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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.
_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE AND FACTS

Facts

This is a wrongful death action stemming from a ladder fall on June 3, 2006, resulting in the death of Petitioner's decedent, Roberto Coba ("Plaintiff"). The accident ladder is an AL-13 articulating ladder designed and manufactured by Respondent, Tricam Industries, Inc. ("Tricam") and allegedly sold to Plaintiff by Respondent, Home Depot U.S.A., Inc. ("Home Depot") (collectively, "Defendants").

The controlling pleading alleges claims against Defendants for strict liability (Counts I and III) and negligence (Counts II and IV). The pled theories include design defect, manufacturing defect, and failure to warn. (R. 93-103).

Prior to trial, Plaintiff served an Affidavit of a liability expert, Farhad Booeshaghi, Ph.D., P.E. (R. 340-348). In the Affidavit, Booeshaghi opined that the accident ladder contained five **design defects** that contributed to Plaintiff's fall. See Affidavit at ¶¶4, 5. Booeshaghi's Affidavit did not include any opinions concerning alleged manufacturing defects or warnings.

Defendants took the deposition of Booeshaghi on August 11, 2010. At deposition, Booeshaghi confirmed that his opinions in this action were limited to alleged **design defects**. See Booeshaghi dep. at 89 (Q. Now, your opinions in this case as reflected in your

affidavit relate to design deficiencies in this AL-13, correct? A. Yes, sir.) (R. 628-677, Ex. 2) (emphasis added). Booeshaghi expressly stated at deposition that he did not have any opinions that the ladder contained a manufacturing defect. Id. at 147 (Q. You don't have any opinion regarding manufacturing defect in this case? A. No, sir ...)(R. 628-677, Ex. 2). Booeshaghi did not render any opinions at deposition concerning the ladder's warnings. (R. 628-677, Ex. 2).

Trial and Inconsistent Verdict

A jury trial commenced in this action on August 23, 2010. At virtually every stage of the trial, Plaintiff's counsel confirmed that the claims against Defendants were limited to design defect and did not address the failure to warn or manufacturing defect allegations.

For example, one motion in limine argued by Defendants sought to exclude evidence that the accident ladder was manufactured in China. Plaintiff's counsel responded that the relevance of the evidence was that it was cheaper to manufacture products in China. Defense counsel replied that the location of the manufacturer was irrelevant because Plaintiff's only claim was design defect. The Court asked Plaintiff's counsel if it was accurate that there was no "claim that the manufacturing of this ladder is somehow defective," and Plaintiff's counsel responded that there was no

claim of a manufacturing defect. Tr. Vol. 1 at 21.

In opening argument, Plaintiff's counsel addressed the claim for design defect. He did not address any claim for negligent manufacture or failure to warn. E.g., Tr. Vol. 1 at 70, 85, 87.

Booeshaghi testified live at trial. His opinions at trial were consistent with the opinions he expressed in his pre-trial Affidavit and at deposition. Specifically, his testimony was limited to design defects. Tr. Vol. 4 at 388 to Vol. 5 at 665. He did not offer any opinion about to the ladder's manufacture or warnings.

The warnings on the accident ladder were not offered as evidence. Further, no evidence was presented that Plaintiff even read the ladder's warnings.

Defendants' expert, Jon Ver Halen, testified at trial that the proximate cause of the accident was that the ladder slipped out, unrelated to any defect in the ladder. Tr. Vol. 6 at 696. He also disputed the claim of Booeshaghi that the ladder had design defects. Tr. Vol. 6 at 708.

Just prior to closing arguments, Plaintiff's attorney withdrew on the record the claim for manufacturing defect. He further confirmed that the jury instructions would not include that claim. Tr. Vol. 6 at 739.

During closing argument, Plaintiff's counsel argued to the

jury that the ladder contained one or more design defects, and he described those design defects. Tr. Vol. 6 at 743, 752-753, 754-55, 759. Plaintiff's counsel did not argue that the ladder's warnings rendered the ladder defective or that Defendants were negligent with respect to drafting the AL13's warnings.

Plaintiff's jury instructions, which were read to the jury, included definitions of strict liability and negligence. The strict liability instructions were limited to design defect. The negligence instructions were limited to the "design, distribution, and sale" of the ladder. The jury instruction for negligence did not address failure to warn. Tr. Vol. 6 at 796-801.

Plaintiff's Verdict Form was used (R. 412-414). Questions 1 and 2 on the form were as follows:

> 1. Did Defendants, Tricam Industries and/or Home Depot, place the ladder on the market with a design defect, which was a legal cause of Roberto Coba's death.
>
> YES _____ NO _____
>
> 2. Was there negligence on the part of Defendants, Tricam Industries and/or Home Depot, which was a legal cause of Roberto Coba's death.
>
> YES _____ NO _____

The jury returned a verdict answering "NO" to Question 1 [design defect], but answering "YES" to Question 2 [negligence]. The jury also answered that Plaintiff's decedent was negligent, and it apportioned 80% of the accident "fault" to him. (R. 412-414).

Defendants' JNOV Motion

Defendants timely served a Motion to Set Aside Verdict and Any Judgment Entered Thereon and To Enter a Judgment in Accordance With Defendants' Motion for Directed Verdict ("JNOV") (R. 628-677).[1] Defendants did not file a Motion for New Trial. Defendants argued in the JNOV motion that the jury verdict was inconsistent because there could be no finding of negligence without a finding of a design defect which contributed to cause the fall. Plaintiff's response was that there was an abundance of evidence, aside from the alleged design defect, upon which the jury could have found Defendants negligent. The trial court agreed and denied Defendants' JNOV motion. (R. 1249).

Plaintiff's Motion for New Trial

Plaintiff field a Motion for New Trial on a number of grounds. (R. 581-597, 611-627). The grounds involved in this appeal are discussed herein.

Alleged Juror Misconduct:[2] The written Juror Questionnaire

[1] During the trial, Defendants had moved for directed verdict. The trial court deferred arguments on directed verdict until after jury deliberations began. Defendants argued their directed verdict motion on the morning of August 26, 2010, prior to the jury returning a verdict. The trial court denied the motion. Tr. Vol. 7 at 835.

[2] The transcript of jury voir dire appears in the Record on Appeal dated July 15, 2011 at Vol. VIII, p. 1254-1417. References to this transcript herein are to the actual transcript page.

completed by prospective jurors asked a single question about litigation history. The question was contained in number 8, which asked: "Have you or any family member ever been sued or have you sued someone else? (This includes claims made by or against you which never went to court)." The Questionnaire did not define the term "sued," and it did not otherwise explain the nature or type of information being sought.

During voir dire, the judge asked potential jurors whether they have ever "sued" or been "sued." Neither the judge nor the attorneys explained to potential jurors the nature or types of "suits" for which information was being sought. At no time did the judge or the attorneys specifically ask potential jurors whether they had been involved in any collection actions, divorce actions, foreclosure actions or commercial disputes. Plaintiff's attorney did not ask a single question of potential jurors about prior lawsuits. The only prior litigation history disclosed by any potential juror during the entire jury selection process was personal injury claims or lawsuits.[3]

[3] A potential juror (Martinez) disclosed that she was involved in a prior motor vehicle accident and was sued by an insurance company. See Tr. at 18-20. Another potential juror (Knox) disclosed that she had sued a hospital 5 years prior for personal injury from a motor vehicle accident. Id. at 21-25. Juror Suso disclosed that he sued an insurance company related to a whiplash injury in a motor vehicle accident in the mid '90's. Id. at 21, 26-27. Another potential juror (Henry-Nembhard) disclosed that he sued the insurer of the other vehicle in a motor vehicle accident, and

After jury selection, but prior to opening arguments, the judge asked counsel for both sides to "run the jurors" to ascertain whether any juror had an undisclosed litigation history. The judge's stated intent was to avoid the scenario now argued by Plaintiff on appeal. Plaintiff's counsel stated that he understood. The following exchange occurred:

> THE COURT: Are we on the record? I want to be on the record. To the parties, can I ask you, did you all have a chance to run the jurors, to run the jurors to determine whether or not there is any litigation pending that they didn't tell us about or anything like that?
>
> MR. MOWERS: No.
>
> MR. LABRADOR: No, we didn't.
>
> MR. DeMAHY: No.
>
> THE COURT: All right. Is it possible you all can contact your respective offices to do that? Because I want to know if there is something I need to be aware of now, rather than after a verdict. And the only reason that I ask this, and I started asking this during every trial, is because I had a situation where a juror --
>
> MR. DeMAHY: I've had that.
>
> THE COURT: -- was a member -- I mean, was litigating a case that they didn't tell us about. So then I got a motion for a new trial, when there was an adverse verdict for the defendant, asking me -- Because the juror failed to disclose that. And even though I'm well-versed on the case law now as it relates to that, I hope to avoid that. And so --

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he also sued his insurer related to a separate motor vehicle accident. Id. at 28-29. Alternate Juror Pimienta disclosed that he sued an office building for personal injury from faulty furniture. Id. at 30-31.

> MR. DeMAHY: *Well, they were asked, all of them, about claims that they have had and injuries that they have had. So I would think that if they have a lawsuit, that's a claim. In my mind, it was covered is what I'm, is what I'm saying to Your Honor.*[4]
>
> THE COURT: No, I know. And I understand the position, but sometimes – You see, while I have an alternate juror – Let's say that there is a juror who –
>
> MR. DeMAHY: I understand.
>
> THE COURT: -- who forgot that they were involved in an auto accident --
>
> MR. DeMAHY: I've had that.
>
> THE COURT: -- and they have, I mean, they have mediation scheduled tomorrow. Okay? Let's assume that they just forgot and they didn't tell us about it. I would like to know about that before the jury goes to deliberate, because after they start deliberating, there is nothing I can do. So if you have the ability to call your offices, give them the jurors' names to see if something comes up, I would appreciate that, as compared to me having to wait and find this out. Because you are going to run – I'm assuming that -- I assume this, I don't know if it's true, but that the party who gets an adverse verdict, whether it is the plaintiff or the defendant, may say: Let's just check these jurors out to make sure everything was copesetic. And if you are going to do that after the jury verdict, I would like you to do it before the jury verdict so that I can cure any possible taint that may exist. I'm not saying that there is any, but – And, in fact, I may even have Rene run them too –
>
> MR. DeMAHY: Okay.

(Emphasis added). At no time did Plaintiff's counsel express to the trial court any inability to conduct juror investigation prior to

[4] It is clear from this statement that Plaintiff's counsel's only concern about prior litigation was personal injury litigation.

jury submission.

Juror Gamboa did not have a history of personal injury actions. However, he may have been a party to the following domestic and commercial actions.

- A divorce proceeding in 1990, 10 years prior to trial. At the post-verdict juror interview, Juror Gamboa stated that he never had to go to a court, and although he did hire a lawyer initially, he and his wife subsequently reached an agreement without lawyer involvement. Tr. of juror interview at 32-34.

- An alleged action against Juror Gamboa by WHLNB Real Estate filed on May 24, 2000, over 10 years prior to this trial. According to the court docket, a default final judgment was entered on June 9, 2000, in the amount of $154, and the judgment was subsequently satisfied. At the juror interview, Juror Gamboa could not recall the action, and he did not recognize the name of the plaintiff. He then testified that this may have been a foreclosure action because he gave the house to his ex-wife and she stopped making the payments. Id. at 34-35, 35-36. However, in fact, the action was not a foreclosure action (it was a landlord/tenant eviction), and it does not appear that the action had anything to do with his wife. Thus, this action remains an alleged action, not a proven action.

- A “contract & indebtedness” action against Juror

Gamboa by Team Health filed on August 17, 2006, about 4 years prior to the trial. The entire amount of the debt was $491, and a default judgment was entered. At the juror interview, Juror Gamboa testified that the action was a suit to recover an emergency room bill. He claimed that he did not hire a lawyer, and he did not have to go to court; he was also unaware that a default judgment was entered. Id. at 36-38.

- A "contract & indebtedness" action filed by Chrysler Financial against Juror Gamboa on March 15, 2001. At the juror interview, Juror Gamboa testified that he and his ex-wife had bought a car together for which he was making payments. When his ex-wife got mad she returned the car to the dealership. He did not know if he had been sued in the matter, and did not think he had ever gone to court in the matter. Id. at 36, 38. In fact, the court docket reflects that Juror Gamboa was voluntarily dismissed from the action on August 3, 2001, and it appears from the court docket that Juror Gamboa was voluntarily dismissed from the action prior to service of process.

- A possible "contract & indebtedness" action filed by WS Holdings against on June 28, 2007. According to the court docket, the action was voluntarily dismissed on August 10, 2007, about a month and a half after it was filed without any litigation activity. At the juror interview, Juror Gamboa seemed to have this

action confused because he erroneously thought the action was still ongoing, which it wasn't. Id. at 39. Juror Gamboa seemed to confuse this possible action with a 2008 mortgage foreclosure action by Lasalle Bank, which, according to the court docket, was still pending.

Other Recalled Products Designed by Simpson: Plaintiff also sought a new trial based on the exclusion of evidence addressing other products designed by Dennis Simpson, Tricam's corporate designee, that had been recalled. Simpson testified at deposition that he designed two Tricam products which were recalled. One recall pertained to a Tricam pressure washer, and the other recall pertained to a Tricam toy wagon. Neither product had a defect that was similar in any way to the ladder defect(s) alleged in this action.

Impeachment of Simpson with Deposition: Plaintiff also sought a new trial based on the trial court's exclusion of Simpson's deposition testimony where Simpson expressed no opinion about whether a defectively designed or manufactured ladder could cause serious injury or death to the user. Plaintiff's argument was that the evidence was somehow relevant to Simpson's qualifications.

Ladder Manufactured in China, No Longer Sold by Home Depot, and Discontinued: Plaintiff also sought a new trial based on the trial court's exclusion of evidence that the AL-13 ladder was

manufactured in China, and was no longer sold by Home Depot, having been discontinued.

The trial court denied Plaintiff's motion for new trial. (R. 1250-1251).

Appeal

The same day the trial court denied post-trial motions, it entered Final Judgment in favor of Plaintiff (R. 1248). Defendants appealed to the Third District Court of Appeal, and Plaintiff cross-appealed the denial of the Motion for New Trial. (R. 1240-1247).

The Third District reversed the Final Judgment. The panel majority agreed with Defendants that the jury verdict was inconsistent because the jury found that the AL-13 contained no design defect and the only evidence of "negligence" pertained to the AL-13's design. The Third District also agreed with Defendants that, because the inconsistency in the verdict was fundamental, Defendants did not waive the inconsistency by failing to object prior to jury discharge. 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 both the Fifth and Fourth Districts on these exact issues. As to Plaintiff's cross-appeal, the Third District affirmed without any discussion.

Plaintiff petitioned this Court to hear the case on the basis of conflict jurisdiction. The Court accepted jurisdiction.

SUMMARY OF ARGUMENT

I. A new trial is not the proper remedy in this case for the inconsistent verdict because Defendants did not file a motion for new trial. Further, the inconsistent verdict was "fundamental" and the jury's intent could be determined from the verdict. Thus, the facts of this case fall within the exception to the general rule that a new trial is required when an inconsistent verdict occurs. The Third District's decision should therefore be affirmed.

II. Defendants did not waive the objection to the inconsistent verdict by failing to object prior to discharge of the jury because the inconsistent verdict was "fundamental". A fundamental error can be raised post-verdict by a party without waiving its objection.

A fundamental inconsistency is one that goes to the foundation of the case or to the merits of the cause of action. In Florida, no matter what theory of products liability is pursued – negligence, breach of warranty or strict liability – the plaintiff has the burden of establishing, among other things, that a defect was present in the product. Clearly, where Plaintiff's only theory of negligence was that the product contained a design defect, it was fundamentally inconsistent for the jury to find that there was no design defect but also find Defendants negligent. Accordingly, no

waiver occurred by Defendants' failure to object prior to jury discharge, and the Third District's decision should be affirmed.

III. The trial court did not abuse its discretion in denying Plaintiff's motion for new trial based on Juror Gamboa's alleged failure to disclose litigation history. Plaintiff did not establish any prong of the three-part test utilized by courts in determining whether a juror's non-disclosure of information during voir dire warrants a new trial. First, Plaintiffs did not establish that any of Juror Gamboa's alleged prior lawsuits were relevant and material to jury service in this products liability action; indeed, the alleged undisclosed lawsuits were either remote in time, resolved quickly, not personal injury and/or minor in nature. Second, Plaintiff did not establish that any juror (including Juror Gamboa) "concealed" the information during questioning. Indeed, it is clear that the all the jurors focused only on personal injury actions and failed to appreciate that "suits" included divorce proceedings, commercial actions, etc. It is also clear that Plaintiff's counsel's only interest was in personal injury actions of which Juror Gamboa had none.

Third, Plaintiff did not establish that Juror Gamboa's alleged failure to disclose litigation history was not attributable to Plaintiff's attorney's lack of diligence. Indeed, Plaintiff's attorney did not define or explain to the jurors the term "suit,"

and he did not ask a single question of jurors concerning prior litigation history.

IV. The trial court did not abuse its discretion in excluding evidence that other products designed by Simpson had been recalled or that Simpson expressed no opinion at deposition that a defective ladder can harm someone. Simply stated, these matters were irrelevant to whether the AL-13 contained a design defect, the sole issue for jury decision. Accordingly, the trial court properly excluded the evidence.

V. The trial court did not abuse its discretion in excluding evidence that the Model AL13 was made in China, that Home Depot no longer sold the Model AL-13, and/or that Tricam stopped making the Model AL-13. Again, these matters were irrelevant to whether the Model AL-13 contained a design defect. Accordingly, the trial court properly excluded the evidence.

ARGUMENT

I. A NEW TRIAL IS NOT THE PROPER REMEDY FOR THE INCONSISTENT VERDICT IN THIS CASE BECAUSE DEFENDANTS DID NOT FILE A MOTION FOR NEW TRIAL AND BECAUSE THE INCONSISTENT VERDICT WAS FUNDAMENTAL.

Plaintiff's first argument is that the proper remedy for an inconsistent verdict is a new trial. Plaintiff cites several cases supporting this position. The cases are Mike Henry, Inc. v. Donaldson, 558 So.2d 1093 (Fla. 5th DCA 1990), Spitz v. Prudential-Bache Securities, Inc., 549 So.2d 777 (Fla. 4th DCA 1989), Alvarez

v. Rendon, 953 So.2d 702 (Fla. 5th DCA 2007), Frank v. Wyatt, 869 So.2d 767 (Fla. 1st DCA 2004), MSM Golf, LLC v. Nugent, 853 So.2d 1086 (Fla. 5th DCA 2003), and Southland Corp. v. Crane, 699 So.2d 332 (Fla. 5th DCA 1997). Contrary to Plaintiff's contention, however, these cases are not applicable to "Coba" and do not constitute a ground for conflict jurisdiction for two reasons.

First, the cases are not applicable to "Coba" because, in each of the cases, the party seeking a new trial on appeal had actually filed a motion for new trial that was denied by the trial court. In contrast, Defendants filed a JNOV motion only and did not couple it with a motion for new trial. While Florida Rule of Civil Procedure 1.480 authorizes a motion for new trial to be joined with a JNOV motion or be requested in the alternative, this Rule does not require it. Further, while Plaintiff did file a motion for new trial, Plaintiff did not do so on the basis of the inconsistent verdict. Under these circumstances, where neither party filed a motion for new trial based on the inconsistent verdict, a new trial is not a proper remedy.

Second, the cases cited by Plaintiff are not applicable to "Coba" because they reflect general law and do not address the issue in the context of a fundamentally inconsistent verdict in a factually similar case. As will be shown below in Argument II, courts having considered the issue of whether a new trial should be

granted in the context of a fundamentally inconsistent verdict, in a factually similar case, have not ordered new trials. The courts have ordered judgments for the defendants. The Third District in this case referred to these types of cases as an "exception" to the general rule, stating, "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.

In sum, for the reasons stated above, the Petition should be denied.

II. DEFENDANTS DID NOT WAIVE AN OBJECTION TO THE INCONSISTENT VERDICT BY FAILING TO OBJECT PRIOR TO DISCHARGE OF THE JURY BECAUSE THE INCONSISTENT VERDICT WAS FUNDAMENTAL.

Plaintiff's second argument is that Defendants waived an objection to the inconsistent verdict by failing to object prior to discharge of the jury. Plaintiff's brief ignores a plethora of authority to the effect that a fundamentally inconsistent verdict can be raised for the first time *after* discharge of the jury and can even be raised for the first time on appeal. See generally

Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970) ("'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.").

A dispositive case notably absent from Plaintiff's brief is North American Catamaran Racing Association, Inc. (NACRA) v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1985). In NACRA, a boater was killed in a shark attack after her catamaran capsized. The boater's estate brought a products liability action against the catamaran's manufacturer alleging claims for strict liability and negligence. Both claims were based on the allegation that the manufacturer defectively designed the catamaran.

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" and the second question "Yes."

The manufacturer moved for a directed verdict, judgment notwithstanding the verdict, and new trial on the grounds that the estate failed to prove strict liability or negligence. From a denial of the motion and judgment against it, the manufacturer appealed. The Fifth District reversed, finding that the verdict was

fundamentally inconsistent "because the only evidence of negligence offered against NACRA at trial related to its alleged negligent design. But, the jury found that there was no design defect. And if that were true, there was no other evidence to sustain the jury's verdict in this case." NACRA at 671 (citations omitted). The court stated that, "[a]ccordingly, we have no alternative but to reverse the judgment and remand for entry of judgment in NACRA's favor." Id.[5]

Another dispositive case also notably absent from Plaintiff's brief is Nissan Motor Co, Ltd. v. Alvarez, 891 So.2d 4 (Fla. 4th DCA 2004). In Nissan, a motorist brought a products liability action against an automobile manufacturer after a rollover accident. The lawsuit alleged claims for strict liability and negligence. The strict liability claim was based on an alleged design defect. The negligence claim was based on the manufacturer's duty to use reasonable care in the design, manufacture, assembly, distribution, and/or sale of the vehicle. The motorist specifically alleged that the manufacturer negligently failed to give proper warnings to the purchaser concerning the vehicle's dangerous propensities.

During trial, the focus of the motorist's claim was that the

[5] The court did not order a new trial, even though a new trial motion had been filed; rather, it ordered a judgment for the defendant.

vehicle contained a design defect that made it more susceptible to "rollovers." The motorist presented a significant amount of expert testimony and evidence about the vehicle's design. The motorist argued that the vehicle was defective and that the manufacturer knew that the vehicle was defective when it sold it. Critically, the motorist presented no evidence on the negligent failure to warn issue. The manufacturer presented its own expert witnesses and evidence that the vehicle did not have a design defect.

The trial court instructed the jury on both negligence and strict liability. The negligence instruction was limited to negligent design, manufacture, assembly or distribution. The motorists did not request a jury instruction on negligent failure to warn, and no such instruction was given. The strict liability instruction was limited to 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 motorists did not submit a verdict form that included negligent failure to warn.

After deliberations, 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. In post-trial motions, the manufacturer argued that the jury's verdict was inconsistent because, under the evidence presented at trial, the jury could not have found Nissan liable for negligence while also specifically finding that there was no design defect. In response, the motorists argued that the jury's verdict was proper because there was sufficient evidence to find the manufacturer negligent for "failure to warn" which does not require a finding of a design defect. The trial court agreed with the motorists, and it specifically stated in the order denying the manufacturer's post-trial motions that it found that the motorists presented sufficient evidence and argument to establish that the manufacturer was negligent, independent of the alleged defect.

The Fourth District disagreed with the motorists and with the trial court. In pertinent part, the Fourth District stated:

> The Alvarezes' Amended Complaint alleged causes of action for both strict liability and negligence. As part of the negligence claim, the Alvarezes specifically alleged that Nissan failed to give proper warnings. However, at trial, the record reflects that the Alvarezes abandoned the failure to warn claim and instead focused entirely on the claim of a design defect. If the only evidence of negligence that the Alvarezes presented at trial related to the design defect, then the jury could not have found Nissan liable for negligence while finding that the vehicle did not contain a design defect.

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> Nissan argues that the instant case is more similar to Terex[6] and Anheuser-Busch[7] because the record evidence cannot sustain a finding of negligent failure to warn. Nissan makes two arguments in support of its appeal: 1) the Alvarezes presented insufficient evidence at trial to support their claim of a negligent failure to warn and 2) the jury was not instructed on the Alvarezes' claim of failure to warn and therefore, the jury could not find Nissan liable on that basis. We agree.
>
> .
> .
> .
>
> We agree with the reasoning of the fifth district that since there was no evidence of negligence other than negligent design, there can be no basis to sustain the jury's verdict. We therefore reverse the Final Judgment and direct the trial court to enter a judgment for the defendants.

Nissan at 6-8.

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[6] In Terex Corp. v. Bell, 689 So.2d 1122 (Fla. 5th DCA 1997), the plaintiff and his wife brought suit after he was injured operating a crane, which had been sold by the defendant. The jury found that the crane was not defective, but held the defendant 43% negligent. On appeal, the Fifth District reversed the verdict on the basis that it was inconsistent. The Fifth District stated, "[b]ecause the only evidence of negligence offered against appellant at trial related to its alleged negligent design and the jury found there was no design defect, there was no other evidence to sustain its verdict."

[7] In Anheuser-Busch, Inc. v. Lenz, 669 So.2d 271 (Fla. 5th DCA 1996), the Fifth District held that a brewer was not liable for injuries suffered by a restaurant employee when a beer bottle exploded where the jury specifically found no defect in the bottle when it was placed on the market and there was no other evidence of negligence on the part of the brewer.

The facts in "Coba" are non-distinguishable in all pertinent respects to the facts in the Fifth District's NACRA decision and the Fourth District's Nissan decision, with which the Third District aligned itself in this case. Despite the similarity of the facts, Plaintiff does not even mention NACRA or Nissan in the Brief. Instead, Plaintiff relies primarily on the Fourth District's decision in Moorman v. American Safety Equipment, 594 So.2d 795 (Fla. 4th DCA 1992).

Moorman is both distinguishable and does not control in this case for the simple reason that the plaintiff in Moorman pled negligent failure to warn (which does not require a product defect). Further, plaintiff presented evidence at trial on the warning claim, and the jury was instructed on negligent failure to warn. In addition, the alleged defect in the product for which the manufacturer purportedly had a duty to warn developed not at the time of manufacture, but subsequent to the manufacture date through ordinary use of the product. Also, only the strict liability instruction required that the defect be present "when it left the possession" of the defendant, and the general definition of product defect given to the jury in the instructions was not limited in its terms to a manufacturer's plant defect. On these facts (none of which are germane to the case at hand), the Fourth District concluded that this verdict was not inconsistent, let alone

fundamentally inconsistent, for the jury to answer "no" to the question whether the defendant placed a seatbelt on the market with a defect which was the legal cause of damage to the plaintiff, and "yes" to the question whether there was negligence on the part of the defendant which was the legal cause of damage to the plaintiff.

Given that a fundamentally inconsistent verdict was not involved, Moorman 1) does not control the outcome of this case nor 2) establish a basis for conflict jurisdiction.

Equally significant, subsequent to Moorman, the Fourth District addressed the issue of an inconsistent verdict in Nissan (discussed above) with a different result because the inconsistency in Nissan was of a fundamental nature. Addressing waiver, the Fourth District expressly acknowledged its earlier decision in Moorman, but declined to follow it; instead, the Fourth District followed the Fifth District in NACRA, concluding that the defendant did not waive the defect in the verdict by failing to object prior to discharge of the duty because the verdict was fundamentally inconsistent.[8]

[8] Plaintiff cites several other cases in this section of the Initial Brief, but none of the cases hold that a party waives a fundamentally inconsistent verdict, as opposed to an inconsistent verdict, by failure to object prior to discharge of the jury. The cases are J.T.A. Factors, Inc. v. Philcon Svcs, Inc., 820 So.2d 367 (Fla. 3d DCA 2002), Gup v. Cook, 549 So.2d 1081 (Fla. 1st DCA 1989), Progressive Select Ins. Co. v. Lorenzo, 49 So.3d 272 (Fla. 4th DCA 2010), Cocca v. Smith, 821 So.2d 328 (Fla. 2d DCA 2002), and Hendelman v. Lion Country Safari, Inc., 609 So.766 (Fla. 4th DCA

In "Coba," Plaintiff has not and can not make a persuasive argument that the subject verdict is not fundamentally 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 "Coba" is fundamental because Florida law is clear: In every products liability case, whether the case is founded on negligence, breach of an implied warranty or strict liability, the plaintiff has the burden of establishing, among other things, that a defect was present in the product. Cassisi v. Maytag Co., 396 So.2d 1140, 1143 (Fla. 1st DCA 1981); Royal v. Black and Decker Mfg. Co., 205 So.2d 307, 309 (Fla. 3d DCA 1967) ("Whatever form of liability is pursued--whether it be negligence, warranty, or strict liability--certain common denominators are inescapable. At the heart of each theory is the requirement that the plaintiff's injury must have been caused by some defect in the product. Generally, when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the manufacturer.").

Given that a defect is a required and necessary element of a products liability case, the verdict in this case is irrefutably

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1992).

fundamentally inconsistent. Accordingly, the Third District correctly ruled that no waiver occurred by Defendants' failure to object prior to 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).

It also makes no difference, as alleged by Plaintiff, whether the "negligence question" precedes or comes after the strict liability question in a case like this where the negligence allegation is based solely on the product containing a design defect. If the "negligence question" precedes the "strict liability question" and the jury answers "Yes" to the negligence question, it would be crystal clear that the jury's answer to that question was error once the jury answers "No" to the second question of whether the product contains a design defect. Given the specific nature of the second question, it would be unreasonable to conclude or

hypothesize that the answer to the second question may have been the error, which Plaintiff contends may have occurred.

Finally, this Court should reject Plaintiff's contention that Defendants (somehow) invited the error by failing to object to the verdict form prior to it being submitted to the jury. Plaintiff suggests that Defendants should have proposed a verdict form that instructed the jury not to answer the negligence question in the event it answered no to the product defect question. Plaintiff's argument is invalid because at the time the verdict form was submitted to the jury, the court had not ruled on Defendants' directed verdict motion; thus, the negligence and strict liability claims were both pending entitling Plaintiff to a jury decision on both claims. Further, Plaintiff maintained below and even through the Third District appeal that there was sufficient evidence, aside from a product defect, upon which the jury could find in favor of Plaintiff on the negligence claim. The trial court agreed, denying Defendants' directed verdict motion. As long as both claims remained for the jury to decide, the verdict form which Plaintiff now suggests that Defendants should have proposed, would have been improper and rejected.

Defendants specifically contend that, due to the fundamentally inconsistent verdict, they did not waive the objection by failing to object prior to discharge of the jury. Defendants further

contend that no conflict exists between the Third District's decision in this case and the decision of any other district court or of this Court. Thus, no basis for conflict jurisdiction exists.

III. A NEW TRIAL IS NOT WARRANTED BASED ON CONCEALMENT OF LITIGATION HISTORY BY JUROR GAMBOA BECAUSE THE INFORMATION WAS NOT RELEVANT AND MATERIAL TO JURY SERVICE, JUROR GAMBOA DID NOT CONCEAL THE INFORMATION DURING QUESTIONING, AND ANY FAILURE TO DISCLOSE BY JUROR GAMBOA WAS ATTRIBUTABLE TO PLAINTIFF'S COUNSEL'S LACK OF DILIGENCE.

In De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995), the Florida Supreme Court approved a three-part test utilized by lower courts in determining whether a juror's non-disclosure of information during voir dire warrants a new trial. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, the complaining party must establish that the juror concealed the information during questioning. Third, the complaining party must establish that the juror's failure to disclose the information was not attributable to the complaining party's lack of diligence.

Materiality: Pursuant to De La Rosa's first prong, the complaining party must establish not only that the non-disclosed matter was "relevant," but also that it is material to jury service in the particular case at hand. Roberts v. Tejada, 814 So.2d 334, 339 (Fla. 2002). A juror's non-disclosure of information is considered material where the omission of the information prevented counsel from making an informed judgment – which would in all

likelihood have resulted in a peremptory challenge. De La Rosa at 242; Roberts at 341 (nondisclosure is considered material if it is substantial and important so that if the facts were known, the moving party may have been influenced to peremptorily challenge the juror from the jury); McCauslin v. O'Connor, 985 So.2d 558, 561 (Fla. 5th DCA 2008) ("Omitted information has been considered relevant and material where it implies a bias or sympathy for the other side which in all likelihood would have resulted in the use of a peremptory challenge.").

In ascertaining whether a juror's prior litigation history is material, the court can consider several factors. These factors include remoteness in time, the character and extensiveness of the litigation experience, and the juror's posture in the litigation.

> Remoteness in time is one aspect to consider in determining the impact, if any, of a juror's prior exposure to the legal system on his present ability to serve in a particular case. See, e.g., Leavitt, 752 So.2d at 732 (Fla. 3d DCA 2000) (concluding that the juror's undisclosed collection claim, which had arisen more than ten years previously, was not material); D'Amario, 732 So.2d at 1146 (Fla. 2d DCA 1999) (determining that undisclosed litigation regarding collection claims which occurred almost twelve years prior to the present lawsuit were remote and not material), quashed on other grounds, D'Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001); Bernal, 580 So.2d at 316 (determining that the plaintiff was entitled to a new trial where a juror failed to disclose that he had been a defendant in a personal injury case one year previously). Other factors may include the character and extensiveness of the litigation experience, and the juror's posture in the litigation. See De La Rosa, 659 So.2d at 241 (holding that the trial court did not err in granting a new trial based on juror

> misconduct where the foreman had not responded to inquiries in voir dire about prior lawsuits, even though he had been a party in six cases, involving debt collections and the dissolution of his marriage); Garnett, 767 So.2d at 1231 (recognizing as pertinent to its De La Rosa analysis the fact that, because the juror had been in the position of being, in effect, a potential defendant in his prior insurance claim experience, it appeared likely that he would have been more sympathetic to the defense than to the plaintiff); Bernal, 580 So.2d at 316 (For a plaintiff in a personal injury case, the failure of a juror to disclose that he had been a defendant in a personal injury case one year previously would be material.).

Roberts at 342-43.

Numerous cases establish that not all prior litigation history is material to warrant a new trial. An example is Birch v. Albert, 761 So.2d 355, 358 (Fla. 3d DCA 2000), a medical malpractice action. In Birch, the Third District held that a juror's involvement in a collection action that was quickly resolved was not material. In so doing, the Third District made clear that "[m]ateriality must be analyzed on a case-by-case basis," and that an automatic new trial is not mandated "whenever there has been a nondisclosure of litigation information." Birch at 359.

Another example is Leavitt v. Krogen, 752 So.2d 730 (Fla. 3d DCA 2000), wherein the Third District held that a juror's collection claim was not material to a medical malpractice action, and her failure to disclose the information in voir dire did not warrant new trial based on juror misconduct. The court explained that, "[t]he claim arose more than ten years previously. As all

collection disputes are generally favorable to the plaintiff, the outcome of the action was not material to this case." Leavitt at 732.

As another example, in Public Health Trust of Miami-Dade County v. Metellus, 948 So.2d 4 (Fla. 3d DCA 2006), the Third District held that a juror's failure to reveal, in response to a voir dire question asking whether she had ever been involved in a lawsuit, that she had been in a divorce and was the subject of collection efforts by creditors did not warrant a new trial in a medical malpractice action. The court's first explanation was that, "in the absence of any definition of 'lawsuit' which would, as in Roberts v. Tejada, 814 So.2d 334 (Fla. 2002), include such proceedings, there was no deliberate misstatement by the juror which would justify relief under De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995)." Public Health Trust at 5. The court's second explanation was that "there was no showing, as is also required, that counsel would have exercised a peremptory challenge against the juror had he been given the information in question. Id. (citation omitted).

As another example, in Parra v. Cruz, 59 So. 3d 211 (Fla. 3d DCA 2011), the Third District rejected a claim in an automobile negligence action that every single juror's nondisclosure of litigation history warranted a new trial. The Third District stated

that, "Respondents are unable to show how the prior litigation history of these jurors is material to the present action. They claimed that every juror had concealed all types of prior litigation relating to himself or herself and family members, including divorce actions, paternity actions, contract indebtedness actions, eviction proceedings, probate proceedings and criminal matters. The respondents rely on the misplaced notion that any prior litigation history coming to light after trial is grounds for a new trial. This is an untenable position." Parra at 213.

A final example is Simon v. Maldonado, 65 So.3d 8 (Fla. 3d DCA 2011. In Simon, Third District reversed the trial court's grant of a new trial on the basis of a juror's alleged nondisclosures. The Third District stated, "it cannot be said that [juror] Subaran's failure to disclose prior litigation deprived the Maldonados of a fair and impartial trial. It cannot be said that the allegedly undisclosed legal claims—two of which were liens, two were minor-collection related suits and two were mortgage foreclosures—were relevant or material to this case." Simon at 11-12.[9]

[9] Other Florida district courts have held similarly. E.g., Ford Motor Company v. D'Amario, 732 So.2d 1143, 1146 (Fla. 2d DCA), reversed on other grounds, D'Amario v. Ford Motor Company, 806 So.2d 424 (Fla. 2001) (The court concluded that a juror's failure to disclose three workers' compensation claims and a $1,000 lawsuit over a real estate transaction that occurred 12 years prior was not material in a crashworthiness case against a car manufacturer. The court held that the plaintiffs were not entitled to a new trial, in part, because "these matters are not material as they are remote in

Concealment: With respect to concealment, the second prong of the De La Rosa test, this Court has stated that:

> It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the voir dire process. Again, as with the concept of materiality, analysis of a single question or series of questions may or may not provide an answer. The information disclosed by other prospective jurors may be as important in any particular inquiry by counsel, because the dynamics and context of the entire process may define the parameters of that which should be disclosed.

Roberts at 345-46. "Information is considered concealed for purposes of the three part test where the information is 'squarely asked for' and not provided." Birch v. Albert, 761 So.2d 355, 358 (Fla. 3d DCA 2000) (citations omitted).

An illustrative case is McCauslin v. O'Connor, 985 So.2d 558, 561 (Fla. 5th DCA 2008). In McCauslin, The court held that there was

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time" and "small in amounts."); Gamsen v. State Farm Fire & Cas. Co., 68 So. 3d 290 (Fla. 4th DCA 2011) (a personal injury action, wherein the plaintiffs appealed the trial court's grant of a new trial to the defendants on the basis of alleged non-disclosure of prior litigation history by two jurors. The plaintiffs first argued on appeal that the information omitted by the two jurors was not material. The Fourth District stated that, "[t]he test is not simply whether information is relevant and material in general, but whether it is 'relevant and material to jury service in the case.'" Gamsen at 293 (quoting Roberts v. Tejada, 814 So. 2d 334, 340 (Fla. 2002) (quoting De La Rosa, 659 So. 2d at 241). The Fourth District then noted that Juror Two filed a domestic violence petition in 2000, nine years before the trial in this case, and she had been involved as a juror in a domestic violence action. The Fourth District stated that, "[n]ot only are the two cases dissimilar in nature, they are remote in time. It is highly unlikely the UM carrier would have peremptorily challenged Juror Two on this basis. Juror Two's nondisclosure was not material to jury service in this case.").

no concealment by two jurors that had been involved in prior automobile accidents. The court explained that, "[s]everal individuals clearly had information that was not drawn out by the broad and general questions asked by plaintiff's counsel. Overall, the record suggests that Jurors Rivers or Mitchell did not so much conceal their prior accidents as fail to appreciate that disclosure was required." McCauslin at 562.

Another illustrative case is Birch v. Albert, 761 So.2d 355 (Fla. 3d DCA 2000). In Birch, a juror failed to disclose that she had been sued for non-payment of a $1,000 anesthesiologist bill. While the jurors were asked if they had ever been a party to a lawsuit, the only explanation provided of the term "lawsuit" was, at one point during questioning, where one juror was asked more specifically whether she had ever brought a lawsuit or was sued by anyone as a result of a car accident or other incident. As observed by the trial judge, it is likely that the juror that failed to disclose the collection action was misled as to the type of litigation being questioned about because, the emphasis in the questioning during voir dire by both the plaintiff and the defendant was about the jurors' views of medical negligence, their knowledge and experience with premature or problem deliveries, and, by defense counsel, whether the jurors would be swayed by sympathy for the brain damaged child.

Due Diligence: “The [De La Rosa] ‘due diligence’ test requires that counsel provide a sufficient explanation of the type of information which potential jurors are being asked to disclose, particularly if it pertains to an area about which an average lay juror might not otherwise have a working understanding. Thus, resolution of this ‘diligence’ issue requires a factual determination regarding whether the explanations provided by the judge and counsel regarding the kinds of responses which were sought would reasonably have been understood by the subject jurors to encompass the undisclosed information.” Roberts at 343. “[A]ttorneys must be mindful in this process to ask such questions in terms which an average citizen not exposed to a panoply of legal processes would be capable of understanding. Trial counsel must take special care during the interrogation process to explain in a lay person's terms all the types of legal actions which may be encompassed by the term ‘litigation, or other similar words commonly used by attorneys.” Roberts at 344. “The failure to make sufficient inquiries about the lawsuits or claims which the juror was being asked to disclose may constitute a lack of due diligence under the third prong of the test.” McCauslin at 563.

In most cases where the courts held that the due diligence requirement was met, the court or attorneys specifically explained to the jurors that “lawsuits” included not just personal injury

actions, but also included collection actions, contract actions, commercial disputes, foreclosure actions, divorces, etc. For example, in De La Rosa, there were several questions during voir dire regarding involvement in prior lawsuits. The questions specifically included whether the jurors were involved in "a commercial dispute where you have been involved as a litigant."

Another example is Roberts, where during voir dire questioning, the trial judge initially stated: "I'll ask you ... have you been a party to a lawsuit. What I mean by that is, have you brought a court action against somebody else seeking money from them or if someone brought an action against you, seeking money from you. And it could be because of an auto accident, breach of contract, many other things, divorces and what not. But let me know if you have been a party, a plaintiff or defendant, in a case yourself or maybe a close family member has been involved in a lawsuit. Let me know that as well." Thereafter, immediately before the plaintiff's attorney questioned each potential juror, he said: "He [the judge] asked you if you had ever been a party to a lawsuit. And again, the reason isn't to embarrass you, because you know when you were in the lawsuit, you may have won and you thought it was great or you lost, thought it stunk. Or you may have been a defendant and think all the plaintiffs are out to get their money or you may have been a plaintiff and thought otherwise. It's really

important what you bring to the stand on this issue. So I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, any kind of lawsuit, a divorce, a collection of a debt, a breach of contract, an assault and battery, an auto accident, a defective product, a medical negligence case, such as this case, a divorce, anything at all."

This Case: In "Coba," the trial court was correct and did not abuse its discretion in denying Plaintiff's motion for new trial because Plaintiff failed to establish any of the three De la Rosa requirements for a new trial.

- First, Plaintiff did not establish that any of Juror Gamboa's alleged prior lawsuits were relevant and material to jury service in this products liability action; indeed, the alleged undisclosed lawsuits were either remote in time, resolved quickly, not personal injury and/or minor in nature.

- Second, Plaintiff did not establish that Juror Gamboa "concealed" the information during questioning; indeed, it is clear that the all of the jurors focused only on personal injury actions and failed to appreciate that "suits" included divorce proceedings, commercial actions, etc. It is also clear from the exchange between the trial court and Plaintiff's counsel's that Plaintiff's counsel's only interest was in personal injury actions of which Juror Gamboa had none.

- Third, Plaintiff did not establish that Juror Gamboa's alleged failure to disclose litigation history was not attributable to Plaintiff's attorney's lack of diligence; indeed, Plaintiff's attorney did not define or explain to the jurors the term "suit," *and he did not ask even a single question of jurors concerning prior litigation history*. It is self-serving for Plaintiff's counsel to claim post-verdict that he would have struck Juror Gamboa had he known of Juror Gamboa's litigation history. Plaintiff's trial counsel, an experienced litigator, knew or should have known that jurors often don't understand the scope of a general question about litigation history. If litigation history was so important to counsel that he would have preemptory challenged a juror with a history of litigation, he would have questioned jurors in detail about the subject. At a minimum, he would have investigated the litigation history of the selected jurors during trial, as the trial court instructed the attorneys.

In sum, Defendants contend that the trial court did not abuse its discretion in denying Plaintiff a new trial based on juror misconduct.[10] Accordingly, the petition should be denied.

IV. THE JURY WAS NOT MISLED BY THE EXCLUSION OF EVIDENCE THAT OTHER PRODUCTS DESIGNED BY SIMPSON HAD BEEN RECALLED OR BY THE REFUSAL TO ALLOW IMPEACHMENT OF SIMPSON WITH HIS DEPOSITION

[10] An order refusing to grant a new trial is reviewed for abuse of discretion. Southwin, Inc. v. Verde, 806 So.2d 586 (Fla. 3d DCA 2002); Michelin Tire Corp. v. Milbrook, 799 So.2d 248 (Fla. 3d DCA 2001).

TESTIMONY.

Recalls: Plaintiff argues that the jury should have been permitted to hear evidence of recalls of other products designed by Simpson because the other recalls are somehow relevant to Simpson's competence and Tricam's alleged inadequate quality control procedures, and to refute Tricam's argument at trial that compliance with ANSI standards rendered a product non-defective. Plaintiff's arguments are unpersuasive for several reasons.

First, Plaintiff withdrew the claim that the accident ladder contained a manufacturing defect making Tricam's quality control procedures irrelevant. Also, Tricam's argument with respect to ANSI standards was simply that the subject ladder complied with the standards, which even Plaintiff's expert admitted. Defendants did not argue that compliance with ANSI rendered a product non-defective. Finally, it is hard to conceive how an unrelated product recall could have any bearing on whether the subject product was defective. Bizzle v. McKesson Corp., 961 F.2d 719, ,721-22 (8th Cir. 1992) ("Assuming, without deciding, that the Bizzles had sufficient evidence to prove that Carl's cane was manufactured by Acorn, there was minimal evidence to suggest that Carl's cane was the same model that Acorn recalled. The recall's minimal probative value was easily outweighed by the dangers of unfair prejudice to Acorn and of misleading the jury caused by the very real

possibility that Carl's cane was not subject to the recall. We therefore conclude the district court did not err in refusing to admit evidence of the recall.").

In sum, the trial court did not abuse its discretion in excluding evidence of unrelated product recalls.[11] Accordingly, the denial of Plaintiff's motion for new trial should be affirmed.

Impeachment of Simpson: At deposition, Simpson expressed no opinion about whether a defectively designed or manufactured ladder could cause serious injury or death to the user. However, at trial, Defendants conceded that point. Plaintiff contends that the exclusion of Simpson's deposition testimony on that issue warrants a new trial because the testimony is somehow relevant to Simpson's qualifications.

The trial court's decision should be affirmed because the evidence, in reality, has no bearing on Simpson's qualifications. In addition, the evidence is improper impeachment as an inadmissible opinion of a non-expert witness. Also, any error in exclusion was harmless. Defendants conceded the obvious at trial

[11] "The admissibility of evidence lies within the sound discretion of the trial court. The trial court's discretion is broad, and the decision to admit evidence will not be reversed unless there is a clear abuse of discretion." Hernandez v. State, 979 So.2d 1013, 1016 (Fla. 3d DCA 2008) (citations omitted). The standard of review for a trial court's decision to limit cross-examination is also abuse of discretion. McCoy v. State, 853 So.2d 396 (Fla. 2003).

that a defective ladder can cause serious injury or death. Thus, the denial of a new trial based upon upon this issue should be affirmed.

V. THE JURY WAS NOT MISLED BY THE EVIDENCE EXCLUSION THAT THE LADDER WAS MADE IN CHINA, AND NO LONGER SOLD BY HOME DEPOT, AND WAS DISCONTINUED

Plaintiff argues that the manufacture of the ladder in China was relevant to quality control. Defendants disagree that the location of a product's manufacture, in and of itself, has any bearing whatsoever on "quality control." Arlington Industries, Inc. v. Bridgeport Fittings, Inc., 2009 WL 2950644 (M.D.Pa. 2009) (excluding evidence that the product was manufactured in China as not relevant to any issues in dispute).

More importantly, quality control has no bearing upon whether a product is defectively designed as opposed to defectively manufactured. Plaintiff's only claim at trial was that the ladder was defectively designed. Plaintiff's counsel admitted this at trial in arguing the relevance of the ladder being manufactured in China. Tr. Vol. 1, 21 (The Court: Is there any evidence that the manufacturing of this ladder in any way – Well, is there a claim that the manufacturing of this ladder is somehow defective? Mr. Demahy: No. But I don't think that's the probative issue ...).

Plaintiff also argues that the trial court erroneously excluded evidence that Home Depot stopped carrying the Tricam AL-13

articulating ladder and that Tricam discontinued manufacturing the ladder because the exclusion prevented the jury from seeing the entire history of the "dangerous product" involved in this case. The fallacy in Plaintiff's argument is that there was no evidence establishing that Home Depot's decision to stop selling the AL-13 was related to any defect, let alone the product defect alleged in this action. Further, the evidence established that Tricam stopped manufacturing the AL-13 because Home Depot stopped selling the AL-13, not because of any defect in the product.

Univ. of Miami, Inc. v. Spunberg, 784 So. 2d 541 (Fla. 4th DCA 2001), cited by Plaintiff for the proposition that "the jury should have been presented with the entire truthful picture of the history of the dangerous product in this case," is entirely irrelevant. Univ. of Miami is not a products liability action and does not stand for the proposition that a jury should be apprised of the entire history of a product. Rather, Univ. of Miami is an action by a physicians' professional association for breach of contract and tortious interference with business relationship against a hospital.

In addition, Plaintiff's quote of Univ. of Miami is taken entirely out of context. The issue in Univ. of Miami was whether the trial court erred in not allowing the defendants to impeach a doctor of the professional association with a letter stating that

the association was allowed to reapply for staff privileges. The appellate court held that the trial court abused its discretion in excluding the evidence because the letter refuted the doctor's testimony, that he was never offered an opportunity to apply for a position.

As can readily be seen, Univ. of Miami has no bearing on whether the trial court in this action abused its discretion in excluding evidence that Home Depot stopped selling the AL-13 articulating ladder and/or that Tricam discontinued manufacturing the ladder. Univ. of Miami is the only legal authority cited by Plaintiff for their claim of error

The trial court did not abuse its discretion in excluding evidence that the accident ladder was manufactured in China, Home Depot stopped carrying the AL-13 articulating ladder, and Tricam discontinued manufacturing the ladder. Accordingly, the judgment appealed should be affirmed.

CONCLUSION

Respondents, Tricam Industries, Inc., and Home Depot, U.S.A., Inc., respectfully request this honorable Court to enter an Order dismissing this appeal for lack of conflict jurisdiction, or alternatively, affirming the Third District decision.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail on March 21, 2014, to:

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Initial Brief 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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