IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC05-418
L.T. CASE NO. 4D03-2138

ANDREA ROBIN ALVAREZ and
KEVIN R. ALVAREZ,

Petitioners,

vs.

NISSAN MOTOR CO., LTD., a
foreign corporation; et
al.,

Respondents.
______________________________/

BRIEF OF PETITIONERS ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On October 17, 1997, Andrea Alvarez was driving on the highway in her 1993 Nissan Pathfinder. She inadvertently drove off the roadway and when she steered to re-enter the roadway, the vehicle rolled onto the driver's side. Andrea was injured in the accident, which resulted in her left arm being amputated at the elbow (A1).

Andrea and her husband sued Nissan Motor Co. Ltd., Nissan Motor Corp. In U.S.A., and Vernon Scott Motors (collectively "Nissan") in a lawsuit claiming that the accident was caused by a design defect in that the vehicle lacked "rollover immunity" (A1). That claim was pursued under two causes of action: 1) strict liability based on a design defect that made the vehicle unreasonably dangerous and 2) negligence based on Nissan's duty to use reasonable care in the design, manufacture, assembly, distribution, and/or sale of its vehicle (A1). Part of the negligence claim was that

Nissan negligently failed to warn of the vehicle's rollover propensities (A1-2).

At trial, the Alvarezes presented a significant amount of evidence that the Pathfinder contained a design defect that caused it to have an unreasonably dangerous rollover propensity. The Alvarezes also presented proof of negligent design (A2,4).

The jury was instructed on negligence and strict liability, and was asked to determine whether the Pathfinder had a design defect that made it unreasonably dangerous, and whether Nissan was negligent (A2). Neither the jury instructions nor the verdict form informed the jury that if it found no defect, it was to proceed no further (A2). The jury's verdict found no design defect, but negligence (A4). Nissan did not object to the verdict as being inconsistent prior to the jury's discharge (A4). The jury also found Nissan 51% at fault and Andrea 49% at fault, and awarded Andrea $3,057,000 and her husband $415,000 (A4).

Post-trial, Nissan argued for the first time that the verdict was inconsistent, claiming the jury could not find Nissan liable for negligent design when it found no design defect (A2). The Alvarezes argued that the verdict was consistent because, in addition to proving Nissan's negligent design, they also proved its negligent "failure to warn," which was not based upon a design defect. The trial court agreed and entered judgment for the Alvarezes, reduced by Andrea's percentage of fault (A2).

The Fourth District found no evidence of Nissan's failure to warn (A2), thus the verdict could not be affirmed as "consistent." Although the court found the verdict inconsistent, it did not reverse for a new trial. The court ruled that the jury could not find Nissan negligent, although Plaintiffs had proven negligent design, since the jury had found no design defect (A2), and reversed for judgment in favor of Nissan (A4). While the Fourth District recognized Florida case law holding that a party waives its

challenge to a verdict's inconsistency by failing to object before the jury is discharged, the court instead chose to follow a so-called "exception" to that general rule, espoused by the Fifth District in North Am. Catamaran Racing Ass'n Inc. ("NACRA") v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1985) (A4). The Fourth District agreed with NACRA that: (1) a jury's verdict finding no design defect, but negligent design in a products liability case, is a "fundamental inconsistency" that does not have to be objected to before the discharge of the jury in order to be preserved for appellate review, and; (2) such "fundamental inconsistency" in a products liability case requires reversal for entry of judgment in favor of the defendant manufacturer, instead of a new trial (A4). Accordingly, the Fourth District reversed the judgment in favor of the Alavarezes for entry of judgment for Nissan (A4).

SUMMARY OF ARGUMENT

The so-called exception to the general rule adopted in NACRA, and followed by the Fourth District, is nothing more than an express and direct conflict with: (1) cases requiring an objection to a verdict's inconsistency before the jury is discharged in order to preserve the inconsistency for appeal, and; (2) cases holding that when a verdict is inconsistent, and the jury's intent is unclear, a new trial is required.

ARGUMENT

I. The Fourth District's Decision Conflicts with Cases Which Hold That the Failure to Object to a Verdict's Correctable Inconsistency Before the Jury Is Discharged Waives the Right to Challenge the Inconsistency on Appeal

A. Conflict with Cases Requiring an Objection to an Inconsistent Verdict Before the Jury Is Discharged

The Fourth District's decision excusing Nissan's failure to object to the inconsistent verdict before the jury was discharged, is contrary to this State's well-established case law requiring such objection to preserve the inconsistency for appellate review. Cowart v. Kendall United Methodist Church, 476 So.2d 289, 290

(Fla. 3d DCA 1985); Gup v. Cook, 549 So.2d 1081 (Fla. 1st DCA 1989); Alamo Rent-A-Car, Inc. v. Clay, 586 So.2d 394, 395 (Fla. 3d DCA 1991); Cowen v. Thornton, 621 So.2d 684, 688 (Fla. 2d DCA 1993), Judge Altenbernd's concurring opinion; Simpson v. Stone, 662 So.2d 959, 961 (Fla. 5th DCA 1995); Beverly Health & Rehab. Services, Inc. v. Freeman, 709 So.2d 549, 551-52 (Fla. 2d DCA 1998); C.G. Chase Constr. Co. v. Colon, 725 So.2d 1144, 1145 (Fla. 3d DCA 1999).

In Cowart, in footnote 2, the Third District stated that inconsistency situations are particularly appropriate for enforcing the preservation requirement, because if the jury had been allowed to reconsider its verdict, it might have resolved the conflict adversely to the party complaining on appeal. The failure to seek jury reconsideration of an inconsistent verdict is regarded as a conscious choice of strategy to avoid the risk of having the jury unfavorably change its verdict, which effects a binding waiver.

The Fourth District decision directly and expressly conflicts with the above cases, which it refused to apply, stating that they merely set forth the "general rule."[1] Instead, the court opted to follow the Fifth District's NACRA decision, which recognized an "exception" to the general rule requiring an objection, where the verdict in a products liability case is "fundamentally inconsistent" (A4).[2] That occurs, the

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[1]//The Fourth District ignored its prior decisions which hold that in order to preserve a verdict's inconsistency for appeal, the inconsistency must be objected to before the jury is discharged. Linquist v. Covert, 279 So.2d 44 (Fla. 4th DCA 1973); Brown v. North Broward Hosp. Dist., 521 So.2d 143 (Fla. 4th DCA 1988); Shofner v. Giles, 579 So.2d 861 (Fla. 4th DCA 1991); Odom v. Carney, 625 So.2d 850 (Fla. 4th DCA 1993); Florida DOT v. Stewart, 844 So.2d 773 (Fla. 4th DCA 2003).

[2]/The Fourth District ignored its previous refusal to follow NACRA's "fundamental inconsistency" exception in a products liability case, Moorman v. American Safety Equipment, 594 So.2d 795, 799-800 (Fla. 4th DCA 1992), which held that verdict inconsistencies that could have been corrected while a jury was still available are not important enough to bypass the finality attached to a jury's decision, so as to allow the inconsistency to be raised on appeal; that the fundamental error doctrine should not be used where verdict inconsistencies are involved, and; there is nothing unjust about refusing to relieve a party of its own failure to object to an inconsistency in a verdict until after the jury had been discharged.

Fourth District held, where a verdict in a products liability case finds no product defect, but finds the manufacturer negligent, and the only evidence of negligence related to negligent design (A4). The Fourth District also held that this so-called "fundamental inconsistency" both excused the manufacturer's failure to object to a verdict's inconsistency before the jury is discharged, and also required entry of judgment for the manufacturer, instead of a new trial (A4). The Fourth District also relied upon two later Fifth District cases, Terex Corp. v. Bell, 689 So.2d 1122 (Fla. 5th DCA 1997) and Anheuser-Busch, Inc. v. Lenz, 669 So.2d 271 (Fla. 5th DCA 1996), which followed that court's prior NACRA decision (A3).

A case that conflicts with both the Fourth District's decision here, and with NACRA, is Wharfside Two, Ltd. v. W.W. Gay Mechanical Contractor, 523 So.2d 193 (Fla. 1st DCA 1988), where the First District held that a verdict's "fundamental inconsistency" required a

new trial, not entry of judgment for the defendant, but citing to NACRA.

B. Conflict with Adoro Marketing, Inc. v. DaSilva

The Fourth District's decision also conflicts with Adoro Marketing, Inc. v. DaSilva, 623 So.2d 542 (Fla. 3d DCA 1993). In that products liability case, the jury found negligence, but no design or manufacturing defect. The defendants argued that the verdict was inconsistent, because there was no basis for its negligence finding since the jury found no defect, and asked for judgment entered in their favor. They did not ask to have the jury reconsider its verdict to resolve the inconsistency. The Third District refused to enter judgment for the defendants, and affirmed the judgment for the plaintiff, ruling that the defendants' failure to seek jury reconsideration of the inconsistency waived the right to challenge the inconsistency on appeal. That ruling directly conflicts with the Fourth District's decision.

C. Conflict with Cases Holding That Where the Inconsistency was Correctable by the Jury, an Objection Before the Jury's Discharge Is Required

The purpose of requiring an objection to an inconsistent verdict before the jury is discharged is to allow the jury an opportunity to correct the inconsistency. As stated in Cowart, supra, where answers to interrogatory verdicts are inconsistent with each other, the general rule requiring a timely objection before the jury is discharged applies because verdict inconsistencies involve (476 So.2d at 290):

> ...a contradiction which could obviously be resolved, one way or the other, if an objection is raised when the verdicts are returned so that the jury may reconsider the case as a whole. (emphasis added)

Here, if Nissan had objected and the jury had been instructed that its two findings could not stand together, and to reconsider its verdict, the jury may very well have returned a verdict finding both a defect and negligence, which the evidence would have supported, and which the jury would have been at liberty to do. In

Stevens Markets, Inc. v. Markantonatos, 189 So.2d 624 (Fla. 1966), this Court stated:

> It is clearly the right and duty of the Court before discharging the jurors to call their attention to a defective verdict and give them an opportunity to return a proper verdict.... When they are sent back to further ... reconsider the matter, the case is still in their hands. **They are not bound by their former action. They are at liberty to review the case and bring in an entirely new verdict.** (emphasis added)

See also Morton Roofing, Inc. v. Prather, 864 So.2d 64, 66-67 (Fla. 5th DCA 2003).

II. The Fourth District's Decision Conflicts with Cases Which Hold That, Even If Preserved for Review, an Inconsistent Verdict Requires a New Trial

A. Conflict With Ashby Div. of Consolidated Aluminum Corp. v. Dobkin, 458 So.2d 335 (Fla. 3d DCA 1984)

In Dobkin, the jury found the manufacturer negligent, but found no product defect. Judgment was entered for the plaintiff on the negligence claim. The Third District reversed, rejecting the plaintiff's claim that the verdict was consistent because of the manufacturer's failure to warn. The court found no failure to warn evidence. The court applied the following rule in determining that the verdict was inconsistent:

> Where the findings of a jury's verdict in two or more respects are findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at

> the same time, they are in fatal conflict. In such circumstances, contradictory findings mutually destroy each other and result in no valid verdict, and a trial court's judgment based thereupon is erroneous. (emphasis added)

Because the manufacturer in Dobkin had preserved the inconsistency for appeal by objecting before the jury's discharge, the Third District reversed for a new trial.

The Fourth District's decision directly conflicts with Dobkin.[3] In both cases the courts found no evidence of failure to warn, but evidence of negligent design, which conflicted with the jury's finding of no defect. However, instead of concluding that the inconsistency created an invalid verdict requiring a new trial, the Fourth District resolved the inconsistency itself by necessarily concluding that the jury's finding of no defect cancelled out the jury's finding of

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[3]/The Fourth District also ignored its prior decision in Consolidated Aluminum Corp. v. Braun, 447 So.2d 391 (Fla. 4th DCA 1984), which was in accord with Dobkin. The verdict in that products liability case found no design defect, but negligent design. The Fourth District rejected the manufacturer's argument that it was entitled to judgment in its favor, and reversed the inconsistent verdict for a new trial on all issues.

negligence. In fact, the jury's finding of negligence could just as well have canceled out its finding of no defect, because the inescapable implication in finding Nissan negligent is that the jury found something wrong with the vehicle. To conclude that the jury intended one finding (no defect) to control over its other finding (negligence) is to engage in sheer speculation. As Dobkin held, the inconsistent findings cancel each other out, requiring a new trial.

B. Conflict with Cases Holding That a Court Can "Conform" a Jury's Verdict Only Where the Jury's Intent Is Clear, and That Where a Verdict is Inconsistent and the Jury's Intent Is Not Clear, a New Trial Is Required

The Fourth District rejected the jury's verdict because it was inconsistent, but instead of granting a new trial, it entered judgment for Nissan. Doing so directly conflicts with Cory v. Greyhound Lines, Inc., 257 So.2d 36 (Fla. 1971), which held that a court may

only conform or amend a verdict where the jury's intention is clear:

> There is no doubt of the power of the court to amend a verdict after the discharge of the jury.... But there is one important limitation to this rule, ... that the amendment ... must be such as to make the verdict conform to the real intent of the jury. The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his for theirs. After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment. (Id. at 41).

Contrary to the above pronouncement of this Court, the Fourth District essentially amended the jury's verdict to find Nissan not liable by disregarding the jury's finding of negligence, even though it acknowledged that there was evidence of negligent design to support that finding. However, the Fourth District concluded that the legal effect of the inconsistent findings was that the finding of no defect cancelled out the finding of negligence. The issue was not the legal effect of the two inconsistent findings.

The issue was the jury's intent, which was at least unclear in light of the inconsistency. In fact, a strong argument can be made that the jury's finding that Nissan was 51% at fault showed the jury intended to find Nissan liable, but the Fourth District ignored that intent by entering judgment for Nissan.

The Fourth District's decision also conflicts with cases which hold that where a verdict is inconsistent, and there is no way to "square the verdict" or determine the intent of the jury, a new trial is required on all issues. The Southland Corp. v. Crane, 699 So.2d 332, 334 (Fla. 5th DCA 1997).[4] Here, because the jury found Nissan negligent but found no defect, which the Fourth District ruled was inconsistent, the jury's intent was at least unclear, requiring a new trial. It was absolutely contrary to Florida law and the jury's intent

[4]/The Fourth District ignored its own decision, Spitz v. Prudential-Bach Securities, Inc., 549 So.2d 777 (Fla. 4th DCA 1989), which held that where a verdict is inconsistent and the intent of the jury cannot be determined, a new trial is required.

for the Fourth District to enter judgment for Nissan instead of at least granting a new trial, where the jury found Nissan negligent based on ample evidence of negligent design, and also found Nissan 51% at fault for the loss of Andrea's arm, arguably evidencing the jury's **clear** intent to hold Nissan liable.

CONCLUSION

There is a conflict in the law as to whether a party must object to an inconsistent verdict before the jury is discharged in order to preserve the inconsistency for appeal, and whether an inconsistent verdict, where the jury's intent is unclear, requires a new trial. The Fourth District's decision, which followed the NACRA decision, is at odds with Florida case law. The Court should take this opportunity to resolve that conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to: George N. Meros, Jr., Esq., Gray, Harris & Robinson, P.A., P. O. Box 11189, Tallahassee, FL 32302; and W. L. Kirk, Jr., Esq., Rumberger,

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