

IN THE SUPREME COURT OF FLORIDA

CASE NO.
LOWER COURT CASE NO. 4D03-383

UNION CARBIDE CORPORATION,

Petitioner,

vs.

YVES J. LAGUEUX,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

FERRARO & ASSOCIATES, P.A.

4000 Ponce De Leon Blvd.

Suite 700

Miami, FL 33146

-and-

PODHURST ORSECK, P.A.

25 West Flagler Street, Suite 800

Miami, Florida 33130

(305) 358-2800 / Fax (305) 358-2382

By: JOEL S. PERWIN

Fla. Bar No. 316814

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE AND FACTS	3
III. SUMMARY OF THE ARGUMENT	3
IV. ARGUMENT	3

NO FLORIDA CASE HAS EVER ADDRESSED THE ASSERTED PROPRIETY OF A RETRIAL ON APPORTIONMENT WHEN THE TRIAL COURT ERRONEOUSLY INCLUDED NON-PARTIES ON THE VERDICT FORM.

V. CONCLUSION

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE AND TYPE SIZE AND FONT

TABLE OF CASES

	Page
<i>Blinn v. Florida Department of Transportation</i> , 781 So. 2d 1103 (Fla. 1st DCA 2001)	2
<i>Fabre v. Marin</i> , 623 So. 2d 1182 (Fla. 1993)	2
<i>Gross v. Lyons</i> , 763 So. 2d 276 (Fla. 2000)	4
<i>Marriott International, Inc. v. Perez-Melendez</i> , 855 So. 2d 624 (Fla. 5th DCA 2003)	2
<i>Massey v. State of Florida</i> , 760 So. 2d 956 (Fla. 3rd DCA 2000)	2
<i>Schindler Elevator Corp. v. Viera</i> , 693 So. 2d 1106 (Fla. 3rd DCA), <i>review denied</i> , 700 So. 2d 687 (Fla. 1997)	3

I
INTRODUCTION

Union Carbide's sole basis for seeking discretionary review is an argument which it did not raise in the district court until its motion for rehearing. At no time did Union Carbide ever ask the district court for a new trial re-apportioning fault, should the district court accept Mr. Lagueux's contention that he was entitled to a directed verdict on the asserted fault of non-parties Johns-Manville and Phillip Carey.^{1/} Although Union Carbide asserts in its closing footnote (Jurisdictional Brief at 7 n. 2) that it "did request the specific relief of a new trial," the arguments which it advanced on appeal in support of a new trial--the same arguments which it had advanced below--did *not* include the contention which it raised for the first time on rehearing, and now raises in this Court. At no time on appeal did either side challenge the jury's apportionment of 10% fault to non-party Georgia-Pacific, or suggest in any context that a new jury on remand should reallocate Georgia-Pacific's fault. As we argued in opposition to the motion for rehearing, arguments raised for the first time on rehearing

^{1/} Union Carbide's contention (Jurisdictional Brief at 4) that the district court's disposition "created a new factual question: how fault should be apportioned [on remand]"--is nonsense. That question was created at the trial level the minute the Plaintiff moved for a directed verdict on the asserted fault of Johns-Manville and Phillip Carey, without objecting to the inclusion of Georgia-Pacific on the verdict form. It was also inherent in Mr. Lagueux's appeal on the issue of Johns-Manville's and Phillip Carey's fault.

are waived.^{2/}

In any event, there is no merit to Union Carbide's new argument. The only cited decision in which the district court ordered a reapportionment of fault on remand is one in which the trial court had refused to permit a *Fabre* assignment of fault to one or more non-parties,^{3/} and a retrial therefore was necessary to determine the percentage, if any, of those excluded non-parties' fault. There is no decision governing a case like this one, in which the trial court's error was the *inclusion* of non-parties on the verdict form, and the jury *did* make an apportionment to every party and non-party assertedly at fault. Here, the jury fully considered all the evidence of non-party Georgia-Pacific's asserted contribution, as a percentage of the universe of fault causing Mr. Lagueux's injury, and assigned that contribution 10%. The erroneous inclusion of non-parties Johns-Manville and Phillip Carey has nothing whatsoever to

^{2/} See *Marriott International, Inc. v. Perez-Melendez*, 855 So.2d 624 (Fla. 5th DCA 2003); *Blinn v. Florida Department of Transportation*, 781 So.2d 1103 (Fla. 1st DCA 2001); *Massey v. State of Florida*, 760 So.2d 956 (Fla. 3rd DCA 2000).

Union Carbide's citation to the trial transcript (Jurisdictional Brief at 6-7) is not only inappropriate in a jurisdictional brief, but is misplaced. Despite an offhand comment during argument on the post-trial motions, Union Carbide at no time raised this issue in the post-trial motions; at no time did it move, in writing or verbally, for an alternative new-trial ruling in the event this Court should agree that a directed verdict for the Plaintiff was appropriate; and at no time did it secure a ruling on any such alternative motion. In any event, the dispositive point is that no such issue was raised on appeal.

^{3/} *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).

do with the jury's liquidation of Georgia-Pacific's 10% fault. And as the sole Defendant, Union Carbide by definition is responsible for everything else. It is not surprising, therefore, that Union Carbide did not raise this issue on appeal. And in any event, there is certainly no district court decision which directly addresses it, and thus could create inter-district conflict warranting this Court's review.

II **STATEMENT OF THE CASE AND FACTS**

Union Carbide's statement (brief at 1-2) is correct.

III **SUMMARY OF THE ARGUMENT**

We have summarized the argument in the Introduction.

IV **ARGUMENT**

NO FLORIDA CASE HAS EVER ADDRESSED THE
ASSERTED PROPRIETY OF A RETRIAL ON
APPORTIONMENT WHEN THE TRIAL COURT
ERRONEOUSLY INCLUDED NON-PARTIES ON THE
VERDICT FORM.

The controlling response is that Union Carbide did not raise this issue until its motion for rehearing in the district court. Under the authorities cited already, that was too late. Moreover, its assertion of inter-district conflict is incorrect.

Union Carbide cites a single Third District decision, *Schindler Elevator Corp. v. Viera*, 693 So.2d 1106, 1107 (Fla. 3rd DCA), *review denied*, 700 So.2d 687 (Fla.

1997), which required a new trial because an asserted *Fabre* non-defendant had been *omitted* from the verdict form: “[W]here a jury has been prevented from properly considering apportionment because a *Fabre* nonparty was erroneously omitted from the verdict form, the solution is a new trial limited to the apportionment issues” But Union Carbide’s restatement of this holding adds a critical extension which the Third District Court never considered or addressed (Jurisdictional Brief at 5) (emphasis added): “[W]here an appellate court decides to exclude *or permit* a party or non-party on the verdict form for purposes of apportionment of liability, the apportionment calculation necessarily changes, and if apportionment decisions are to be made by a jury, the court has no choice but to order a new trial on apportionment.” This extrapolation of the *Schindler* holding is Union Carbide’s invention. It is neither found nor implied in *Schindler*.

Nor is it a logical extension of *Schindler*. When the trial court has erroneously omitted asserted *Fabre* non-parties from the verdict form, a new trial is inescapable, so that a jury can consider the asserted fault of those non-parties; and if they are found to have been at fault, the jury must re-allocate fault. But it hardly follows that when the trial court has erroneously *included* asserted *Fabre* non-parties on the verdict form, a new trial on remand is required, whether or not there may be other non-parties whose assignment of fault was not affected by the district court’s disposition. This is because, under settled principles, a defendant found liable is responsible for all of the plaintiff’s damages, except to the extent that the jury apportions fault to a non-party.

See Gross v. Lyons, 763 So.2d 276, 279 (Fla. 2000).

Here the jury considered the universe of conduct which assertedly caused Mr. Lagueux's injuries, and concluded that Georgia-Pacific was responsible for 10% of that injury. That judgment was supported by the evidence, and neither party challenged it either at trial or on appeal. Under Florida law, in the absence of any other non-party properly on the verdict form (which was the district court's disposition), Defendant Union Carbide is legally responsible for 90% of the damages. And in any event, neither the *Schindler* decision nor its underlying reasoning speaks at all to this question, and thus there is no basis for the assertion of conflict jurisdiction.

V
CONCLUSION

It is respectfully submitted that the Petition for Review by this Court should be denied.

Respectfully submitted,

FERRARO & ASSOCIATES, P.A.

4000 Ponce De Leon Blvd.

Suite 700

Miami, FL 33146

-and-

PODHURST ORSECK, P.A.

25 West Flagler Street, Suite 800

Miami, Florida 33130

(305) 358-2800 / Fax (305) 358-2382

By: _____

JOEL S. PERWIN

Fla. Bar No. 316814

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed February _____, 2004, to all counsel of record on the attached service list.

JOEL S. PERWIN
Fla. Bar No. 316814

CERTIFICATE OF COMPLIANCE AND TYPE SIZE AND FONT

I certify that this brief complies with the type-volume limitation set forth in Florida Rule of Appellate Procedure 9.210(a). This brief is typed in Times New Roman 14.

JOEL S. PERWIN, ESQ.
Fla. Bar No. 316814

SERVICE LIST

Michelle J. Cole, Esq.
Alston & Bird, LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000

John H. Pelzer, Esq.
Ruden, McClosky, Smith, Schuster & Russell, P.A.
200 E. Broward Blvd., 15th Floor
P.O. Box 1900
Ft. Lauderdale, FL 33302

David Venderbush, Esq.
Alston & Bird, LLP
90 Park Avenue
New York, NY 10016-1387