67,761

IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~67,671~~

CHRYSLER CORPORATION, etc.,

Petitioner,

vs.

JACK E. WOLMER, etc.,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

HADDAD, JOSEPHS & JACK,
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-and-

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I
STATEMENT OF THE CASE AND FACTS

In violation of Rule 9.120(d), Fla. R. App. P., Chrysler's brief includes an appendix containing 6 documents in addition to the opinion below, and makes at least 9 factual allegations which are wholly outside of the district court's opinion.[1/] If we step outside of the proper record to rebut these factual assertions--most of which are simply wrong--then we are violating the rules no less than Chrysler. But if we leave these incorrect assertions unrebutted, then we will be sanctioning not only Chrysler's transgression of the appellate rules, but also its blatent misstatements of the evidence.[2/] The only appropriate outcome is for this Court either to decline jurisdiction at the threshold, or at the least to strike Chrysler's brief with instructions that Chrysler file a new brief which complies with those rules.

The relevant facts surrounding Mary Wolmer's death are well-summarized in the

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[1/] These factual allegations are: 1) that throughout extensive testing involving rear-end impacts, the Wolmer's model vehicle never experienced a broken shock absorber or fuel-tank rupture upon contact with any portion of the shock absorber (brief at 1); 2) that a 30 m.p.h. moving-barrier test is equivalent to a 45 m.p.h. vehicle-to-vehicle impact (brief at 1 n.2); 3) that the only tank rupture in Chrysler's test was the result of a retention strap which cut the tank (brief at 1 n.2); 4) that Chrylser changed the strap design and eliminated the problem (*id.*); 5) that the retention strap was not involved in the Wolmer accident (*id.*); 6) that federal standard 301 allows some fuel leakage after a 30 m.p.h. impact (brief at 1-2); 7) that Chrysler's tests on the Wolmer model showed no leakage (brief at 2); 8) that there was no instance of fuel tank rupture and fire in this model before the Wolmer accident (brief at 2); and 9) that the district court made specific factual findings on the absence of a design defect, Chrysler's failure to follow the recommendations of its engineers, and Chrysler's awareness of prior crash fires (brief at 2 n.9).

[2/] For example, Chrysler shamelessly represents to this Court that its testing of the Wolmer vehicle never produced a broken shock absorber (brief at 1), ignoring the testimony of its own witness--of which Chrysler has actual knowledge because we have been emphasizing this testimony throughout these proceedings--that the shock absorber did actually break off in the §301 tests (R. 309-10). In addition, Chrysler ignores the result of one test conducted 8 months before the accident, in which the "left rear shock absorber was severely bent in the extended position by contact with the fuel tank seam . . ." (PX. 33). These tests and others, according to one witness, made it "clearly foreseeable" that "the contact between the shock absorber and the fuel tank would be sufficient to put a hole in the fuel tank" (R. 586-87).

district court's opinion (A. 6-7, 9-10). We should point out, however, that the district court did not purport to summarize *all* of the voluminous evidence of Chrysler's reckless disregard for human life. To the contrary, the district court's opinion lists only some of the "testimonial and documentary evidence" supporting the award of punitive damages (A. 10).[3/]

II
SUMMARY OF THE ARGUMENT

The district court's decision acknowledges and enforces this Court's pronouncements that mere knowledge of a condition is not alone sufficient to warrant punitive damages, in the absence of some independent evidence of wantonness in failing to correct it. The decision does not uphold the punitive award upon any assumption that an automobile is an inherently dangerous product. The decision does construe the Supremacy Clause, but it is so clearly correct in doing so that there is no reason for this Court to review it. And the decision does not conflict with any other decision in stating both that an inconsistency of verdicts does not relieve the trial court of its obligation to review the plaintiff's verdict in the light of all evidence which supports it; and that the failure to complain at trial of inconsistent verdicts precludes such a complaint on appeal.

[3/] The district court's opinion notes that the fixed filler-tube connection was "'a gross design defect'" and "'[t]otally unreasonable'" (A. 10); that even the low-speed moving-barrier test "revealed contact problems between the fuel tank and shock absorber" (A. 11); that these low-speed tests also revealed "problems of fuel leakage from the filler tube" (A. 11); that both kinds of result "evidenced Chrysler's actual knowledge of both problems" (*id.*); that such knowledge obligated Chrysler to conduct additional tests at higher speeds (*id.*); that Chrysler's failure to do so, or to otherwise correct the problem was "'an atrocious violation of accepted practices in safety engineering' which demonstrated 'a reckless disregard for safety'" (A. 11); that in light of the low-speed test results, the likelihood of a breach in the fuel system at higher-speed crashes was "'very great'" (*id.*); that even a predictive analysis, as opposed to further high-speed testing, would have revealed the likelihood of "'fuel system compromise'" (*id.*); and that even Chrysler's own internal memorandum disclosed that the Wolmer vehicle "'marginally'" met the minimal government standard (*id.*).

III
ARGUMENT

A. THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN *WHITE*, *COMO OIL*, *CARRAWAY* AND *DETROIT MARINE*.

We agree with Chrysler's reading of *Como Oil* and *White Construction*, as they construe *Carraway*.[4/] Although neither is a products case--and thus neither offers the kind of precise factual analogy which has traditionally been necessary to support conflict jurisdiction[5/]--they do hold respectively that neither a defendant's knowledge that he was overfilling an underground gas tank (*Como Oil*) or that the brakes on his loader were not working properly (*White Construction*) were sufficient to show recklessness in the defendant's failure to correct or warn about the danger.[6/] The obvious reason, of course, is that there were no additional facts in either case to show that the defendant had some actual appreciation or reckless disregard of the significant dangerousness of the condition which he knew he was creating.[7/]

[4/] *See Como Oil Co. v. O'Loughlin*, 466 So.2d 1061 (Fla. 1985); *White Construction Co. v. Dupont*, 455 So.2d 1026 (Fla. 1984); *Carraway v. Revell*, 116 So.2d 16 (Fla. 1959).

[5/] *See Financial Federal Savings and Loan Association v. Burleigh House, Inc.*, 336 So.2d 1145 (Fla. 1976), *cert. denied*, 429 U.S. 1042, 97 S. Ct. 742, 50 L. Ed.2d 754 (1977); *Trustees of Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961).

[6/] But there is no such holding in *Detroit Marine Engineering, Inc. v. Maloy*, 419 So.2d 687 (Fla. 1st DCA 1982), in which there was no evidence even that the defendant had actual knowledge of the product defect in question. Indeed, a central issue in *Detroit Marine* was whether the product was defective at all.

[7/] To the contrary, the driver in *Como Oil* may have merely been negligent or grossly negligent, *see* 466 So.2d at 1062, in failing to appreciate the significant danger which he was creating in overfilling the tank; and the driver in *White Construction*, in the context of the specific events which took place, might have merely been negligent in proceeding to back up his truck despite actual knowledge that its brakes had not been working, *see* 455 So.2d at 1028. As the court noted in *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 263 (Fla. 1st DCA 1984), *review denied*, 467 So.2d 999 (Fla. 1985), this Court in *White Construction* "merely characterized the particular facts of that case as nothing more than a single isolated instance of negligence, i.e., the defendant operated the loader even though aware that its brakes were defective."

But neither the district court's decision in this case, nor the other district court decisions upon which it relied, are inconsistent with that rule.[8/] In *Johns-Manville*, *supra* note 7, for example, the court expressly acknowledged the standard articulated in *Carraway* and *White Construction*, 463 So.2d at 247, and said that mere knowledge of a condition is ***not*** sufficient in the absence of proof of the defendant's "wanton disregard of the potential harm likely to result as a consequence of that wrongful conduct."[9/] Thus, in the very passage from *Johns-Manville* quoted by the district court in this case (A. 9), the court could not have made more clear that knowledge of a product defect must be coupled with "knowledge that [the] product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death . . . ." *Id.* at 249. Indeed, the *Johns-Manville* court expressly distinguished *White Construction* on that basis, 463 So.2d at 263-64.[10/]

[8/] *See Johns-Manville Sales Corp. v. Janssens*, *supra* note 7; *Toyota Motor Co. v. Moll*, 438 So.2d 192 (Fla. 4th DCA 1983) (per curiam); *Piper Aircraft Corp. v. Coulter*, 426 So.2d 1108 (Fla. 4th DCA), *review denied*, 436 So.2d 100 (Fla. 1983); *American Motors Corp. v. Ellis*, 403 So.2d 459 (Fla. 5th DCA 1981), *review denied*, 415 So.2d 1359 (Fla. 1982). *See also Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed.2d 145 (1982). It is interesting that in every one of these cases except *Toyota Motor Co. v. Moll*, in which no review by this Court was sought, this Court denied conflict review. Although such denial implies no approval of the district court's decision on the merits, it most certainly indicates that these decisions did not conflict with *Como Oil* or *White Construction*--or at least were unworthy of review by this Court.

[9/] *Id.* at 247, *citing Adams v. Whitfield*, 290 So.2d 49 (Fla. 1974), *Griffith v. Shamrock Village, Inc.*, 94 So.2d 854 (Fla. 1957), *and Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950) (en banc).

[10/] The same is true of all the other district court decisions cited by the district court in this case. In *Toyota v. Moll*, *supra* note 8, the court expressly acknowledged the requirements of malicious or reckless conduct, and allowed a punitive award ***not*** simply because Toyota knew of the problem, but also because, "in wanton disregard of the safety of the purchasing public, [it] continued to market the '73 Corona without correcting its life-threatening design flaws." 438 So.2d at 195. Similarly in *Piper Aircraft Corp. v. Coulter*, *supra* note 8, it was the "failure to act in the face of a known, substantial danger to the lives of the aircraft occupants" which warranted the punitive award. 426 So.2d at 1110. And in *American Motors Corp. v. Ellis*, *supra* note 8, 403 So.2d at 467 the punitive award was permissible because "the manufacturer knew that its product was

The instant case is no different. After expressly acknowledging the requirements of *Como Oil*, *White Construction* and *Carraway* (A. 8), and quoting *Johns-Manville*, the district court in this case concluded that the punitive award was appropriate ***not*** simply because Chrysler knew of the problem, but because in addition "Chyrsler 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" (A. 11). That knowledge--not just of the problem but of the overwhelming danger--came in part from Chrysler's own tests--which disclosed that Chrysler's practice in this case was "'an atrocious violation of accepted practices in safety engineering,'" and reflected "'a reckless disregard for safety'" (A. 11). This case does not hold that mere knowledge of a problem will warrant a punitive award.[11/]

B. THE DECISION BELOW DOES NOT CONFLICT WITH *JOHNS-MANVILLE* BY MISAPPLICATION OF THE RULE IN THAT CASE AND WITH *LOLLIE* IN HOLDING THAT THE VOLARE WAS AN "INHERENTLY DANGEROUS" PRODUCT.

The district court acknowledged the evidence not simply that Chrysler knew of the problem, but knew also that it was "inherently dangerous to life and limb and, still,

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defectively designed ***and*** that injuries and deaths had resulted from the design defect, but continued to market the product in reckless disregard of the public safety . . . ." 403 So.2d at 467 (emphasis added).

11/ Chrysler suggests (brief at 5) that the facts of this case cannot satisfy *Como Oil* and *White Construction*, because "even the opinion below cannot avoid disclosing that Chrysler expended substantial efforts in the safety development of its vehicle and fuel system." But the district court's opinion says no such thing. It merely acknowledges that Chrysler tested this car "[i]n an effort to demonstrate compliance with a government-imposed standard" (A. 10)--and ***not*** that Chrysler expended any effort to improve the safety of this vehicle. To the contrary, as we will demonstrate if required to brief this case, Chrysler was unwilling to spend a penny beyond that required by the federal standards, either to test at higher speeds or to make any of the improvements concerning the two problems with this model which its own test results disclosed--even though the same improvements had been made on almost all of Chrysler's other models. In any event, even if Chrysler had taken some minimal steps, there was still overwhelming evidence that Chrysler acted in a wanton and reckless manner in failing to take the additional steps which it knew to be necessary. Chrysler has cited no authority that evidence of some minimal care automatically precludes a punitive award, and has not urged conflict jurisdiction on that basis.

continued to market the vehicle" (A. 11). Seizing upon the words "inherently dangerous," Chrysler asserts that the district court must have based its ruling on the erroneous assumption that the Wolmer vehicle was an inherently dangerous product under the rule in *Tampa Drug Co. v. Wait*, 103 So.2d 603 (Fla. 1958), thus giving rise to a duty to warn consumers of its dangerousness. According to Chrysler, this imputed holding conflicts with *Lollie v. General Motors Corp.*, 407 So.2d 613, 615 (Fla. 1st DCA), *review denied*, 413 So.2d 876 (Fla. 1982), which states that "[a]lthough 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."

This asserted conflict is Chrysler's invention. There is not one hint in the district court's decision which even remotely sustains Chrysler's claim that it based any part of its ruling on punitive damages upon the assumption that the Wolmer vehicle was "inherently dangerous" in the manner in which that phrase was used in *Tampa Drug Co. v. Wait*. To the contrary, the "inherently dangerous" doctrine has nothing to do with punitive damages, but only with the standard of liability--that is, the duty to warn. Chrysler did not contest the finding of liability in this case--only the award of punitive damages. There is no hint in the district court's opinion that it transposed this theory of liability onto the entirely-separate question of punitive damages.

C. ALTHOUGH THE DECISION OF THE DISTRICT COURT DOES CONSTRUE THE "SUPREMACY CLAUSE" OF THE UNITED STATES CONSTITUTION, THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE DISTRICT COURT'S HOLDING ON THE QUESTION OF PRE-EMPTION.

We fully acknowledge that in examining the extent to which a federal statute might pre-empt the common-law remedy of punitive damages, the district court in this case was construing the Supremacy Clause of the U.S. Constitution--and that this Court has ***discretionary*** jurisdiction over decisions which "expressly construe a provision of the state or federal constitution" under Rule 9.030(a)(2)(A)(ii), Fla. R. App. P. The question

is whether this Court should exercise its discretion--that is, whether Chrysler has made a colorable showing that the district court erred.

Although it cites a number of legislative pronouncements about the scope and purpose of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381 et seq., and the regulations promulgated thereunder (brief at 6-9), Chrysler neglects to quote for this Court the one dispositive statutory provision upon which the district court relied (A. 14). Section 1397(c) explicitly provides that "[c]ompliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from ***any liability*** under common law" (our emphasis). That pronouncement thoroughly destroys Chrysler's assertion of pre-emption. Thus, it is not surprising that Chrysler has failed to cite a single case which agrees with its position, relying instead upon general authorities on the issue of pre-emption in unrelated contexts, and attempting to distinguish the Supreme Court's most recent discussion of pre-emption of punitive damages in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed.2d 443 (1984). In light of *Silkwood*, it is not surprising that every case to consider the specific issue of pre-emption which Chrysler raises here has rejected it out-of-hand.[12/]

D. THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN *BANKERS*, BECAUSE *BANKERS* DOES NOT REMOTELY SUGGEST WHAT CHRYSLER SAYS IT DOES.

Chrysler argued on appeal that in ruling on its renewed motion for directed verdict on the negligence claim, the trial court should have excluded from consideration all evidence which the plaintiff had offered on his claim of strict liability, since the jury had rejected that claim. As the district court noted (A. 12), Chrysler offered no authority

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12/ *See Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657 (5th Cir. 1981), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed.2d 145 (1982); *Elsworth v. Beech Aircraft Corp.*, 37 Cal.3d 504, 208 Cal. Rptr. 874, 691 P.2d 630 (1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2345, 85 L. Ed.2d 861 (1985). *See generally Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 53 U.S.L.W. 4612 (U.S. June 4, 1985).

for this position, which violates the unanimous rule that in considering a renewed motion for directed verdict, the trial judge must consider all evidence which supports the jury's finding.

Chrysler now claims that this holding conflicts with *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530 (Fla. 1985), in which, according to Chrysler (brief at 10), "this court specifically ***considered***" (our emphasis) a similar question, and "held" that the trial court "could have" granted a motion for directed verdict, "but for the existence of additional evidence" precluding it. But what this Court "considered" in one of its opinions--what it said the trial court "could have" done in some hypothetical situation--is pure *dictum* which is inherently incapable of supporting conflict jurisdiction in this Court.[13/] What this Court ***held*** in *Farish* is that the trial court was right to ***deny*** the principal's motion for a directed verdict on the basis of the jury's exoneration of the agent, in light of the plaintiff's evidence of direct wrongdoing by the principal. Any accompanying suggestion that in some other case the trial court might direct a verdict for the principal on the basis of the jury's exoneration of the agent, is pure *dictum*, insufficient to demonstrate conflict jurisdiction.

Moreover, *Farish* does not even contain such *dictum*, because it does ***not*** state ***what*** the appropriate remedy is when a jury exonerates an agent while finding against the principal on a purely-derivitive claim. To use Chrysler's language (brief at 10) *Farish* most certainly does ***not*** "hold" that the trial court "could have" directed a verdict under such circumstances; and Chrysler's attribution of such a "holding" to *Farish* is indefensible. To the contrary, *Farish* simply does not address the question, because it did not arise in *Farish*. But it has arisen in analogous cases, and as the district court noted

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13/ *Pinkerton-Hays Lumber Co. v. Pope*, 127 So.2d 441, 443 (Fla. 1961). *See Niemann v. Niemann*, 312 So.2d 733, 734-35 (Fla. 1975) (conflict depends on district court's decision, not its opinion or reasoning); *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla.) (same), *cert. denied*, 398 U.S. 951, 90 S. Ct. 1871, 26 L. Ed.2d 291 (1970).

(A. 12-13), the only appropriate response to inconsistent verdicts is for the defendant to call the inconsistency to the trial court's attention before the jury is excused, because any "inconsistency in the verdicts . . . could have been corrected in virtually no time at all by a resubmission of the cause to the jury . . . ." *Lindquist v. Covert*, 279 So.2d 44, 45 (Fla. 4th DCA 1973).

Chrysler's suggestion is that despite its failure to point out the alleged inconsistency in the jury's verdict, the trial court should have effectively directed a verdict for Chrysler on the negligence claim, in light of the jury's verdict for Chrysler on the strict-liability claim, by declining to take into consideration any of the evidence offered by Chrysler in support of the strict-liability claim--which is, of course, ***all*** of the evidence. According to Chrysler, a plaintiff who has persuaded the jury on one of his claims should be out of court if he has failed to persuade the jury on an inconsistent claim. He should take no credit from the jury's acceptance of one of his positions; he should have no opportunity for the jury to resolve the apparent conflict. Obviously that contention is absurd. As the district court noted in citing this Court's decision in *Cutchins v. Seaboard Air Line R. Co.*, 101 So.2d 857 (Fla. 1958) (A. 13), a motion for directed verdict is not the appropriate vehicle through which to address an alleged inconsistency of verdicts. There is no case in Florida or in any other jurisidiction which has ever held otherwise.

On the basis of the foregoing reasoning, the district court noted in *dictum* that the argument which Chrysler should have been making but did not make, either in the trial court or in the district court, was that the verdicts were inconsistent (A. 12). But no such argument was properly before the district court because Chrysler had raised no such argument below. Seizing upon a footnote from this Court's decision in *Farish*, 454 So.2d at 532 n.2, Chrysler argues that *Farish* departs from the longstanding rule that a defendant has no right to complain about inconsistent verdicts unless he raises the point

in time for the jury to correct the problem.

We have three responses. First, this pronouncement in the district court's opinion is pure *dictum*, because Chrysler raised no contention of inconsistent verdicts in the district court; and as we have noted, *dictum* cannot support conflict jurisdiction in this Court. Second, even if Chrysler has properly read the footnote from *Farish*, that too is pure *dictum*, because it simply disagrees with the theory upon which the district court in *Farish* rejected the appellant's assertion of inconsistent verdicts, while ***affirming*** the same outcome for another reason. And third, what this Court said in *Farish* was that the defendant ***had*** effectively raised the claim of inconsistent verdicts by its objection to the trial court's instructions on the principal's liability, and thus ***had*** preserved the point for appellate review. There is no suggestion in *Farish* that a claim of inconsistent verdicts does not have to be raised one way or another in the trial court. In this case, as the district court plainly stated (A. 12), it was not raised in ***any*** context below.

IV
CONCLUSION

It is respectfully submitted that this Court should not exercise its discretion to review the decision in the instant case, because it does not conflict in any respect with any decision of this Court or any other district court of appeal.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of November, 1985, to: MICHAEL B. DAVIS, ESQ., Davis, Critton, Hoy & Diamond, P.O. Box 3797, West Palm Beach, Florida 33402; and to SHEILA L. BIRNBAUM,

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