IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v. CASE NO. SC06-
DCA CASE NO. 2D04-4371

CAUSEWAY VISTA, INC.,

Respondent.
_____/

JURISDICTIONAL BRIEF OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR REVIEW OF A DECISION OF
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 Appendix hereto will be indicated parenthetically as "A." with the appropriate page number(s).

The decision of the lower tribunal is currently reported as Causeway Vista, Inc. v. State of Florida, Department of Transportation, 30 Fla. L. Weekly D2812 (Fla. 2d DCA Dec. 14, 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. (A. 2-3) During the jury trial which resolved valuation issues, testimony was adduced which established the range of severance damages in the amount of $100 to $14,000. (A. 3) 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.

(A. 4) The jury returned a zero verdict for severance damages. Id.

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.

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. (A. 6) 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. (A. 10) On February 17, 2006, the Department timely 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). The Department's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The Department argues that this Court should exercise its discretionary jurisdiction to review the Second DCA's decision in this case because the requisite conflict exists between that decision and the Fourth DCA's decision in State, Dep't of Transp. v. Denmark, 366 So. 2d 476, 477 (Fla. 4th DCA 1979). On facts which for all practical purposes were identical, the Fourth DCA, unlike the lower court in this case, held that a claim that a severance damages verdict was below the range of testimony was not properly preserved for review where the complaining party had failed to object to the verdict prior to the discharge of the jury.

ARGUMENT

ISSUE

THE LOWER COURT'S DECISION HEREIN IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

A. The Second DCA's Decision Herein Is In Irreconcilable Conflict With The Fourth DCA's Decision In Denmark.

It is well settled that this Court's jurisdiction to review decisions of district courts of appeal pursuant to Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(2)(A)(iv) because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). The Second DCA's decision in this case applied a rule of law to produce a different result than that reached in a prior case involving substantially the same facts.

In Denmark, 366 So. 2d at 477, 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. 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 Fourth DCA reversed holding, in part, that an award of severance damages below the range of the testimony was an inconsistent verdict which required an objection prior to the discharge of the jury to preserve the issue for review. Specifically, the court stated:

> 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]
>
> * * *
>
> 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 significant aspects of the Denmark decision that place that decision in squarely in conflict with the lower court's decision in this case. First, like the verdict in this case, 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 also Cocca v. Smith, 821 So. 2d 328 (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 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 (Fla. 4th DCA 2003).

B. Policy Considerations.

The substantial underlying policy considerations attending the rule applied in Denmark counsel strongly against permitting the Second DCA's decision to stand. The Fourth DCA addressed these considerations in a subsequent decision explaining that:

> In failing to object to the verdict in the presence of the jury, we conclude that ASE has waived this issue. 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 2003).

The inconsistency between the evidence adduced and the verdict in the case at bar was readily apparent and 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 failure to object prior to the discharge of the jury foreclosed the employment of a readily available, expeditious remedy and should, therefore, have barred review of its claim on appeal. The lower court's failure to enforce this procedural bar places its decision in irreconcilable conflict with Denmark.

CONCLUSION

The lower court's decision is in direct and irreconcilable conflict with the Fourth DCA's decision in Denmark. This Court has a proper basis to exercise its 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).

WHEREFORE, Petitioner, State of Florida, Department of Transportation, respectfully requests this Honorable Court exercise its discretionary jurisdiction to grant review, quash the decision of the Second DCA, and remand the cause 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 21st day of February, 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

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