IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,502

NORM BURG CONSTRUCTION
CORPORATION,

Petitioner,

-vs-

JUPITER INLET CORPORATION,
et al.,

Respondents.

______________________________/

REPLY BRIEF OF PETITIONER,
NORM BURG CONSTRUCTION CORPORATION

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REPLY BRIEF OF PETITIONER, NORM BURG CONSTRUCTION CORPORATION

STATEMENT OF CASE AND FACTS

Introduction

The petitioner, NORM BURG CONSTRUCTION CORPORATION, referred to in this brief as "BURG", files this its reply brief and responds herein as necessary for the purpose of clarification and correction.

Case and Facts

Although it certainly is not determinative of the certified question, JUPITER attempts to cloud the issue and suggest that there was some legal partial separation or severance of the indemnification claims in this litigation which would support its position that an appeal filed as to one final judgment would support jurisdiction to review a different separate final judgment rendered some three months later. The following must be corrected:

1. On page 2 JUPITER states that the original plaintiff (Brocard) filed a motion to have the contractual indemnification claims of JUPITER against BURG severed. The index to the Record-

on-Appeal reflects the filing of such motion (R. 12317-2318), but does not reflect thereafter an order on such motion. This is consistent with the trial transcript which demonstrates that arguments concerning contracutal indemnification were presented during the jury trial (T. 958-964), evidence was presented specifically concerning the elements of Florida Statutes Section 725.06 which relates to contractual indemnification (T. 1056-1058), and the contractual indemnification issues were presented, asserted and argued by both BURG and JUPITER on BURG'S motion for directed verdict during the jury trial (T. 1184-1191). It was not until after all evidence had been completed and the parties were in the process of attempting to formulate a jury interrogatory form that the parties finally stipulated that the court would determine the contractual indemnification issue on the evidence presented as a matter of law. (T. 1356-1357).

2. JUPITER'S suggestion that it agreed to have only a separate final judgment on contractual indemnification is not supported by the Record. At the conclusion of the trial the subject was specifically discussed and JUPITER attaches only page 1487 of the trial transcript as part of its appendix and ignores what was finally determined and agreed to by the parties. The transcript reflects, beginning on page 1487 and continuing to 1488, the following:

> [BROCARD] Well, Your Honor, if I may, however, that works out for them, my judgment should be against Jupiter Inlet Corporation and the Partnership. And, the Court reserves ruling on entry of judgment--either way, or just simply leave it at that. Because that's between them.
>
> [COURT] Well, I'd rather enter one judgment, I think, in the case taking care of all of these.

[BURG] I would then respectfully suggest that we do it upon motions since Your Honor still has to consider the contractual indemnification claim, which was not determined by the jury but which will be determined by Your Honor as a matter of law.

[COURT] The Plaintiff's judgment in this proceeding is only against--

[JUPITER] Jupiter Inlet.

[COURT] Only against Jupiter. Jupiter Companies, both of them, I guess.

[BROCARD] Yes, sir.

[COURT] Well, I don't see why we can't go ahead and enter that.

[JUPITER] I agree we can do it in two separate judgments. I have no problem with that.

[BURG] Yes, sir.

[COURT] Good. Prepare it and get that over by three-thirty this afternoon and I'll enter that. (T. 1487-1488).

2. On page 4 JUPITER states parenthetically that the final judgment dated February 15, 1985, in some manner addressed a "common law indemnity claim", but a review of the final judgment clearly demonstrates that the only judgment appealed was that in favor of BROCARD and against JUPITER and such judgment did not in any way touch upon or determine the rights of BURG.

3. On page 5 JUPITER seems to suggest that the final judgment which was submitted and entered in favor of BURG and against JUPITER in connection with the claims for indemnification contains some type of improper language. The Record is clear that the final judgment dated May 17, 1985, in favor of BURG and against JUPITER on all indemnification claims is and was the only final judgment which touches upon the rights of such parties and it was clearly

contemplated and intended that a second final judgment would be entered. (T. 1487-1488).

ARGUMENT

THE FILING OF A NOTICE OF APPEAL DIRECTED TO A FINAL JUDGMENT WHICH HAS ADJUDICATED THE RIGHTS OF ONLY ONE PARTY IN AN ACTION DOES NOT VEST AN APPELLATE COURT WITH JURISDICTION TO REVIEW A SUBSEQUENT FINAL JUDGMENT WHICH ADJUDICATES SEPARATE INDEPDENT AND DISTINCT CLAIMS AS TO A SEPARATE INDEPENDENT AND DISTINCT PARTY WHO WAS NOT A PARTY TO OR AFFECTED BY THE EARLIER FINAL JUDGMENT IN THE ABSENCE OF A TIMELY NOTICE OF APPEAL DIRECTED TO SUCH SEPARATE AND INDEPENDENT JUDGMENT.

It is submitted that JUPITER seeks to improperly confuse documents and judicial acts from which a final appeal may be perfected, and then add gratuitous prepositional phrases in an attempt to "bootstrap" jurisdiction where it does not and did not exist. First, an order denying a Motion for New Trial and an Order which merely denies a summary judgment are not the appealable orders in this case. Additionally, the gratuitous phrases which JUPITER now adds to describe the Motion for New Trial and the denial of the summary judgment simply do not change the posture of the present appeal. In the present case JUPITER sought review of the final judgment entered against it in favor of BROCARD which was dated in February, 1985. JUPITER simply did not enter its appeal to seek review of the separate and independent final judgment, which was the only judgment which touched upon the rights between BURG and JUPITER.

It is submitted that the Williams v. State, 324 So. 2d 74 (Fla. 1975), decision does not address and was not intended to address the issue in this case. Here, multiple separate and independent parties are involved in multiple, separate and independent claims. The filing of one notice of appeal as to one final judgment simply did not extend jurisdiction to review any final judgment which may have

affected other parties at some future date, and no reasonable reading of Williams is a basis for a contrary principle of law. There simply is no decision which holds that a notice of appeal as to one final judgment with one party somehow extends to vest appellate jurisdiction to review some other final judgment with some other party. The determinative documents for appellate review are the notice of appeal and the final judgment to which it is directed. Jury verdicts are not appealable and jury findings must be reduced to some formal written final determination by the court and, commonly, as in this case, various legal matters must be considered and applied before a final judgment is entered. A jury verdict simply is not the final step of the litigation process and was never intended to be. The suggestion by JUPITER that the final judgment was made final by the denial of the Motion for New Trial is correct, but the mere fact that the Motion for New Trial contained one issue as to some different party does not change the requirements for an appeal.

JUPITER'S suggestion that the issue of "prejudice" is the governing criteria simply is not the law. It could be argued in every case in which a notice of appeal was filed 31 days after the entry of final judgment that there was no prejudice. Here, there was never a notice of appeal filed as to the judgment involving BURG, and it was not until the appellate brief was reviewed that it was determined that there was an argument contained in the brief directed to the BURG judgment. The present case does not deal with some type of superficial technicality, superficial deficiency, typographical error, clerical error, or non-substantial defect in

the mere form of a notice of appeal.

A review of the decisions set forth by JUPITER demonstrates clearly that such decisions are not applicable under the circumstances in this case. For example, BURG did not complain because JUPITER filed a notice of appeal seeking review of the determination of a post-trial motion. In a similar manner, BURG did not seek a dismissal because "assignments of error" were insufficient. It is submitted that Ratner v. Miami Beach First Nat'l Bank, 362 So. 2d 273 (Fla. 1978), simply has nothing to do with the issues before this court.

In a similar manner, this case does not involve a situation in which a single notice of appeal has been filed, but the notice of appeal itself has described two separate and distinct judgments as was the case in Milar Galleries, Inc. v. Miller, 349 So. 2d 170 (Fla. 1977). If JUPITER had filed a notice of appeal and had described the final judgment in favor of BURG, no Motion to Dismiss would have been filed. In the present case, JUPITER simply failed to seek review or ever designate the final judgment entered in favor of BURG as being a subject to the appeal. This case is not one of confusion or an attempt to seek review of the final judgment against BURG because nothing was ever filed in connection with the final judgment when it was entered.

It is interesting to note that JUPITER'S reliance upon decisions such as Bay Area News, Inc. v. Poe, 364 So. 2d 830 (Fla. 2d DCA 1978), is contrary to JUPITER'S own position. As recognized in the footnotes in the Bay Area decision, the notice of appeal was not sufficient to bring up for review an injunction which was entered

by separate judgment in the case. The Bay Area decision merely permitted review based upon a notice of appeal which set forth a denial of post-trial motions as the order under review to review a portion of the determinations made by the trial court. The court specifically noted in footnote 2 that the appealing party had not filed a notice of appeal timely as to the judgment on the injunction and if the appellate court permitted an attack on the injunction, it would totally change the appellate time involved in connection with seeking review of the injunction. Thus, the Bay Area decision clearly supports the position of BURG in this litigation.

Decisions such as Casino, Inc. v. Kugeares, 354 So. 2d 936 (Fla. 2d DCA 1978), involve typographical errors in connection with judgments entered against only one party. Decisions such as Casino do not in any way excuse the filing of a notice of appeal as a prerequisite to vest appellate jurisdiction in an appellate court.

One also finds that decisions such as Eggers v. Narron, 238 So. 2d 72 (Fla. 1970), involve notices of appeal which describe post-trial orders denying motions for new trial as the orders under review, which is not the issue in this case. A superficial reading of State v. Allen, 196 So. 2d 745 (1967), demonstrates that it involved a totally different situation than is before the court in this case. Bowen v. Bowen, 352 So. 2d 166 (Fla. 1st DCA 1977), and Burlington v. Allen, 295 So. 2d 684 (Fla. 1st DCA 1974), involve notices of appeal which describe a post-trial motion and a single notice of appeal which designates two separate judgments for review, respectively. It is clear that neither decision has anything to do with the failure to file a notice of appeal to review the final judgment which was entered in favor of BURG in this

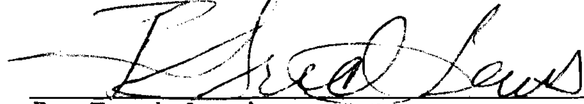
litigation.

If the deficiency in this case had been merely some hyper-technical point no motion to dismiss would have been filed and this court would not have been faced with the present issue. The defects in this case are not merely in the form or the words used in a notice of appeal, but the defect and the deficiency is that the complaining party never vested the appellate court with jurisdiction to review a separate and independent judgment. This court needs to address the true issue in this case so that the bench and bar will know that if the present appeal is not dismissed that it is not necessary to file a notice of appeal directed to separate final judgments involving separate and distinct parties in litigation. It is submitted that a dismissal was mandated by the decisions previously set forth and if this court approves the proposition asserted by JUPITER it will reverse appellate requirements and appellate practice as it has been established over the years which requires the filing of a notice of appeal as to a judgment as a prerequisite to jurisdiction and that such jurisdiction may not be extended otherwise.

CONCLUSION

Based upon the arguments, authorities and reasoning set forth in the original brief and contained herein, the certified question should be answered in the negative, and the appeal as to BURG should be dismissed in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of July, 1986, to: Kathryn M. Beamer, Esq., SCHULER & WILKERSON, P.A., Attorneys for JUPITER, Suite 4-D, 1615 Forum Place, West Palm Beach, FL 33401; Edna L. Caruso, Esq., EDNA L. CARUSO, P.A., Attorney for BROCARD, Suite 4B-Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; Jose G. Rodriguez, Esq., Attorney for BROCARD, Suite F, 328 First Street, West Palm Beach, FL 33401; Kenneth P. Carman, Esq., KUVIN & CARMAN, P.A., Attorneys for BURG, P.O. Box 350276, Fort Lauderdale, FL 33335; and to W. Chester Brewer, Jr., Esq., EASLEY, MASSA & WILLITS, P.A., Attorneys for BURG, Suite 800, Forum III, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401.

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