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Supreme Court of Florida

CASE NO. SC12-2624

DIANA COBA as Personal Representative of the Estate of ROBERT COBA, deceased,

Petitioner,

v.

TRICAM INDUSTRIES, INC., and HOME DEPOT, U.S.A., INC.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of the wrongful death of Roberto Coba, who died following a fall from an extension ladder manufactured by the Defendant Tricam Industries, Inc. ("Tricam") and sold by the Defendant Home Depot, U.S.A., Inc. ("Home Depot"). Mr. Coba, a civil engineer, was using the ladder as intended to perform a roof inspection on a home when the accident occurred. Tr. 107-10. After Mr. Coba had climbed the ladder, his fourteen year-old step-son Inri heard a metallic sound, and looked up to see the ladder bending in toward the wall. Tr. 140. With his thirteen year-old daughter Dorsey and her brother Inri watching in horror, Mr. Coba fell backwards to the concrete patio behind the house. Tr. 118-21. Inri tried to break the fall with his hands, "but he came down too fast and his weight was too much for [Inri] to hold." Tr. 122.

Mr. Coba landed on his back on the concrete floor, hit his head and was rendered unconscious. Tr. 123. His panicked daughter tried to call 911, but she was crying and had difficulty speaking after seeing her father's fatal fall. Tr. 124. Paramedics eventually arrived and transported Mr. Coba and the children to the hospital. Tr. 125. The children's mother (Mr. Coba's wife), the Plaintiff Diana Coba, met them at the hospital. Tr. 126. Mr. Coba lingered in a coma for ten days before dying from his injuries. Tr. 209.

It was Plaintiff's position at trial that the ladder failed due to the presence of defects and Defendants' negligence. Mr. Coba's step-son Inri Ochoa testified that there was no debris and nothing slippery on the concrete where Mr. Coba set up the ladder. Tr. 114. The concrete was not broken or uneven. Tr. 114.

Plaintiff's expert, Dr. Booeshaghi, is an accident reconstructionist with degrees in mechanical engineering, metal deformation, and biomechanics. Tr. 390. It was his opinion that the accident was caused by the ladder not locking in position, although appearing to be, which is called a "false lock." The failure to lock caused the ladder to telescope. Tr. 609.

Dr. Booeshaghi testified that the patent on the ladder indicated crossbars to increase the rigidity of the ladder's side rails, but the ladder did not have these braces. Tr. 448. Dr. Booeshaghi testified that the ladder was in a fully extended position and "that there is no way the ladder kicked out with it being in a fully extended position." Tr. 484. Dr. Booeshaghi stated that the pins from the J-locks can appear to be inserted in the outer rail, but not be in the locked position. The J-locks would still "click" as if in a locked position. Tr. 490-91. Because the ladder would still (at least temporarily) hold a person's weight, the user has a false sense of security—the ladder has a hidden danger. Tr. 492, 497.

Dr. Booeshaghi actually demonstrated the false locking mechanism to the jury,

placing the J-locks in the position where they appeared to have locked but were not. Tr. 490. He climbed up the ladder in front of the jury to demonstrate how it would hold a person's weight (at least temporarily) without being locked. Tr. 491.

When the ladder carries the user's load, the outside rail may be locked, but the inside rail is not and starts telescoping downward. Tr. 504. This caused the ladder to bounce like a pogo stick, fall forward while throwing Mr. Coba backward. The J-locks must not have been locked or else the accident would not have happened. Tr. 521. Dr. Booeshaghi testified that the Defendants should have warned the public that the ladder false-locks. Tr. 605.

Defendants' expert Ver Halen testified to his opinion that there was no design defect, and that the accident was caused by the ladder slipping. Tr. 663.

The jury returned a verdict in favor of the Defendants on Plaintiff's strict liability claim, finding that the Defendants did not "place the ladder on the market with a design defect, which was a legal cause of Roberto Coba's death." R.III-412. The jury returned a verdict in favor of the Plaintiff on her claim for negligence, but apportioned 80% comparative negligence to Roberto Coba. R.III-413. Neither party lodged an objection to the verdict as being inconsistent before the jury was discharged.

After the verdict, Plaintiff's counsel investigated the litigation history of the

jurors; found evidence that four of the jurors had concealed significant prior litigation; and filed a Motion to Interview Jurors. R.IV-598. The Plaintiff also filed a Motion for New Trial or for Additur. R.IV-611. The Motion for New Trial was based in part on the juror nondisclosures. R.IV-613.

The Defendants filed a Motion to Set Aside Verdict and to Enter Judgment in Accordance with Motion for Directed Verdict. R.IV-628.

The trial court granted Plaintiff's Motion to Interview Jurors, and the jurors in question were interviewed. SR. 1.[1] In those interviews, juror Willy Gamboa admitted to being a party in at least five prior lawsuits not disclosed during voir dire, including at least two that were still ongoing at the time of trial.

A lawsuit filed against Mr. Gamboa that he did not disclose in voir dire was a case filed by a medical provider called Team Health, an emergency room which had treated Mr. Gamboa for an injury to his back in 2006. SR. 37. That lawsuit against him was still ongoing at the time of the jury interview. SR. 38.

Another case involving Mr. Gamboa was a divorce proceeding filed in 1990. SR. 32. Although he hired a lawyer at the beginning of that case, it was resolved by agreement so he did not have to attend court. SR. 33.

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[1] "SR" refers to the transcript of the October 6, 2010 interview of jurors, with which the record was supplemented by the order of the Third District dated November 29, 2011. No supplemental index was prepared by the clerk.

When asked about a case that appeared to be a mortgage foreclosure, Mr. Gamboa did not at first recall the name of the plaintiff, WHLN Real Estate, but he surmised that it was the holder of his mortgage. SR. 34. When asked if he had a case involving his home back in 2000, he responded: "I have had situations involving my home every year . . . [f]or something, or for some other reason." SR. 35. He then recalled that the case back in 2000 was the foreclosure of the mortgage on the house he had transferred to his ex-wife. SR. 35-36.

A fourth case was a suit against him by Chrysler Financial Corporation arising out of a defaulted auto loan on a car he and his ex-wife had bought jointly. SR. 36. Mr. Gamboa was unsure whether that case was still ongoing, but he indicated that he thought it was still active because his ex-wife called him to report that "they are all calling me" in connection with that lawsuit. SR. 38.

A fifth undisclosed lawsuit was a mortgage foreclosure case on Mr. Gamboa's current home filed by WS Holding Company. SR. 39. Mr. Gamboa had hired and fired two lawyers to defend him in that case, and most recently was representing himself because his latest lawyer "wasn't giving [him] the results that [he] wanted." Another foreclosure case involving Mr. Gamboa was filed by LaSalle Bank in 2008.

Judge Thomas asked Mr. Gamboa why he did not disclose those cases during voir dire; and he responded: "I didn't recall that. I couldn't recall all of them." SR.

40. When asked specifically whether he recalled the cases that were still pending at the time of trial, the juror said: "Not at that moment. I wasn't thinking of what do I have pending or not. I was thinking about, what am I getting into?" SR. 41.

At the close of the juror interviews, Judge Thomas read into the record the question from Mr. Gamboa's jury questionnaire: "Have you or any family member ever been sued?" SR. 41. His response was "No." SR. 42. During voir dire, Judge Thomas also had asked all of the panel members about their prior litigation history; the question, answered "No" by Mr. Gamboa was this: "And second row, have any of you ever been sued?" R.VIII p. 1271.

A hearing was held on the parties post-trial motions. R.VIII p.1418. The first ground argued on Plaintiff's Motion for New Trial was the juror nondisclosures. R.VIII p.1420. Plaintiff's trial counsel who had conducted voir dire represented "as an officer of the court that I definitely would have struck Mr. Gamboa" peremptorily, if he had truthfully revealed his litigation history, including the fact that he was still a party in ongoing lawsuits. R.VIII p.1434.

The trial court denied Plaintiff's Motion for New Trial (R.VII p.1250), denied Defendants' Motion to Set Aside Verdict (R.VII p.1249), and granted an additur in the amount of the medical bills: $179,739. R.VII p. 1253. After reduction by 80% comparative negligence, that resulted in a total judgment of $349,947.80. R.VII

p.1248. Defendants accepted the additur, and both parties appealed.

On appeal, the Third District reversed the denial of Defendants' motion for a directed verdict, holding both that the objection to the inconsistent verdict was not waived–because the inconsistency was "fundamental"–and that the proper remedy was not a new trial, but entry of judgment in favor of Defendants, as follows:

> After the verdict was read, neither the plaintiff nor the defendants objected to the verdict. . . . [T]he defendants filed a motion to set aside the verdict and to enter judgment in accordance with their motion for a directed verdict. . . .
>
> At the hearing, . . . the defendants argued that the verdict should be set aside because the jury's finding of negligence was fundamentally inconsistent with its finding that there was no design defect. Specifically, the defendants argued that there was insufficient evidence to sustain a verdict of negligence given that all of the plaintiff's evidence at trial related to the ladder's purported defective design, and the jury found that the ladder did not have a design defect. . . .
>
> On appeal, the defendants argue that the jury's finding of negligence was fundamentally inconsistent with its finding that there was no design defect because there was insufficient evidence presented to sustain a verdict of negligence with respect to anything other than a design defect. Thus, the defendants argue the trial court erred in denying the defendants' motion to set aside the verdict in accordance with their motion for a directed verdict. We agree.
>
> "In reviewing a trial court's denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the nonmoving party." *Miami-Dade Cnty. v. Asad*, 78 So. 3d 660, 663-64 (Fla. 3d DCA 2012). A denial of a motion for a directed verdict must be reversed "if there is 'no evidence upon which the jury could legally base a verdict' in favor of the non-moving party." *Id*. at

664 (quoting *Posner v. Walker*, 930 So. 2d 659, 665 (Fla. 3d DCA 2006)).

The plaintiff concedes that the verdict in this case was inconsistent, but argues that the defendants waived their objection to the inconsistency by failing to object before the jury was discharged. Normally, we would agree. The Fourth and Fifth District Courts of Appeal, however, have carved out an exception to this general rule where the inconsistency "is of a fundamental nature." *See Nissan Motor Co. v. Alvarez*, 891 So. 2d 4, 8 (Fla. 4th DCA 2004); *Am. Catamaran Racing Ass'n (NACRA) v. McCollister*, 480 So. 2d 669, 671 (Fla. 5th DCA 1985). Because we agree with the well-reasoned opinions of our sister courts to the north, and because there is no case in this district which has held to the contrary, we adopt the "fundamental nature" exception as applied in this context.

* * *

Similarly, in *Alvarez*, the Fourth District rejected the plaintiffs' argument that the defendants waived their challenge to an inconsistent verdict by failing to object before the jury was discharged, adopting the fundamental nature exception articulated in *NACRA*. *Alvarez*, 891 So. 2d at 8. *Alvarez* is on "all-fours" with the instant case.

Alvarez and her husband sued Nissan alleging claims of (1) strict liability based on a design defect and (2) negligence based on the design, manufacture, assembly, distribution, and/or sale of the vehicle, and failure to properly warn purchasers concerning the vehicle's dangerous propensities. Despite these allegations in the complaint, the plaintiffs at trial confined their proof of negligence solely to the claim of a negligent design defect. The plaintiffs presented no evidence on the issue of negligent failure to warn or the other theories raised in the complaint.

The jury was presented with a verdict form nearly identical to those presented in *NACRA* and the instant case, which required the jury to answer the following questions:

> 1. Did the Defendants . . . place the Nissan Pathfinder on the market with a defect which was the legal cause of damage to the Plaintiff, Andrea Alvarez?
>
> 2. Was there negligence on the part of the Defendants . . . which was a legal cause of damage to the Plaintiff, Andrea Alvarez?

Id. at 6. The jury returned a verdict finding that there was no design defect, but that Nissan was negligent.

The Fourth District reversed, holding that the verdict was fundamentally inconsistent, reasoning as follows:

> 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.

Id.

In rejecting the plaintiffs' argument that the defendants waived their objection to the inconsistent verdict by failing to object before the jury was discharged, the Fourth District: noted the fundamental nature exception recognized by the Fifth District in *NACRA*; found the facts in *NACRA* analogous; concluded that, as in *NACRA*, the inconsistency was of a fundamental nature; and reversed the judgment and remanded for entry of judgment in the defendants' favor. *Id*. at 8.

In this case, like in *Alvarez*, the plaintiff alleged claims of strict

liability and negligence based on manufacturing and design defects, the distribution and sale of the products, and failure to warn, but then limited the presentation of evidence at trial solely to the product's purported design defect. The plaintiff did not elicit any testimony regarding a manufacturing or warning defect, did not introduce the warnings on the ladder into evidence, did not proffer evidence regarding negligence in the sale or distribution of the ladder, and expressly withdrew her manufacturing defect claim prior to closing arguments. Additionally, the jury was not instructed on either manufacturing defect or warning defect standards. Nevertheless, like in *Alvarez*, the jury returned a verdict finding that there was no design defect while also finding that the defendants were negligent. As in *Alvarez*, we conclude such a finding was fundamentally inconsistent because, "[i]f the only evidence of negligence [the plaintiff] presented at trial related to the design defect, then the jury could not have found [the defendants] liable for negligence while finding that the [product] did not contain a design defect." *Id*. at 6.

In sum, we agree with the analysis and holdings in* NACRA *and* Alvarez*. We hold that a party does not waive a challenge to a purported inconsistency in a verdict by failing to object prior to the discharge of the jury when the inconsistency is of a "fundamental nature." Applying this reasoning to the case at bar, we hold that, given the jury's determination that there was no design defect, a finding of negligence is fundamentally insupportable because the only evidence of negligence proffered by the plaintiff related to a negligent design.

As the dissent emphasizes, 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. *See Grossman v. Greenberg*, 619 So. 2d 406, 409 (Fla. 3d DCA 1993) ("We remand for a new trial on the damages because we find the jury verdict inconsistent and the jury's intent cannot be determined from the verdict."); *see also Spitz v. Prudential-Bache Sec., Inc*., 549 So. 2d 777, 779 (Fla. 4th DCA 1989). However, this 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. We therefore reverse the trial court's denial of the defendants' motion to set aside the verdict in accordance with its motion for a directed verdict, and instruct the trial court to enter judgment in favor of the defendants. *See NACRA*, 480 So. 2d at 671.

Tricam Inds, Inc. v. Coba, 100 So. 3d 105, 108-112 (Fla. 3d DCA 2013)(emphasis added).

The Third District also affirmed the denial of a new trial based upon the jury non-disclosure issue, agreeing with the trial court that the Plaintiff failed to satisfy the "due diligence" prong of the inquiry. *Id*. at 114. The court held that one of the reasons why the Plaintiff failed to establish due diligence was that the Plaintiff did not during trial "run the jurors' litigation histories before the end of the trial" using computerized database records. *Id*. The court did not address the other arguments made for reversal in the opinion.

SUMMARY OF THE ARGUMENT

The Third District erroneously ordered a directed verdict for the Defendants based upon the inconsistent verdict. The remedy for an inconsistent verdict should be grant of a new trial.

In the event that this Court does not accept the Petitioner's argument that the proper remedy for an inconsistent verdict is a new trial, then this Court should reverse the Third District's holding that the objection to the inconsistent verdict was not

waived because the inconsistency was fundamental. This Court should not recognize an exception to the preservation requirement of timely objection to an inconsistent verdict based upon a "fundamentally inconsistent" verdict. Therefore, if this matter is not reversed for a new trial, the judgment in favor of the Plaintiff for the amount awarded by the jury (plus the additur) should be reinstated.

This Court should order a new trial based upon the concealment by juror Gamboa of his significant litigation history, including cases against him still pending at the time of trial. The Third District's conclusion that the "due diligence" prong was not met, in part because the Plaintiff did not investigate the jurors' litigation history during trial, conflicts with this Court's holding in *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002) that parties have until the time for filing a motion for new trial to investigate jurors' prior litigation history.

The Third District erred in affirming the trial court's denial of a new trial based upon the exclusion of evidence that other products designed by Tricam's Dennis Simpson had been recalled due to defects and by affirming the trial court's refusal to allow impeachment of Mr. Simpson with his deposition testimony.

The Third District also erroneously affirmed the trial court's rulings excluding evidence of the history of the ladder being made in China, because it could be made more cheaply there, and that it was a product no longer sold by Home Depot.

ARGUMENT

I.

THE PROPER REMEDY FOR AN INCONSISTENT VERDICT IS GRANT OF A NEW TRIAL INSTEAD OF A JUDGMENT IN FAVOR OF DEFENDANTS

Should this Court adopt the "fundamentally inconsistent" exception to the error preservation requirement of a timely objection before discharge of the jury, the Court should resolve the conflict between the districts on the proper remedy when an inconsistent verdict is returned by holding that a new trial is required. Where a special interrogatory verdict has two conflicting answers it is arbitrary to presume that the correct answer (the one that accurately reflects the jury's resolution of the disputed issue) is the answer that came first in time.

The decision under review conflicts with cases including *Mike Henry, Inc. v. Donaldson*, 558 So. 2d 1093, 1095 (Fla. 5th DCA 1990)("These findings are fatally inconsistent under any view of the evidence. Clearly, either the jury misunderstood the evidence or the instructions or both, and the court should have granted the motion for new trial"); *Spitz v. Prudential-Bache Securities, Inc.*, 549 So. 2d 777, 779 (Fla. 4th DCA 1989)("A new trial is proper when a verdict appears to be inconsistent and the intent of the jury cannot be determined"); *Alvarez v. Rendon*, 953 So. 2d 702 (Fla. 5th DCA 2007)(proper remedy for inconsistent jury verdict in breach of employment

contract action by physician and counterclaim by employer was new trial); *Frank v. Wyatt*, 869 So. 2d 773, 774 (Fla. 1st DCA 2004)("because . . . the verdict was legally inadequate and inconsistent, the trial court should have granted [defendant's] motion for a new trial on damages"); *MSM Golf, L.L.C v. Nugent*, 853 So. 2d 1086, 1087 (Fla. 5th DCA 2003)("As the verdict was patently inconsistent, either party was, as the trial court correctly observed, entitled to a new trial"); *Southland Corp. v. Crane*, 699 So. 2d 332, 334 (Fla. 5th DCA 1997)(finding "the verdict is clearly contradictory" and thus "[a] new trial is required on all issues").

The grant of a directed verdict is inappropriate because there was evidence from which the jury could have found negligence, making it just as likely that the finding of no defect was the erroneous one. It is no more likely that the jury erred in finding negligence than it is that the jury erred in finding the lack of a defect in the product. Both of those propositions are equally logical and permissible.

If the questions had been reversed on the verdict form and the jury had answered "yes" to the question of negligence first, but "no" to the question of whether there was a defect, the proposition that a directed verdict is the proper remedy would require a directed verdict for the Plaintiff on the strict liability count because of the preclusive effect of the finding of negligence. That makes no more sense than a determination that the Defendant is entitled to a directed verdict when the order of the

questions was reversed. It is impossible to tell which of the findings was correct, so the only appropriate remedy where a verdict is inconsistent is the grant of a new trial.

II.

DEFENDANTS WAIVED ANY OBJECTION TO THE INCONSISTENT VERDICT BY FAILING TO OBJECT AND REQUEST FURTHER DELIBERATIONS BEFORE THE JURY'S DISCHARGE

In the event that this Court should not reverse the Third District's decision to order a directed verdict based upon the inconsistency in the verdict, then this Court should address the question whether the Defendants' objection to the inconsistent verdict was properly preserved. The Defendants waived any possibility of review of the denial of their motion for directed verdict because the Defendants failed to object to the alleged inconsistent verdict before the jury was discharged. The Defendants also waived any objection by agreeing to the verdict form that the trial court used. Therefore, the trial court correctly entered judgment in favor of the Plaintiff on the negligence count and in favor of the Defendant on the strict liability count.

"A contention that a jury verdict is inconsistent must be raised at the time the verdict is read and before the jury is released in order to allow an opportunity to cure." *J.T.A. Factors, Inc. v. Philcon Svcs, Inc.,* 820 So. 2d 367, 371 (Fla. 3d DCA 2002). The Third District's decision in this case conflicts with decisions of other

courts holding that "[t]he law is clear that, where no objection is made to a defective verdict form or inconsistent verdict before the jury is discharged, any defect or inconsistency is waived." *Gup v. Cook*, 549 So. 2d 1081, 1083 (Fla. 1st DCA 1989).

This case is like *Moorman v. American Safety Equip.*, 594 So. 2d 795 (Fla. 4th DCA 1992), in which the jury answered "no" to this question: "Did defendant place a seatbelt on the market with a defect which was a legal cause of damage to [Moorman]?" That jury also answered "yes" to the question: "Was there negligence on the part of [ASE] which was a legal cause of damage to [Moorman]?" *Id.* at 798. The trial court granted defendant's motion for new trial based on that inconsistency, noting in the order as follows:

> The basis for granting a new trial on the issue of liability is that the Jury's finding in response to question 3(a) of the Verdict to the effect that the Defendant, American Safety Equipment Corporation, did not place a seat belt on the market with a defect is irreconcilably in conflict with its findings in response to questions 3(b) and 5 of the Verdict to the effect that there was negligence on the part of American Safety Equipment Corporation, which was the legal cause of the damage to Plaintiff. ***Defendant, American Safety Equipment Corporation, could not have been negligent in manufacturing and distributing a seat belt which was not defective*** when shipped.

Id. (Emphasis added).

On appeal from the grant of a new trial, the Fourth District reversed, holding that the verdict was not inconsistent, and holding that even if it was inconsistent, the

issue of the inconsistent verdict had been waived by failure of the defendant to object before the jury was discharged. The court also rejected the argument that an exception to the waiver requirement should be recognized where the inconsistency in the verdict was "fundamental," stating as follows:

> ***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.

ASE counters that *Robbins* should not control because the inconsistency in this verdict is "fundamental", citing *North American Catamaran Racing Ass'n v. McCollister,* 480 So.2d 669 (Fla. 5th DCA 1985), *rev. denied,* 492 So.2d 1333 (Fla. 1986). There, the court excused a failure to make a contemporaneous objection by holding that the inconsistency was "fundamental". 480 So.2d at 671. The Fifth District

> did not explain what it meant by "fundamental", and no definition can be gleaned from the rest of its decision. Curiously, the court cites our *Robbins* decision for this proposition, but there is really nothing in it to support the citation. In fact the only place where the fundamental concept is even mentioned is in our observation that the issue did not involve "bias or prejudice on the part of the jury, nor does it involve issues of a constitutional or fundamental character." *Robbins,* 404 So.2d at 771.
>
> That hardly represents an explicit decision by this court to carve out a "fundamental" exception to the rule requiring action while the jury is still in court.

Id. at 799 (emphasis added).

The requirement of a timely objection has a long history in Florida jurisprudence. As noted by the Fourth District in *Progressive Select Ins. Co. v. Lorenzo*, 49 So. 3d 272 (Fla. 4th DCA 2010), this Court first enunciated the preservation requirement decades ago:

> We first address preservation. Looking back over almost eighty years of Florida case law reveals a consistent goal of ensuring that "the intent of the jury in rendering the verdict may fairly and with certainty be gleaned from the words used . . . ." *Gen. Motors Acceptance Corp. v. Judge of Circuit Court*, 102 Fla. 924, 136 So. 621, 622 (Fla. 1931). To that end, Florida courts have required any objection to the form of the verdict to be made before the discharge of the jury to allow correction of a correctable error. *Higbee v. Dorigo*, 66 So. 2d 684, 685 (Fla. 1953). When that verdict is rendered and "no objection appears to have been made to the form of verdict when the same was presented to the court, the form thereof was waived." *General Motors*, 136 So. at 622. This requirement has withstood the test of time and remains the law today. *See Atl. Coast Line R. Co. v. Price*, 46 So. 2d 481, 483 (Fla. 1950); *Dep't of Transp. v. Stewart*, 844 So. 2d 773, 774 (Fla. 4th DCA 2003);

> *Moorman v. Am. Safety Equip*., 594 So. 2d 795, 799 (Fla. 4th DCA 1992).

Id. at 276.

The reason for a rule requiring a timely objection is one of judicial economy. "This procedure allows the jury an opportunity to 'correct' the inconsistency." *Cocca v. Smith*, 821 So. 2d 328, 330 (Fla. 2d DCA 2002)(reversing trial court's grant of a new trial and remanding for reinstatement of the jury verdict where inconsistent verdict not preserved by timely objection before jury discharged).

There can be no principled manner in which the courts could deem one sort of inconsistent verdict "fundamentally inconsistent," while determining that other inconsistent verdicts are not "fundamentally inconsistent" and still subject to the preservation requirement. In order to meet the definition of an inconsistent verdict (as opposed to a merely inadequate verdict), the jury's finding on one count or aspect of the case has to be negated by the jury's finding on another aspect of the case.

For example, in *Hendelman v. Lion Country Safari, Inc.*, 609 So. 766 (Fla. 4th DCA 1992), the jury awarded the plaintiff damages for future pain and suffering but awarded zero damage for the plaintiff's past intangible damages. On appeal from the judgment in favor of the plaintiff awarding only future damages, the Fourth District affirmed based upon the appellant's failure to object the inconsistent verdict before

the jury was discharged. There could be nothing more fundamental than the inconsistency between awarding future intangible damages without an award of past damages, but the court recognized that the preservation requirement still applied. The only rule that makes sense is a rule that makes a timely objection to an inconsistent verdict in every case. Otherwise, parties are going to be left with the unanswerable question whether the inconsistency is "fundamental." Parties and trial courts should not be left to guess on a case-by-case basis.

Finally, if the verdict was fundamentally inconsistent, that error was invited by Defendants, who made no objection to the verdict form prior to it being submitted to the jury. Any assumed fundamental inconsistency could have been prevented by an instruction after the first question on the verdict form to the effect that–if the jury found no defect in the ladder–the jury should not answer the question concerning whether there was negligence on the part of the Defendants. Therefore, for two reasons,the Defendants' objection to the verdict as being inconsistent was waived.

III.

A NEW TRIAL IS REQUIRED DUE TO CONCEALMENT BY JUROR GAMBOA OF HIS RELEVANT LITIGATION HISTORY

This Court should reverse the Third District's ruling denying a new trial on all issues as a result of the nondisclosure by juror Willy Gamboa of his prior litigation

history. In light of the materiality of his undisclosed litigation history—including his participation in at least two pending cases at the time of trial of this case—the trial court abused its discretion[2] in denying Plaintiff's motion for new trial. The Third District's affirmance of that ruling places it in conflict with decisions of this Court and of other districts.

A juror's litigation history is a critical factor in ascertaining a juror's capability of being fair and impartial during the course of a trial. Thus, even if that history involves a different type of case, it is relevant and material to jury service. *See De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995)("A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general.").

A juror must furnish complete and truthful answers during voir dire and avoid false statements of facts and concealment of material matters, because full knowledge of all material and relevant matters is essential to a party's ability to challenge the juror for cause or peremptorily. A juror who conceals such information or makes false misrepresentations is guilty of misconduct; prejudicing a party by impairing his right to challenge. *See De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995).

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[2]"The standard of review for a motion for new trial based on a juror's alleged non-disclosure during voir dire is abuse of discretion." *State Farm Fire & Cas. Co. v. Levine*, 875 So. 2d 663, 666 (Fla. 3d DCA 2004).

There are three factors to consider when granting a new trial due to juror nondisclosure. First, the party requesting a new trial must show that the undisclosed information is relevant and material to jury service in the case. *De La Rosa v. Zequeira,* 659 So.2d 239, 241 (Fla. 1995).

That materiality prong does not mean that the undisclosed cases must involve similar claims or issues as the case on which the juror sits. *See Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002). In *Wilcox v. Dulcom*, 690 So. 2d 1365 (Fla. 3d DCA 1997), reversal was warranted where a juror failed to disclose that she had been involved in a collections dispute and a party in a domestic action. Although the action concerned personal injury arising from an automobile accident, the court held that "[t]he litigation history of a potential juror is relevant and material to jury service, even if that history involves a different type of case." *Id.* at 1366.

Instead, this materiality prong focuses on whether the attorneys would likely have stricken the juror, had the truth been known. "A juror's nondisclosure of information during voir dire is considered material if it is so substantial that, if the facts were known, the defense [or plaintiff] likely would peremptorily exclude the juror from the jury." *Murray v. State*, 3 So. 3d 1108, 1121-22 (Fla. 2009) (quoting *McCauslin v. O'Conner*, 985 So. 2d 558, 561 (Fla. 5th DCA 2008)). The focus should be on what counsel "would have done during voir dire had the litigation

history been disclosed." *Fine v. Shands Teaching Hops. & Clinics, Inc.*, 994 So. 2d 426, 427-28 (Fla. 1st DCA 2008).

As confirmed at the hearing on post-trial motions by attorney Pete Demahy, who handled jury selection in this case—it is clear that the Plaintiff would have exercised a peremptory strike on juror Gamboa, who had been sued several times in prior litigation and was an active litigant at the time of this trial. Such a person who has been sued many times would be likely to sympathize with the Defendant, and likely has a jaded view of the civil justice system as a whole. Further, whether or not Mr. Gamboa in misrepresenting his litigation experience actually held a bias or prejudice for one side or the other, the Plaintiff would certainly strike him and any other juror who did have the intelligence or honesty to accurately answer the questions posed concerning prior lawsuits by or against them.

Next, the complaining party must prove that the juror concealed the information. *De La Rosa* at 241. This Court need only compare the answers given by Mr. Gamboa on the juror questionnaire and at voir dire to the answers elicited at the juror interviews held on October 6, 2010, for proof of concealment.

The party seeking a new trial based on juror nondisclosure need not demonstate any intent by the juror to deceive the parties and the trial court. "[A] juror's nondisclosure need not be intentional to constitute concealment." *Roberts v. Tejada*,

supra, at 343. Thus, even if Mr. Gamboa was telling the truth when he claimed to have forgotten about the many cases he was involved with in the past, such innocent misrepresentations are just as material as knowingly false statements.

The third prong requires that the party show that the failure to disclose was not due to the party's lack of diligence. *Id.* Here, the trial court requested that the attorneys not repeat questions already answered on the questionnaire and by the court. R.III-423-24. The court then asked the jurors: "Have any of you been sued?" R.III-434. Mr. Gamboa unequivocally answered in the negative. R.III-435; RVIII-1271. Following the court's instructions, the attorneys did not question the jurors further as there was no indication that clarification or elaboration was necessary.

The Third District determined that the Plaintiff failed to satisfy the "due diligence" prong based in part on the Plaintiff's failure to "run" the jurors' litigation history during trial. In *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002), this Court reversed the Third District insofar as it held that a check of jurors' litigation history had to be accomplished prior to the end of the trial. This Court noted that "[t]he trial lawyer cannot be expected to be both in the courtroom presenting a case and at the same time at a different location, or even in a different location of the same courthouse at the same time." Therefore, the questioning of Juror Gamboa during voir dire and Plaintiff's filing of the challenge to juror non-disclosure within the ten

day period for a motion for new trial satisfied the diligence prong.

The Plaintiff amply satisfied the three-prong test for a new trial based on juror concealment. Therefore, the Third District's affirmance of the denial of a new trial should be reversed.

IV.

THE JURY WAS MISLED BY THE EXCLUSION OF EVIDENCE THAT OTHER PRODUCTS DESIGNED BY DEFENDANTS' CORPORATE REPRESENTATIVE SIMPSON HAD BEEN DUE TO RECALLED DEFECTS AND BY THE REFUSAL TO ALLOW IMPEACHMENT OF SIMPSON WITH HIS DEPOSITION TESTIMONY

A. Introduction:

The jury was not allowed to hear evidence that Dennis Simpson, who had designed the ladder involved in this case, had designed other products which had been recalled due to safety defects. Tr. 23-29. Further, the Plaintiff was unfairly prevented from impeaching Mr. Simpson with his deposition testimony, in which he refused to concede that a defective ladder can cause serious injury or death.

B. Other Recalled Products Designed By Mr. Simpson:

Apart from designing the defective ladder involved in this case, Mr. Simpson also testified about two other products, a pressure washer and toy wagon, that he designed and tested at Tricam, both of which were manufactured in China and recalled by the US Consumer Products Safety Commission ("CPSC") because they

were defective. Tr. 24. The trial court granted Defendants' motion in limine seeking to exclude that testimony. Tr. 25, 29.

Mr. Simpson was the person at Tricam with the most knowledge of his company's quality control procedures as well as the only person responsible to make sure that the factories in China were manufacturing Tricam's products in accordance with the design specifications and standards.

This Court should grant a new trial because the evidence concerning these recalled products was relevant on the issue of Mr. Simpson's lack of competency as a design engineer, along with Tricam's inadequate quality control procedures. The evidence also was relevant to refute Tricam's argument below that compliance with ANSI standards rendered a product non-defective. The other recalled products designed by Mr. Simpson met ANSI standards, but were dangerous and defective.

C. Precluding Plaintiff From Impeaching Simpson with Deposition:

At trial Defendants conceded that a defective ladder can indeed cause serious injuries or death. However, that was contrary to the deposition testimony of Tricam's representative who designed the ladder in question. In his deposition, Mr. Simpson offered the preposterous position that he had no opinion whether "a ladder that fails can cause serious injury to the user." Tr. 177. When asked again whether he would "agree that a product that is—a ladder that is defectively manufactured can cause a

serious injury," Mr. Simpson refused to concede the obvious and disingenuously stated: "I find that as a hypothetical case and I can't respond to that." Tr. 178. He likewise stated that he had no response to the question whether a ladder that is defectively designed and/or manufactured can cause death. Tr. 178. The jury should have been allowed to hear that deposition testimony, which was directly relevant to the lack of qualifications of Mr. Simpson. The Plaintiff was unfairly prejudiced by the trial court's ruling preventing impeachment of Mr. Simpson with that deposition testimony. The Third District erroneously affirmed that ruling.

V.

THE PLAINTIFF WAS PREJUDICED BY THE EXCLUSION FROM EVIDENCE OF THE HISTORY OF THE LADDER AS BEING MADE IN CHINA, NO LONGER SOLD BY HOME DEPOT AND DISCONTINUED

The jury in this trial was given only part of the picture of the history of the ladder that failed, killing Mr. Coba. The complete picture, unknown to the jury, was that the ladder was manufactured in China, far from Defendant's American facilities, where Defendant had no ability to monitor its production for quality control and safety. Tr. 15. Tricam bought ladders made in China because they were cheaper to manufacture there. Tr. 20. The jury did not know that Home Depot no longer carried the model of ladder as a product for sale, and that its manufacture had been

discontinued. The Plaintiff was unfairly prejudiced by these evidentiary limitations imposed by this Court.

The jury should have been presented with the entire truthful picture of the history of the dangerous product involved in this case. *See generally, University of Miami v. Spunberg*, 784 So. 2d 541, 547 (Fla. 4th DCA 2001)(where "the jury was not given a complete picture of what really happened . . . the court abused its discretion in excluding the evidence").

CONCLUSION

WHEREFORE, the Third District Court of Appeal erroneously ordered a directed verdict in favor of the Defendants, judgment below should be reversed and a new trial be ordered on all issues. In the alternative, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by email upon Jeffrey Mowers, Counsel for Respondents, Lewis Brisbois Bisgaard & Smith, LLP, jmowers@lbbslaw.com, 200 SW 1st Avenue, Suite 910, Fort Lauderdale, FL 33301; Paul Kaulas, Co-counsel for Respondents, Kaulas, McVey & Parsky, LLC, pvk@mcveyparsky-law.com, 30 North LaSalle Street, Suite 2100, Chicago, IL, 60602; Jose M. Francisco, Co-counsel for Petitioner, Jose M. Francisco, P.A., litigationsec1@jmflawyers.com, 5757 Blue Lagoon Drive, Suite 230, Miami, FL 33126; Orlando Cabeza, Co-counsel for Petitioner, DeMahy Labrador Drake Victor Payne & Cabeza, odcabeza@dldlawyers.com, mfernandez@dldlawyers.com, 150 Alhambra Circle, Penthouse, Coral Gables, FL 33134; on this the 3d day of February, 2014.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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