because the "two issue rule" is only properly invoked and applied to preclude appellate review in situations in which two or more distinct and separate causes of action are submitted to a jury under a general verdict.

A. The Third DCA's Ruling Departs From This Court's Prior Decisions Involving The "Two Issue Rule" Which All Arise In A Context In Which At Least Two Separate Causes Of Action Are Submitted To A Jury.

This Court's basic formulation of "two issue rule" has been that the unobjected to use of a general jury verdict form will be insufficient to preserve for appellate review an erroneous jury instruction on any one cause of action if the instructions are proper on any other cause of action being submitted to the jury for an overall general verdict. Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978), presented both malicious prosecution and false imprisonment causes of action; Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980), presented both negligence and agency theories of liability; and First Interstate Development Corp. v. Ablanedo, 511 So.2d 536 (Fla. 1987), presented both a fraud claim and a misrepresentation claim.

The beneficial purposes achieved by the "two issue rule" to preclude appellate review in certain situations were clearly explained in Colonial Stores. This Court noted there that no injustice could result from the rule because "... the remedy is always in the hands of counsel. Counsel may simply request a

special verdict as to each count in the case." 355 So.2d at 1186. (Emphasis Added.) The First Interstate decision in 1987 limited the application of the "two issue rule" in a situation which is not germane to the issue presented in this case, but still only spoke about a context in which at least two separate causes of action were being submitted to the jury.

No decision of this Court discussing the "two issue rule" has ever suggested that the rule should be invoked to preclude appellate review of an erroneous jury instruction in a case in which only a single cause of action was being submitted for a general verdict. More specifically, no decision by this Court has ever suggested that the "two issue rule" requires counsel who wishes to preserve the right of appellate review of error occurring during a trial to seek a special verdict form or special interrogatories to a jury for each element of a claim and for each element of defense for each cause of action submitted so that the appellate court can later determine exactly why a jury reached a particular verdict. This Court's formulation of the "two issue rule" appears to have been correctly followed in all reported decisions in which two or more causes of action have been submitted to a jury.[4]

---

[4] See, e.g., Jacksonville Racing Association, Inc. v. Harrison, 530 So.2d 1001 (Fla. 1st DCA 1988); Emerson Electric Co. v. Garcia, 623 So.2d 523 (Fla. 3rd DCA 1993); Florida East Coast Railway. v. Gonsiorowski, 418 So.2d 382 (Fla. 4th DCA 1982); Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), quashed on other grounds, 550 So.2d 461 (Fla. 1989); Penske Truck Leasing Co. v. Moore, 702 So.2d 1295 (Fla. 4th DCA 1997); and Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982).

B. The Third DCA's Ruling In This Case Has Reached A Different Conclusion Than Would Be Reached By At Least Three Other DCAs Which Have Considered The Precise Question.

The Third DCA's decision in this case is fundamentally at odds with decisions of the First, Second and Fourth DCAs which reach opposite conclusions on the same question.

The First, Second and Fourth DCAs follow one rule in which those DCAs have rejected any requirement for using special interrogatories or special verdict forms for liability sub-questions when a single cause of action is submitted to a jury for a general verdict.[5] The Third DCA, and possibly the Fifth DCA, follow a completely opposite and conflicting rule, the one which has been applied to Barth in this case.[6] The Third DCA's decision in this case directly conflicts with a decision of the Fourth DCA decided only two months earlier.[7]

In Davidson v. Gaillard, 584 So.2d 71 (Fla. 1st DCA 1991), the court held that the "two issue rule" should not be extended to require a claimant to specifically demonstrate by special interrogatory verdict the precise element which the jury found

---

[5] That rule is that the "two issue rule" is not applicable if only a single cause of action is being submitted to the jury. Davidson v. Gaillard, 584 So.2d 71 (Fla. 1st DCA 1991); A.G. Edwards & Sons, Inc. v. Weinreich, 572 So.2d 993 (Fla. 2nd DCA 1990); Charlemagne v. Francis, 700 So.2d 157 (Fla. 4th DCA 1997); and LoBue v. Travelers Insurance Co., 388 So.2d 1349 (Fla. 4th DCA 1980).

[6] The other rule is that the "two issue rule" is applicable even if only a single cause of action is being submitted to the jury. Barth v. Khubani, 705 So.2d 72 (Fla. 3d DCA 1997); Comreal Miami, Inc. v. Hatari Imports, Inc., 559 So.2d 1175 (Fla. 3rd DCA 1990.); Gonzalez v. Leon, 511 So.2d 606 (Fla. 3rd DCA 1987); Pfister v. Parkway General Hospital, Inc., 405 So.2d 1011 (Fla. 3rd DCA 1981); and Rosenfelt v. Hall, 387 So.2d 544 (Fla. 5th DCA 1980).

[7] Charlemagne v. Francis, 700 So.2d 157 (Fla. 4th DCA 1997), decided on October 15, 1997.

lacking in a single cause of action. 584 So.2d at 74. In A.G. Edwards & Sons, Inc. v. Weinreich, 572 So.2d 993 (Fla. 2nd DCA 1990), the court held that the "two issue rule" was not applicable where only a single cause of action was submitted to the jury. 572 So.2d at 996. In Charlemagne v. Francis, 700 So.2d 157 (Fla. 4th DCA 1997), the court held that the "two issue rule" is inapplicable because the appellant claimed only one theory of liability against the appellees. 700 So.2d at 160. Likewise, in LoBue v. Travelers Insurance Co., 388 So.2d 1349 (Fla. 4th DCA 1980),[8] the court held that the "two issue rule" should not be extended when appellant's claim submitted to the jury was not predicated upon multiple theories of responsibility. 388 So.2d at 1351, n.3. The court further reasoned that the rule should not be extended to require a claimant to specifically demonstrate the precise element of the cause of action which the jury found lacking. Id.

Barth submits that these three other DCAs are properly applying the "two issue rule", and urges this Court to reject the Third DCA rule as applied in this case and in certain earlier cases in the Third DCA as well.

C. The Third DCA's Application of The "Two Issue Rule" in Cases Involving Only a Single Cause of Action As It Has Evolved To This Case Has A Long and Inconsistent History, But Should Be Rejected.

In applying the "two issue rule" to preclude appellate review in this case, the Third DCA continues its erroneous application

---

[8] The Third DCA in Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987) decided expressly not to follow LoBue. 511 So.2d at 608.

of the "two issue rule" in cases where only a single cause of action or a single theory of liability is presented to a jury. This departure from Florida law began strongly with the Third DCA's decision in Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987). The Gonzalez court noted that it could find nothing in the prior decisions of this Court to suggest any limitation for the "two issue rule" and saw no reason to confine that rule only to cases involving the submission of multiple causes of action to a jury. As a result, the Third DCA in Gonzalez extended the "two issue rule" to require objection to a general verdict and/or a request for special verdict interrogatories to address the multiple elements of a single cause of action. Although the Third DCA's decision in this case directly follows the rationale, approach and decision which it discussed in detail in Gonzalez, the Third DCA curiously did not cite Gonzalez as supporting its decision in Barth. Yet this is the exact rule which the Third DCA has followed and applied in this case.

Although as noted, three other DCAs follow a different rule, in Gonzalez the Third DCA made reference to the Fourth DCA's earlier decision in Barhoush v. Louis, 452 So.2d 1075 (Fla. 4th DCA 1984), while expressly rejecting the Fourth DCA's fundamentally different approach in LoBue. In Barhoush, which is easily distinguished, the Fourth DCA fashioned a limited extension of the "two issue rule" for a damages issue when the party claiming error had not requested an itemized damages verdict as he had a right to do under Fla. Stat. Sec. 768.48 as

it then stood.[9] It thus appears that the Fourth DCA may have fashioned a limited extension of the "two issue rule" for certain types of damages issues which require the jury to itemize damages for an effective appellate review. No such special and limited issue involving damages is present in this case. The Fourth DCA's most recent decision in Charlemagne is completely consistent with LoBue and reaches a directly opposite conclusion to the Third DCA in this case.

In addition to the conflicts with Florida law and with the decisions by the three other DCAs presented above, the Third DCA's decision in this case represents an evolution which is itself inconsistent with certain remarks in earlier Third DCA panel decisions which have not been followed.

In Brown v. Sims, 538 So.2d 901, 907 n. 4 (Fla. 3d DCA 1989), quashed in part and remanded in part, 574 So.2d 131 (Fla. 1991) (decided on other grounds without comment on the "two issue rule."), Judge Ferguson severely questioned the continued validity of the Gonzalez extension of the "two issue rule" in light of this Court's decision in First Interstate Development Corp. v. Ablanedo, 511 So.2d 536 (Fla. 1987). However, the Third DCA has neither adopted nor followed Judge Ferguson's views expressed in Brown. Barth submits that Judge Ferguson foresaw the exact problem which has developed in this case.

---

[9] This provision applicable in medical malpractice cases was repealed in 1986 and replaced by Sec. 768.77, Fla. Stat. (1997). A later Fourth DCA case, Odom v. Carney, 625 So.2d 850 (Fla. 4th DCA 1993) has also allowed a limited extension of the "two issue rule" to a damages issue when the party claiming error had not requested an itemized damages verdict, citing Barhoush.

Another case, Emerson Electric Co. v. Garcia, 623 So.2d 523 (Fla. 3d DCA 1993), involving the submission of multiple causes of action to a jury was not decided ultimately on the basis of the "two issue rule" but contains some pertinent remarks. That court noted, in dicta, that it "reject[ed] the proposed extension of the 'two issue rule' to require a jury finding on every factual basis alleged in support of a theory of liability." Id. at 524. These remarks have also not been followed by the Third DCA which has adhered to the rule from the uncited Gonzalez case in this and other cases.

D. The Third DCA's Formulation Of The "Two Issue Rule" Is Neither Necessary, Practical Nor Efficient For The Administration Of Justice, And Will Only Lead To Further Problems If It Is Allowed To Continue. This Court Should Reject It.

The Third DCA's rule does not reflect Florida law or practice and is neither necessary, practical nor efficient for the administration of justice. Requiring special jury interrogatories in every such case would likely require lengthy and complex jury interrogatories for what have been relatively simple cases for juries to decide up until now, and could spawn an entire new class of issues for appeal. Such special interrogatories would need to address specifically every element of claim or defense in each cause of action submitted on which the trial court might be committing error in its instructions. Such a result is inconsistent with the stated goals of the "two issue rule," that is, to promote efficiency and judicial economy.

Routine use of special jury interrogatories to isolate possibly erroneous jury instructions relating to specific

elements of claim and/or defense in each count in such cases would confuse juries and cause the jury to place undue emphasis on precisely the possibly erroneous instructions and issues in order to respond to the special verdict interrogatories. Such a requirement would conflict with the notion that instructions should not give undue prominence to any one phrase or theory of the case. Floyd v. Sellars, 145 So.2d 880 (Fla. 3rd DCA 1962), cert. den. 155 So.2d 149 (Fla. 1963).

Trial courts do not intentionally make errors during instruction conferences, but, nevertheless, errors are made. In a like manner counsel, too, can make errors, particularly in the heat of trial when often counsel cannot determine immediately with confidence whether a particular ruling by the court constitutes a serious error or sometimes even an error at all. Given these practical considerations, it is not realistic for counsel to be expected to craft and present complex special interrogatories to isolate every potential element of claim or defense for which there might be error immediately upon learning of the trial court's rulings during an instruction conference.

Most typically, the trial court proceeds directly from the instruction conference, to closing argument, to instructing the jury and then to submitting the case. Too many people are waiting and time is too precious to allow counsel to regroup following the numerous legal rulings[10] which typically occur at

---

[10] For example, in this case the trial court ruled on numerous legal points relating to the twenty-seven jury instructions concerning the breach of contract issues which ultimately emerged from the lengthy instruction conference. R. 565-606.

an instruction conference and then to reconvene later with the trial court to present complex, written special verdict interrogatory requests.

Fla. R. Civ. P. 1.470(b) requires counsel to submit written requests relating to jury instructions to the trial court if the trial court is to be required to consider them. This is not difficult for jury instructions which can be ordinarily drafted in advance of trial. Moreover, as this Court noted in Colonial Stores, to avoid any limitation on appellate review posed by the "two issue rule," counsel need "simply request a special verdict as to each count in the case." 355 So.2d at 1186. (Emphasis Added.) As this Court correctly observed, it is not difficult for counsel to request a trial court in writing, in advance, to issue special interrogatories in a case with multiple counts so that the jury may return separate general verdicts for each individual count submitted to the jury. Indeed, this is easy for counsel to do because the separate counts which are likely to be submitted are known by the time the trial commences.

However, the time problems posed by the Third DCA's formulation of the "two issue rule" cannot be adequately dealt with even with modern technology such as word processors which run on laptop computers and which can be carried into the courtroom. It is simply not practical to expect counsel to be able to submit carefully crafted requests for special interrogatories and special verdict forms to a trial court in writing during the charging conference - based upon how a trial court rules in rapid fashion on many, many issues during an

instruction conference. The range of errors and the specific errors which a trial court might make in its rulings in a charging conference can rarely be predicted accurately in advance, and sometimes even counsel cannot be sure on the spur of the moment if a ruling by the trial court is in error. The stringent requirement imposed by the Third DCA's current formulation of the "two issue rule" is much different than the well established rule that counsel must request special verdict interrogatories for the separate causes of action being submitted to the jury in order to preserve appellate review.

The Third DCA's formulation is also certain to present other troublesome difficulties if it continues to be the rule or be required anywhere in Florida. Given that requests for special interrogatory verdicts are already required to preserve appellate review in most cases when separate causes of action are submitted to the jury, why would the Third DCA's rule not extend further to require an additional layer of special interrogatories to isolate the possible instruction errors under each element of claim or defense under <u>each</u> separate cause of action being submitted to such a jury? This "minor" but logical extension of the Third DCA's rule would lead to an intolerable level of complexity. This would not promote efficiency and would defeat the efforts at judicial economy that the "two issue rule" properly seeks to obtain.

As can be seen from this discussion, the practical effects of adopting the Third DCA's approach would be unwieldy, if not unmanageable, and would fundamentally change civil trial practice

in Florida. Such an adoption might discourage trial courts from correcting errors. Because the jury's general verdict could potentially be upheld on appeal anytime it was susceptible of two or more constructions, there would be no incentive for trial courts to correct errors, such as through the direction of a post-trial verdict.

E. The Third DCA's Formulation Of The "Two Issue Rule" As Applied In This Case Would Require A Drastic Change In Civil Jury Trial Practice In Florida, And Should Not Be Further Considered Except Through The Well Established Process For Amendment Of Court Rules.

Fla. R. Civ. P. 1.470(b) addresses many matters relating to jury instructions, including the need for counsel to take certain steps in writing and on the record during the charging conference in order to preserve appellate review for instruction errors. This rule has persisted without significant amendment for a long while now, apparently or obviously because the Civil Rules Committee of The Florida Bar, the Board of Governors of The Florida Bar as well this Court itself has not seen fit to amend those rules to provide for and require the kinds of special procedures that the Third DCA's extension of the "two issue rule" would truly require.

Many other States do not address these matters in the same manner as does Florida, nor do the U.S. District Courts, including those sitting in Florida. The various "experts" who participate in the Court Rule amendment processes under Fla. R. Jud. Admin. 2.130 certainly are aware of these differences, and presumably have not chosen to press for adoption of changes to rules followed by other courts. In Colonial Stores this Court

noted that the various states generally followed one of two principal different approaches in dealing with the appellate review issue: some states will reverse if there is any error which might have been prejudicial on any count in a single overall general verdict covering all counts, while others will not reverse unless special interrogatories are obtained so that separate general verdicts are obtained for each separate count submitted. 355 So.2d at 1186.

By way of comparison, the U.S. Courts of Appeal do not follow the "two issue rule" as it exists in Florida in reviewing judgments entered by U.S. District Courts following jury trials which conclude in single overall general verdicts covering multiple counts.[11] However, because of the two options available to the U.S. District Courts under Fed. R. Civ. P. 49 in lieu of obtaining a single overall general verdict covering multiple counts in a case, such overall general verdict cases are no longer common in practice. See, Moore's Federal Practice, Sec. 49.02.

In contrast, Florida has no rule or procedure available comparable to Fed. R. Civ. P. 49(a) for civil jury cases, and it is not clear that such a rule could be adopted without a change to the Florida Constitution. The Florida practice in civil jury cases of obtaining special interrogatories or using special verdict forms so that general verdicts can be obtained

---

[11] See, for example, Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 965 (3rd Cir. 1988), Hay v. Irving, 893 F.2d 796, 799 (5th Cir. 1990), Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499, 1504 (10th Cir. 1984).

separately, count by count, to preserve appellate review under the "two issue rule" is subsumed within the broader procedures available to the U.S. District Courts under Fed. R. Civ. P. 49(b). This long standing Florida practice, however, is not prescribed in any Florida court rule. Yet, in further distinction to the Florida practice, a number of other states have adopted explicit court rules which are derived from parts of Fed. R. Civ. P. 49.

The Supreme Court of South Carolina which generally applies the "two issue rule" as it is known and applied in Florida, recently rejected an attempt by an intermediate appeal court in South Carolina (comparable to the Third DCA in this case) to extend that rule to sub-questions (relating to elements of liability or defense) within a single count. Anderson v. South Carolina Dept. of Highways, 472 S.E.2d 253, 255 (S.C. 1996).

These considerations are mentioned simply to urge this Court to be particularly sensitive to the complications which could result from any "change" which could immediately affect, at a fundamental level, civil jury trial practice throughout Florida. Any such sweeping changes, if they have merit, are best made through the well established processes for amendment of the Court Rules under Fla. R. Jud. Admin. 2.130. This Court should reject the Third DCA's attempted, ill conceived extension of the "two issue rule" to require counsel to obtain special jury interrogatories for all sub-questions about the elements of liability and defense for each separate count in order to preserve appellate review.

For all of these reasons, this Court should reject the Third DCA's view that the "two issue rule" bars appellate review in this case, or requires the request for or the use of special jury interrogatories or verdict forms for all sub-questions about the elements of liability and defense for each separate count submitted to a jury.

II. THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE "STATUTE OF FRAUDS" WAS ERRONEOUS AND PREJUDICIAL AND WARRANTS REVERSAL AND REMAND FOR A NEW TRIAL.

Barth's breach of contract claim is based upon a written Agreement. R. 74-77. Prior to trial, plaintiff filed a motion in limine seeking to strike certain affirmative defenses of the Khubani defendants, one of which was the "statute of frauds." R. 483-492. The trial court denied that motion. Tr. at 82-85. Plaintiff moved again at the close of the defendants' case for a ruling as a matter of law that the "statute of frauds" did not apply to the written Agreement at issue in this case, and, as such, that no "statute of frauds" question should go to the jury. Tr. at 868-870. The trial court again denied that motion. Tr. at 870. Over Barth's objection in accordance with Fla. R. Civ. P. 1.470(b) at the instruction conference, the trial court allowed the following jury instruction to be submitted to the jury:

> STATUTE OF FRAUDS
>
> 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 Plaintiff directly and unconditionally for Defendants' 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 Defendant made a promise to pay Glenn Turner's debt, you should find that the contract is invalid because it was not in writing. However, if the greater weight of the evidence shows that Defendant promised to pay Plaintiff unconditionally, then you should find that the contract is valid or go on to consider Defendant's other defenses.

Tr. at 946-947 and 1039. Barth contends that it was error to allow any "statute of frauds" question to go to the jury and that the actual "Statute of Frauds" instruction given to the jury misstated the law, was confusing, and was otherwise erroneous and prejudicial. Because the specific instruction given to the jury in this case tended to confuse rather than enlighten, and may have misled the jury and caused them to arrive at a conclusion that otherwise would not have been reached by them, the trial court erred and proper grounds exist for reversal and grant of a new trial. Florida Motor Lines v. Bradley, 164 So. 360 (Fla. 1935).

A. The Written Agreement Upon Which Barth's Breach Of Contract Claim Is Based Does Not Include Any Promise By Khubani To Pay A Debt Of Another, And The Statute Of Frauds Was Inapplicable As A Defense To The Written Agreement As A Matter Of Law.

The Florida statute of frauds is contained in Sec. 725.01, Fla. Stat. The statute of frauds specifies that certain specific categories of contracts must be in writing and be signed by the party to be charged in order to be enforced.[12] The Khubani

---

[12] While the Agreement upon which Barth's breach of contract claim is based was in writing and signed by Barth, it was not signed by Khubani (i.e. the party to be charged). R. 86-88.

defendants argued that the written Agreement upon which Barth's breach of contract claim is based fell into the category of "a promise to answer for the debt, default or miscarriage of another," and, as such, was barred by the statute of frauds. Tr. at 870. However, the written Agreement in question does not contain "a promise to answer for the debt, default or miscarriage of another", and clearly does not support such an interpretation on its face. R. 86-88.

The written Agreement in question was simply a promise by Khubani to pay Barth a fee for Barth's assistance to Khubani pursuant to the written agreement. Id. The written Agreement was entered into by Khubani for Khubani's own economic advantage. As such, the written Agreement clearly was not a promise to answer for the debt of another and does not fall within the Florida statute of frauds. It was error for the trial court to instruct the jury on any statute of frauds defense when, as a matter of law, no such statute of frauds defense was applicable to the written Agreement upon which Barth's breach of contract claim was based.

B. The Undisputed Evidence Shows That Khubani Expected To Directly Benefit From The Written Agreement With Barth, A Circumstance Which Eliminates Any Statute Of Frauds Defense.

Even if the trial court could have somehow found the written Agreement to contain a promise by Khubani to pay the debt of

another,[13] the written Agreement is still not subject to the statute of frauds because Khubani expected to directly benefit from the written Agreement. Controlling Florida law specifically provides that:

> The pivotal question on the applicability of that statute is whether the promise is, in fact, an actual assumption of the liability of another with consideration flowing only to such other or, to the contrary, is an original undertaking of the promisor himself supported by independent consideration flowing to him.

Jim & Slim's Tool Supply, Inc. v. Metro Communities Corporation, 328 So. 2d 213, 215 (Fla. 2d DCA 1976) (emphasis added). See also, J.F. Hoff Electric Co., Inc. v. Goldstein, 560 So. 2d 419, 421 (Fla. 4th DCA 1990); Al Booth's Inc. v. Boyd-Scarp Enterprises, Inc., 518 So. 2d 422, 424 (Fla. 5th DCA 1988) ("Where the alleged oral promise is a direct promise to be obligated in the first instance, it is outside the statute of frauds and enforceable"); Moore v. Chapman, 351 So. 2d 760, 761-62 (Fla. 1st DCA 1977) ("Independent consideration which operates

---

[13] As previously shown, the written Agreement does not contain any promise to answer for the debt of another and the court should have concluded as a matter of law that there was no statute of frauds question to send to the jury. R. 86-88. Unfortunately, the trial court was apparently mislead and confused by Khubani's testimony that it was his understanding that part of the fee which he was to pay to Barth was to pay certain attorneys fees which were owed to Barth by Glenn Turner. Tr. at 799. While Khubani's testimony may have been relevant to the issue of whether or not Barth and Khubani ever entered into an agreement, Khubani's testimony was irrelevant to the issue of whether or not the written Agreement was unenforceable based upon the statute of frauds because the written Agreement was not signed by Khubani. The statute of frauds defense was only potentially applicable to the written Agreement and since the written Agreement did not contemplate a promise to pay the debt of another, the statute of frauds was not an applicable defense, as a matter of law, to the written Agreement.

to the benefit of the promisor for the payment of a third party debt can take the transaction out of the Statute of Frauds.").

In other words, even if the effect of an agreement is to pay a debt of another, the agreement is not covered by the statute of frauds if the promisor derives a direct benefit from the promise under this "leading object" or "main purpose" exception. Al Booth's, Inc., 518 So. 2d at 423 ("when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."), quoting Corbin on Contracts Sec. 366. See also, The Restatement (Second) of Contracts, Sec. 116. Application of the foregoing legal principles to the undisputed evidence at trial relating to this matter demonstrates that the written Agreement sought to be enforced was not barred by the statute of frauds, and that no statute of frauds question should have gone to the jury.

The written Agreement is not covered by the statute of frauds because Khubani did not enter into the Agreement for the sole purpose of guaranteeing or paying the debt of another. There is no question under the testimony of this case that the written Agreement was entered into by Khubani in order for Khubani to obtain a specific benefit. Khubani's agreement was made in exchange for consideration that flowed directly to Khubani and his companies.

Khubani's own testimony shows that he did not believe that the written Agreement was entered into for the sole purpose of paying the debt of another (i.e., Turner's debt to Barth).

Khubani testified that he believed that only $160,000 of the total $300,000 fee due under the written Agreement with Barth was for payment of Turner's debt. Khubani further testified that the balance of the $300,000 fee was to be paid by Khubani for the assistance which Barth was to provide to Khubani under the written Agreement. Tr. at 799.

The Agreement on its face also clearly shows that in exchange for the promise to pay the total $300,000 fee under certain circumstances, Khubani would receive valuable consideration from plaintiff. In fact, the Agreement explicitly states that "for and in consideration of the premises as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows." R. 86-88. As a result, the Agreement itself confirms that consideration flows directly to Khubani. Further, paragraph 3 of the Agreement requires performance by Barth of certain acts for the benefit of Khubani. R. 86-88. Specifically, plaintiff agreed to provide Khubani certain documents that Khubani could then use in his efforts to make a profit on the transaction. As a result, the Agreement on its face takes it outside the statute of frauds, because if that written Agreement is otherwise enforceable, Khubani has received consideration in exchange for his promise.

There was no evidence presented at the trial from which the jury could find that Khubani promised to pay plaintiff's fee under the Agreement solely for Turner's benefit, which is the only type of promise that could have come within the statute of

frauds. See, Tr. at 803-06 for an example of such testimony.[14] Since the terms of the written Agreement, along with the testimony at trial, clearly shows that there was consideration flowing to Khubani in exchange for the payment of the $300,000 fee, the Agreement must fall outside the statute of frauds. It was prejudicial error for the trial court to instruct the jury that any statute of frauds defense was applicable.

C. The Actual "Statute Of Frauds" Instruction Given To The Jury Misstated The Law, Was Confusing, And Was Otherwise Erroneous And Prejudicial, Warranting Reversal And Remand For A New Trial.

As just shown, the trial court improperly allowed a jury instruction relating to Khubani's statute of frauds defense to be submitted to the jury over Barth's objections. Tr. at 946-947. However, even if the written Agreement was potentially subject to the statute of frauds as a promise to pay the debt of another, Barth contends that the actual "statute of frauds" instruction given to the jury itself misstated the law, was confusing, and was otherwise erroneous and prejudicial.

Specifically, part of the statute of frauds instruction given to the jury read as follows: "If the greater weight of the evidence shows that Defendant made a promise to pay Glenn Turner's debt, you should find that the contract is invalid

---

[14] For statute of fraud purposes, it is unimportant that Khubani testified that he never agreed to the written Agreement upon which Barth's breach of contract claim is based. What is important is that Khubani acknowledged (at Tr. 803-806) that he expected to directly benefit from his arrangement with Barth and that because of that acknowledgement the written Agreement cannot be construed simply as an agreement to answer for the debt of another. The statute of frauds is not, therefore, an applicable defense to the written Agreement upon which Barth's breach of contract claim is based.

because it was not in writing." Id. This portion of the jury instruction is clearly inconsistent with controlling Florida law which provides that even if the effect of an agreement is to pay a debt of another, the agreement is not covered by the statue of frauds if the promisor derives a direct benefit from the promise under the "leading object" or "main purpose" exception to the statute of frauds. See, Al Booth's Inc. v. Boyd-Scarp Enterprises, Inc., 518 So. 2d 422, 424 (Fla. 5th DCA 1988); Moore v. Chapman, 351 So. 2d 760, 761-62 (Fla. 1st DCA 1977); Jim & Slim's Tool Supply, Inc. v. Metro Communities Corporation, 328 So. 2d 213, 215 (Fla. 2d DCA 1976); and, J.F. Hoff Electric Co., Inc. v. Goldstein, 560 So. 2d 419, 421 (Fla. 4th DCA 1990).

It was prejudicial error for the trial court to provide the jury with specific jury instruction relating to the statue of frauds because that specific instruction fundamentally misstated the applicable law.

Because the "statute of frauds" issue was improperly sent to the jury, and because the specific jury instruction sent to the jury misstated the controlling Florida law, there has been prejudicial error. The statute of frauds issue should have been determined by the Court as a matter of law on the undisputed evidence, and the Court should have ruled that the contract is not barred by the statute of frauds. As a result, a new trial should be granted on Barth's breach of contract count. Charlemagne v. Francis, 700 So. 2d 157, 160 (Fla. 4th DCA 1997);

Eaton Constr. Co. v. Edwards, 617 So. 2d 858, 860 (Fla. 5th DCA 1993); Florida Motor Lines v. Bradley, 164 So. 360 (Fla. 1935).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Third DCA's application of the "two issue rule" to bar appellate review, and remand this action for a new trial without the erroneous "statute of frauds" instruction on the breach of contract count.

Respectfully Submitted,

AKERMAN, SENTERFITT & EIDSON, P.A.
Sun Trust International Center
One Southeast Third Avenue, 28th Floor
Miami, Florida 33131-1704
(305) 374-5600
Fax No.: (305) 374-5095

By: (*Original Signed*) _____
BERNARDO BURSTEIN, ESQ.
Florida Bar # 972207

-and-

RICHTER, MILLER & FINN
1019 Nineteenth Street, N.W., #650
Washington, D.C. 20036
(202) 467-6200
Fax No.: (202) 293-4395

By: (*Original Signed*) _____
PAUL S. RICHTER, ESQ.
Florida Bar # 918090

Attorneys for petitioner/appellant
Roger V. Barth

CERTIFICATE OF FONT AND TYPE SIZE

Counsel hereby certifies that this brief is typed using 12 point Courier, a font that is not proportionately spaced.

(Original Signed by B.B).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petitioner's Initial Brief On The Merits has been sent by mail to Herbert Stettin, P.A., One Biscayne Tower, Two South Biscayne Boulevard, Suite 3270, Miami, Florida 33131, and to Susan E. Trench, Esq., Goldstein & Tanen, P.A., One Biscayne Tower, Suite 3250, Two South Biscayne Boulevard, Miami, Florida 33131, attorneys for defendants Victor M. Khubani, Khubani Enterprises, Inc. and Azad International, Inc., this 8th day of November, 1998.

(Original Signed by B.B).

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 Appeals
Decision Case No. 97-681

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

Bernardo Burstein, Esq.
AKERMAN, SENTERFITT & EIDSON, P.A.
Sun Trust International Center
One Southeast Third Avenue, 28th Floor
Miami, Florida 33131
(305) 374-5600
Fax No.: (305) 374-5095

and

Paul S. Richter, Esq.
RICHTER, MILLER & FINN
1019 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 467-6200
Fax No.: (202) 293-4395

Attorneys for Petitioner/Appellant

INDEX

Appendix Tab #1

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1997

ROGER V. BARTH	**	
Appellant,	**	
vs.	**	CASE NO. 97-681
VICTOR M. KHUBANI, KHUBANI ENTERPRISES, INC. and AZAD INTERNATIONAL, INC.,	**	LOWER TRIBUNAL NO. 93-7185
Appellees.		

Opinion filed December 31, 1997.

An Appeal from the Circuit Court of Dade County, Gisela Cardonne, Judge.

Akermen, Senterfitt & Eidson and Bernardo Burstein; Richter, Miller & Finn and Paul S. Richter (Washington, D.C.), for appellant.

Goldstein & Tanen and Susan E. Trench; Herbert Stettin, for appellees.

Before COPE, GODERICH and SORONDO, JJ.

PER CURIAM.

The plaintiff, Roger V. Barth, appeals from an adverse final

judgment and from the denial of his motion for a new trial. We reverse, in part, and affirm, in part.

First, we find that the trial court erred by granting a directed verdict on the plaintiff's count for fraud. The plaintiff testified that the defendant's agent had made a false statement concerning a material fact; that the agent was acting within his scope of authority; that the agent knew the representation was false; that the agent intended that the representation induce the plaintiff to act; and that the plaintiff's reliance on the representation caused him a resulting injury. This evidence presented by the plaintiff was sufficient to state a prima facie case of fraud. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985). Additionally, we find that the trial court erred by granting a directed verdict on the plaintiff's count for fraud on the alternative basis that the claim for fraud in the inducement was barred by the economic loss rule. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1240 (Fla. 1996)("[F]raud in the inducement is an independent tort and is not barred by the economic loss rule.").

Next, we 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. Whitman v. Castlewood Int'l Corp., 383 So. 2d 618 (Fla. 1980); Comreal Miami, Inc. v. Natari Imports, Inc., 559 So. 2d 1175 (Fla. 3d DCA 1990); Pfister v. Parkway Gen. Hosp., Inc., 405 So. 2d 1011 (Fla. 3d DCA 1981), review denied, 413 So. 2d 876 (Fla. 1982).

The plaintiff's remaining point lacks merit.

Affirmed, in part; reversed, in part, and remanded for further proceedings consistent with this opinion.

Appendix Tab #2

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

WEDNESDAY, FEBRUARY 25, 1998

ROGER V. BARTH,	**	
Appellant,	**	
vs.	**	CASE NO. 97-681
VICTOR M. KHUBANI, et al.,	**	LOWER TRIBUNAL NO. 93-7185
Appellees.	**	
	**	

Upon consideration, appellees' motion for rehearing is hereby denied. COPE, GODERICH and SORONDO, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Herbert Stettin
Paul B. Richter
Bernardo Burstein
Susan E. Trench

/NB

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix was served via regular U.S. mail this 9th day of November, 1998 to Herbert Stettin, Esq., Herbert Stettin, P.A., One Biscayne Tower, Suite 3250, Two South Biscayne Boulevard, Miami, Florida 33131; and Susan E. Trench, Esq., Goldstein & Tanen, P.A., One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131.

(Original Signed)
BERNARDO BURSTEIN