

Third District Court of Appeal

State of Florida, July Term, A.D. 2012

Opinion filed August 29, 2012.

Not final until disposition of timely filed motion for rehearing.

No. 3D11-50

Lower Tribunal No. 07-29041

Tricam Industries, Inc., et al.,
Appellants/Cross-Appellees,

vs.

Diana Coba, etc.,
Appellee/Cross-Appellant.

An Appeal from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Lewis, Brisbois, Bisgaard & Smith, LLP, and Jeffrey A. Mowers and Cindy J. Mishcon, for appellants/cross-appellees.

Wasson & Associates, Chartered, and Roy D. Wasson and Annabel C. Majewski; DeMahey, Labrador, Drake, Victor, Payne & Cabeza, P.A., and Orlando Cabeza, for Appellee/cross-appellant.

Before ROTHENBERG and EMAS, JJ., and SCHWARTZ, Senior Judge.

ROTHENBERG, J.

Tricam Industries, Inc. (“Tricam”) and Home Depot, etc., (collectively, “the

defendants”) appeal from a final judgment entered pursuant to a jury verdict in favor of Diana Coba (“the plaintiff”), as personal representative of the estate of Roberto Coba (“the decedent”), and denial of their motion to set aside the verdict. The plaintiff cross-appeals from a denial of her motion for a new trial. Because the verdict was fundamentally inconsistent, we reverse the trial court’s denial of the defendants’ motion to set aside the verdict, and remand for entry of judgment in favor of the defendants. In addition, because we find the trial court did not abuse its discretion in concluding that the plaintiff failed to satisfy her burden of establishing that a new trial was warranted based on juror non-disclosure, we affirm the trial court’s denial of the plaintiff’s motion for a new trial.

The decedent, a civil engineer, fell from a thirteen foot Gorilla Professional Type 1A 4-in-1 aluminum ladder (“the ladder”) manufactured by Tricam and sold by Home Depot, and died ten days later. In her complaint against the defendants, the plaintiff alleged theories of: (1) strict liability for manufacturing and design defects; and (2) negligence for failing to manufacture, design, market, sell and distribute the ladder in a reasonably safe condition, and failing to warn of the ladder’s dangerous conditions. At trial, however, the evidence presented and arguments made by the plaintiff went solely to the ladder’s design.

Specifically, the plaintiff’s expert, Dr. Farhad Booeshaghi, a consulting engineer and accident reconstructionist, testified that the ladder was defectively

designed because it was capable of falsely appearing to be in a locked position since the pins in the “J locks,” which attached to the ladder’s outer rails, “click[ed]” as if they were locked even when they were not. He explained that when that occurred, the ladder was capable of temporarily holding a person’s weight, giving the user a false sense of security. Dr. Booeshaghi opined that at the time of the accident, the ladder was in such a “false lock” position, and the false-lock-failure, combined with the decedent’s weight, caused the ladder to “telescope”¹ at full extension, impelling the ladder forward and launching the decedent backward. He also opined that the inclusion of an additional crossbar would have increased the structural rigidity of the ladder and prevented the ladder from telescoping. Lastly, he testified that the accident would not have occurred had the locks been properly locked, and that it was ultimately the decedent’s responsibility to properly lock the ladder.

Conversely, the defendants’ expert, Mr. Jon Ver Halen, a consulting engineer, testified that the ladder was not defectively designed. He opined that it was impossible for a “false lock” to occur on an articulating ladder, and explained that, given the “factor of safety” built into the ladder’s “load factor,” it could not have structurally failed when used in its intended manner. In addition, Mr. Ver

¹ According to Dr. Booeshaghi, in engineering terms, a product “telescopes” when “the inside, relative to the outside, goes in. . . . When it goes in . . . the “J” locks and the side rails . . . start deforming relative to each other.”

Halen explained that, based on the ladder's length and likely position against the house, and the location and types of marks and deformations left on the wall, floor, and ladder, the accident could not have been caused by the telescoping process described by Dr. Booeshaghi. Instead, according to Mr. Ver Halen, the physical evidence suggested that the ladder was set up on a "relatively slippery" surface, enabling the ladder to slide as the decedent climbed it, and ultimately giving way, causing the decedent to fall.

After the plaintiff rested her case, the defendants moved for a directed verdict, noting that neither Dr. Booeshaghi nor any other witness testified regarding any flaw in the manufacturing process, the warnings that were provided, or the sale or distribution of the ladder, and that the warnings on the ladder were not introduced into evidence. The trial court denied the motion. However, prior to closing arguments, the plaintiff expressly withdrew her manufacturing defect claim and, given the lack of evidence on the remaining allegations, the trial court limited the (1) strict liability jury instructions to the standard for finding a design defect, and (2) the negligence instructions to the standard for finding negligence in the "design, distribution, and sale" of the ladder. The jury was not instructed on either manufacturing defect or warning defect standards, and trial counsel for the plaintiff and the defendants neither argued nor sought a finding regarding a failure to warn.

The jury returned a verdict finding that there was no design defect, but that

the negligence of Tricam and Home Depot was a legal cause of the decedent's death, and awarded the decedent's daughter \$25,000 for lost past support and services; \$45,000 for her future lost support and services; and \$1.5 million for intangible damages; and apportioned eighty percent comparative negligence to the decedent. The verdict form was crafted and filled out as follows:

VERDICT FORM

We, the jury, return the following verdict:

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 X

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 X NO _____

After the verdict was read, neither the plaintiff nor the defendants objected to the verdict. However, after the jury was discharged, counsel for the plaintiff conducted an investigation of the jurors; discovered that several jurors had failed to disclose their litigation history; and thereafter filed motions to interview jurors and for a new trial. Additionally, the defendants filed a motion to set aside the verdict and to enter judgment in accordance with their motion for a directed verdict. The trial court granted the plaintiff's motion to interview the jurors, and noticed a

hearing on the remaining issues.

At the hearing, the plaintiff argued a new trial was required based on juror Willy Gamboa's failure to disclose his litigation history, which included a divorce, three foreclosures, and two collection actions. The plaintiff's trial counsel represented that if he would have known about juror Gamboa's litigation history, he would have peremptorily struck him.

Conversely, 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. The trial court denied the plaintiff's motion for a new trial and the defendants' motion to set aside the verdict and enter judgment in accordance with their motion for a directed verdict. These appeals followed.

The trial court erred in denying the defendants' motion to set aside the verdict in accordance with the defendants' motion for a directed verdict.

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,² we

² In J.T.A. Factors, Inc. v. Philcon Services, Inc., 820 So. 2d 367, 371 (Fla. 3d DCA 2002), this Court held that the defendant waived its challenge to a purported inconsistency in the jury verdict by failing to object prior to the discharge of the

adopt the “fundamental nature” exception as applied in this context.

Because NACRA and Alvarez are similar to the facts in the instant case, and because we agree with and adopt the holdings in each, we briefly examine them herein. The plaintiff in NACRA brought a wrongful death action against NACRA, which manufactured a catamaran that capsized and resulted in the death of Christine Wapniarski. At trial, the plaintiff claimed there was a design defect, and the trial court instructed the jury on two theories as to NACRA’s liability, strict liability and negligence, both of which were premised on NACRA’s negligent design of the boat. NACRA, 480 So. 2d at 671. Specifically, the jury was asked the following two questions:

1. Was the sailboat defective when sold and, if so, was the defect a legal cause of the 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?

Id. The jury answered “No” to the first question and “Yes” to the second question.

Id. Although the verdict was clearly inconsistent, NACRA failed to object to the

jury. This Court expressly adopted the general rule that “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. . . .” However, in Philcon, this Court was not presented with a situation in which the verdict was **fundamentally** unsupportable. In fact, this Court expressly determined that the plaintiff proffered sufficient evidence to meet the elements of the relevant cause of action at issue in that case, tortious interference. See id. (“[W]e find no merit to J.T.A.’s arguments that the evidence presented at trial was insufficient to meet the elements of tortious interference and therefore affirm without further discussion.”).

inconsistency before the jury was discharged. Nevertheless, the Fifth District reversed and remanded for entry of judgment in NACRA's favor based on its conclusion that the inconsistency was of a "fundamental nature" because the only evidence of negligence offered against NACRA at trial related to its alleged design defect. Id.

The appellee counters that NACRA waived appellate review of the inconsistency by not objecting before the jury was discharged. True, a party must object to defective verdict forms or inconsistent verdicts before the jury is discharged to preserve the claim, Higbee v. Dorigo, 66 So. 2d 684 (Fla. 1953); Papcun v. Piggy Bag Discount Souvenirs Food and Gas Corp., 472 So. 2d 880 (Fla. 5th DCA 1985). Here, however, the inconsistency is of a fundamental nature because the only evidence of negligence offered against NACRA at trial related to its alleged negligent design. See Papcun v. Piggy Bag Discount Souvenirs Food and Gas Corp.; Robbins v. Graham, 404 So. 2d 769 (Fla. 4th DCA 1981). 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. Cf. Cowart v. Kendall United Methodist Church, 476 So. 2d 289 (Fla. 3rd DCA 1985) (while verdict not inconsistent, no evidence to support it). Accordingly, we have no alternative but to reverse the judgment and remand for entry of judgment in NACRA's favor.

Id. (footnotes omitted).

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.

We note that this issue could and should have been easily avoided had proper attention been paid to the need to revise the verdict form to reflect the narrower issues for the jury's consideration based on the change in the plaintiff's case. As we explained, the first question on the jury form asked:

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?

After the jury answered "No" to this question, the second question on the verdict form was no longer necessary, given the absence of any evidence, argument, or instruction on negligent manufacturing or negligent failure to warn. Unfortunately, neither the parties nor the trial court recognized the need to revise the proposed verdict form to reflect this. The verdict form should have been revised to add the following language after the first question:

If your answer to Question One is "No," your verdict is for defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.

However, despite the failure of the trial court to amend the verdict form, once the jury answered “No” to question one, that finding rendered legally irrelevant any further finding by the jury. The fact that the jury answered question two (as the verdict form erroneously required) is of no moment where, as here, the negative answer to the first question required the court, as a matter of law, to enter judgment for the defendants.

The trial court did not abuse its discretion in denying the plaintiff’s motion for a new trial based on juror Gamboa’s non-disclosures.

“We review an order granting or denying a motion for new trial based on juror nondisclosure for abuse of discretion.” Pereda v. Parajon, 957 So. 2d 1194, 1197 (Fla. 3d DCA 2007) (citing Palm Beach Cnty. Health Dep’t v. Wilson, 944 So. 2d 428, 430 (Fla. 4th DCA 2006)). Entitlement to a new trial on the basis of a juror’s non-disclosure requires the complaining party to demonstrate that: “(1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party’s lack of diligence.” Pereda, 957 So. 2d at 1197 (citing Roberts v. Tejada, 814 So. 2d 334, 339 (Fla. 2002)).

Even assuming, without deciding, that the plaintiff satisfied the first two requirements, we conclude the trial court did not abuse its discretion in denying the plaintiff’s motion for a new trial. As shown below, the record supports the

conclusion that juror Gamboa's failure to disclose his litigation history was attributable to the plaintiff's lack of diligence, and that, consequently, the third prong was not satisfied.

In analyzing the "due diligence prong," the Florida Supreme Court has stated:

Of course, attorneys 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."

Roberts, 814 So. 2d at 344. Accordingly, the Court held:

The "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.

Id.; see also Pereda, 957 So. 2d at 1198.

In this case, the jury questionnaire 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)." And, during voir dire, the trial court asked the jurors whether they had "ever been sued." Juror Gamboa responded "No" to each of these questions, but after rendering the verdict, disclosed having

been involved in a divorce, foreclosure actions, and collection cases. However, the context in which the trial court asked the jurors about their litigation history, coupled with the jurors' responses, suggests the jurors may not have fully understood the nature of the inquiry. As shown below, the plaintiff's trial counsel did not make any effort whatsoever to explain the types of legal actions that were encompassed in the trial court's questions.

During voir dire, the trial court gave a brief summary of the subject matter at issue before the court, a personal injury, and immediately thereafter asked the jurors whether they had ever been sued.

THE COURT: This is a dispute where the plaintiff alleges that there was **injury** that was caused by the defendants, and they're asking to be compensated for that **injury**. In other words, this is a dispute that will boil down to monetary damages. Okay?

In this case, the plaintiff, they have the burden of proving by the greater weight of the evidence that there was an **injury**, that it was caused by an act of the defendants, and that they suffered damages as a result of that **injury**. Okay?

It is their burden. If they don't meet their burden, you have to return a verdict in favor of the defendants. Okay?

First row sitting here, have any of you ever been sued?

(emphasis added).

All of the responses by the jurors were disclosures of prior **personal injury suits**. For instance, prospective juror Martinez disclosed that she was sued by her insurance company because of a car accident in which she was **injured**. In addition, prospective juror Herny-Nembhard answered that she was involved in

two accidents, still suffers from a “bad **injury**,” but was not sued. None of the jurors disclosed having been sued in any other type of case.

The trial court then followed up by questioning the jurors as to whether they had ever sued someone else.

THE COURT: The first row up here, my next question to you is: Have any of you ever sued anyone else?

.....

THE COURT: Remember, my first question was have you ever been sued. Now this question is: Have you ever sued someone else?

Again, all of the responses related to personal injury suits. For instance, prospective juror Knox disclosed that she sued a hospital arising out of an **injury** and two surgeries on her left ankle, resulting in a disability. Prospective Juror Suso disclosed that she sued an insurance company after being involved in a car accident and suffering a whiplash **injury**. Prospective Juror Herny-Nembhard disclosed that she sued an insurance company after being involved in a car accident and suffering an **injury**. Prospective juror Pimienta disclosed that he sued an office building for an **injury** he suffered caused by faulty furniture. Finally, prospective juror Clark disclosed that his wife was involved in a worker’s compensation lawsuit arising out of an **injury** to her wrist she sustained while on the job. None of the jurors disclosed having sued anybody for anything other than suits arising out of personal injury situations.

Given the context of the trial court’s questions, and the jurors’ responses

thereto, the trial court could have reasonably concluded that the jurors did not fully understand the nature of the inquiry, and that a reasonable attorney, exercising due diligence, should have asked follow-up questions or have explained to the jurors that the trial court's questions were not limited to personal injury suits.

The plaintiff argues that the trial court precluded her from doing so based on the trial court's instruction to:

not ask the **same exact question** that's on the questionnaire. . . . For example, if they say "I live in Homestead," don't ask them, "Where do you live?" You can, of course, ask any follow-up questions that you believe are relevant to them being able to serve as a fair and impartial juror.

(emphasis added). We disagree.

First, we note that the plaintiff did not object to the trial court's instruction, and therefore waived any error resulting therefrom. Furthermore, the plain wording of the trial court's instruction only precluded trial counsel from asking the "same exact question" asked on the questionnaire, and did not prevent trial counsel from elaborating or explaining what the questions meant, or correcting any obvious misunderstanding resulting from the questions. If trial counsel was unsure regarding the scope of the trial court's instructions, he should have asked for clarification by the trial court.

Additionally, we note that during the trial, the trial court suggested that the attorneys run the jurors' litigation histories electronically before the jury

commenced deliberations and while an alternate juror was still available. While the plaintiff's trial counsel noted he had encountered problems regarding undisclosed juror litigation history in previous cases, he stated he was satisfied with the jurors' responses and declined the offer to run the jurors. We acknowledge that the Florida Supreme Court, in Roberts, held that trial counsel are not categorically **required** to run the jurors' litigation histories before the end of trial in order to satisfy the "due diligence" prong. Roberts, 814 So. 2d at 344. Trial attorneys are, however, **permitted** to conduct such searches, just as trial courts are permitted to suggest them. Notably, the Florida Supreme Court, in Roberts, did not hold that trial courts cannot, in the appropriate circumstances, consider a trial counsel's refusal to run a juror's litigation history as one of several factors under a due diligence inquiry.

Given this set of facts, we cannot say the trial court abused its discretion in denying the plaintiff's motion for a new trial. Accordingly, we reverse the final judgment and the trial court's order denying the defendants' motion to set aside the verdict in accordance with their motion for a directed verdict, and remand with instructions to enter judgment in favor of the defendants. In addition, we affirm the trial court's order denying the plaintiff's motion for a new trial.

Reversed in part; affirmed in part; and remanded with instructions.

EMAS, J., concurs.

SCHWARTZ, Senior Judge. (dissenting in part).

While I agree with the rest of the opinion, I disagree in two fundamental respects with the court's treatment of the "inconsistent verdict" question. In my view:

- a) The appellant waived the right to complain of any inconsistent verdict because of its failure to request that the conflict be resolved by the jury after its allegedly flawed verdict was returned.
- b) Even if this were not so, the appropriate remedy is not, as the majority does, simply to resolve the conflict in favor of appellant but a new trial so that a jury and not the court may decide the question.

It is true, as the court says, that *North American Catamaran Racing Ass'n, Inc. (NACRA) v. McCollister*, 480 So. 2d 669, 670 (Fla. 5th DCA 1985), and *Nissan Motor Co., Ltd. v. Alvarez*, 891 So. 2d 4, 5 (Fla. 4th DCA 2004), are entirely on point, both as to the fact that verdicts returned by the jury were indeed irreconcilably inconsistent, which was correct, and in solving that problem by disregarding the jury's determination of liability in favor of its contrary conclusion that there was no product defect and entering judgment for the defendant on appeal, which was not.

I

In the first place, since the judgment on appeal is in favor of the plaintiff and thus in effect represented the trial judge's resolution in favor of the plaintiff, it was

incumbent upon the appellant as the loser to preserve the issue by objecting to the alleged inconsistency after the return of the verdict. *MGM Grand Hotel, Inc. v. Siegel*, 506 So. 2d 451, 453-54 (Fla. 3d DCA 1987) (“[T]he complaining party must raise the objection at trial so that the jury may be given a chance in effect then to resolve the dispute, perhaps against that party.”)³; *Cowart v. Kendall United Methodist Church*, 476 So. 2d 289, 290 (Fla. 3d DCA 1985) (“[A] *defendant's* initial challenge on appeal to a verdict for the injured spouse on the

³ In *Siegel*, 506 So. 2d at 453-54, we stated that the judgment loser could not claim that the winner had waived the inconsistency point:

Although, as we have seen, MGM does not dispute the irreconcilable nature of the jury responses, it claims that the issue was “waived” by the fact that neither side objected to the inconsistency after the return of the verdict. We do not believe that MGM is in a position to make this claim. Unlike all the decisions cited, this is not a case in which the appellant claims that a verdict *consistent* with the judgment against it is inconsistent with another verdict in its favor; in that situation, the complaining party must raise the objection at trial so that the jury may be given a chance in effect then to resolve the dispute, perhaps against that party. Just the opposite is true here: the judgment against the appellant MGM is thoroughly sustainable and consistent if the gross negligence finding is put together with the legal causation determination in answer to question 1. Thus, if anyone were required to object to the inconsistency, it was MGM, and if anyone could challenge the failure to object, it was the Siegels. Far from doing so, however, the Siegels, by motion for new trial and cross-appeal, have specifically sought a new trial as to legal cause.

(Footnote and citations omitted).

Unlike the one in *Siegel*, the judgment winner-appellee has insisted on the waiver point. Under the law, I think we have no choice but to uphold it.

ground of inconsistency with a no damage finding in the derivative claim is barred by the failure to assert that position when the verdicts were returned.”).

The majority discounts this contention by applying an “exception” to the waiver rule adopted in NACRA and Alvarez to the effect that it does not apply when a so called “fundamental” inconsistency arises, as it is said occurred when the jury found liability in the face of a non-existent product defect. The simple comeback is that there is no conceptual or reasoned basis for the distinction and no cognizable way to apply it.

Ironically enough, just this point was made by the Fourth District itself in Moorman v. American Safety Equipment, 594 So. 2d 795, 800 (Fla. 4th DCA 1992), in which the same alleged inconsistency⁴ occurred, the court said:

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

⁴ The fact that in the Moorman court there actually was no inconsistency does not distract from the validity of the waiver holding. A decision based on two alternative holdings is stare decisis as to both. Clemons v. Flagler Hospital, Inc., 385 So. 2d 1134, 1136 (Fla. 5th DCA 1980) (“(W)here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.” quoting Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949)); see Paterson v. Brafman, 530 So. 2d 499, 501 n. 4 (Fla. 3d DCA 1988) (explaining the fact a holding was alternative does not detract from its authority); see also Parsons v. Federal Realty Corp., 143 So. 912, 920 (Fla. 1931) (“Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined.”); Carol City Utilities, Inc. v. Dade County, 183 So. 2d 227, 231 (Fla. 3d DCA 1966) (same).

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.

...

Here, there are compelling reasons not to excuse a previous failure to speak out when the original jury itself could have corrected the supposed error. They are found, as we have already said, in the

sanctity of a jury verdict and society's interest in avoiding repeat trials for the same dispute. Verdict inconsistencies which could have been corrected while the jury was still available are simply not important enough to bypass the ordinary finality attached to their decision.

Moorman, 594 So. 2d at 799-800.⁵

I agree.

II

Even if the waiver point were not correct, it is simply wrong for the court either here or in NACRA and Alvarez, to resolve the acknowledged inconsistency itself,⁶ much less to do so in favor of the loser below, appellant here. The appropriate remedy instead is a new trial on the issue. As was specifically acknowledged in Siegel at 453:

There is no doubt-and MGM agrees -that, since the identical conduct was involved in both theories, MGM's breach of contract could not be deemed the legal cause of the loss, as found in answer 1, and its gross negligence not the legal cause of the loss, as found in answer 4. As courts have often held in determining the effect of totally irreconcilable special verdicts, which are, as here, unaccompanied by a general one, no judgment for either side can properly be entered and the only solution is to require a new jury to decide whether the now-determined-to-be insufficient security was or was not a legal cause of the apparent theft. See Merrill Lynch, Pierce,

⁵ I am at a loss to understand how or why the Fourth District in Alvarez, could entirely ignore this dispositive holding and adopt instead the reasoning of the holding of another court in NACRA which it, itself, had so severely (and correctly) criticized.

⁶ Just as it was probably wrong for the trial judge to do so in favor of the plaintiff below. The difference in treatment is in the fact that, under our rules, the defendant, as the appellant has the burden to demonstrate and preserve error.

Fenner & Smith, Inc. v. Anderson, 501 So. 2d 635, 637 (Fla. 1st DCA 1987); see also J. Moore & J. Lucas, Moore's Federal Practice 49.03[4], at 49-32 (2d ed. 1986); Guidry v. Kem Manufacturing Co., 598 F. 2d 402 (5th Cir.1979), cert. denied, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980); Fugitt v. Jones, 549 F.2d 1001 (5th Cir.1977); Blue Chelan, Inc. v. Department of Labor and Industries, 101 Wash.2d 512, 681 P. 2d 233 (1984); see also Froehlich v. West Palm Beach Water Co., 66 So. 2d 596 (Fla. 1953).

(Footnote omitted). 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.”); 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.”); see also Alvarez v. Rendon, 953 So. 2d 702 (Fla. 5th DCA 2007) (concluding proper remedy for inconsistent jury verdict in breach of employment contract action by physician and counterclaim by employer was a new trial); Frank v. Wyatt, 869 So. 2d 763, 764 (Fla. 1st DCA 2004) (“[B]ecause . . .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.

Newgent, 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.”).