

SUPREME COURT OF THE STATE OF FLORIDA

SC12-2624

DIANA COBA, as personal  
representative of the ESTATE  
OF ROBERTO COBA, deceased,  
on behalf of the estate and  
survivor decedent,

Petitioner,

v.

TRICAM INDUSTRIES, INC., a  
foreign corporation, and HOME  
DEPOT U.S.A., INC., d/b/a HOME  
DEPOT, a foreign corporation,

Respondents.

BY \_\_\_\_\_

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RESPONDENTS' ANSWER BRIEF ON JURISDICTION

PETITION FROM THE THIRD DISTRICT COURT OF APPEAL (CASE NO: 3D11-50)

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**STATEMENT OF THE CASE AND FACTS**

This is a products liability action stemming from an alleged ladder accident occurring on June 3, 2006, resulting in the death of Roberto Coba. The ladder was an AL-13 articulating ladder designed and manufactured by Respondent Tricam, and allegedly sold to Roberto Coba by Respondent Home Depot. The counts alleged in the Complaint were for strict liability and negligence based on allegations of design defect, manufacturing defect, and failure to warn.

Despite what was alleged in the Complaint, Petitioner's sole evidence and arguments at trial were that the ladder contained a design defect. Petitioner did not elicit any testimony at trial concerning a manufacturing defect or a warning defect, did not introduce the warnings on the ladder into evidence at trial, did not proffer any evidence at trial regarding negligence in the sale or distribution of the ladder, and expressly withdrew the manufacturing defect claim prior to closing arguments at trial. In addition, the jury was not instructed at trial on either manufacturing defect or warning defect standards.

On the verdict form, the jury was first asked to answer whether the ladder contained a design defect. The jury was then asked to answer whether Respondents were negligent. The jury answered "No" to the first question indicating that the ladder did

not contain a design defect, but "Yes" to the next question indicating that Respondents were negligent. The jury also assigned 80% comparative negligence to Mr. Coba.

Respondents filed a post-trial motion for directed verdict, arguing that the jury verdict was fundamentally inconsistent. The trial court denied the motion and entered judgment for Petitioner.

On appeal, the Third District agreed with Respondents that the jury verdict was fundamentally inconsistent because the jury found that there was no design defect and the only evidence of negligence pertained to the ladder's design. The Third District also agreed with Respondents that, because the inconsistency in the verdict was fundamental, Respondents did not waive the inconsistency by failing to object prior to discharge of the jury. Finally, the Third District ruled that a new trial was not warranted because this was not a case where the jury's intent could not be determined from the verdict. In reaching these decisions, the Third District aligned itself with the Fifth and Fourth Districts on these exact issues.

In the Fifth District case of North American Catamaran Racing Association, Inc. (NACRA) v. McCollister, 480 So.2d 669 (Fla. 5<sup>th</sup> DCA 1985), a boater was killed after the boat capsized. The boater's estate brought a products liability action against the manufacturer of the boat alleging strict liability and negligence claims. Both claims were based on the allegation that the

manufacturer defectively designed the boat. At trial, the jury was asked to answer the following questions: (1) Was the sailboat defective when sold and, if so, was the defect a legal cause of death of Christine Wapniarski? (2) Was there negligence on the part of defendant NACRA which was the legal cause of the death of Christine Wapniarski? The jury answered the first question "No," but it answered the second question "Yes." The Fifth District reversed a judgment against the manufacturer, finding that the verdict was **fundamentally inconsistent** because the only evidence of negligence related to the boat's design but the jury found that there was no design defect. The Fifth District further held that, because the inconsistency was of a fundamental nature, the manufacturer did not waive the inconsistency by not objecting before the jury was discharged. The Fifth District did not remand for a new trial, but instead remanded for entry of judgment in the manufacturer's favor.

Similarly, in the Fourth District case of Nissan Motor Co, Ltd. v. Alvarez, 891 So.2d 4 (Fla. 4<sup>th</sup> DCA 2004), a motorist brought claims against an automobile manufacturer for strict liability and negligence following a rollover accident. During the course of the jury trial, the focus of the motorists' claim was that the vehicle contained a design defect that made the vehicle more susceptible to "rollovers." Critically, the motorists presented no evidence on the

issue of negligent failure to warn, instead confining their proof of negligence solely to the claim of negligent design. The verdict form required the jury to answer the following questions: 1. Did the Defendants, Nissan Motor Co., Ltd., Nissan Motor Corp. in U.S.A., and Vernon Scott Motors, place the Nissan Pathfinder on the market with a defect which was a legal cause of damage to the Plaintiff, Andrea Alvarez? 2. Was there negligence on the part of the Defendants Nissan Motor Co. Ltd. and Nissan Motor Corp. in U.S.A. which was a legal cause of damage to the Plaintiff, Andrea Alvarez? The jury returned a verdict finding there was no design defect, but that the manufacturer was negligent in the design, manufacture, assembly, distribution, or sale of the vehicle. The Fourth District reversed on the basis that the motorist abandoned the failure to warn claim and instead focused entirely on the claim of a design defect, and therefore, if the only evidence of negligence related to the design defect, then the jury could not have found the manufacturer liable for negligence while finding that the vehicle did not contain a design defect. The Fourth District further held, in agreement with the Fifth District in NACRA, that, because the inconsistency was of a fundamental nature, the manufacturer did not waive the inconsistency by not objecting before the jury was discharged. Further, like the Fifth District in NACRA, the Fourth District did not remand for a new trial, but

instead remanded for entry of judgment in the manufacturer's favor.

Petitioner now seeks discretionary review in this Court. The alleged basis of jurisdiction is that the Third District's decision expressly and directly conflicts with other district court decisions.

#### SUMMARY OF ARGUMENT

Discretionary jurisdiction should be denied because the Third District's decision does not expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. To the contrary, the Third District simply decided in this case that the inconsistency in the verdict was of a fundamental nature, and therefore, Respondents did not waive the error by failing to object prior to discharge of the jury. The Third District further held that, based on the facts presented, a judgment for Respondents was warranted rather than a new trial. None of the cases cited by Petitioner as a basis for conflict jurisdiction discuss or even decide these specific issues. In addition, the Third District's decision is consistent with the decisions of the only other districts to decide these specific issues (the Fourth and Fifth Districts). Therefore, there is no inter-district conflict.

#### ARGUMENT

DISCRETIONARY JURISDICTION SHOULD BE DENIED BECAUSE THE  
DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT



**EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.**

Petitioner's argument is two-fold. First, Petitioner argues that the Third District's decision expressly and directly conflicts with decisions of other district courts requiring timely objection to preserve an inconsistent verdict. Second, Petitioner argues that the Third District's decision expressly and directly conflicts with decisions of other districts holding that a new trial is the appropriate remedy for an inconsistent verdict.

This Court has identified two basic forms of decisional conflict that can properly trigger "conflict jurisdiction." Specifically, in Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960), this Court unanimously held that alleged conflict jurisdiction may exist either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case." Stated differently, the "conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." Kyle v. Kyle, 139 So.2d 885, 887 (Fla.

1962) (citations omitted).

In this case, the Third District did not announce a rule of law that conflicts with other appellate expressions of law or apply a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case. In fact, none of the cases cited by Petitioner as a basis for conflict jurisdiction involve the same rule of law announced in this case or involve application of a rule of law to produce a different result in a case involving substantially the same controlling facts.

Waiver of Inconsistent Verdict: On the issue of waiver, Petitioner argues that the Third District's decision in this case is in direct conflict with Gup v. Cook, 549 So.2d 1081 (Fla. 1<sup>st</sup> DCA 1989). Respondents disagree.

In Gup, the inconsistency in the verdict pertained to an aspect of damages, not to the foundation of the case or the merits of the cause of action. Specifically, the inconsistency was that the jury awarded \$0 for future medical expenses but then awarded \$500,000 for future medical expenses reduced to present value. The First District held that the inconsistency was waived by failure of the defendant to object prior to discharge of the jury. Critically, the First District was not asked to decide (nor did not decide) whether the inconsistency was fundamental, or if it was fundamental, whether the general rule of waiver would apply.

In contrast, in this case, the Third District accepted Respondents' argument that the verdict was **fundamentally** inconsistent, not just inconsistent. "'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). The error in this case was fundamental because there can be no products liability claim in Florida without a product defect. Royal v. Black and Decker Mfg. Co., 205 So.2d 307, 309 (Fla. 3d DCA 1967); Cassisi v. Maytag Co., 396 So.2d 1140, 1143 (Fla. 1st DCA 1981). Further, no evidence of negligence was offered at trial other than pertaining to defective design. The error in this case clearly went to the foundation of the case or merits of the cause of action. Thus, the error was fundamental and could be corrected on appeal without an objection before discharge of the jury. See also Palm Beach County v. Awadallah, 538 So.2d 142, 143 (Fla. 4th DCA 1989) ("In the instant case, the jury verdict and the judgment are contrary to the law in that one of the elements for the awarding of business damages, that the business be located on adjoining land owned by the party whose property is being taken, was not satisfied. We agree with the County's contention here that the fundamental error concept is applicable.); Keyes Co. v. Sens, 382 So. 2d 1273, 1275 (Fla. 3d DCA 1980) (failure to object to jury

verdict assessing greater damages against principal than agent's conduct caused may be excused because error goes to ultimate merits of the cause).

In sum, the rule of law announced in this case is different from the rule of law announced in Gup. In addition, the facts in this case and Gup are not substantially similar, and therefore, the Third District did not apply a rule of law to produce a different result from a prior case involving "substantially the same controlling facts." Therefore, there is no conflict that would justify conflict jurisdiction.<sup>1</sup>

New Trial: Petitioner cites six cases from other jurisdictions for the general proposition that a new trial is proper when a verdict appears to be inconsistent and the intent of the jury cannot be determined from the verdict; however, none of the cases cited by Petitioner involves facts similar to the facts at hand. Further, none of the cases cited by Petitioner address the exception to the general rule recognized by the Third District in this case.

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<sup>1</sup> Petitioner also cites Cocca v. Smith, 821 So.2d 328, 330 (Fla. 2d DCA 2002), but does not expressly claim that it establishes conflict jurisdiction. In fact, it doesn't. The alleged inconsistency in Cocca pertained to the jury's allocation of fault in a negligence action stemming from a motor vehicle accident. Again critically, the Second District did not decide whether the inconsistency was fundamental, or if it was, whether the general rule of waiver would still apply. Thus, Cocca also does not establish conflict jurisdiction.

Specifically, the Third District stated, "in most cases featuring inconsistent verdicts, the appropriate remedy is to remand for a new trial because the jury's intent cannot be determined from the verdict ... [T]his case constitutes one of the few exceptions to the general rule. As we have explained, the only evidence offered against the defendants related to a purported design defect, and the jury specifically found there was no design defect. Because there was no evidence to support any other cause of action, there remains no issue to be resolved on remand." See Opinion at 12-13.

Again, the cases cited by Petitioner do not address the exception recognized by the Third District in this case (and previously recognized by the Fourth and Fifth Districts); rather, the cases cited by Petitioner state only a general rule of law. In addition, the facts in this case are not substantially similar to the cases cited by Petitioner. Thus, there is no basis for conflict jurisdiction.

#### CONCLUSION

Respondents, Tricam Industries, Inc., and Home Depot, U.S.A., Inc., respectfully request this honorable Court to deny discretionary jurisdiction because the Third District's decision does not expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same

question of law.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to: **Orlando Cabeza, Esquire**, Attorneys for Petitioner, DeMahy Labrador Drake Victor Payne & Cabeza, [odcabeza@dldlawyers.com](mailto:odcabeza@dldlawyers.com); [mfernandez@dldlawyers.com](mailto:mfernandez@dldlawyers.com); **Jose M. Francisco, Esquire**, Co-Counsel for Petitioner, Jose M. Francisco, P.A., [litigationsecl@jmflawyers.com](mailto:litigationsecl@jmflawyers.com); **Roy D. Wasson, Esquire**, Co-Counsel for Petitioner, Wasson & Associates, Chartered, [roy@wassonandassociates.com](mailto:roy@wassonandassociates.com); and **Paul Kaulas, Esquire**, Co-counsel for Respondents, McVey & Parsky LLC., [pvk@mcveyparsky-law.com](mailto:pvk@mcveyparsky-law.com) on January 23, 2013.

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**CERTIFICATE OF COMPLIANCE**

WE HEREBY CERTIFY that the foregoing Answer Brief on Jurisdiction complies with the typeface and font size requirements set forth in Rule 9.210, Fla.R.App.P., in that the following font type and size was used: Courier New 12-point font.

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