IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v. CASE NO. SC06-333

CAUSEWAY VISTA, INC.,

Respondent.
_____/

BRIEF ON THE MERITS OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA
CASE NO. 2D04-4371

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PRELIMINARY STATEMENT

Causeway Vista, Inc., a defendant and appellant below and respondent here, will be referred to as Causeway Vista. The State of Florida, Department of Transportation, the petitioner/condemning authority and appellee below and petitioner here, will be referred to as the Department.

Citations to the record on appeal will be indicated parenthetically as "R." with the appropriate page and volume number(s). Citations to the order of taking transcript will be indicated parenthetically as "T." with the appropriate page number(s). Citations to the trial transcripts, which commenced on July 12, 2004, will be indicated parenthetically as "TT." with the appropriate court reporter's volume and page number(s).

The lower court's decision is currently reported as Causeway Vista v. State, Dep't of Transp., 918 So. 2d 352 (Fla. 2d DCA 2005).

STATEMENT OF THE CASE AND FACTS

This case arose from the Department's taking of a parcel of real property owned by Causeway Vista. Causeway Vista, 918 So. 2d at 353. The property consisted of a large piece of dry land and submerged lands lying in a canal behind the uplands. Id. The uplands were improved with buildings and other structures including a seawall and boat ramp leading into the canal. Id. Two docks were located on the submerged lands. Id.

The Department sought to take the property for use in a road improvement project at the intersection of Courtney Campbell Causeway, the Veteran's Expressway, and Memorial Highway in Hillsborough County. Id. Following a bench trial the circuit judge entered an order of taking which allowed the Department to take the entirety of the uplands and granted the Department a construction and maintenance easement over the submerged lands. Id. Consequently, Causeway Vista was entitled to compensation for the land and improvements taken and severance damages, if any, to the submerged remainder. Id. During the jury trial addressing valuation issues, testimony was adduced which established the range of severance damages to the

submerged lands in the amount of $100 to $14,000.[1] Id.

Among others, the jury was given the typical "range of testimony" jury instruction for eminent domain valuation proceedings, to-wit:

> Your verdict must be based on a careful consideration of all the evidence and these legal instructions that I have given you, and it may not be less than the lowest value nor more than the highest value testified to by any witness in this proceeding.

(TT.XI 1538-1539) Causeway Vista, 918 So. 2d at 354. The jury returned a zero verdict for severance damages. (R.6 1142-1147) Id. None of the parties requested that the jury be polled nor did counsel for Causeway Vista raise any objection going to the error in the severance damages verdict prior to the discharge of the jury. (TT.XI 1557-1559)

Causeway Vista filed a motion for new trial grounded in part on the contention that the severance damages verdict was legally inadequate. Id. The trial judge denied the motion and Causeway Vista appealed. Id.

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[1] The $100 figure was established during cross-examination of the Department's appraiser who testified that severance damages to the submerged remainder were: "a nominal or token amount. I think I had said in my appraisal $100, but some nominal amount." (TT.VI 670-671) Causeway Vista's appraiser set the top of the range for severance damages at $14,000. (TT.VII 891-892)

On appeal, the Department argued that the issue was not preserved for review by virtue of Causeway Vista's failure to object to the verdict prior to the discharge of the jury. Causeway Vista, 918 So. 2d at 355. Nevertheless, the lower court rejected the Department's position and reversed the cause, holding in pertinent part:

> this court has repeatedly held that the proper method to challenge an inadequate verdict is to file a posttrial motion. See, e.g., Cocca v. Smith, 821 So. 2d 328, 330 (Fla. 2d DCA 2002); Cowen v. Thornton, 621 So. 2d 684, 687 (Fla. 2d DCA 1993). This is in contrast to what is needed to challenge an inconsistent verdict, which requires an objection to the verdict before the jury is discharged. Cocca, 821 So. 2d at 330; Deklyen v. Truckers World, Inc., 867 So. 2d 1264,1266 (Fla. 5th DCA 2004)(noting that a verdict which fails to award any damages in a particular category is an inadequate verdict and not necessarily an inconsistent verdict and that only an inconsistent verdict requires an objection before the jury is discharged).
>
> Here, the zero verdict for severance damages is inadequate, not inconsistent. Therefore, Causeway Vista properly preserved the issue through its motion for new trial. Because the issue was properly preserved and the jury's verdict was legally inadequate, Causeway Vista is entitled to a new trial.

Id.

The Department's timely Motion for Rehearing was denied by order entered January 25, 2006. Causeway Vista, 918 So. 2d at

352. On February 17, 2006, the Department filed its notice invoking this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(2)(A)(iv). By Order entered June 23, 2006, this Court accepted jurisdiction. The Department's brief on the merits follows.

SUMMARY OF ARGUMENT

The Department's appraiser's testimony on cross-examination amounted to an admission that Causeway Vista was entitled to at least $100 in severance damages. Causeway Vista's appraiser's testimony set the top of the range for severance damages at $14,000. Although the jury's zero verdict for severance damages was obviously inconsistent with this evidence, Causeway Vista failed to object to the verdict prior to the discharge of the jury and raised the issue for the first time in its unsuccessful motion for a new trial.

Causeway Vista's irremediable procedural default should have barred review of this claim on appeal. Nevertheless, the Second DCA reached the merits of the claim and afforded Causeway Vista a new trial on severance damages on the basis of its conclusion that the verdict was not inconsistent but merely inadequate. This decision is contrary to the Fourth DCA's decision in State, Dep't of Transp. v. Denmark, 366 So. 2d 476, 477 (Fla. 4th DCA 1979), where an award of severance damages below the range of the testimony was found to be an inconsistent verdict which required an objection prior to the discharge of the jury to preserve the issue for review.

The decision is also at odds with substantial policy

considerations which disfavor the re-litigation of cases on the basis of error that could have been easily corrected had a timely objection been forthcoming. This Court should reject the Second DCA's decision and afford the Denmark rule statewide application.

ARGUMENT

ISSUE

CAUSEWAY VISTA'S FAILURE TO OBJECT PRIOR TO THE DISCHARGE OF THE JURY SHOULD HAVE BARRED APPELLATE REVIEW OF ITS CLAIM THAT THE JURY'S ZERO VERDICT FOR SEVERANCE DAMAGES WAS IMPERMISSIBLY BELOW THE RANGE OF THE TESTIMONY ADDUCED AT TRIAL.

Notwithstanding Causeway Vista's failure to object to the severance damages zero verdict prior to the discharge of the jury, the Second DCA reached the merits of Causeway Vista's claim and reversed the cause for a new trial on severance damages on the strength of its determination that the verdict was inadequate and not inconsistent. The court, without explanation, reached this conclusion after stating that:

> In this case, the Department admitted in its case-in-chief that Causeway Vista had suffered some severance damages because access to the seawall and submerged land would be severely restricted both during and after the road improvement project, and the Department's expert valued the severance damages at $100. Given this testimony, **the jury was required by the unique law applicable to condemnation cases to award Causeway Vista no less than $100 in severance damages.** [Emphasis added]

Causeway Vista, 918 So. 2d at 355.[2] Similarly, when discussing the jury's discretion in terms of the severance damages award the court observed:

> However, once the Department conceded that Causeway Vista had suffered severance damages and had offered testimony as to the value of those damages, **the jury no longer had the discretion to deny Causeway Vista an award of severance damages or to wholly reject the expert testimony on the issue of the amount of those damages.** [Emphasis added]

Causeway Vista, 918 So. 2d at 356.

This is precisely why the verdict is inconsistent with the evidence and not merely inadequate. Because the Department's appraiser's testimony was an admission that Causeway Vista was entitled to at least $100 in severance damages, Behm, 336 So. 2d at 581-582, the jury's zero verdict was inconsistent with both the evidence adduced and the range of testimony jury instruction given in this case.

The lower court's refusal to recognize that Causeway Vista's claim was procedurally barred squarely collides with the

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[2] The unique law the court referred to is the well established rule of law in condemnation proceedings expressed in the jury instruction which requires that the jury verdict "shall not be less than the lowest value testified to by any witness nor shall it be higher than the highest value testified to by any witness." Behm v. Div. of Admin., State Dep't of Transp.,

Fourth DCA's decision in State, Dep't of Transp. v. Denmark, 366 So. 2d 476, 477 (Fla. 4th DCA 1979), where an award of severance damages below the range of the testimony was found to be an inconsistent verdict which required an objection prior to the discharge of the jury to preserve the issue for review. The decision under review also flies in the face of substantial policy considerations disfavoring the re-litigation of cases on the basis of error that could have been easily corrected had a timely objection been forthcoming.

In Denmark, the Department's appraiser testified that severance damages to the remainder amounted to $229,850, but that they would be entirely offset by enhancement to the value of the remainder resulting from the proposed project. Denmark, 366 So. 2d at 477. The landowner's appraiser testified that severance damages would amount to $320,000, and that there would be no enhancement. Id. The jury returned a verdict finding severance damages to the remainder in the amount of $48,000, and no special enhancement, which yielded a total severance damages award in the amount of $48,000. Id. The trial judge granted the landowner's motion for judgment notwithstanding the verdict and increased the severance damage award to $229,850. Id. The

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336 So. 2d 579, 581 (Fla. 1976).

Fourth DCA reversed holding, in part:

> No objection was made to the verdict before the jury was discharged. The record reflects that the trial court had a side bench discussion with all counsel, off the record, immediately after the verdict was received. Thereafter the trial court asked if anyone wished to poll the jury and all counsel declined. Then the jury was discharged. As soon as the jury was gone counsel for the appellee requested that the court delay entry of a final judgment because the jury's award of severance damages was **inadequate** and noted the same error later relied on by the trial court in granting the judgment notwithstanding the verdict. [Emphasis added]
>
> We believe this situation is similar to one involved in *Lindquist v. Covert*, 279 So.2d 44 (Fla. 4th DCA 1973), wherein we held that the failure to object to **inconsistent verdicts** before the discharge of the jury precluded subsequent review of the error. [Emphasis added]
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> * * *
>
> As in *Lindquist*, we must concede the error in the jury's answer to question 2(a). However, the jury's net award under question 2(c) of $48,000.00 is well within the permissible range of damages established by the evidence. We cannot know for a certainty what the jury intended. But had the error in the answer to question 2(a) been called to the court's attention prior to the discharge of the jurors, the jurors would have had an opportunity to reconsider all three questions pertaining to severance damages in light of the error, and could have returned a new verdict reflecting their findings. That opportunity was foreclosed

> upon discharge of the jury without objection.

Denmark, 366 So. 2d at 478.

There are two material aspects of the Denmark decision that are particularly noteworthy. First, like the verdict in this case (R.6 1142-1147), the Denmark verdict was not facially inconsistent. None of the findings by the jury on the verdict form were mutually exclusive or otherwise at odds with one another. The severance damages verdict in Denmark, like the severance damages verdict here, was inconsistent with the evidence adduced at trial. See Cocca v. Smith, 821 So. 2d 328, 331 (Fla. 2d DCA 2002)(Indicating that an inconsistent verdict is not limited to facial inconsistency but can also arise from an inconsistency with the instructions given or the evidence adduced).

Second, although the Denmark landowner, like Causeway Vista in this case, had characterized the verdict as being inadequate, that did not defeat application of the procedural bar arising from the failure to object to the verdict before the jury was discharged. As the Fourth DCA noted in a later case:

> This court has consistently held that a party's failure to object or otherwise inform the court of an inconsistent verdict before the jury is dismissed waives the inconsistency in the verdict as a point on

> appeal....It follows that a party may not circumvent these cases by later arguing the verdict is inadequate or contrary to the weight of the evidence....**It logically follows that most inconsistent verdicts, in some respect, would be either inadequate or contrary to the manifest weight of the evidence.** [Citations omitted; emphasis added]

Florida Dep't of Transp. v. Stewart, 844 So. 2d 773, 774 (Fla. 4th DCA 2003). The Second DCA should have been of like mind in this case.

The soundness of the rule of law established in Denmark is confirmed by the substantial policy considerations compelling its application. These considerations find their origin in the contemporaneous objection requirement and counsel strongly in favor of rejecting the Second DCA's decision and applying the Denmark rule statewide.

In Murphy v. International Robotic Systems, 766 So. 2d 1010 (Fla. 2000), this Court was confronted with conflicting decisions concerning appellate review of improper, but unobjected-to closing argument. Prior to its disposition of this specific issue, the Court made some observations concerning the contemporaneous objection requirement which bear repeating here:

> The contemporaneous objection requirement originated in the English legal

> system as a mechanism for preserving error for appellate review, and the requirement was carried forward and generally adopted in America....In *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n. 1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), the United States Court of Appeals for the Third Circuit stated that the reasons for the contemporaneous objection requirement:
>
> > go to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.
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> In *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978), this Court similarly stated:
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> > The requirement of a contemporaneous Objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Murphy, 766 So. 2d at 1016-1017.

Speaking specifically to the failure to object to an

inconsistent verdict prior to the discharge of the jury, the Fourth DCA expressed the view that:

> Certainly this court does not approve the creation of technical barriers to appellate review. At the same time, however, there would be little fairness in reversing the plaintiff's judgment because of an inconsistency in the verdicts which could have been corrected in virtually no time at all by a resubmission of the cause to the jury had either of the appellants raised the matter before the jury was discharged.

Lindquist v. Covert, 279 So. 2d 44, 45 (Fla. 4th DCA 1973).

Subsequent to Lindquist, the Fourth DCA further addressed the attendant policy considerations explaining that:

> It is quite basic that objections as to the form of the verdict or to inconsistent verdicts must be made while the jury is still available to correct them. In *Robbins v. Graham*, 404 So.2d 769 (Fla. 4th DCA 1981), we held that errors of form or consistency must be raised on the spot, even though it might be to a party's benefit to remain silent and later seek a new trial. *See also Department of Transportation v. Denmark*, 366 So.2d 476 (Fla. 4th DCA 1979), and *Lindquist v. Covert*, 279 So.2d 44 (Fla. 4th DCA 1973), to the same effect. In *Robbins*, Judge Stone explained that:
>
> > This principle is founded on the concept of fundamental fairness. Relitigation would deprive the appellants of their earned verdict and give the appellees an unearned additional bite of the apple.

404 So.2d at 771. In addition to these reasons, we also suggest that the importance of the right to trial by jury implicates a strong deference to a jury's decision, requiring that its verdict be sustained if at all possible. Moreover, the societal interest in furnishing only a single occasion for the trial of civil disputes would be entirely undone by the granting of second trials for reasons which could have been addressed at the first.

* * *

Here, there are compelling reasons not to excuse a previous failure to speak out when the original jury itself could have corrected the supposed error. They are found, as we have already said, in the sanctity of a jury verdict and society's interest in avoiding repeat trials for the same dispute. Verdict inconsistencies which could have been corrected while the jury was still available are simply not important enough to bypass the ordinary finality attached to their decision.

Frankly, some of the recent fundamental error cases suggest that the idea is being used far too routinely. Appellate courts should not appear to strain to reach issues which have not been adequately preserved below. There is nothing unjust about refusing to relieve a party of its own failure to do something about an internal inconsistency in a verdict until long after the rendering jury has been discharged. We are thus quite loathe to take up an issue that could have been settled by submission to the jurors who had already resolved the essential factual dispute.

Moorman v. American Safety Equipment, 594 So. 2d 795, 799-800

(Fla. 4th DCA 1992).

Rejection of the Second DCA's decision and the establishment of the Denmark decision as the statewide rule of law in eminent domain valuation proceedings would reaffirm these fundamental policy considerations and call them into play in circumstances, such as those presented here, where a party either inadvertently or by design, deprives the trial judge of an opportunity to rectify reversible error.

The inconsistency between the evidence adduced and the severance damages verdict in the case at bar was patently discernable, reversible error, which could have been corrected easily. The trial judge, had he been given the opportunity, could have simply instructed the jury that their award of severance damages had to fall within the range of the testimony, $100 to $14,000, and then sent the jury out for further deliberations. Causeway Vista's apparent election to remain silent in the face of such obvious error foreclosed the employment of an expeditious remedy and should have barred review of its claim on appeal.

Instead, Causeway Vista's reticence was rewarded with a new trial which will consume additional judicial labor and obligate the Department to pay its own, as well as Causeway Vista's,

attorney's fees, expert's fees, and costs associated with the re-litigation of the severance damages claim in addition to the parties' fees and costs generated by the first trial. See § 73.091(1), Fla. Stat. (2005). The Second DCA's decision must not be permitted to stand because it will unintentionally foster gamesmanship and the squandering of limited resources.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, the lower court's decision should be quashed and the cause remanded with directions to affirm the final judgment in its entirety and vacate the court's December 14, 2005 order granting Causeway Vista's motion for appellate attorney's fees.[3]

Respectfully submitted,

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[3] Inasmuch as Causeway Vista was the appellant below, affirmance of the final judgment precludes an award of appellate attorney's fees. § 73.131(2), Fla. Stat. (2005).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this _____ day of July, 2006, to **DAVID W. HOLLOWAY, ESQUIRE**, Tileston, Simon & Holloway, P.A., 215 Imperial Boulevard, Suite B-1, Lakeland, Florida 33803, counsel for CAUSEWAY VISTA, INC.; **LUCY JULIA HAWRSK**, 3700 Dana Shores, Tampa, Florida 33634, representative for the ESTATE OF JOHN HAWRSK, DECEASED; and **JAMES L. ESTES, JR., ESQUIRE**, Senior Corporate Counsel, TECO Energy, Inc., Post Office Box 111, Tampa, Florida 33601, counsel for TECO ENERGY, INC.

_____
GREGORY G. COSTAS

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing has been prepared using Courier New 12 point font.

_____
GREGORY G. COSTAS