IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,671

CHRYSLER CORPORATION, a foreign corporation,

Petitioner,

v.

JACK E. WOLMER, Personal Representative of the State of MARY WOLMER and JACK E. WOLMER, individually,

Respondent.

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER, CHRYSLER CORPORATION

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IDENTITY OF AMICI AND REASON FOR APPEARANCE

Amici curiae are the Motor Vehicle Manufacturers Association of the United States, Inc. and the Product Liability Advisory Council, Inc., as further described below.

The membership of the Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA)[1/] and that of the Product Liability Advisory Council, Inc. (PLAC)[2/] include many

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1/ The MVMA is a trade association whose member companies build over 99 percent of all motor vehicles produced in the United States. Its members also manufacture such other diverse products as farm, industrial, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for innumerable industrial and agricultural uses.

The members of the Motor Vehicle Manufacturers Association of the United States, Inc. are: AM General Corporation; American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; Navistar International Corporation; M.A.N. Truck & Bus Corporation; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

2/ PLAC is a nonprofit membership corporation formed for the principal purpose of promoting the sound development of products liability law.

The members of the Product Liability Advisory Council, Inc. are: American Honda Motor Company, Inc.; Automobile Importers of America; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; The Firestone Tire & Rubber Company; Fruehauf Corporation; Great Dane Trailers, Inc.; International Playtex Corporation; Motor Vehicle Manufacturers Association of the

Footnote Continued

major manufacturers of automotive, industrial, farm and mining equipment. Therefore they are vitally interested in the fair and efficient development and application of product liability and punitive damage law in this State; and they are gravely concerned that affirmance of the punitive award in this case would undermine the standards governing that area of the law.

The award below -- $3,000,000.00 in punitive damages (in addition to $1 million in compensatory damages)[3/] must be paid by the Defendant to the husband of a passenger who was killed when the automobile in which she was seating was rammed at a high speed from the rear. Amici have entered this case because they believe that to be a substantial miscarriage of justice and a serious distortion of the principles of punitive damages law. Indeed, if this extraordinary award is allowed to stand, and the dangerously erroneous standards of liability applied below are not corrected by this Court, Amici believe that the fair and orderly administration of ordinary products liability litigation in Florida, and to some extent throughout the nation, will be materially upset.

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United States, Inc.; Nissan Motor Corporation; Otis Elevator Company; Porsche Cars North America, Inc.; Saab-Scania of America, Inc.; Sturm, Ruger & Company; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., U.S.A., Inc.; and U-Haul International, Inc.

3/ Remitted to $800,000.

This case, accordingly, is of great importance, not only to the courts of Florida, but also to sellers and consumers[4/] who daily litigate claims upon the common law rules of products liability and damages law in this state in particular, and throughout the nation.

Counsel for Amici have studied and written in the area of punitive damages in products liability litigation for a number of years. For purposes of brevity, and because there are few academic studies of the policy issues, Amici's counsel have found it practicable to cite and quote from several of their own writings.[5/] The Court and attorneys for the parties are

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4/ Individual consumers themselves face only a remote possibility of ever being a plaintiff in such an action; much more real for most consumers is the added price they pay as product purchasers, as a kind of tax or insurance premium, that reflects the manufacturer's costs of products liability judgments (or of its own insurance). See generally Owen, Rethinking the Policies of Strict Products Liability Law, 33 Vand. L. Rev. 681 (1980).

5/ One of amicus' counsel, David Owen, has published certain writings in the area of punitive damages in products liability litigation (and tort law generally). See, e.g., Prosser and Keeton on Torts (5th ed. of Prosser on Torts, West 1984, W. Page Keeton, ed.; by W. P. Keeton, D. Dobbs, R. Keeton & D. Owen); Products Liability and Safety--Cases and Materials (Foundation Press 1980, W. Keeton, D. Owen & J. Montgomery); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982); Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103 (1982); Owen Punitive Damages in Products Litigation, 74 Mich. L. Rev. 1257 (1976). Counsel wishes to disclose that they have cited several of these writings.

requested to judge independently the merits of the arguments in this brief and of any such source materials relied upon herein.[6/]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The MVMA and PLAC adopt the statement of the case and statement of facts to be submitted by the Defendant/Petitioner Chrysler.

SUMMARY OF ARGUMENT

Amici have familiarized themselves with the matter, and regard it as essentially a case in which a passenger was killed because the stationary vehicle in which she was sitting was hit from the rear, at high speed, by a reckless driver of a pickup truck. Ordinarily, such an accident gives rise to a lawsuit, at most, between the victim and the driver of the "bullet" vehicle. Plaintiffs' counsel, however, has converted this one, first, into a products liability suit against the manufacturer of the victim car -- on the theory that the smaller car was "defective" because it could not withstand being rammed by a truck at 50-65 m.p.h.; and, second, into a punitive damages case -- on the theory that the manufacturer knew the car might

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6/ Counsel for Amici were retained in this matter after all such writings had been published.

not be able to withstand such a collision without some risk that a fire might result which could injure the occupants.

Our review of the case convinces us that: (1) the plaintiffs' design defect evidence itself was weak; (2) the "evidence" of "malice" for the punitive damages claim is virtually nonexistent; and (3) the legal standards on which they were awarded by the jury, and reinstated by the DCA, were totally improper and contrary to explicit decisions of the Supreme Court. In sum, the jury's verdict appears to have been based upon sympathy and compassion for Mrs. Wolmer and her family -- and perhaps on prejudice against the large corporate defendant from out of state -- rather than upon the law.

The reason that we are filing this Amicus brief is that we, as others, are deeply troubled by the intrusion into ordinary accident cases of a serious risk of runaway punitive damages verdicts, based on sympathy, bias or prejudice, as appears to have happened here.

> In short, the risk of crushing liability as a result of punitive damages is too great. It threatens the business community with the legal equivalent of an atom bomb. It places the entire product liability system in jeopardy of runaway unregulated verdicts."

Twerski, National Product Liability Legistition: In Search for the Best of All Possible Worlds, 18 Idaho L. Rev. 411, 475-76 (1982).

> Large assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of America industry.

Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 6 (1982) [hereinafter cited as "Problems"].

> Assuming that punitive damages are proper in product liability litigation -- a dubious assumption -- steps must be taken to limit the subsequent potential for economic catastrophe.

Werber, The Products Liability Revolution -- Proposals for Continued Legislature Response in the Automotive Industry, 18 New Engl. L. Rev. 1, 45 (1982). Some might quarrel with particular aspects of these warnings. The critical point, however, is that there is widespread academic consensus (as discussed below) that the problem is present and substantial and that it needs prompt and decisive attention by the legislatures or the courts.

Amici believe this case to be a typical -- albeit tragic -- products liability design defect case, not unlike those tried in the courts of Florida and across the nation every day. Therefore it offers an especially good opportunity for the Court, in the process of reversing the enormous punitive damages judgment, to explain the errors made at trial in the

application of punitive damages principles and, even more importantly, to lay out guidelines for the proper application of punitive damages principles in products liability litigation.

I.

THE LEGAL STANDARDS FOR PUNITIVE DAMAGES APPLIED BY THE COURTS BELOW WERE SERIOUSLY IN ERROR

The instruction of the trial court authorized the jury to return a punitive award if it found that Chrysler acted with "willfulness" (more fully, "wantonness, willfulness or reckless indifference")(R. 1758; 1765-66). Although this may formerly have been the accepted "test" for punitive damages liability, it was decisively narrowed by this Court in Carraway v. Revell, 116 So.2d 16 (Fla. 1959), as reaffirmed in White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984). The key was the elimination of "willfulness" as the basis for liability. Carraway provided the following standard, a new and significantly more realistic one:

> The character of negligence necessary to sustain an award of punitive damages must be a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or that reckless

> indifference to the rights of others which is equivalent to an intentional violation of them.

This change was absolutely necessary. A "willful" conduct standard permits the quasi-criminal punishment of actors for engaging in any conduct that involves any foreseeable risk to the interests of any other persons. The effect is to make every driver of every car liable for punitive damages every time there is an even non-negligent accident.

The Carraway standard, however, properly makes liability contingent on the actor's knowledge, not only that his conduct may possibly harm another, but also that it is illegal -- a violation of the rights of others. Thus the Court has replaced "willfulness" with a much narrower and more appropriate definition of the wrong: "intentional violation of ['the rights of others']."

Whatever the context, but especially when applied to manufacturers of useful products that sometimes are involved in accidents, the Carraway narrowing of the "willful" or "conscious" concept met a vital need:

> Accordingly, if the standard of liability is defined in terms of the defendant's "consciousness" of danger, it is imperative that the definition also include some notion that the danger is excessive and preventable -- a consciousness that the conduct is unlawful or morally wrong -- lest the defendant's mere awareness of the probability of harm generate punitive damages or other exceptional liability in all contexts, even where

> the conduct is reasonable and lawful notwithstanding its inherent risks. The design of automobiles for the crash environment, see infra, ch. 17, is a case in point."

Prosser and Keeton on Torts 214 n.62 (5th ed. 1984).

This is indeed what happened at the trial below. Although the jury concluded in its verdict that the design of the Volare was not even defective, they based their verdict on the erroneous "willful" standard in the instruction. This error in the jury instruction was of course corrected by the trial judge's ruling setting aside the punitive damage award. Yet the DCA reinstated the error with the verdict, by applying in effect a "willfulness" test adapted to the crashworthiness context:

> The [evidence] would permit a jury to reasonably infer that Chrysler had actual knowledge that the fuel system in the 1977 Volare station wagon was inherently dangerous to life and limb and, still, continued to market the vehicle. Thus, there was sufficient evidence to let the issue of punitive damages go to the jury.
>
> (DCA Opinion p. 6).

The Court, therefore, took the view that punitive damages could be assessed because Chrysler engineers knew that the fuel tank could break and cause a fire when rammed at some speed -- 50, 65, 90 m.p.h. -- and also apparently because they accepted the socially prescribed (by NHTSA) line-drawing point of 30 m.p.h., as discussed below.

Once it reverted to this plainly deficient legal standard, it is not surprising that the DCA reinstated the jury verdict. But the result was to contravene, directly, Carraway and White Construction. The Court of Appeal fell into error as to the punitive damage standard because it mistakenly relied on the standard of liability for punitive damages which applies in "inherently dangerous product" cases such as Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984). The error is clear cut. Unlike asbestos, the subject in Johns Manville, an automobile is not an "inherently dangerous" product[7/] under Florida law:

> We agree with the trial court's refusal to give the requested instructions. . . . The key in this determination is that an automobile is not an inherently dangerous product, as defined in Tampa Drug Co. v. Wait, 103 so.2d 603 (fla. 1958), the case cited as the authority for the requested

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7/ It can present a danger, of course, if misused:

> The types of commodities that have been held to come within the Wait standard and do, therefore, impose a strict duty to warn are highly toxic materials, dynamite, second-hand guns, and drugs. . . . Just as an automobile tire cannot be said to be dangerous in and of itself in the same manner as carbon tetrachloride or dynamite, neither can an automobile fuel storage tank.

Lollie v. General Motors Corp., id. at 616. It is equally clear that the standard which should have governed punitive damage in the case was that of White Construction, supra, not Johns-Manville. This case simply does not involve an "inherently dangerous" product.

> instructions. The court in Wait specifically asserted that it was not dealing with a defective article, but rather "a commodity burdened with a latent danger which derives from the very nature of the article itself." There the court was dealing with the use of carbon tetrachloride, a product which "appears harmless in and of itself, [but] has lurking in its innocent appearance death-dealing potentialities."
>
> Although an automobile has long been held to be a dangerous instrumentality, it is so because of the dangers in its use and operation, not because it is dangerous in and of itself. . . .

Lollie v. General Motors, 407 So. 2d 613, 615 (Fla. 1st DCA 1981)(reh. den. 1982).

If allowed to stand, the DCA's radical new standard would permit punitive damages in virtually every crashworthiness or other design products liability case even where the design was not defective and the manufacturer had exercised due care. See generally Problems, 49 U. Chi. L. Rev. 1, 23 (under such a standard, punishment would be justified "for most significant decisions even if made in all good faith, and even if on balance good"). This result would be totally illogical and unfair and far beyond what the courts of Florida or any other state have ever held even for compensatory damages liability. Chrysler, like every other car manufacturer, well knows the unhappy fact that every car of every design involves hundreds of design "conditions" that unfortunately may be involved in

injury and death in many, many different types of accidents every day. Some fifty thousand persons in this country are killed in traffic accidents -- each one involving cars of various design "conditions" -- each year, and four or five million more are injured. See BNA Prod. Safety & Liab. Rep. 338 (Apr. 27, 1984). Yet no state in this nation imposes liability on automotive manufacturers for even compensatory damages merely for knowing those facts; surely it would be unfair and unwise social policy for this Court to let stand the radical District Court of Appeals opinion approving millions of dollars in punitive damages for any such accidents.

II.

THIS COURT IS URGED TO REAFFIRM ITS PRUDENT STANDARD FOR PUNITIVE DAMAGES LIABILITY AND TO BUTTRESS THE NASCENT TREND TOWARD STRICTER JUDICIAL CONTROL OVER SUCH AWARDS TO HELP COMBAT THEIR INTRUSTION INTO ORDINARY PRODUCTS LIABILITY CASES

Punitive damages claims and verdicts in products liability cases are spreading across the land. Many plaintiffs' counsel now routinely include a count for punitive damages in every design or warnings case. Because of the absence of clear rules on liability and the amount of such damages, many trial courts have been reluctant to take such cases from the jury. And with a jury's natural sympathy for an individual and human plaintiff, seriously injured while using products made by

multi-million dollar institutions, usually from out of state, the temptation to "find" sufficient corporate "malice" to augment the victim's verdict often is just too great. While such damages claims may have a proper role to play in proper cases, see, e.g., Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976), they have recently been intruding deeply into ordinary products liability cases -- where no of flagrant misbehavior in facts exists -- and wreaking havoc at such trials. See Moore v. Remington Arms Co., 427 N.E.2d 608, 616-17 (Ill. App. 1982)("The tide has . . . turned: judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded"). In a nutshell, punitive damages in products liability cases have gotten dangerously out of hand.

Most recently, the leading academic commentators who have spoken to the issue have loudly (and with a rare and virtual unanimity) been sounding the alarm: "Punitive damage awards that are unjustified threaten the entire structure of product liability litigation. . . ." Twerski, National Product Liability Legislation: In Search for the Best of All Possible Worlds, 18 Idaho L. Rev. 411, 474 (1982); Prosser & Keeton on Torts, supra, 13-14 (noting that certain problems in products liability cases "have stimulated re-examination of the policies and procedures for awarding punitive damages"); Wheeler, The

Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983)(calling for tightening certain specific procedures in punitive damages cases generally); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 So. Cal. L. Rev. 1, 78 (1982)(emphasizing products liability cases, and concluding that "the current expansive judicial attitude toward punitive damages is decidedly misguided"); Cooter, Economic Analysis of Punitive Damages, 56 So. Cal. L. Rev. 79, 98 ("punitive damages should be regarded as an unusual measure, appropriate only for gross, intentional fault"); Owen, Civil Punishment and the Public Good, id. at 103 (agreeing that "an unbridled, expansive application of punitive damages is undesirable on grounds of fairness and efficiency"); Priest, Punitive Damages and Enterprise Liability, 56 So. Cal. L. Rev. 23, 132 (observing "the absence of theoretical justification for punitive damage judgments"); Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 So. Cal. L. Rev. 133 ("Punitive damages are in the air, are on the move. They are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."); Wheeler, Symposium Discussion, 56 So. Cal. L. Rev. 155, 160 (noting that, in products liability cases, "[t]here were more punitive damages awards in 1980 and 1981 than in the entire prior history of the

United States"); Henderson, Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765, 787 (1983)("Awarding punitive damages whenever a manufacturer unreasonably defers implementation of a safety-related product design change would . . . as a practical matter exacerbate a growing problem in product liability law."); Problems, 49 U. Chi. L. Rev. 1, 59 (1982)("the experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriate assessed, are sometimes unfairly large").

Amici ask the Court to underscore the vital importance of such restraint, and to subject the present verdict to the strictest scrutiny. From a broader perspective, however, it is important that this Court go further and lay down basic guidelines of principle and law to help both trial courts and counsel in these treacherous, uncharted seas.

III.

THIS CASE GIVES THE COURT AN OPPORTUNITY TO PROVIDE IMPORTANT GUIDELINES FOR THE PROPER ADMINISTRATION OF SUCH CLAIMS

In the course of deciding this appeal, the Court can provide a significant service to bench and bar by providing

guidance on certain recurring problems, several of which were present in this case.

It is significant, in this respect, that several courts have recognized the vast potential for destructive unfairness which exists when claims for punitive damages in products liability cases to be surrendered to the jury without such guidance and restraint. See, for example, the carefully reasoned opinions in Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983)(Becker, J.); Moore v. Remington Arms Co., 427 N.E.2d 608 (Ill. App. 1981) (Londrigan, J.).

The lesson offered by these and other such cases, as well as the commentators we have discussed above, is that the courts must take a much firmer hold on the punitive damages issue in these cases or face the possibility that the entire, intricately crafted structure of products liability law and litigation will be undermined by juries left at sea with only sympathy for a rudder.

That reform must begin with a more active and responsible role for the trial judge in the peculiarly difficult and important area of punitive damages:

> As soon as possible after discovery has been completed, courts should rule on whether there is sufficient evidence to establish a prima facie case for punitive damages. If the claim survives a motion for summary judgment, the court should carefully assess the evidence presented at trial. If the evidence is insufficient to justify a

> punitive award, the court should direct a verdict on the issue. This will ensure that only serious punitive damages claims will be considered by juries.

Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 89 (1983). "[J]udicial scrutiny over the awards provides a partial justification for allowing such awards in the first place." Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alas. 1979); Wangen v. Ford Motor Co., 294 N.W.2d 437, 461 (Wis. 1980); Rinker v. Ford Motor Co., 567 S.W.2d 655, 669 (Mo. App. 1978)(means available to courts to control excessive awards); Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983): "[W]e agree with Judge Friendly's observation in Roginsky . . . that 'the consequences of imposing punitive damages in a case like the present are so serious' that 'particularly careful scrutiny' is warranted." See also the similar views of a federal district judge in Alsop & Herr, Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective, 11 Wm. Mitchell L. Rev. 319 (1985).

As a preliminary matter, the trial and appellate courts in every case should scrutinize the evidence on the fundamental question of whether the defendant knew its conduct to be illegal or very wrong.[8/] The trial court in this very case did

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8/ "The defendant's conduct should not only be wrongful in its consequence, but it should be clear also that the

Footnote Continued

take that step, to its credit. Unfortunately the DCA set the critical ruling aside. The effect must be to discourage trial judges from exercising the supervision which is so urgently needed.

In addition, there are several specific measures the Court can adopt to help protect against unfair assessment of punitive damages, while leaving this remedy available to punish and discourage truly flagrant misbehavior on those rare occasions when such conduct is truly proved.

A. Defining the Standard of Liability

The problem that needs attention first is the definition of the basis for liability. It is hard to improve upon the Carraway standard, for it requires that the plaintiff prove the defendant's misconduct was "flagrant," i.e. that it demonstrate an "entire want of care," or knowledge that it was unlawful. Other courts and commentators concur in the appropriateness of such standards in the products liability context. See, e.g., Moore v. Remington Arms Co., 427 N.E.2d 608, 617 (Ill. App. 1981); Leichtamer v. American Motors Corp., 424 N.E.2d 568, 580 (Ohio 1981). See generally Problems, 49 U. Chi. L. Rev. 1, 20-24; R. Epstein, Modern Products Liability Law 181 (1980).

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> defendant knew that the conduct was wrongful (that is, knew that he regarded the risk as wholly inappropriate) at the time it was undertaken and nonetheless decided for reasons of self- interest to continue that conduct until caught red-handed." R. Epstein, Modern Products Liability Law 181 (1980).

Valuable as Carraway is, however, more precision in the standard would be helpful. We suggest that the phrase "extreme departure from the norm" would add an important definitional element:

> [D]amages ordinarily will be proper only in cases of extreme departure from accepted safety norms in the particular industry. To avoid punitive assessments for simply erring on design decision 'close calls,' the standard must be interpreted to provide a fair measure of breathing space for the manufacturer to make good faith mistakes.

Problems, 49 U. Chi. L. Rev. 1, 27-28. See also id. at 24; Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103, 115-16 (1982)(describing the concept by graph: "Punishment becomes appropriate at point x3, set at an 'extreme' distance from the norm, where the conduct has become clearly flagrant. . . . Between x2 and x3, an actor's conduct will either derive from a good faith mistake or, if known to be wrong, will only be a minor theft for which the payment of compensatory damages will be punishment enough."); Note, 42 Ohio St. L.J. 771, 773 (1981) ("major departure from ordinary negligence").

This Court may make an important improvement in its standard for punitive damages liability at least in products liability cases, by requiring proof of the defendant's "extreme departure" from acceptable behavior.

B. Compliance with Statute or Regulation

Compliance with an applicable safety statute or regulation -- such as Federal Motor Vehicle Safety Standard 301 -- is generally and fairly considered good proof (but not conclusive) that a product is not defective and, conversely, that the manufacturer used "due" care in making and selling it. The issues change substantially, however, when the focus shifts from liability for compensatory damages -- based on principles of loss spreading, to liability for punitive damages -- which serve a very different purpose. "[P]articularly if many in the industry have come to treat the provision as the proper safety norm, proof of compliance with the regulation or statute ordinarily should be deemed conclusive proof of good faith and hence a conclusive defense to a punitive damages claim." Problems, 49 U. Chi. L. Rev. 1, 42.

Every automotive design safety standard involves a delicate balance of many competing desiderata such as the reduction of risk to the extent feasibile, maximization of utility and the minimizing of cost. Necessarily there are practical limitations as these ideals conflict. For example, steps taken to eliminate a hazard may increase costs. Indeed measures to reduce one risk necessarily may increase another. (Note, for example, the possibility that the risk in side collisions may increase if the back of the car is "beefed up" to reduce the risk in rear-end collisions).

The National Highway Traffic Safety Administration deliberates long and hard, and considers argument from all interests (including consumer and industry interests and its own experts) before it promulgates a standard. While a plaintiff may deride the standards because they set "minimums" in some respects, they often represent an "optimal" social compromise on the issue.

Automotive engineers must design to some point, and it must usually be "reasonable" for them to select the level of safety promulgated as adequate by the federal government.

One can understand that such a decision might fairly be adjudged "unreasonable" (and hence negligent) -- in the rare instance where the engineers are shown to have known of a serious hazard, easily remedied, and not considered by the agency. On the other hand, it is difficult to fathom how any decision to design to the federally approved safety standard could <u>ever</u> be adjudged quasi-criminal, and hence the basis for a punitive assessment. Yet this is what the plaintiff's counsel urged, and what the DCA approved. Such a result is as contrary to common sense as it is unacceptable as a social policy:

> [A] product that complies with both the standards of common practice and government regulation should rarely, if ever, be the subject of a punitive damages attack. . . . Even if a product that complies with both common practice and statute may be found defective, it is wholly inappropriate to assert that a party who has complied with the

> only fixed standards for conduct should be treated as reckless, or worse, for doing so. To expose such defendants to punitive damages . . . is not only to attack the defendant for his conduct, but by the same token to impugn everyone associated with the formulation of products standards, including the federal government, with the same degree of reckless indifference . . . . [Except where defendants submit fraudulent data to the government], conformity with applicable standards must be an absolute defense to all punitive damage claims.

R. Epstein, Modern Products Liability Law 181-82 (1980).

This Court is urged to adopt the principle that compliance with an applicable safety standard is conclusive on the punitive damages issue.

C. Abuse of Expert Testimony

The abuse of expert testimony may become the most serious problem the courts face in this area.

Expert testimony as to defectiveness is a central aspect of the plaintiff's proof in the typical products liability case. Because of the complexity of the scientific choices that are on trial, this is usually necessary, notwithstanding the obvious danger of the "professional" expert witness whose very business it is to "find" a defect in the product before the trial, and to give his or her "expert" opinion in that regard to the jury.[9/] That juries are sorely tempted to surrender

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9/ See W. P. Keeton, D. Owen & J. Montgomery, Products Liability and Safety -- Cases and Materials 882 (1980),

Footnote Continued

their ultimate decisional responsibilities to such experts (as they are thought to do with lie detectors -- the "black box" phenomenon) is well known. This problem cannot be avoided. But this distortion of the expert's role has been spreading, insidiously, into the punitive damages arena where it promises to wreak havoc if not attacked promptly and decisively.10/

In at least three other recent cases, Airco Inc. v. Simmons First National Bank, 638 S.W.2d 660 (Ark. 1982), Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983), and Ford Motor Co. v. Stubblefield, 319 S.E.2d 470 (Ga. App. 1984)(CCH ¶ 10,216), the juries awarded punitive damages upon the basis of "expert opinions" that the manufacturers had been guilty of making and selling products, respectively, "grossly in violation of safety engineering principles" (638 S.W.2d at 662); manifesting a "colossal disregard for the safety of the

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noting that "[s]ome judges are becoming quite skeptical concerning the use and abuse of expert testimony," and admonishing: "Beware of the expert who is a 'professional' witness!"

10/ In this particular case, Chrysler did not object to the qualifications of the experts to testify. Nevertheless the amici urge that if that testimony was properly in the case, it still cannot provide a sufficient basis for punitive damages. In other words, its presence may or may not be reversible error but it adds nothing and certainly does not provide any meaningful step toward the satisfaction of the high standard required for punitive damages in Florida.

users" (717 F.2d at 840); and based upon "deliberate and callous" engineering decisions. Defendant's Application for a Writ of Certiorari, p. 25, citing transcript p. 1260.

It is perhaps not entirely coincidental that the "expert" in the Airco and Stubblefield cases, who claims to have testified "in over 100 cases with products ranging from toys to airplanes,"[11/] is the very same Dr. Ball (although he testified in Stubblefield as "Mr." Ball) who was the plaintiff's principal expert in this case at trial. This particular engineer has apparently made testimony on supposed "corporate malice" his particular specialty, for he has of late been appearing in courtrooms at least throughout the South testifying in products liability suits on the reprehensibility of manufacturers. Indeed, he advertises this as a field of his expertise.[12/] Perhaps one should not quarrel with success, for upon his opinions of corporate "malice" juries have made assessments of punitive damages, against at least three manufacturers, of many millions of dollars: $3 million in Airco, $8 million in Stubblefield, and $3 million in this case.

11/ See Products Liability and Transportation Legal Directory (1983). The pertinent page is reproduced in Appendix A to this brief.

12/ See his entry in the Products Liability and Transportation Legal Directory, Appendix A.

A second aspect of the problem is equally serious. It is the jury's responsibility alone to make the legal "malice" judgment. The engineer plainly has no "expert" qualification to pass upon the ultimate question of whether certain conduct was blatantly anti-social or "gross" and "reprehensible. This is the type of ultimate socio-political decision which the community must make (through the jury). It cannot be turned over to a technical expert hired for the occasion without a terrible degradation of our system of justice.

It was, perhaps, this most fundamental problem with such testimony that caused the Third Circuit in Acosta to raise the serious impropriety of such testimony sua sponte:

> Although not raised on appeal, the admissibility of this ["colossal disregard"] statement under Fed. R. Evid. 702 or 704 is open to serious question.

717 F.2d at 840 n.20.

More technically, analogous precedent leads to the same conclusion.

Notwithstanding the substantial relaxation of the ultimate opinion rule, an expert of course is still not entitled to give an "opinion" on a "legal" issue. See generally Palm Beach County v. Town of Palm Beach, 426 So. 2d 1063 (Fla. 4th DCA 1983); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979); Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983); Fed. R.

Evid. 704, Advisory Committee's Note ("The abolition of the ultimate opinion issue rule does not lower the bars so as to admit all opinions."). "Opinions phrased in terms of inadequately explored legal criteria should similarly be excluded as not helpful and possibly misleading. . . . Opinion testimony resulting in substantial danger of unfair prejudice, confusion of the issues, or misleading of the jury may be excluded under Rule 403." M. Graham, Evidence -- Text, Rules, Illustrations and Problems 340 (1983). Surely the ultimate issue of "malice" in a punitive damages case is a "legal" issue on which "expert" "opinions" are most improper.

This abuse of expert testimony looms large and dark upon the horizon. The Court is urged to declare its impropriety, decisively, before it winds its way insidiously into more and more jury verdicts.

D. Reversal Rather Than Remittitur

The size of the punitive damage award in this case -- $3 million -- is itself a strong indication that the jury's actions were distorted by passion, bias or prejudice, and that the trial judge acted properly in setting aside the award. There is an insidious danger, however, in an approach to these cases which focuses too closely on the size of the award.

In punitive damages cases, courts face a real temptation to "compromise" the punitive damages issue by remitting an excessive verdict to some "reasonable" amount. The possibility is remote in this case, of course, because Chrysler's approach to the appeal has been to demonstrate the impropriety of the entire award and not to request a reduction. Nevertheless the Court has indicated a special interest in the problem of punitive damages and amici think it appropriate to comment, briefly, on that aspect of the situation, insofar as the use of the remittitur must be assessed with other potential reforms.

Remittitur may be appropriate in some cases, where both the underlying legal wrong and its reprehensibility are clear, but when the verdict appears too large. Yet in an ordinary product case like this, where the underlying issues of negligence and proximate cause are themselves in doubt, where the jury found the product nondefective, and where the enormity of the verdict so brightly displays its error, the bias or prejudice that produced the erroneous verdict very probably infected the entire deliberative process. The jury's decision-making in this case thus appears demonstrably tainted altogether -- not only on the punitive damages issue, but on the question whether the plaintiffs had a claim at all. See generally Problems, supra, 49 U. Chi. L. Rev. 1, 56 (noting "the probability that the error will contaminate the entire case").

> Remittitur may too easily be used improperly as a compromise, . . . when an excessive verdict was produced by passion or prejudice and thus should be stricken altogether, sometimes along with the verdict for compensatory damages as well.

Problems, supra, 49 U. Chi. L. Rev. 1, 58.

The point, we urge, is that remittitur sometimes permits the Court to achieve fairness in the individual case but its use should not become a facile "compromise" which preempts the more far-reaching and fundamental reforms which are essential.

CONCLUSION

One must wonder what went wrong in the trial below to produce such an extraordinary result. The plaintiff's counsel's oratory undoubtedly was effective; perhaps it was the erroneous admission of the extraordinary "expert" testimony on the defendant's "malice"; perhaps it was the trial court's erroneous "willfull" instruction to the jury, who otherwise had no direction on this issue; surely the jury felt compassion for Ms. Wolmer and her husband. Most probably the explanation lies in a combination of factors some of which will never be known. What is certain, however, is that the plaintiff's counsel succeeded in converting a tragic yet basically simple rear-end collision into a complex products liability case, and, then, into an occasion for turning the plaintiffs (otherwise very generously compensated) into instant multi-millionaires.

In the process, two basic values were lost: justice, and the law. Amici respectfully urge this Court to restore the products liability law of Florida to its proper balance, to proclaim the total inappropriateness of punitive damages awards in ordinary products liability crashworthiness cases, and to provide some guidance to the courts and counsel on the proper administration of such claims in cases of this type.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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