IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,881

FILED
DEBBIE CAUSSEAUX
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By

KAREN D'AMARIO, individually,
and on behalf of CLIFFORD
HARRIS, a minor, and
CLIFFORD HARRIS, individually,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

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# RESPONDENT'S BRIEF ON JURISDICTION

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CABANISS, MCDONALD, SMITH &
WIGGINS, P.A.
Barnett Bank Center,
Suite 1600
390 North Orange Ave.
Orlando, FL 32801
Attorneys for FORD MOTOR
COMPANY

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
4000 NationsBank Tower
100 SE Second Street
Miami, Florida 33131
(305) 530-0050
Attorneys for FORD MOTOR
COMPANY
By: WENDY F. LUMISH
JEFFREY A. COHEN

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CERTIFICATE OF TYPE STYLE

The type style utilized in this brief is 12 point Courier proportionately spaced.

## STATEMENT OF THE CASE AND FACTS

Plaintiff, Clifford Harris, then 15 years old was a passenger in a Ford vehicle when the minor driver who was drunk and speeding, crashed into a tree. Several minutes later, the vehicle caught fire resulting in injury to Harris. He brought this products liability action alleging that the vehicle was not crashworthy.

Before trial, Plaintiff sought to exclude evidence of the driver's negligence (including his lack of supervision while driving, his speeding and his intoxication) arguing that, although the driver's negligence caused the collision with the tree, it was not the cause of Plaintiff's claimed burn injuries. As such, Plaintiff contended it was improper to "apportion" fault between the negligent driver and the car manufacturer who was allegedly responsible for a successive and distinct injury. Pursuant to Nash v. Wells Fargo Guard Services. Inc., 678 So. 2d 1262 (Fla. 1996), Plaintiff further asserted that Ford had not properly pled the driver as a culpable third party.

Ford responded that the issue was timely raised and that the driver's negligence was relevant in a crashworthiness case based on the decision in Kidron, Inc. v. Carmona, 665 So. 2d 289 (Fla. 3d DCA 1995) (holding that the driver's negligence is relevant in a crashworthiness case).

The court ultimately found that the evidence was relevant. That ruling resulted in the following stipulation that was read to the jury:

> [F]or the purpose of this case, the cause of the collision with the tree, it was the negligent and excessive speed of the driver, Stanley Livernois. **It** was determined that Stanley Livernois had a **blood** alcohol level of 14%. (T. 1461-62)

After a defense verdict, Plaintiffs filed a new trial motion in which they continued to challenge the timeliness of the disclosure of the negligent non party, and continued their argument that apportionment was improper in successive injury cases. The court ruled that there was no procedural impairment to asserting the defense, but that it should have excluded the "remote" condition of alcohol from the case. At no time did Plaintiffs argue, nor did the court address, the issue **of** whether the driver was an intentional tortfeasor and/or whether Stellas v. Alamo Rent-A-Car, Inc., 702 ***So.* 2d 232** (Fla. **1997)** was applicable to this case.

The Second District resolved the apportionment issue in one paragraph of its opinion:

> Clifford Harris was a passenger in a **1988** Ford Escort LX driven **by** his friend, Stanley Livernois. Livernois was driving without the adult supervision his driver's license required. He was also speeding **and** intoxicated when the car collided with a tree. A witness to the crash circled the car twice and noticed a fire in the engine area. Some minutes later, the fire spread and an explosion occurred, engulfing the car in flames. Harris was severely injured, losing three limbs and suffering burns *to* much **of** his body. On the facts in the crash-worthiness case, the appellant properly raised an apportionment defense. See Kidron, Inc. v. Carmona, 665 ***So.*** 2d 289 (Fla. **3d** DCA **1995)**

D'Amario v. Ford Motor Co., 732 *So.* 2d **1143, 1145** (Fla. 2d **DCA** 1999).

Plaintiffs' motion for new trial also raised an issue about misconduct of two jurors who allegedly failed to disclose information on the juror questionnaires. The trial court agreed

with Plaintiff that a new trial should be granted on this basis as well. The Second District again disagreed, finding that the test set forth in De La Rosa v. Zequiera, 659 So. 2d 239 (Fla. 1995) had not been met.

## SUMMARY OF THE ARGUMENT

First, Petitioner asserts that the decision of the Second District allowing the nonparty driver to be on the verdict form is the conflict with a contrary ruling from the Third District. In fact, the Third District decision addresses whether a drunk driver is an intentional tortfeasor, while D'Amario addresses the different question as to whether there can be an apportionment defense based on the negligence of the driver in a crashworthiness case. Moreover, even if conflict exists, this Court should decline review because it can do no more than issue an advisory opinion. Because Plaintiff failed to raise this issue below and because the issue of nonparties on the verdict form is now moot in light of the verdict, the rights of these parties cannot be affected by a ruling on these issues.

Plaintiff's second basis for asserting conflict also fails. Contrary to Plaintiff's mischaracterization of the District Court's ruling, the court carefully considered each allegation of juror misconduct, measured it against the test set forth by this Court in De La Rosa v. Zeauiera, 659 So. 2d 239 (Fla. 1995) and found there to be no basis for a new trial. There is no conflict.

Finally, the Second District did not run afoul of cases addressing the standard of review for granting a new trial based

on juror misconduct. Rather, it simply applied the facts to established law.

## ARGUMENT

**I. THIS COURT SHOULD NOT EXERCISE JURISDICTION BASED ON ALLEGED CONFLICT WITH NASH V. GENERAL MOTORS.**

Plaintiff first argues that the Second District's ruling on the apportionment issue conflicts with the Third District's decision in Nash v. General Motors, 24 Fla. Weekly D1031 (Fla. 3d DCA Apr. 28, 1999). In Nash, the Third District relied on Stellas v. Alamo Rent-A-Car, Inc., 702 So. 2d 232 (Fla. 1997) to hold that "it was error for the drunk driver, an intentional tortfeasor, to appear on the same verdict form as General Motors, the negligent tortfeasor in a products liability action." 24 Fla. L. Weekly at D1032.

Plaintiff reads D'Amario far too broadly in his attempt to create conflict with Nash. While Nash held that a drunk driver is an intentional tortfeasor, there is no discussion of "intentional" versus "negligent" tortfeasors in D'Amario. While Nash focused on whether Stellas was applicable to the facts of that case, there is no discussion of Stellas in D'Amario. Likewise, while D'Amario finds an apportionment defense to be proper based on Kidron, there is no discussion of Kidron in Nash. Thus, from the face of the two decisions, it is clear that the courts were focusing on different issues. Nash addresses the question as to whether a drunk driver is an intentional tortfeasor who may not appear on the verdict form, while D'Amario addresses whether the negligence of the driver is relevant in a

crashworthiness case such that apportionment to the driver is proper.[1]

Even further, regardless of whether this Court is inclined to find conflict between the two decisions, there is an **important** policy reason why this Court should decline review **of** the D'Amario case. Simply stated, there is no basis **upon** which this Court can reverse the Second District's decision because the issues raised in the Nash case were not preserved **in** D'Amario **and** the propriety of placing a non-party on the verdict is moot in light of the jury's decision in Ford's favor.

**As** to preservation of error, there is no dispute that the issue upon which the Third District ruled in Nash was never raised before the trial court or the Second District **in** this case -- nor does Plaintiff claim that it was. **All** along, the apportionment issue in D'Amario centered on the manner in which the defense was raised and the relevancy of the driver's negligence in this crashworthiness case. Thus, because the status of a drunk driver as an intentional tortfeasor was not raised below, Plaintiff cannot rely on the argument asserted in Nash to reverse the verdict in this case. Morales v. Sperry Rand Corp., **601** ***So.*** 2d 538, 540 (Fla. 1992).

It is equally clear that any issue about the propriety of non-parties on the verdict **form** is rendered moot and harmless **by**

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[1] Indeed, Plaintiff make this point in his brief when he noted that there was no issue in Kidron as to intoxication or any other intentional misconduct. (Petitioner's Br. at 3 n.2) This further demonstrates that the decision in D'Amario has nothing to do with intentional torts -- the real focus of Nash.

virtue of the verdict in Ford's favor. As the Second District explained in E.H.P. Corp. v. Cousin, 654 So. 2d 976 (Fla. 2d DCA 1995), a jury finding in a defendant's favor renders harmless any claimed error relating to non-party tortfeasors. Accord Loureiro v. Pools by Greg, Inc., 698 So. 2d 1262 (Fla. 4th DCA 1997); Hasbursh v. WJA Realty, 697 So. 2d 219 (Fla. 4th DCA 1997). Applied here, even if the driver were erroneously included on the verdict form, that error would not permit reversal of the jury verdict in Ford's favor. As such, any decision by this Court could not result in an overturning of the jury verdict.

In light of the foregoing, were this Court to review D'Amario, it could do no more than issue an impermissible advisory opinion. See Department of Revenue v. Kuhnlein, 646 So. 2d 717, 720-21 (Fla. 1994), cert. denied sub nom, Adams v. Dickinson, 515 U.s. 1158 (June 26, 1995) ("every case must involve a real controversy as to the issue or issues presented"). Accordingly, if the Court is inclined to review the question of whether a non-party drunk driver can be placed on the verdict form, it should grant review in Nash, Case No. 96,139 (petition pending), a case wherein the rights of the parties can be affected.

## 11. THERE IS NO EXPRESS AND DIRECT CONFLICT ON THE ISSUE OF JUROR MISCONDUCT.

In De La Rosa v. Zequiera, 659 So. 2d 239 (Fla. 1995), this Court set forth the proper standard to be used in determining whether a new trial should be granted based on alleged non-disclosures during voir dire. The Court held that a new trial may only be granted where the complaining party has established:

(a) the undisclosed information is relevant and material to jury service,

(b) the juror concealed the information during questioning, and

(c) the failure to disclose was not attributable to the complaining party's lack of diligence.

Ignoring the plain language of the Second District's decision, Plaintiff attempts to create conflict by mischaracterizing the decision below as a "reprise" of the quashed majority opinion in Zequiera v. De La Rosa, 627 So. 2d 531 (Fla. 3d DCA 1993), in which the court analyzed each prior suit and found it to be immaterial. To the contrary, it is evident that the Second District's opinion is entirely consistent with De La Rosa and cases following De La Rosa.

Plaintiff first complains that Juror Leslie failed to disclose a prior lawsuit involving her husband. Because Juror Leslie was not married at the time of the lawsuit, the court found the juror's response to be truthful.[2] Thus, unlike the juror in De La Rosa whose answer was untruthful, the juror in this case responded accurately to the questionnaire. Accordingly, the second prong of De La Rosa has not been met.

Additionally, the Second District noted:

> Requiring a potential juror to disclose matters in a juror questionnaire relating to family members before they became family would impose an impractical, if not impossible, standard. In addition, the prior lawsuit was dismissed more than a decade before the trial in this cause. Further, the appellees did not ask a

[2] In direct contradiction to the district court's finding on this issue, Plaintiff asserts that Juror Leslie "undeniab[ly] misrepresent[ed]" her husband's prior lawsuit. (Petitioner's brief at 5) However, counsel's disagreement with the Second District's finding is not a basis to assert conflict jurisdiction.

> single question on this topic when potential jurors acknowledged prior lawsuits in the questionnaire. Therefore, we conclude that, first, Leslie did not conceal this information and further, it was not material to the cause being tried.

732 *So.* 2d at 1146. Thus, unlike counsel in De **La** Rosa who asked about the subject that was allegedly concealed, here, as the appellate court recognized, no such inquiry was made. **As** a result, the Second District properly found the lack of questioning demonstrated that the existence of prior lawsuits was not material to counsel's decision-making **process.**

Plaintiffs' second challenge to Juror Leslie was her alleged failure to disclose that the business for which she worked **had a** fleet of 25 Ford vehicles. The Court concluded that there was no concealment because the juror was only asked about the vehicles she owned and she answered truthful about those vehicles. 732 ***So.*** 2d **at 1146.** Thus, once again, counsel's attempt to cast this as a "Judge Schwartz reprise" on materiality is simply a misreading of the Second District's decision.

Turning to Juror Warwick, Plaintiffs rely upon alleged nondisclosures concerning a prior lawsuit involving her husband, as well as three workers compensation claims filed on his behalf. Once again, the Second District relied on counsel's failure **to** ask about litigation history and also noted that the juror was not required to disclose the workers compensation claims. *732* ***So.*** **2d** at **1146.** Thus, the alleged nondisclosures fail each of the De La Rosa tests.

Moreover, to the extent the Second District did make a comment about the significance ***of*** Juror Warwick's undisclosed litigation, such comment was not foreclosed **by** De La Rosa. As

Ford argued to the Second District, De La Rosa did not adopt a per se test deeming **all** nondisclosures of prior litigation to be material. Rather, the Court in De La **Rosa** looked to the facts of that particular case, including the number of undisclosed lawsuits and the juror's involvement as a defendant in the majority ***of*** those claims, As such, it was not inconsistent with De La Rosa for the Second District to note that one claim involved a **1985** lawsuit wherein the juror's husband sued for $1,000 in a real estate transaction, and that the workers compensation claims were remote in time, small in amounts and were asserted **by** one seeking monies.

**In** sum, far from being in conflict with De La Rosa, the Second District's decision correctly tracks this Court's decision **and** rules in harmony with its holding.

**III. THERE IS NO EXPRESS AND DIRECT CONFLICT AS TO THE STANDARD OF REVIEW OF AN ORDER GRANTING A NEW TRIAL FOR JUROR MISCONDUCT.**

Failing all else, Plaintiff asks this Court to find express and direct conflict with "decisions holding that orders granting new trials for juror misconduct are reviewable on appeal only for an abuse of discretion." (Petitioner's brief at 9) Unlike its other two claimed conflicts, Petitioner fails to even identify the specific cases with which D'Amario allegedly conflicts. Indeed, it is not even clear what Plaintiff asserts the conflict to be.

Initially, Plaintiff suggests that the appropriate standard of review of an order granting a new trial based on juror misconduct is abuse of discretion and that the Second District

"appears" to have applied a de novo standard.[3] Plaintiff's perception as to the standard that the court applied, is irrelevant because the court did not state that it was applying a de novo standard. Thus, there is no conflict on the face of the two opinions. Moreover, it is clear that the district court performed the analysis which was required -- it determined whether the test set forth in De La Rosa had been met under the facts of the case.

Later in his brief, Plaintiff seems to suggest that there is conflict because the district court failed to use the words "abuse of discretion" when it reversed the new trial order. (Petitioner's Br. at 9) This argument is equally untenable because there simply is no requirement that the district court specifically articulate that it is applying the correct standard in making its determination. As such, no conflict exists as to the standard of review.

## CONCLUSION

Based on the foregoing, Ford respectfully requests that this Court decline to exercise jurisdiction in this case.

[3] In any event, Plaintiff's reliance on cases dealing with the standard of review of orders granting new trials because the verdict is against manifest weight of the evidence is misplaced. See Smith v. Brown, 525 So. 2d 868 (Fla. 1988); E.R. Squibb and Sons, Inc. v. Farnes, 697 So. 2d 825 (Fla. 1997).

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was sent via U.S. Mail on August 9th, 1999, to BILL **WAGNER, ESQ.**, Counsel for **Plaintiffs,** WAGNER, VAUGHAN & McLAUGHLIN, 601 Bayshore Boulevard, Suite 910, Tampa, Florida 33606; WIL **FLORIN, ESQ.**, Republic Bank Center, 3rd Floor, *28059* U.S. Highway *19* North, Clearwater, Florida 34621; and JOEL D. **EATON, ESQ.**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130-1780.

CABANISS, MCDONALD, SMITH &
WIGGINS, P.A.
Barnett Bank Center,
Suite 1600
390 North Orange Ave.
Orlando, FL 32801
Attorneys for FORD MOTOR
COMPANY

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
4000 NationsBank Tower
100 SE Second Street
Miami, Florida 33131
(305) *530-0050*
Attorneys for FORD MOTOR
COMPANY

By: ______________________
WENDY F. LUMISH
Florida Bar No. 334332
JEFFREY A. COHEN
Florida Bar No. *057355*

2038413v9