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 JURISDICTION

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

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. The Third DCA reversed in part, affirmed in part and remanded the case to the trial court for further proceedings. Barth v. Khubani, 705 So.2d 72 (Fla. 3d DCA 1997). Appendix A. The trial court has not yet acted on the remand.

Barth now asks this Court to exercise its discretionary jurisdiction to review the portion of that decision relating to the "two issue rule" applicable in certain jury cases. The Third DCA improperly invoked and applied the "two issue rule" to bar appellate review of an erroneous jury instruction in this case in which only a single cause of action had been submitted to the jury for a general verdict. The "two issue rule" applied by the Third DCA in this context is fundamentally different than the rule applied by three other DCAs.

During the jury trial, the court dismissed Barth's cause of action for fraud and misrepresentation at the close of his case in chief.[1] That dismissal left Barth with only one remaining cause of action -- a claim for breach of contract. At the instruction conference prior to the trial court's submission of the case to the jury on the single breach of contract issue, Barth objected to any jury instruction concerning the "statute of frauds." The trial court, nevertheless, gave an erroneous

[1] The trial court's dismissal of Barth's cause of action for fraud and misrepresentation was reversed and Khubani's motion for rehearing was denied. Appendices A and B.

"statute of frauds" instruction over objection[2] and submitted the case to the jury for a general verdict on Barth's single cause of action.

The Third DCA ruled that Barth failed to preserve the question for review by not further objecting to a general verdict and/or by not requesting special jury verdict interrogatories, citing the "two issue rule." Appendix A at 2-3. The Third DCA's application of the "two issue rule" thus barred review because Barth did not attempt to isolate the trial court's instruction error by further objection or with special jury interrogatories. Under the proper interpretation of the "two issue rule" as followed by three other DCAs, Barth did not need to object to the use of a general verdict or request special interrogatories because only a single cause of action was submitted to the jury.

The Third DCA's decision is fundamentally at odds with decisions of the First, Second and Fourth DCAs which reach opposite conclusions on the same question. Moreover, no decision of this Court has ever suggested that the "two issue rule" should be invoked to preclude review of an erroneous jury instruction when only a single cause of action was submitted for a general verdict. This case presents this important issue and this Court should exercise its discretionary jurisdiction for review of the questions involved.

---

[2] The Third DCA's discussion of the "two issue rule" in this case assumes, without deciding, that the "statute of frauds" instruction actually given was erroneous. The error in that instruction is easily shown under well settled law; however, no further discussion of this point will be made in this Initial Brief on Jurisdiction.

SUMMARY OF THE ARGUMENT

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 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 general verdict. The three civil cases of this Court which discuss the "two issue rule" all arise in the context where two or more causes of action are submitted to a jury: Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978) (malicious prosecution and false imprisonment causes of action); Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980) (negligence and agency theories of liability); and First Interstate Development Corp. v. Ablanedo, 511 So.2d 536 (Fla. 1987) (a fraud claim and a misrepresentation claim). This Court's judicially created "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 for a general verdict.[3]

However, the specific problem concerning us now is: how, if at all, should the "two issue rule" be applied when only a single cause of action is being submitted to the jury for a general verdict? No decision of this Court has ever suggested that the

---

[3] 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).

"two issue rule" should be extended to bar review of an erroneous jury instruction in a context in which only a single cause of action is submitted to the jury. The District Courts of Appeal which have addressed this issue are now sharply split based upon differing interpretations and applications of this Court's prior decisions. The First, Second and Fourth DCAs follow one rule.[4] The Third DCA, and possibly the Fifth DCA, follow a completely opposite and conflicting rule, the one which has been applied in Barth.[5] Two of the DCAs have issued inconsistent rulings on the precise issue, and the two most recent rulings by those two DCAs reach contradictory conclusions with each other.[6]

As a result, this case is well postured now to permit this Court to exercise its discretionary jurisdiction to resolve this conflict and decide whether the "two issue rule" should be extended to preclude appellate review of erroneous jury instructions in cases in which only a single cause of action is submitted to the jury for general verdict. This is a significant

[4] 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).

[5] 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).

[6] The Fourth DCA's decision in Charlemagne v. Francis, 700 So.2d 157 (Fla. 4th DCA 1997), decided on October 15, 1997, reached an opposite conclusion from the Third DCA in this case decided only two months later.

issue affecting trial practice throughout Florida. Accordingly, Barth urges this Court to exercise discretionary review and reject the Third DCA rule. The Third DCA's rule does not reflect Florida law or practice and is neither necessary, practical nor efficient for the administration of justice.

ARGUMENT

I. THE THIRD DCA INCORRECTLY HELD THE "TWO ISSUE RULE" APPLIES EVEN WHEN A SINGLE CAUSE OF ACTION IS SUBMITTED TO THE JURY

In making its determination that Barth did not properly preserve the "statute of frauds" instruction error for review, the Third DCA found that the "two issue rule" applied even though only a single cause of action was being submitted to the jury.[7] In the view of the Third DCA, because Barth did not object to the use of a general verdict form and a general verdict form was used, it was unclear whether the jury found the underlying contract to be unenforceable because it was barred by the statute of limitations, or because Barth had failed to perform the conditions precedent, or because no valid contract existed (e.g., due to the "statute of frauds"). App. A at 2-3. The Third DCA thus found that reversal would be improper because Barth was unable to demonstrate prejudice due to the error.

Barth contends that Third DCA's basic reasoning and approach is flawed because the "two issue rule" is only properly invoked

---

[7] No objection to the use of the general verdict form was required if Barth is correct -- as the First, Second and Fourth DCAs have ruled -- that the "two issue rule" does not bar appellate review when only a single cause of action was being submitted to the jury. Barth did not object to a general verdict form and did not request special jury interrogatories.

and applied in situations in which two or more distinct causes of action are submitted to a jury for a general verdict.

II. THE THIRD DCA'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH FLORIDA LAW AS TO WHEN THE "TWO ISSUE RULE" APPLIES.

A. The Third DCA's Decision Conflicts With The Decisions Of Three Other District Courts Of Appeal Which Correctly Interpret The Decisions Of This Court.

In applying the "two issue rule" in this case, the Third DCA continues erroneously to apply the "two issue rule" 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. Thus, Gonzalez extended the "two issue rule" to require an objection to a general verdict and/or to request special verdict interrogatories addressing the multiple elements of a single cause of action. Although the decision in this case directly follows the rationale, approach and decision of Gonzalez, the court did not cite Gonzalez.

At the same time, three other DCAs reach fundamentally different conclusions on this and these other DCAs have not followed the rationale, approach or rule of Gonzalez. See, e.g., Davidson v. Gaillard, 584 So.2d 71, 74 (Fla. 1st DCA 1991) (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 lacking in a single cause of action.); A.G. Edwards & Sons, Inc. v. Weinreich, 572 So.2d 993, 996 (Fla. 2nd DCA 1990) (The "two issue rule" was not applicable where only a single cause of action was submitted to the jury.); Charlemagne v. Francis, 700 So.2d 157, 160 (Fla. 4th DCA 1997) (The "two issue rule" is inapplicable because the appellant claimed only one theory of liability.). Further, 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 LoBue court 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.

Although Gonzalez expressly rejected LoBue, at the same time it cited Barhoush v. Louis, 452 So.2d 1075 (Fla. 4th DCA 1984). In easily distinguishable Barhoush, the Fourth DCA fashioned a limited extension of the "two issue rule" for a damages issue which arose when an itemized damages verdict had not been requested.[9] No such special damages issue is present in this case and thus the Fourth DCA's variation for itemized damages is not germane. More importantly, the Fourth DCA's most recent

---

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

[9] Fla. Stat. § 768.48 referred to in Barhoush was replaced by Fla. Stat. § 768.77 in 1986. Odom v. Carney, 625 So.2d 850 (Fla. 4th DCA 1993) also allowed a limited extension of the "two issue rule" to a damages issue when an itemized damages verdict was not requested, citing Barhoush.

decision in Charlemagne is completely consistent with LoBue, and reaches an opposite conclusion to the Third DCA in this case.

Thus, the rule of the Third DCA (and in the Fifth DCA) as applied in this case is fundamentally different and conflicting to the rule applied in the First, Second and Fourth DCAs.

B. The Third DCA's Rule As It Has Evolved To This Case Is Inconsistent With Remarks In Several Earlier Third DCA Panel Decisions Which Are No Longer Being Followed In The Third DCA.

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 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). 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. Neither Judge Ferguson's views in Brown nor the view expressed in Emerson Electric have been followed.

It is thus seen that previously there was some internal disagreement within the Third DCA concerning the rule which is now being followed by the Third and Fifth DCAs.

III. THE THIRD DCA'S PRESENT 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.

It has never been the law or practice in Florida to require counsel to request special jury interrogatories in order to preserve the right to appellate review of erroneous jury instructions in every case involving submission of only a single cause of action to a jury. To now require special jury interrogatories in every such case would require lengthy and complex jury interrogatories -- addressing specifically every element of claim or defense on which the trial court might be committing error -- for what have been relatively simple cases for juries to decide. Routine use of such special jury interrogatories to isolate possibly erroneous jury instructions would confuse juries and cause juries to place undue emphasis on precisely the possibly erroneous instructions. This could spawn an entire new class of issues for appeal.

The 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. That is easily done and complied with in advance because the separate causes of action are always known in advance. On the other hand, 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.

The Third DCA's formulation is also certain to present other troublesome difficulties if it continues to be the rule. Given that requests for special interrogatory verdicts are already

required to preserve appellate review in all 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 each separate cause of action being submitted to such a jury? Such a "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.

CONCLUSION

For all of the foregoing reasons, this Court should exercise its discretionary jurisdiction for review in this case and reverse the Third DCA's decision on the "two issue rule."

Respectfully Submitted,

AKERMAN, SENTERFITT & EIDSON, P.A.
One Southeast Third Ave., 28th Fl.
Miami, Florida 33131-1704
(305) 374-5600
Fax No.: (305) 374-5095

By: _____
BERNARDO BURSTEIN, ESQ.
Florida Bar # 972207

-and-

RICHTER, MILLER & FINN
1019 19th St., N.W., #650
Washington, D.C. 20036
(202) 467-6200
Fax No.: (202) 293-4395

By: _____
PAUL S. RICHTER, ESQ.
Florida Bar # 918090

Attorneys for petitioner/appellant, Roger V. Barth

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by mail to Herbert Stettin, P.A., Two S. Biscayne Blvd, Suite 3250, Miami, FL 33131, and to Susan E. Trench, Esq., Goldstein & Tanen, P.A., Suite 3250, Two S. Biscayne Blvd, Miami, FL 33131, attorneys for Victor M. Khubani, Khubani Enterprises, Inc. and Azad International, Inc., this 3rd day of April, 1998.

_____

Appendix A

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. Hatari 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 B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

WEDNESDAY, FEBRUARY 25, 1998

ROGER V. BARTH,

Appellant,

vs.

VICTOR M. KHUBANI, et al.,

Appellees.

** CASE NO. 97-681

** LOWER TRIBUNAL NO. 93-7185

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 S. Richter
/NB

Bernardo Burstein
Susan E. Trench