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

APPELLANT'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

1. KHUBANI'S ARGUMENTS FAIL TO RECOGNIZE THAT THE PRECEDENTS OF THIS COURT FOR THE PAST TWENTY YEARS HAVE CONFINED THE APPLICATION OF THE "TWO ISSUE RULE" ONLY TO CASES INVOLVING THE SUBMISSION OF MULTIPLE CAUSES OF ACTION TO A JURY.

As a matter of history, the common law rule followed in Florida until 1978 was that any prejudicial error was presumed to affect an overall general verdict in a cases involving the submission of multiple causes of action to a jury. Up until then it was not necessary for counsel in Florida to request special verdicts in civil cases involving the submission of multiple counts (i.e., multiple causes of action) to a jury in order to preserve the right for appellate review.

As civil litigation became more complicated in Florida prior to 1978 with cases requiring the submission of multiple causes of action to juries, the practice developed of using special verdict forms to identify the jury's verdicts on each separate cause of action. This was a good, logical, and natural development which made it easier for the trial court to provide intelligible instructions, easier for counsel to organize closing arguments, and easier for juries to keep the instructions logically in mind in reaching their verdicts on the separate counts. The juries would be instructed to return a separate verdict for each count in accordance with a special verdict form.

Based upon that successful developing practice and with the prospect that additional judicial efficiencies could be obtained, the Florida Supreme Court adopted the "two issue rule" in its decision in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978) in 1978. That new rule changed the common law

presumption that had theretofore been followed in Florida. Under the then new "two issue rule" in Florida, if "[o]ne of the issues submitted to the jury ... [is] free from prejudicial error, it will be presumed all issues ... [are] decided in favor of the prevailing party." Colonial Stores at 1186. This Court further specifically considered and discussed the possibility that injustice could result from the change in the rule, concluding, however, that any injustice or unfairness could be easily avoided. The Court advised of a simple, direct practice for counsel to follow to avoid such problems: "... the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case." (Emphasis Added.) Colonial Stores at 1186.

These comments make it absolutely clear that this Court intended the "two issue rule" to apply only to appeals arising in cases which had involved the submission of a least two separate causes of action to a jury.[1] The Court did not change the scope of the "two issue rule" in First Interstate Development Corp. v. Ablanedo, 511 So.2d 536 (Fla. 1987), which continued to confine its applicability to appeals arising from cases involving the submission of a least two separate causes of action to a jury. This Court specifically held that the two issue rule "applies to

[1] Colonial Stores did not mandate the use of special verdicts for each separate count in cases involving the submission of multiple causes of action to juries. The "two issue rule" operates only to preclude appellate review by a party claiming error only if the party claiming error did not request the trial court to use such special verdicts.

those actions that can be brought on two theories of liability..." First Interstate at 538.

From this brief historical review, it is very clear that there is no basis in the precedents of this Court either for Khubani's arguments [Khubani Answer Br. 16-22] or for the Third DCA's application of its extended version of the "two issue rule" to bar appellate review in this case. The "two issue rule" as formulated and adopted by this Court has never required the use of special verdicts for each theory of non-liability (and/or on each affirmative defense) in a case involving the submission of only a single cause of action to a jury in order to preserve appellate review.[2]

2. KHUBANI'S PROPOSED "SOLUTION," WHILE ATTRACTIVE AT FIRST BLUSH, IS ILL CONCEIVED AND UNWORKABLE AND WOULD CHANGE CIVIL JURY TRIAL PRACTICE IN A FUNDAMENTAL MANNER IN FLORIDA.

The Third DCA's decision and the "solution" proposed by Khubani for extension of the "two issue rule" is ill considered, incomplete and unworkable, even though seductively simple and seemingly logical at first blush. Either would change civil jury trial practice in a fundamental manner throughout Florida.

Khubani's position may be stripped down to a very simple proposition: he urges that the "two issue rule" be extended to require counsel to request a special verdict for each theory of non-liability in order to preserve the right for appellate review, even in cases submitted on only a single cause of

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[2] Khubani's contention that the "two issue rule" has been consistently invoked to bar appellate review in cases involving a single cause of action is simply untrue. See, discussion at pp. 11-13, infra. Serious flaws associated with Third DCA's decision and Khubani's "solution" are also discussed below.

action.[3] [Answer Br. 14, 16.] Khubani also urges that this is a simple and easy rule for counsel to follow because all affirmative defenses can be determined in advance.[4] [Answer Br. 14, 19, 24.] The apparent simplicity of Khubani's proposal is deceptive because it is seriously flawed and incomplete, and beset with semantic problems.

What is a "theory of non-liability?" Is it the same from a defendant's perspective as from a plaintiff's perspective? An "affirmative defense" would seem to only represents one type of "theory of non-liability." Why does Khubani's proposal apply only to "affirmative defenses" which he erroneously equates with theories of non-liability? [Answer Br. 16.] Even the Third DCA's decision in this case is unclear about what the Third DCA really expected Barth to do at trial. Does it make any sense now to adopt a new rule of court procedure which will affect <u>every</u> civil jury trial in Florida and not make it clear what counsel must do to avoid problems under the new rule?[5]

If special verdicts are now to be necessary for subquestions under a single cause of action for the "theories of

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[3] This represents a fundamental change in the "two issue rule" as established by this Court. Affirmance now of the Third DCA's decision would require juries by special verdict to determine subquestions in single cause of action cases, and logically would require juries to determine subquestions by special verdict for <u>each</u> separate count in multiple count cases too.

[4] Although "affirmative defenses" can be determined in advance, more general "theories of non-liability" cannot. The Third DCA's remarks in this case on this exact point focus on broader "theories of non-liability" rather than simply "affirmative defenses." <u>Barth v. Khubani</u>, 705 So.2d 72 (3rd DCA Fla. 1997).

[5] As already noted, this Court wisely provided such explicit guidance when it first adopted the "two issue rule" in <u>Colonial Stores</u> in 1978.

non-liability," how are the trial courts to instruct the jury on the vote to be required to decide each subquestion submitted? Khubani neither anticipates nor suggests how this basic question should be answered. This is not surprising because the issue is truly new and there is no Florida case providing an answer.[6] Yet a definitive answer to this most basic question would be needed immediately because the answer would affect every civil jury trial occurring in Florida. Because jury verdicts in Florida have always been unanimous, the simple answer would seem to be that the jury should be instructed that it must decide each subquestion by unanimous vote.[7]

Even more fundamental questions would arise. Would the additional costs, overhead and burdens associated with this new rule which would affect all civil jury cases in Florida be offset by sufficient judicial economies or other benefits to justify those costs? Certainly longer jury deliberations would be required in almost all cases because more questions (i.e., subquestions under each count) requiring specific decisions would have to be submitted to the jury, increasing considerably the work required by the jury. What real benefits or economies would be obtained? Nothing like this has ever been required before in Florida civil cases and the existing jury trial system has

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[6] The practice under Colonial Stores in which separate causes of action are submitted, count by count, for special verdict, each by unanimous vote, does not present the subquestion issue under individual counts.

[7] This simple answer, however, might not be the "right" or "best" answer. Why should a unanimous special verdict be required on all subquestions submitted so long as the overall verdict on a given count were still unanimous? If some lesser vote might be permitted on subquestions, what should it be? Why?

functioned quite well for a very long time. Requiring special verdicts on all subquestion issues doubtlessly would fundamentally change the dynamics of jury deliberation. This likely would lead to legal challenges that this new type of "trial" no longer constituted a "jury trial" as described in Fla. Const. Art. I, Sec. 22.

Other very significant problems would arise once it was fully appreciated that the elements of an affirmative defense (or a theory of non-liability) overlapped with elements of the plaintiff's claim. In real jury trials in civil cases it is the trial court's substantive jury instructions covering all disputed elements of the plaintiff's theories of liability as well as all disputed elements of the defendant's theories of non-liability, which define the "issues" being submitted to the jury.[8] Even in a simple single count case, the plaintiff has his "theories of liability" and the defendant has his "theories of non-liability." In fact, the elements of each are exactly the same; the difference is that the plaintiff wants the jury to determine those elements one particular way and the defendant wants the jury to determine them differently.

From the defendant's perspective, the "theories of non-liability" involve more than just establishing all of the elements of at least one affirmative defense; they also usually involve attempting to prevent proof of at least one element

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[8] Only the "boiler plate" instructions which describe the general duties of the jurors, how evidence is to be evaluated, the standards of proof, and the like and the specific "finding" instructions which are unique to particular cases, do <u>not</u> define the disputed "issues" to be decided.

essential to plaintiff's affirmative claim. From the plaintiff's perspective, the "theories of liability" involve more than just establishing all of the elements of the plaintiff's affirmative claim; they also usually involve attempting to prevent proof of at least one element essential of each of the defendant's affirmative defenses. Regardless, from any perspective, the full range of disputed "issues" submitted to a jury are set out in the trial court's substantive jury instructions.[9]

Civil juries in Florida have never been required to explain in cases submitted on a single cause of action exactly how the jury has reached its unanimous verdict, "issue" by "issue." The idea of requiring "issue" by "issue" special verdicts commensurate with the range of "issues" defined by the substantive jury instructions is untried and untested. In fact, all of the DCA's which have considered the question of element by element special verdicts, including the First, Second, Third and Fourth, have concluded that the "two issue rule" should not be extended to elements of a claim.[10]

One panel of the Fourth DCA foresaw the problems inherent in the this type of possible "extension" of the "two issue rule" and rejected it completely. "We do not believe the [two issue] rule should be extended to require a claimant to specifically

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[9] Attempts to distinguish elements of a plaintiff's claim from elements of a defendant's theories of non-liability involves only semantics and "hair splitting."

[10] This point illustrates another flaw in Khubani's argument. See, Davidson v. Gaillard, 584 So.2d 71 (1st DCA Fla. 1991); A.G. Edwards & Sons, Inc. v. Weinreich, 572 So.2d 993 (2nd DCA Fla. 1990); Emerson Electric Co. v. Garcia, 623 So.2d 523 (3rd DCA Fla. 1993); and Charlemagne v. Francis, 700 So.2d 157 (4th DCA Fla. 1997).

demonstrate the precise element of the cause of action the jury found lacking. To do so would require the use of an interrogatory type verdict in all cases detailing the elements of the claims and the defenses thereto." LoBue v. Travelers Insurance Co., 388 So.2d 1349, fn. 3 at 1351-52 (4th DCA Fla. 1980). This Court should now overrule the Third DCA's decision.

3. KHUBANI HAS NOT RESPONDED MEANINGFULLY TO THE "RULES" ARGUMENTS RAISED BY BARTH.

A. This Court May Reject The Third DCA's "Extension" Of The "Two Issue Rule" As Without Proper Legal Authorization.

Fla. Const. Art. V, Sec. 2(a) gives this Court the sole judicial rulemaking authority to establish the rules of procedure governing all courts. This Court can exercise its exclusive rulemaking authority by formal rulemaking procedures as provided in Fla. R. Jud. Admin. 2.130 or by judicial decision as it did, for example, in Colonial Stores. Although the District Courts of Appeal and the other lower courts are fully competent to interpret and apply the rules of procedure as established by this Court, those lower court have no legal authority to "amend" or "extend" the rules established by this Court.

The Third DCA established its own "extended" version[11] of the "two issue rule" to refuse to consider part of Barth's appeal.

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[11] A panel of the Third DCA acknowledged that the Third DCA's decision in Gonzalez v. Leon, 511 So.2d 606 (3rd DCA Fla. 1987), was an "extension" of the "two issue rule" which was unsupported by any precedent from this Court, noting that the Gonzalez extension was probably not good law after First Interstate. Brown v. Sims, 538 So.2d 901, 907 n. 4 (3rd DCA Fla. 1989), quashed in part and remanded in part, 574 So.2d 131 (Fla. 1991). The Court in Brown, however, did not need to decide the appropriateness of the Gonzalez extension of the "two issue rule" because the error in that case affected all elements of the plaintiff's single cause of action.

Although Barth did everything necessary to comply with the applicable court rules to preserve the trial court's instruction error for review, the Third DCA's decision amended the "two issue rule" established by this Court to deprive Barth of his right to judicial review. The Third DCA's "extension" of the "two issue rule" is legally infirm in view of Fla. Const. Art. V, Sec. 2(a). Khubani's Answer Brief did not address this point.

B. This Court Should Use The Existing, Well Established Rule Making Processes To Make Any Further Changes Dealing With This Area Of Judicial Procedure.

This Court has established detailed, formal rulemaking procedures in Fla. R. Jud. Admin. 2.130 consistent with its authority under Fla. Const. Art. V, Sec. 2(a). The "two issue rule" as adopted in 1978 has persisted without protest or formal rulemaking amendment for more than twenty years now, obviously because the Civil Rules Committee of The Florida Bar, the Board of Governors of The Florida Bar, and interested civil trial practitioners as well this Court has not seen any need to further modify that rule. Khubani does not address this point in his Answer Brief.

Any extension of the existing "two issue rule" will have many, far reaching and complex implications, including possibly even changing the nature of civil jury trial as that has existed and been known in Florida. Fla. Const. Art. I, Sec. 22. If any changes might be desirable or necessary, this Court should first make full use of the "experts" available to it under Fla. R. Jud. Admin. 2.130 so that only a change for the "better" is made.

In announcing its policy choice for Florida in Colonial Stores, this Court relied in part upon judicial decisions and practices in Ohio, California and Connecticut. While the rules, practices and experiences of other States are always instructive and of great interest when "policy" is being considered, great caution is necessary. Assumptions of any kind without careful inquiry can be very dangerous when attempting to accurately understand the meaning of reported decisions or court rules of other States dealing with the peculiarities of State specific court procedures. Many of Florida's very well established court practices, rules and traditions, and the important details relating to them, which we are inclined to take for granted as basic "assumptions," simply may not exist or even be applicable at all in other States.[12] As noted in Barth's Opening Brief at 16-18, the pertinent civil jury trial practices in the U.S. District Courts are also quite different than those in the State Courts in Florida. This Court should likewise be cautious in

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[12] A few simple examples should suffice. California: A civil jury trial in California requires a twelve member jury, but only nine jurors need concur to reach a verdict. Cal. Const. Art. 1, Sec. 16. The California Civil Procedure Code provides elaborate statutory rules and procedures for various types of permitted verdicts, and there has been extensive litigation concerning those rules. See, Cal. CCP Secs. 624-625. All of this is quite different than Florida. Ohio: A civil jury trial in Ohio requires an eight member jury, but only six jurors need concur to reach a verdict. Ohio Const. Art. 1, Sec. 5, Ohio R. Civ. P. 38, 48. Ohio R. Civ. P. 49 dealing with types of verdicts had its genesis in 1971 in Fed.R.Civ.P. 49, but that rule has been amended based upon Ohio's experience and the current similarities to Fed. R. Civ. P. 49 are very limited, and "special verdicts" have been abolished. Connecticut: A civil jury trial in Connecticut requires a unanimous verdict as in Florida, but a Connecticut statute [Conn. Gen. Stat. 52-224] defines "special verdict" in a manner unknown in Florida. Connecticut also has specific court rules which address verdict form issues.

considering the implications of the Federal rules and the decisions by federal courts which address this general subject area.[13]

These points are offered simply to suggest the wisdom of utilizing the amendment processes for Florida court rules as established by this Court under Fla. R. Jud. Admin. 2.130 in a complex area like this one.

C. Khubani's Argument That Barth Contends There Is A Conflict Between Fla. R. Civ. P. 1.470 And The "Two Issue Rule" Should Be Rejected.

Khubani offers an extended "strawman" argument [Khubani Answer Br. 15, 26-31] that Barth somehow contends that there is a conflict between Fla. R. Civ. P. 1.470 and the "Two Issue Rule" as established and authorized by this Court. This is perplexing because Barth has never made such a contention.

4. KHUBANI'S ATTEMPT TO RATIONALIZE THE CONFLICTING DECISIONS OF THE VARIOUS DISTRICT COURTS OF APPEAL SINCE COLONIAL STORES AND FIRST INTERSTATE SHOULD BE REJECTED.

The decisions from the different DCAs are not easily reconcilable and do not support Khubani's basic contention. [Khubani Answer Br. 16-22.] Although certain decisions from the Third, Fourth and Fifth DCAs have extended the "two issue rule," those DCAs have not universally extended that rule to require special verdicts directed to multiple theories of non-liability

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[13] Florida has no comparable rule to Fed. R. Civ. P. 49 which provides a wide range of discretionary options for verdicts in Federal civil jury cases. A number of the "options" available under Fed. R. Civ. P. 49 depart significantly from the Florida civil jury trial tradition and probably could not be adopted consistent with Fla. Const. Art. I, Sec. 22. As noted, the Federal courts have not adopted Florida's version of the "two issue rule" despite having Fed. R. Civ. P. 49.

in cases with only a single cause of action. Khubani's contention is inaccurate. Only the Third DCA has done that.

The Fifth DCA's remarks in Rosenfelt v. Hall, 387 So.2d 544 (5th DCA Fla. 1980) which preceded this Court's decision in First Interstate implied that the "two issue rule" perhaps should be extended to cover multiple theories of non-liability in a single count case. However, no other Fifth DCA decision has ever followed that suggestion or actually "extended" the "two issue rule." No Fifth DCA decision since First Interstate has suggested that the "two issue rule" has any applicability except to cases involving submission of at least two causes of action to a jury.[14]

The Fourth DCA has extended the "two issue rule" rationale to require "issue isolation" for separate components of statutory damages when a single cause of action is submitted to the jury, nothing more. Barhoush v. Louis, 452 So.2d 1075 (4th DCA Fla. 1984) and Odom v. Carney, 625 So.2d 850 (4th DCA Fla. 1993). This special rule from the Fourth DCA was fully addressed in Barth's Opening Br. at 9-10 and presents circumstances which are easily distinguished from the Third DCA's decision in this case.

The Third DCA alone has expressly extended the "two issue rule" to apply to theories of non-liability in a case involving only a single cause of action in this case and previously in Gonzalez v. Leon, 511 So.2d 606 (3rd DCA Fla. 1987). After Brown, but prior to this case, it did not appear that the Third

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[14] This Court rejected the Fifth DCA's misapplication of the "two issue rule" in First Interstate.

DCA would continue to apply the Gonzalez-like extension of the "two issue rule." See, for example, Comreal Miami, Inc. v. Hattari Imports, Inc., 559 So.2d 1175 (3rd DCA Fla. 1990); and Emerson Electric. However, the Third DCA applied a Gonzalez-like extension of the "two issue rule" in this case, curiously, without citing Gonzalez, and without commenting on Brown or the implications of First Interstate to Gonzalez.

The DCA cases do not support Khubani's basic contention which should be rejected.

5. KHUBANI'S ATTEMPTS TO RAISE "FACTUAL" DISPUTES SHOULD BE SEEN AS IRRELEVANT AND UNAVAILING TO THE LEGAL ISSUE TO BE DECIDED: THE STATUTE OF FRAUDS INSTRUCTION ACTUALLY GIVEN WAS ERRONEOUS AND PREJUDICIAL UNDER THE UNDISPUTED "FACTS."

A. The Trial Court's Statute of Frauds Instruction Was Erroneous And Prejudicial.

Barth stands by his detailed discussion of the legal issues relating to the erroneous Statute of Frauds instruction actually given as set out in his Opening Brief at 19-27. There Barth showed that the Statute of Frauds instruction was erroneous and prejudicial as a matter of law under the undisputed facts. Khubani does not directly challenge Barth's analysis of the trial court's error, but instead discursively attempts to raise and argue various "factual issues." [Answer Br. 31-33.] Certainly there may be disputed facts and interpretations of the facts, but Khubani's approach is unavailing because Barth has shown that the Statute of Frauds instruction actually given was erroneous and prejudicial as a matter of law under the undisputed facts.

B. Khubani's Answer Brief Contains A Long, Convoluted And Discursive Discussion Of The "Facts" Which Is Irrelevant To The Legal Issues To Be Decided.

Khubani's lengthy statement concerning "The Underlying Transaction" [Answer Br. 1-10] in his Statement Of The Case contains many disputed facts and disputed interpretations of disputed facts, and at several points misstates the evidence or mischaracterizes the proceedings at trial. The presentation of these contentions by Khubani, however, is irrelevant to the limited and focused legal issues to be decided.

CONCLUSION

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

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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 Appellant's Reply 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 *18*th day of December, 1998.

(*Original Signed by B.B.*)