O/a 6-3-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,761

FILED
SID J. WHITE
MAY 13 1986
CLERK, SUPREME COURT
By _______ Chief Deputy Clerk

CHRYSLER CORPORATION, etc.,

Petitioner,

vs.

JACK E. WOLMER, etc.,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON THE MERITS

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-and-
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I
STATEMENT OF THE CASE AND FACTS

A. Summary of the Facts. We apologize for the unusual length of the following factual statement, made necessary by Chrysler's repeated failure to acknowledge the best evidence in support of the jury's award of punitive damages. With appropriate citation of the evidence, our statement will show that Mary Wolmer was a rear-seat passenger in her own Chrysler wagon when it was struck from behind by another car at less than 50 m.p.h. The Chrysler became an instantaneous furnace, and Mrs. Wolmer was incinerated, as the two front-seat passengers escaped virtually unharmed. Chrysler has conceded that its negligence caused the fire and Mary Wolmer's death, by paying her husband Jack the compensatory damages awarded by the jury.

But Chrysler was more than negligent. It knew, by virtue of the inherent design of this car, and by the consistent results of its crash tests in compliance with minimal federal standards, that there were three deadly problems with the design of this car, which were likely to cause a fuel-fed fire upon a rear-end collision at less than highway speeds. Wolmer's expert, without objection, testified that one of these defects was a "gross violation" of basic engineering principles; the "very opposite" of a safe failure mode; a "gross design defect," which was "totally unreasonable." Chrysler knew that 25% of all fires in rear-end collisions are caused every year by that same defect; and that 500-1,000 fires caused by rear-end collisions result in death every year. Chrysler also knew that all 3 of the defects easily could have been fixed at minimal cost, by the use of techonologies which Chrysler employed on most of its other cars, and in fact had tested on this car.

Chrysler did not employ those technologies because the car marginally passed the minimum federal test without them. Even though Chrysler knew that the car was defective anyway--even though Chrysler itself felt that the prescribed federal tests were meaningless in predicting real-world events--Chrysler frankly admits, as did its officers at the trial, that the sole criterion governing the design of this car, as well as the

propriety of any modifications, was compliance with the federal standard. Thus, solely because the car passed the federal test, Chrysler knowingly marketed a deadly product, which killed Mary Wolmer. It is no surprise that a plaintiff's expert testified without objection that Chrysler's conduct was "an atrocious violation of accepted practices in safety engineering," which reflected "a reckless disregard for safety." The evidence of record overwhelmingly sustains the jury's punitive award.

B. The Accident—What Happened. On the night of the accident, Robert Wilson was driving Mary Wolmer's 1977 Chrysler Plymouth Volare station wagon on I-95; Elizabeth Rinker was in the right-front passenger seat, and Mary was sitting in the rear left seat (R. 42, 292, 493, 988-89, 993, 997). Ahead of Wilson, Walter Scott's car developed trouble and stopped in the middle lane of an overpass just before the top (R. 55, 60-61). The traffic was heavy (R. 61, 116, 990), and an Oldsmobile eventually stopped behind Scott (R. 55, 62). Wilson approached the Oldsmobile (R. 990-91), and in his rear-view mirror he saw John Beers' Chevy pick-up approaching him (R. 114-16, 993-94). Beers had just moved from the left lane to the center lane in order to make way for faster traffic; he was traveling between 50 and 55 m.p.h. ***before braking*** (R. 116, 121-22). Wilson concluded that Beers would not be able to avoid the impact, and slammed his foot on the Chrysler's brakes (R. 994). Beers slammed on his own brakes, and the Chevy pick-up began to skid before it collided with the Chrysler (R. 117-18).[1/] At least 4 witnesses said that the Chrysler became an instantaneous ball of fire upon impact (R. 65,

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[1/] Taken in the light most favorable to Wolmer, therefore, the evidence shows that Beers was traveling only 50 m.p.h.--or less than the speed limit on I-95--***before*** he applied his brakes; that Beers not only applied his brakes but did so forcefully enough to begin a skid before the impact; and that the Chrysler may not have come to a full stop, and thus was traveling away from Beers, at the time of the impact. A reasonable jury could conclude that the impact speed of Beers' car was substantially less than the 50 m.p.h. which Beers was traveling before he hit the brakes. These facts contrast sharply with Chrysler's self-serving and irrelevant statement (brief at 3) that Beers was travelling 50-65 m.p.h. prior to impact. *See* cases cited in note 82, *infra*. *See generally* Tiedemann, *The Outer Limits of Florida Appellate Advocacy*, The Florida Bar Journal (May, 1986) (and authorities cited).

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68, 127-32, 995-96, 1002, 1011, 1017).[2/] As the two front-seat passengers escaped virtually unharmed through the driver's window (R. 998), they saw the silhouette of Mary Wolmer engulfed in flames in the back seat (R. 66-67, 127-28, 131, 134).

C. *The Death by Fire—How it Happened.* Apart from the fire--from the perspective of structural damage alone--the damage to the rear compartment of Mary Wolmer's Chrysler was "minor" (R. 491; *see* 492); and the structural damage to the Chevy pick-up which hit the Chrysler was only "minor to moderate" (R. 477; *see* R. 469).[3/] Were it not for the fire, this collision was "certainly a survivable-type of collision" (R. 499; *see* R. 506; R. 586, S.A. 1; R. 932).[4/] Thus, Wolmer's evidence easily permitted the jury's conclusion that it was the fire that killed Mary Wolmer--not the crash.[5/]

The Wolmers' 1977 Plymouth Volare wagon was a design produced by Chrysler for the first time in the 1976 Volare wagon; 90 to 95% of the design work on the 1977 Volare wagon--and the entire fuel system--was a carryover from the original 1976 model (R. 104-05, 164, 303, 312, 860). Like any car, this wagon had a predictable collapse characteristic upon impact; it is not accidental, but is specifically designed (R. 562-63, 566, 583). The overwhelming evidence--from both plaintiff's and defendants' witnesses--is that 3 factors, each of them inherent in the design of this car, conjoined to produce the tragic outcome of this crash. Indeed, at least 2 Chrysler employees testified that the

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[2/] One said that the flames were at least 6 feet high (R. 66). Another, comparing the fire to an army flame thrower, said that it was higher than the street lights, at least 30-40 feet into the air--an orange-red fireball which enveloped the entire rear of the car in flames (R. 127, 129-31). A third witness said: "When the cars contacted, it seemed to be almost instantaneous that a big fireball come out of the back and raised higher than the traffic lights on I-95; those aluminum poles that light the road" (R. 1017).

[3/] In this light, Chrysler's citations that the force of the crash was "tremendous" and the impact "severe" (brief at 3) are completely irrelevant.

[4/] "A." refers to the appendix filed with Chrysler's brief. "S.A." refers to the Supplemental Appendix at the end of this brief. It consists in part of a number of key quotations from the transcript.

[5/] The cause of death was complete incineration (R. 206, 221-24, 394, 405, 412-13, 418-19, 422-23). Mary Wolmer was alive before the fire reached her (R. 225-26, 228).

crash mode of the Wolmer accident was typical--not unusual (R. 162-63, 309).

1. *Penetration of the Fuel Tank by the Left Shock Absorber.* One design characteristic is that upon a rear-end collision, the fuel tank will push forward and upward, and given enough force it will ride over the differential and contact the left shock absorber (R. 175-76, 564-67, 620, 1613).[6/] The higher the speed of the crash, the more force will impel the tank forward (R. 310-11); and if the shock has stretched or broken off under pressure, such contact is not "friendly" (R. 311). At some point, one way or another, it will inevitably be punctured by the shock:

> If you push it far enough, you can contact the differential--pardon me--contact the shock; engage the shock enough and actually cause some deformation of the tank with the shock or have the shock actually puncture a hole in the tank.
>
> That would be a characteristic of the way this vehicle collapses, and the fuel system, really, and the front edge of the fuel system interacts in this collapse mode that this particular vehicle undergoes (R. 567).

As the district court noted (A. 9), that is exactly what happened in this crash. The tank behaved precisely the way it was designed to behave upon a rear-end collision. It rode over the differential and contacted the left shock, and the shock broke loose at its top fitting and gouged a hole in the tank (R. 161, 177-79, 588-89 (*see* S.A. 2), 597, 793-95, 1365, 1460-61). It was 14 inches long and 3 inches wide at its widest (R. 1459), and created an avenue through which the fuel in the tank escaped. We discuss the result below.[7/]

[6/] The tank is positioned on the left side of the car (R. 1601, 1613), and the left shock absorber is located in front of it--not parallel and not perpendicular, but at an angle--between the tank and the axle which goes through the middle of the differential (R. 177-78, 1154, 1601). When the car is hit from the rear, the impact pushes the fuel tank forward toward the shock (R. 176, 620).

[7/] Chrysler says (brief at 8) that even one of Wolmer's witnesses "forthrightly" agreed that the tank/shock configuration comported with good engineering practice (*see* R. 620). But the witness says exactly the opposite on the very next page (R. 620), in the context of a colloquy in which he positively blasts Chrysler for recklessness (R. 619-21). In this context, the one citation offered by Chrysler is irrelevant, and probably reflects either the witness' misunderstanding of the question, or an error by the court reporter, but is certainly not a "forthright" admission. Chrysler is repeatedly burdening this Court with irrelevant citations.

2. *How the Fuel Filler Tube Pulled Out of the Fuel Tank.* The second design characteristic concerns the connection between the fuel tank and the filler tube, which leads from the tank to the gas-cap opening at the rear quarter panel of the car (R. 83-85). In this model, as the district court noted (A. 10), the connection between the filler tube and the rear quarter panel is a fixed connection, as opposed to a breakaway connection which would allow the filler tube to pull out of the rear quarter panel upon impact (R. 80-82, 165-66, 313, 557-59). The connection between the filler tube and the gas tank is not really a connection at all; as the district court noted (A. 10), the tube simply goes into the tank 4 or 5 inches, made snug by a double rubber grommet--like a donut--which is designed to fit snugly to prevent fuel leakage (R. 559), but easily gives way to force (R. 102, 558; *see* R. 313-14, 569, 572-74, 1657).

When the wagon is hit from the rear, as the district court noted (A. 10), the 2 side panels deflect outward--away from the car--as the fuel tank moves forward under the car (R. 159-60, 166, 331, 568). The greater the speed, the more the outward deflection (R. 166-67, 572-73). But the filler tube cannot move forward with the tank, because it is "rigidly attached to the outside body panel . . ." (R. 570). Since the tank is moving forward, and the filler tube is attached to the rear quarter panel, which is moving outward, the result is obvious; as the district court noted (A. 10), the other end of the filler tube begins to pull out of the fuel tank: "And if it tugs far enough--and it's going to take five or six inches of displacement--it's going to pull it out of the tank. Pull it out of the tank. And that's what happened in this particular accident" (R. 569; *see* R. 81, 165, 314). And when the tube pulls out of the tank, it leaves a hole from which fuel can, and by hydrostatic pressure, will escape (R. 581; *see* R. 1654-55). It will escape "with substantial force and velocity," and that is precisely what happened in this crash (R. 582).

One of Wolmer's experts was Dr. Leslie Ball, whose impeccable credentials span 9 pages of the transcript (R. 861-70).[8/] Dr. Ball was asked his opinion of Chrysler's use of

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[8/] There is a lengthy *ad-hominem* attack upon Dr. Ball in the Brief of Amici Curiae Motor Vehicle Manufacturers Association of the United States, Inc., and Product

a fixed filler-neck attachment at the rear quarter panel of the car, with a breakaway attachment at the fuel tank (R. 903-04). Chrysler offered no objection to the question, or to Dr. Ball's answer--that it was a "gross violation" of basic engineering principles; the "very opposite" of a safe failure mode; a "gross design defect," which was "totally unreasonable" (R. 904-05; *see* S.A. 9).

Thus, both the shock absorber and the filler tube compromised the integrity of the fuel tank (R. 177, 497-98 (*see* S.A. 3), 597-98).[9/] The tank was not crushed and ***would not otherwise have lost fuel*** except for these two factors (R. 177, 597-98, 314-15). Under the force of the crash, the pressure inside the gas tank was 10 times that of a garden hose (R. 873, 878, 934). Even at hose pressure, the gas would fly out 2 or 2½ feet (R. 879). At 10 times that pressure, it spurts out like a flamethrower, becomes a gaseous vapor which is highly ignitable, and then showers the surrounding area with droplets of gas (R. 873, 880, 894). Of course there are a number of ignition sources in a crash such as this one, like metal scraping the roadway or other metal, or broken headlights or tail lights, or the electrical metering wiring emanating from the gas tank itself (R. 881; *see* R. 102, 1598). Thus, the inevitable result of any significant emission of fuel from the tank is a flash fire and then a ground fire (R. 83, 582, 873, 1598).[10/]

Liability Advisory Council, Inc. (hereinafter "Corporate Amici Brief") at page 24. This attack is a jury argument which has no place in a responsible appellate brief. Moreover, one would think that Chrysler would be a bit reluctant to start throwing stones at experts, in light of the fact that its principal "independent" expert, Derwyn Severy, runs a company consisting principally of former Chrysler employees (*see* R. 1624-26).

[9/] While the trial court concluded that most of the fuel had probably gushed out of the rip caused by the shock, it also found that the evidence showed a causal connection between the fire and the displaced filler tube (R. 2115). The district court noted that "[b]oth of these design characteristics had a causal relationship to the flash fire that consumed Mary Wolmer" (A. 10).

[10/] Chrysler's expert acknowledged that with 16 or 17 gallons in the tank, as in this crash, there are 3,000 pounds of pressure inside it (R. 1634-36). This expert had testified in another case that the crash mode creates pressure inside the tank as high as 250 pounds per square inch, and that given an opening the fluid "will squirt out because of the added pressure that the force provides" (R. 1679). He had conducted a crash test at 55 m.p.h. in which the fuel came out of the tank at 150-250 feet per second (R. 1631). He had written that "fuel coming from the tank provides an instantaneous furnace; sometimes completely enveloping one or more vehicles" (R. 1661).

3. *Deformation of the Floor Pan.* In this car, the filler opening of the gas tank is anywhere from 18 to 24 inches away from the back rest of the rear seat (R. 885, 887). The gas in the tank is maybe 25 inches away from the rear seat (R. 887). In addition, the impact of a rear-end collision causes the back-seat passenger to be thrown backward toward the gas tank (R. 887-88). Thus, Mrs. Wolmer was sitting less than 2 feet from this conflagration at the time it occurred. In a sedan, she might have been protected by a fire wall. In this wagon, as one of Chrysler's experts had written (*see* R. 1652), her only potential protection against the fire was the floor pan, defined as a "piece of metal under your feet starting from the front-area all the way near the rear bumper" (R. 137).

The floor pan is the last line of defense (R. 75, 276, 347), specifically intended by Chrysler to provide a barrier between the passengers and any spillage from the tank as a result of a rear-end collision (R. 71, 136)--to buy them enough time to get out of the car after a collision like this one, whose structural damage is survivable (R. 604-05). Of course, the floor pan will not perform this function if there is any tear between the pan and the rear rail of the automobile to which it is attached (R. 71-72, 92, 279, 1142), which would allow fire to enter the rear passenger compartment (R. 278; *see* R. 138-39). Thus, the pan is snugly attached to the rail to close any avenue through which flames might enter the passenger area (R. 139-40).

In this wagon, however, Chrysler did not use a continuous fusion weld--the strongest possible (R. 85, 96-97)--to attach the floor pan to the rear rail; it used only spot welding--one weld every 2½ inches (R. 72, 102-03, 141-42). But in highway-speed crashes, the spot welding is not strong enough to hold the floor pan in place, as one of the plaintiff's experts testified explicitly (R. 599-600, *see* S.A. 4; *see also* R. 95). It was through the "large gaps" (referred to in the quotation at S.A. 4) that the explosive fire in the fuel system reached Mrs. Wolmer sitting less than 2 feet away. Given the spot welding on this car, separation of the floor pan in a crash like this one was reasonably foreseeable (R. 603). In this crash it separated at the wheel weld--where the floor pan

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provides a ceiling above the wheel (R. 1609-10).[11/]

On the basis of a hypothetical question assuming the 3 defects which we have discussed, the plaintiff's expert, Dr. Leslie Ball, was asked whether Chrysler departed from a reasonable course of engineering and manufacturing practice (R. 908-11). Chrysler objected neither to the question nor to Dr. Ball's answer: "Well, it was an atrocious violation of accepted practices in safety engineering" (R. 911). He was asked without objection whether Chrysler's conduct exhibited reasonable regard for the safety of its customers or passengers, and he answered without objection: "I would say they showed a reckless disregard for safety. They were seeking to meet the letter of the law but not the intent of the law" (R. 912).

D. What Chrysler Knew. On the basis of the foregoing alone, the jury was entitled to conclude that Chrysler knew that a rear-end collision of this car at less than 50 m.p.h. would cause a fire from which a rear-seat passenger would not escape. As we have noted, that result was an inherent characteristic of the design of this car, and Chrysler is certainly charged with knowledge of its own design (*see* R. 278). But there is far more evidence in this case of Chrysler's knowledge, and we consider that evidence below.

The summary begins but by no means ends with Chrysler's testing under Motor Vehicle Standard No. 301 (*see* Chrysler's brief at 4). As the trial court instructed the jury (R. 1754-55) without objection (*see* R. 1718-20), 15 U.S.C. §1391(2) provides that

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[11/] Chrysler contends (brief at 4) that Wolmer offered no testimony that fusion welding is mandated by sound engineering practice, or would have allowed the floor pan to survive this collision. It also points to the testimony for one plaintiff's witness that the separation of the floor pan was not really a defect. Again, Chrysler is simply ignoring the evidence contrary to its position. That evidence showed that the floor pan was designed not to separate even at 30 m.p.h., but did so anyway in some of the 30-m.p.h. tests (R. 72, 92-93, 95-96, 144-45, 279). It therefore was not performing its function (R. 279); Chrysler did not meet its duty of providing an adequate fire wall (R. 605); and one witness found that failure intolerable (R. 1131). It was up to the jury to decide whether the floor pan comported with sound engineering practice, and the testimony of one isolated witness, overwhelmingly contradicted, is irrelevant to this appeal. As we note later, this problem with the floor pan could easily have been corrected (*see* R. 97).

§301 is only a "minimum standard" (*see* R. 1284); and as the trial court also instructed (R. 1755) without objection (*see* R. 1718-20), 15 U.S.C. §1397(c) provides that compliance with §301 "does not exempt any person from any liability under common law."

As we have noted, the design of the Wolmers' 1977 wagon was produced for the first time in the 1976 model (*see* R. 303, 312). Contrary to Chrysler's explicit representation (brief at 8), there were no relevant design changes between the 1976 model and the 1977 Wolmer model (R. 303, 312); even after testing, the fuel systems were ***identical*** (R. 104-05, 164-860). In its brief (p. 8), Chrysler points to testimony concerning 13 design modifications which assertedly were made in the "1977 Volare." The citation provided is Tr. 1591-93, but Chrysler omits to cite the previous page, in which the witness affirms that he is comparing the "'76-'77 . . . series" to "'75 or earlier" (R. 1590-91).[12/] Notwithstanding Chrysler's selective citation of the transcript, the citations provided above leave no question that the 1976 and 1977 models were virtually identical.

That observation raises two questions: 1) what changes did Chrysler make between 1975 and 1976; and 2) even apart from what it knew about the inherent design characteristics of this car, what did Chrysler's testing tell it about the dangers of the new Volare model which it first had marketed in 1976--dangers which should have been corrected before the 1977 model was marketed? On the first point, Chrysler did offer testimony about the changes that were made between 1975 and 1976, but that testimony--at least regarding the specific defects at issue here--does not remotely support Chrysler's assertion (brief at 8) that such changes "materially improved the fuel system and its environment (T:852)." The one citation provided does not support the point. And the testimony listing the changes made for the '76 model (R. 1590-93; *see* R. 584, 1148-49) reveals that with the exception of a general improvement of the car's body structure in

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[12/] After listing the changes--in the page ***after*** the citation provided by Chrysler--the witness concludes: "I haven't seen as many improvements made in a given model change than from the '75 to the '76-'77 series for fuel systems" (R. 1594; *see* R. 1148).

the rear--which would tend to provide some incidental protection for the fuel system--none of those changes had anything to do with the floor pan, the filler tube, or the shock absorbers.13/

In this context, the second question becomes critical: even apart from the inherent design characteristics of this car, what did Chrysler learn from its testing, for both the 1976 and the 1977 models, regarding the 3 specific design characteristics which resulted in Mary Wolmer's death? It is against that backdrop that we will consider the specific test results. As we do so, it is critical to keep in mind that although Chrysler proudly asserts that its testing of the '76 and '77 models was done "to identify actual or potential problems with the system design and to develop corrective measures" (brief at 5)--to "develop design changes which assured still greater integrity in the fuel system" (brief at 6)--Chrysler omits to mention that it did ***not*** adopt for this car a single one of the design modifications which it so repeatedly tested--or any others (*see* R. 164). It did not even ***consider*** adopting them (*see* R. 104-05, 181). We will discuss the reasons for that in a moment. The point to emphasize here--as we look at how Chrysler experimented with fixed attachments of the filler tube, and shaved off a corner of the fuel tank to avoid contact with the shock; and as Chrysler saw the extent to which these modifications significantly reduced the dangers of which it had actual knowledge--Chrysler did not adopt a single one of those changes for the Wolmer car.14/

13/ For example, there was a modification to prevent the filler cap from coming off in an accident (R. 1590)--but that had nothing to do with the inherent problem of a fixed connection at the rear quarter panel and a breakaway connection at the tank. Similarly, Chrysler removed the axle-identification tag from a place where it might cut the fuel tank, and rounded the cover plate on the gear box, and plasticized the brake clip for the same reason (R. 1592), but these changes had nothing to do with the potential threat of the shock absorbers or the potential deformation of the floor pan. And as we have noted, there were no further changes between 1976 and 1977.

14/ Thus, as we will demonstrate, Chrysler is 100% wrong in asserting (brief at 17 n.6) that "when Chrysler's tests identified problems in its designs, it undertook to correct them." To the contrary, it did nothing. As even Chrysler points out (brief at 8), many of its tests on the '77 model were looking toward production of the 1978 and 1979 models. In other words, Chrysler rushed to market the 1977 model without correcting those defects which it planned to correct in the 1978 and 1979 models. The design drawings for

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Since Chrysler did not adopt any of the design modifications which it tested, or any other modifications aimed at the same problems, Chrysler's point is correct--that its testing program showed "substantial concern for the safety of its vehicle design" (brief at 5)--only if its test results were not sufficient to give Chrysler notice of the design problems which resulted in Mary Wolmer's death. But the tests did show the overwhelming danger, and Chrysler made a deliberate decision to ignore it.

Wolmer did not introduce into evidence every one of the written reports on every one of Chrysler's tests. He did, however, introduce general testimony about the overall test results. For example, although the shock absorber did not actually break off in the specific test results introduced by Wolmer, one of Chrysler's employees offered explicit testimony that the shock absorber had ***actually broken off*** in two or more of Chrysler's tests of the Wolmer model (R. 309-10).[15/] In addition, without reference to any specific test results, a number of witnesses testified that Chrysler's tests in general showed direct contact between the fuel tank and the shock absorber (R. 161-62, 311, 344, 346, 1148). One Chrysler employee said that he considered such contact a "failure" whether it punctured the tank or not (R. 308-09). But Chrysler conducted no tests to determine at what point the shock would detach (R. 311-12), or at what point it would threaten the integrity of the tank (R. 344-45). Similarly, without reference to specific tests, Wolmer's witnesses testified, as even a Chrysler witness acknowledged (R. 277), that the overall test results told Chrysler that even a partial filler-tube detachment would cause fuel to

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the '77 model were released in December of 1975; production commenced in early August of 1976; and the car was announced for sale in early October of 1976 (R. 101). At least one change was made on some of the late 1977 models--a shaving off of the fuel tank to minimize contact with the shock absorber--but this change was ***not*** made in the car which was sold to the Wolmers (R. 860).

[15/] We ask the Court to contrast this evidence with Chrysler's explicit representation (brief at 25) that "[i]n no test performed by Chrysler prior to sale of the Wolmer vehicle did the rear shock absorber break off . . ." (*see also* Chrysler's brief at 26). That is a direct misstatement of the evidence, and Chrysler knows it, because we have been emphasizing this testimony throughout the appellate proceedings in this case. Chrysler's consistent response has not been to address this evidence, but to pretend that it does not exist.

leak (R. 165, 571-72). But Chrysler did not test to record the precise point at which the filler tube would pull out of the tank (R. 330-31). And finally, without referring to specific test results, Wolmer's witnesses testified that the overall testing program showed a compromise of the floor pan (R. 92, 96, 144-45). They testified that even the amount of compromise which took place in the low-speed tests would allow flames to enter the passenger compartment (R. 92-93).[16/]

On the basis of this evidence about the overall testing program, Wolmer's evidence about the specific test results was merely cumulative. That testing program, between 1975 and 1977, was conducted with the knowledge that on the nation's highways--for example in 1976, the year Chrysler marketed the Wolmer's car--there were 20 million car crashes in this country, of which 100,000 resulted in fires (R. 1684-85). Of these fires, about 500-1,000 every year are rear-end collisions resulting in death (R. 1690-91). Moreover, one of Chrysler's experts had published a study in 1974 demonstrating that 25% of all fires in rear-end collisions are "caused" by the fuel filler tube pulling out of the tank (R. 1657-58). This expert's research was widely available in the industry (R. 1671); Chrysler itself has a large library of industry research (R. 349-50). From these numbers, the jury could have concluded that Chrysler had actual or constructive knowledge that 125-250 people are killed every year because the fuel filler tube pulls out of the tank; and that 500-1,000 rear-end collisions every year result in death from fire. It is against this backdrop that Chrysler evaluated its test results.[17/]

16/ In addition, the test results showed that even in low-speed rear-end crashes, none of the four doors of the car would open (PX. 20, 52; *see* R. 98, 171-73, 181, 1203-04). Of course, that presented a serious problem in the event of a fuel-fed fire (R. 171), but there is no evidence that any technology existed for correcting that problem. It did, however, underscore the vital importance both of preventing a fuel-fed fire in the first place, and of maintaining the integrity of the floor pan, to prevent the fire from reaching a back-seat passenger before she could exit the car through a window.

17/ In light of this data, and of the inherent design of this car, and of the test results, Chrysler's point is irrelevant that there had been no prior crash fires in this particular model (brief at 17 n.6). The model had only been in existence one year, and Chrysler's knowledge of the danger was shown in many other ways.

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PX. 28 and PX. 44 concern a test conducted March 11, 1975, in which the lower left corner of the fuel tank had been "reworked" in order "to allow more clearance between the tank and the shock absorber . . ." In addition, the car was modified by a breakaway filler tube attachment at the rear quarter panel. Both modifications, therefore, show Chrysler's actual knowledge of both the potential for contact between the tank and the shock absorber, and at least the potential availability of a breakaway attachment at the rear quarter panel (R. 1192). In this test, the fuel tank was "punctured with immediate leakage in excess of one ounce per minute in first five minutes. The measurement of leakage at this point was discontinued." Visual inspection revealed a 1.5-inch-long cut in the fuel tank apparently caused by the edge of the left strap around the tank. The report also notes that the differential had contacted the tank (*see* R. 1194-98). It contains no suggestion that tank strap was the sole cause of the fuel leakage. In its brief (p. 6), Chrysler discusses all of the design modifications which were made for this test, without acknowledging that none of them were adopted for the Wolmer car.

PX. 23, which Chrysler does not discuss at all in its brief, was not a full-car impact test, but an impact-simulator test (or sled test), which involves only that part of the car of concern to the test (R. 1198-99). One finding: "There was fuel tank fluid leakage from the filler tube opening as the tube pulled loose during rear motion of the tank" (*see* R. 1278). PX. 24, which Chrysler also fails to discuss, was a sled test conducted April 23, 1975, which produced an identical result: "The fuel tank suffered leakage after the filler tube pulled away from it" (*see* R. 1297). PX. 27, which Chrysler also fails to discuss, is a sled test conducted April 30, 1975. The result: "The fuel tank lost retention and fell loose from the floor pan allowing loss of tank fluid through the filler tube opening after the filler tube pulled out during the forward displacement of the tank" (*see* R. 1280).[18/]

[18/] Chrysler argues (brief at 26) that "in each sled test in which the fuel filler tube slipped out (Pl. Ex. 23-27), the slippage was caused by the failure of the metal straps holding the gas tank"--and not by the 3 design defects which Wolmer proved. That is simply false. Although some of these test results mention a problem with the strap, not a single one suggests a causal relationship between that problem and the fuel leakage

PX. 33 is a composite exhibit recording the results of several tests. One conducted in June of 1975, in which the filler tube was modified to break away at the tank, showed that "[t]he fuel tank contacted the left shock absorber . . ." PX. 21 records a test in July of 1975, in which two modifications were made for testing purposes: "A breakaway filler tube was installed in the rear quarter panel, and the left front corner of the tank was cut away and replaced with styrofoam in order "to study shock absorbers to fuel tank contact." The result: "Shock absorber and shock absorber lower mounting contacted the shaved corner of the fuel tank ***heavily*** . . ." (*see* R. 677, 1272-74) (our emphasis). The report describes the contact as one of two "potential problem areas." In its brief (p. 7), Chrysler acknowledges these problems, and the need to test further to "consider corrections in these areas." It forgets to mention, however, that no such "corrections" were made "in these areas" on the Wolmer car--which was marketed despite Chrysler's actual knowledge of the problem.

PX. 25 and 26 concern a test conducted August 28, 1975. The result: "There was fuel leakage from the filler opening after the filler tube pulled out of the grommet during tank displacement" (*see* R. 1279). PX. 47 concerns a test conducted February 11, 1976, in which Chrysler used a fixed attachment at the tank. One effect of the crash was that the "wheel well housing sheet metal and rear seat floor pan separated on both sides providing an opening directly into the passenger compartment for fuel if the tank were to be penetrated." In addition, a slight leak developed in the lower left corner of the fuel tank approximately 30 minutes after the test (*see* R. 1186). Chrysler points out (brief at 7) that there was no leakage within the time prescribed by §301, omitting any mention of the significant problem with the floor pan.

PX. 31 concerns a test conducted April 19, 1976, in which a static rollover of the car displaced the filler tube, allowing "the fuel to pour out at a rate much more than

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which occurred; and some of the sled-test results do not even ***mention*** strap retention problems. In addition, even apart from the sled tests, there were vehicle crash tests in which the shock absorber contacted the fuel tank, and in which no strap retention problems are mentioned at all. *See*, *e.g.*, PX. 21, discussed *infra*.

MVSS-301 would allow for leakage." In addition, the filler tube was pulled out of the tank one-tenth of an inch (*see* R. 702-05, 1175, 1178-79, 1181-82). PX. 49 (which is also one of the tests in composite PX. 33) is a test conducted in June of 1976, in which the "fuel tank was contacted by the differential cover and by the left shock absorber" (*see* R. 1184-85).

PX. 20 was also conducted in June of 1976, a film of which was witnessed by one of Chrysler's witnesses, who testified that there was "very positive contact" between the fuel tank and the shock absorber (R. 1621). PX. 29 is an internal review of the entire test program dated September 9, 1976, which was before the Wolmer car was sold, and in which the author informed 9 other Chrysler employees that the test program showed that the Wolmer car "marginally met the fuel system requirements [of Standard 301]." This comment contrasts sharply with Chrysler's representation (brief at 8) that the Wolmer model "fully met and even exceeded" the §301 requirements.[19/]

As Chrysler notes, the Wolmer car was sold in October of 1976. Nevertheless, Chrysler's subsequent testing was introduced into evidence without objection, as relevant to Chrysler's duty to warn its customers of the potential danger of this car.[20/] PX. 33 is

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[19/] Chrysler contends (brief at 27) that the comment in PX. 29 "plainly" refers to front-angle collision tests--not the rear-end tests. We ask the Court to review the document, which "plainly" says no such thing. Even Chrysler tried to get one of the plaintiff's witnesses to admit that the notation is ambiguous (Tr. 850-51)--thus creating a jury question; and at least one witness interpreted the comment to refer to fuel leakage (R. 1202). Thus, the jury was entitled to conclude that even regarding the minimal §301 standard, Chrysler felt that its own compliance was "marginal."

PX. 29 also contains a proposal that Chrysler test in the future at 40 m.p.h. The exhibit says: "[P]roposed future standards include 40 mph rear and 30 mph angular rear requirements." Chrysler argued in the district court that this language referred to future federal standards--not Chrysler proposals. But the document says no such thing, and it was up to the jury to interpret it in light of the plaintiff's testimony about what the document meant (*see* R. 836-37, 1200-01, 1285-86).

[20/] *See generally Toombs v. Ft. Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968); *Tampa Drug Co. v. Wait*, 103 So.2d 603, 607-08 (Fla. 1958); *Piper Aircraft Corp. v. Coulter*, 426 So.2d 1108 (Fla. 4th DCA), *review denied*, 436 So.2d 100 (Fla. 1983); *Clement v. Rouselle*, 372 So.2d 1156 (Fla. 1st DCA 1979), *cert. denied*, 383 So.2d 1191 (Fla. 1980); *Edwards v. California Chemical Co.*, 245 So.2d 259 (Fla. 4th DCA), *cert. denied*, 247 So.2d 440 (Fla. 1971); *Atlas Properties, Inc. v. Didich*, 213 So.2d 278, 279 (Fla. 3rd DCA 1968). *See*

the composite exhibit, which contains the result of a test conducted February 2, 1977, in which the "left rear shock absorber was ***severely bent*** in the extended position by contact with the fuel tank seam . . ." (our emphasis) (*see* R. 680-81, 688-89, 691-92, 693, 709, 1175, 1178-79). PX. 33 also reports about a test conducted February 8, 1977 (*see also* PX. 48), in which the "left forward corner of the tank contacted the left shock absorber." In addition, the "fuel vent line was deflected (where it enters into the forward section of the fuel tank)," and 6 spot welds "broke loose in the left corner of the trunk floor pan" (*see* R. 1188). PX. 30 is a test conducted May 19, 1977, in which the wrong fuel filler tube was used in the car, resulting in substantial fuel leakage. The test at least implicates Chrysler's quality control efforts. Finally, composite exhibit PX. 33 also contains a test conducted November 17, 1977, in which there was a leak in the fuel tank.

In sum, even apart from the general summary evidence about the test results, the test exhibits show that Chrysler had conducted a number of tests at only 30 m.p.h. in which the shock absorber repeatedly had contacted the fuel tank--at least once "heavily" even at that speed (PX. 21, R. 1272-73); once in which the contact was "very positive" (R. 1621); and once in which the shock was "severely bent" (PX. 33, p. 12). And as we have noted, even a Chrysler witness admitted that in some of the other tests, the shock had actually ***broken off*** more than once (R. 309-10). Moreover, Chrysler had conducted

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generally Gordon v. Niagara Machine & Tool Works, 574 F.2d 1182 (5th Cir. 1978); W. Prosser, *The Law of Torts* §96, at 647 n.67 (4th ed. 1971); Annotation, *Products Liability—Failure to Warn*, 53 A.L.R.3rd 239 (1973). That issue was clearly framed by Wolmer's pleadings, and in any event, in the absence of any objection to this evidence by Chrysler, it was tried by implied consent of the parties under Rule 1.190(b), Fla. R. Civ. P. *See Ford Motor Co. v. Hill*, 381 So.2d 249 (Fla. 4th DCA 1979), *aff'd*, 404 So.2d 1049 (Fla. 1981); *Titusville Enterprises, Inc. v. Newkirk*, 205 So.2d 16, 17 (Fla. 4th DCA 1967); *Robbins v. Grace*, 103 So.2d 658 (Fla. 2nd DCA 1958). Wolmer's complaint alleged negligence in failure to warn of the inherently dangerous condition of the car (R. 2007), and the trial court instructed that the manufacturer "must exercise a duty of care commensurate with the scope of foreseeable risk" (R. 1750). There is no requirement that a jury instruction itemize all the various theories of negligence presented by a plaintiff; that would contravene the spirit of the Florida Standard Jury Instructions. *See* General Note on Use, *Florida Standard Jury Instructions in Civil Cases*, p. xix (1982), *cited in Florida East Coast R. Co. v. McKinney*, 227 So.2d 99 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 176 (Fla. 1970).

at least 5 tests in which even at 30 m.p.h. the fuel filler tube had pulled partially out of the tank, and even that caused fuel to leak. And Chrysler had conducted at least 2 tests in which the spot welding on the floor pan failed, and the floor pan had compromised as a result, even at only 30 m.p.h.

On the basis of the test results, the jury could have concluded that Chrysler ***knew*** that the integrity of the fuel tank and the floor pan would be threatened at higher speeds. As one witness testified, that is their job (R. 278). But Wolmer did not leave these conclusions to inference. A number of witnesses stated the obvious--that the greater the speed of the cars involved, the greater the force of any crash (*see, e.g.*, R. 156, 595). Other experts, including Chrysler employees, testified that Chrysler's personnel are obviously aware that people do crash their cars at speeds above those at which Chrysler tested (R. 75-76, 275, 594). And as we have noted, the cars involved in the Wolmer crash were traveling less than the speed limit at that time.[21/] These observations formed a predicate for Wolmer's expert testimony about the 3 defects in this case.

Regarding contact between the tank and the shock, the plaintiff's experts testified that even if contact is light at 30 m.p.h., it will potentially rupture the tank even at 40 m.p.h. (R. 89-90, 156). Thus, the test results made it readily foreseeable that the shock would significantly threaten the integrity of the tank:

> A It was readily foreseeable because the car is optimized to the extent that in a 30-mile per hour moving barrier impact with a 4,000-pound barrier, the front of the fuel tank just barely, or just barely misses, or just barely contacts the shock. It's optimized to that extent. It's designed just to meet that 30-mile an hour standard (R. 585).

* * *

21/ Thus, a rear-end collision at the speed of this crash was certainly foreseeable by Chrysler. *See Huff v. White Motor Corp.*, 565 F.2d 104, 108 (7th Cir. 1977); *Larsen v. General Motors Corp.*, 391 F.2d 495, 504-05 (8th Cir. 1968); *Roberts v. May*, 583 P.2d 305, 307 (Colo. Ct. App. 1978); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 501, 503 (Tex. Civ. App. 1974), *writ ref'd n.r.e.*; *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 436 (1975).

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> Q Is it reasonably foreseeable under anticipated highway speeds, the contact between the shock absorber and the fuel tank would be sufficient to ***put a hole in the fuel tank***?
>
> A It's ***clearly foreseeable*** (R. 586-87) (our emphasis).
>
> * * *
>
> Q Now, what would a reasonably prudent engineer have learned from the experience that Chrysler was having in their development in the fuel system, development testing of the fuel system in this car with respect to the relationship between the shock absorber and the fuel tank in a crash? What kind of information would they have picked up watching the various tests that you reviewed?
>
> A Well, you would have seen, I think, pretty much the same thing I saw, and the same thing that they indicated they saw by working on the basis that there was potential for contact between the front of the tank and the shock absorber, and that if the speeds got significantly beyond the 30-mile an hour test range that they were dealing with in their development testing, that the ***probabilities for breaching*** or failing the fuel system as a result of shock contact ***were very great*** (R. 593-94) (our emphasis).

Regarding the breakaway connection between the filler tube and the tank, one plaintiff's expert testified that it was "reasonably foreseeable under ordinary highway speeds that rear-end collisions would produce separation of the filler tube from the fuel tank" (R. 587).[22/] The same expert opinions were expressed regarding the separation of the floor pan. Chrysler's manager for vehicle structure and analysis engineering (*see* R. 70) acknowledged that the floor pan will separate at higher speeds than 30 m.p.h. (R. 92-94, *see* A. 5). One Chrysler witness had personally examined crash results in which the wheel welds had broken as the rear quarter panel deflected outward (R. 349). And the supervisor of Chrysler's vehicle structure analysis department (*see* R. 135) testified that a 1977 Plymouth sedan failed even to satisfy the minimal 301 requirement because of separation between the rail and the floor pan which in turn caused heavy contact between the rail and the fuel tank; apparently additional spot welds solved the problem

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[22/] Indeed, the manager of Chrysler's production planning department for this car had actual knowledge that in the Ford Pinto, there had been rear-end fuel spillage problems despite compliance with §301 (R. 284).

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at least enough to permit compliance with Standard 301 (R. 142-43).

On the basis of all the foregoing, one of the plaintiff's experts, without objection, reached the bottom line:

> Q (By Mr. Josephs) Tell us what those tests indicate or should have indicated to a reasonably prudent engineer.
>
> A The tests indicate two things. They indicate, number 1 that they have just met the standard, the 30-mile per hour moving barrier standard; and they indicate if you're going to do a little bit of predictive analysis, that if the speed increases by very much, considering the energy relationships and damage, that ***you're going to have fuel system compromise*** (R. 840-41) (our emphasis).[23/]

E. Alternative Designs for this Car. We remind the Court that this crash was readily survivable except for the fire (R. 499, 506, 586, 932); and that the car would not have lost any fuel in this crash were it not for the filler tube pulling out, and the hole caused by the shock (R. 177, 597-98, 314-15). Chrysler was not required to market a perfect car; it was required to utilize the available, cost-effective technologies which would have prevented the fire. There was ample evidence that Chrysler easily could have avoided all three of the defects--and Mary Wolmer's death--at very little cost. Even a Chrysler employee admitted that the Wolmer car was capable of protection beyond Standard 301 (R. 90).[24/]

Regarding penetration of the tank by the shock, a plaintiff's witness offered 2 alternatives--construction of the tank out of a tougher material, or some kind of shield for the tank (R. 587-88, *see* A. 6).[25/] At least 2 other witnesses suggested that the body structure of the car could be better reinforced--perhaps the rear end stiffened--to deter

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23/ In light of all this evidence, Chrysler is wrong to say (brief at 27) that while it may have known of the danger of this car in highway-speed crashes--in the sense that any car may be dangerous in such crashes--it did not know of the defects. The evidence easily permitted the jury to find otherwise.

24/ Standard 301 does not specify any particular type of design--only performance standards--and thus constituted no barrier to any design changes in this car (R. 820).

25/ The suggested crash-resistant fuel cell material would cost an additional $33 per car; a shield for the tank would cost about $10 (R. 623-24). Such added costs would be amortized over the life of production (R. 74).

contact between the tank and the shock without creating any corresponding problems (R. 845, 1144). And one witness suggested that the shock might be designed to fail, if at all, at the bottom rather than the top, and thus reduce the risk of penetration of the fuel tank (R. 949). Even a Chrysler employee suggested that the tank might be constructed out of a heavier gage material to deter penetration (R. 98). The Wolmer tank was only .030 inches in terne-plated steel (R. 102).[26/] But Chrysler never considered this alternative (R. 98). Thus, there were at least 5 cost-effective alternatives to prevent penetration of the fuel tank by the shock.

Regarding the filler tube, the obvious alternative (which we discuss in detail below) was to use a breakaway attachment at the rear quarter panel of the car, and a fixed attachment at the fuel tank, so that the filler tube would travel with the fuel tank during a crash. A second alternative was a longer, more convoluted filler tube, which would tolerate greater stress.[27/] And a third alternative was a simple one-way flow valve in the fuel tank, which would prevent fuel spillage should the tube pull out of the tank. All three alternatives were discussed at length by the plaintiff's expert on this issue (R. 575-79, *see* S.A. 7-8).[28/]

Of these three alternatives, the most obvious is a fixed attachment at the tank and a breakaway attachment at the rear quarter panel.[29/] The technology has existed in the

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26/ One Chrysler memorandum estimates the cost of a heavier tank at 40 cents a car (PX. 29, p. 4). And one of Chrysler's experts had written in 1974 that the fuel tank should be .06 inches in thickness--twice the thickness of the Wolmers' car (R. 1663).

27/ Even a Chrysler expert had suggested this alternative; it is used in a GM Buick (R. 1684).

28/ On the feasibility of a one-way valve at the tank, see also R. 818-20. It would cost about $5 or $6 per car, and its mass production would reduce that cost (R. 622-23). One plaintiff's expert testified that while each of these alternatives presents its own problems, "I don't believe that they present any insurmountable problems. They're used extensively" (R. 813). He said such problems were common to "any filler neck" (R. 814), and that while his suggested changes might require maintenance (R. 819), they "would work very well, and it could be implemented" (R. 820).

29/ One of Chrysler's experts had written that fuel filler necks fixed to the tank by silver solder--as opposed to a rubber grommet--had "withstood substantial crush without rupture" (R. 1656). This expert had written that of 5 or 6 priority safety devices, a fixed

industry since 1965 (R. 1682-83; *see* R. 1682-83). It is used "extensively" (R. 813) in Chrysler and other cars (R. 165-66, 288, 304-05, 316-17, 579). In fact, one of Chrysler's employees agreed that a breakaway attachment at the rear quarter panel was used "in virtually all Chrysler cars manufactured in 1976 and '77 . . ." (R. 282).

As we have noted, at least 4 of Chrysler's crash tests on the Wolmers' model were conducted after modifications including a breakaway attachment at the rear quarter panel and a fixed attachment at the fuel tank (PX. 21, 28, 33 (test 1131), 44; *see* R. 580-81). But for reasons we will suggest below, Chrysler never modified this model to incorporate such a filler tube attachment (R. 304-05). It certainly would have been cheap enough to do so. Chrysler's own internal correspondence (PX. 29, p. 4) shows that a breakaway housing at the rear quarter panel would have cost only an additional 25 cents a car, and a convoluted filler tube only an additional 21 cents a car.[30/]

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attachment of the tank was the number one priority (R. 1657). He wrote: "Filler pipe at tank. Suggested fix: Eliminate the slip fit" (R. 1657). He also wrote: "Filler necks should not be clamped or passed through rubber grommets to attach them with the tank. Only a rigid metal-to-metal connection provides reasonable resistance" (R. 1666-67). And he also wrote in 1974 that his recommendations--including the fixed attachment--were "sufficient to provide crash protection from fuel spillage" at approximately the force of the Wolmer crash (R. 1669). All this was the opinion of *Chrysler's* expert.

A Chrysler employee gave graphic evidence of the value of a breakaway attachment at the rear quarter panel (R. 78-80). He was asked about the value of such an attachment, and mistakenly thinking that he was describing the Wolmer car, he gave enthusiastic testimony about its importance (R. 78-79). Then he was informed that the Wolmer car had a fixed attachment at the rear quarter panel, and he was forced to retract everything he had said (R. 79-80). He was left only with the assertion that the Wolmer car had passed the federal test (R. 80).

[30/] PX. 29, as well as many of the other test exhibits, shows that Chrysler had actual knowledge of these specific design alternatives, and had actually priced them. In the district court (brief at 11 n.5), Chrysler argued that a breakaway attachment at the rear quarter panel "was declared a defect in *Nanda v. Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1975)." That is simply false. The defects in *Nanda* were the vulnerable location of the fuel tank and the lack of flexion in the filler pipe. *Id.* at 216, 220. No case has ever declared such a breakaway attachment to be a defect. It is used in almost every Chrysler model except this one (R. 282), and even Chrysler's expert declared it the ***number one*** safety feature in preventing fuel spillage (R. 1657).

Regarding the failure of the fuel pan, there were a number of alternatives. The spot welds could have been 1½ inches apart instead of 2 inches, or even as close together as 3/4 of an inch (R. 96, 281). Even a Chrysler witness admitted that a few more welds would have helped (R. 148-49). Far superior, however, would have been continuous fusion welding, which is much stronger (R. 85, 96-97). Even a Chrysler employee acknowledged that it is possible to design the floor pan so it will not separate at all at a 30-m.p.h. crash level (R. 1132). The bottom line is that it is possible to design a specific reaction of the floor pan to a specific level of outside force (R. 97).

F. Chrysler's State of Mind. Finally, we reach the $3 million question: why did Chrysler tolerate this known dangerous condition? Why did Chrysler ignore the laws of physics, which pointed inevitably to the defect in the fuel system and the deformation of the fuel pan? Why did Chrysler ignore the carnal proof of those laws on the nation's highways--especially the danger of a breakaway filler tube at the tank? Why did Chrysler eschew predictive analysis? Why did Chrysler decline to test above the minimum standard to verify what the 301 tests showed? Why did Chrysler test the very design modifications which would have saved Mary Wolmer's life--and even employ them on other cars--but not adopt them for the Wolmer car?

Even the Chrysler witnesses acknowledged the importance of further testing.[31/] And Chrysler did have the capacity to test this car, against fixed or moving barriers, at impact speeds as high as 60 m.p.h. (R. 315, 333; *see* R. 164, 182, 1180A). It had started crash testing cars in the 1960's (R. 1173A). It had tested at speeds above 30 m.p.h.

31/ *See* R. 77, 157-58, 167, 1146, 1153. The plaintiff's experts agreed that testing was important and that Chrysler did not test enough (*see, e.g.*, R. 535, 585). But as we have noted, the evidence shows that Chrysler knew the inevitable result of high-speed rear-end crashes even without testing at higher speeds--by the laws of physics or from the lower-speed tests. Indeed, one of the plaintiff's experts testified that testing at higher speeds would have been entirely unnecessary if Chrysler had simply done a few predictive models (R. 899; *see* R. 164, 337-38, 536-37, 542-44). Chrysler uses these technologies to some extent (R. 97). They can test the integrity of the tank (R. 339), and also measure the stress to shocks (R. 1144), but Chrysler never conducted either test on this car (R. 1146, 1400, 1623). A plaintiff's expert testified at length that Chrysler at the least should have undertaken such simple analyses (R. 899-902).

before the federal standard was promulgated (R. 182, 1146, 1184A). It had tested up to 60 m.p.h. (R. 1184A-1185A). It had tested against fixed barriers (R. 1173A-1185A). But after the §301 standard became effective, Chrysler conducted only the minimally-required moving-barrier test at 30 m.p.h. (R. 75, 77, 80, 82, 156, 162, 164, 311-12, 330-31, 333, 344-45, 584, 1146, 1241).[32/]

Of course, the auto manufacturers lobbied heavily to reduce the "minimum" federal standards as far as possible (Chrysler does its share of lobbying, *see* R. 91, 318-19, 1245-48), and the standards eventually adopted were heavily influenced by the auto industry (R. 90-91, 822; *see* R. 319).[33/] Chrysler's supervisor for vehicle structure analysis testified that in 1975, 1976 and 1977, he had discussed with the manager of his department the necessity for testing at higher speeds (R. 316; *see* R. 167-70). And as we have noted, Chrysler's engineers called in writing for tests at 40 m.p.h. in PX. 29. However, although there was limited discussion of higher-speed testing at Chrysler, the idea was dropped (R. 316, 1151). Moreover, there was no formal consideration of adopting any alternative fuel-tank design configurations for this car (R. 104-05, 181), and no changes were made (R. 164).

The question is why? And we think on the basis of all the foregoing that the jurors could have answered that question for themselves. They could have concluded that Chrysler was interested in one thing and one thing only--and that was meeting the

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[32/] After marketing a car, Chrysler tested it further only for durability--mostly for cosmetic purposes (R. 1133). Not even for preparation of this lawsuit did Chrysler test or ask its experts to test at speeds higher than 30 m.p.h. (R. 1620-21). In the district court (brief at 14-15), Chrysler argued that it tested even above the minimal §301 requirement, citing tests in which the actual speed turned out to be 30.6 m.p.h. (PX. 33) or 30.3 m.p.h. (PX. 44), rather than a flat 30. But a plaintiff's expert said that these numbers show a desire to barely meet the minimum 30 m.p.h. level (R. 839-40). As several key Chrysler witnesses testified, they were unaware of any tests above the minimum 301 requirement (R. 82-83, 584, 1146, 1241).

[33/] For example, §301 requires only moving-barrier, not fixed-barrier tests, which are obviously more severe than moving-barrier tests (R. 280, 1168, 1173). Indeed, a fixed-barrier test at only 30 m.p.h. might well have duplicated the force of the Wolmer crash (R. 831-32).

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minimal federal standards--not because it thought those standards would protect its customers, but only because they were mandatory. The jury knew, for example, that the only reason Chrysler had even created a high-speed testing capacity was that it thought the government might require it (R. 182, 334, 1146-47, 1169-70, 1185A). As Chrysler itself acknowledges (brief at p. 21), it "adopt[ed] the NHTSA safety standard as its performance goal"--even though Chrysler itself thought that the standard was worthless as a means of assuring customer safety.[34/] Indeed, the jury heard repeatedly--from the mouths of the Chrysler officials themselves--that Chrysler did not adopt the design modifications which it knew to be necessary, and which it had tested on this very car, and which it had adopted for its other cars--for the sole reason that this car barely passed the §301 tests without them, and that was Chrysler's only concern.

The best example is found in the testimony by deposition of Gilbert Laine, supervisor of Chrysler's vehicle structure analysis department (R. 143-57, *see* S.A. 10-13). We ask the Court to please review S.A. 10-13, in which the witness addresses every problem by saying that there was no §301 violation; and testifies directly that if compliance with §301 were not threatened, Chrysler would not do ***anything*** about a problem. The record in this case is literally teeming with similar examples of Chrysler's obsession with minimal compliance, to the exclusion of human safety. We have reprinted many of these passages in the Supplemental Appendix to this brief.[35/] One employee extolled the virtues of a breakaway attachment at the rear quarter panel. When asked

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[34/] One Chrysler officer opined that the §301 tests are virtually worthless in predicting real-world events, and thus are nothing more than a meaningless hurdle which the auto manufacturers are required to jump (R. 320-21, 326, 328). That testimony alone supports the inference that Chrysler did not conduct these tests because it cared about its customers. Thus, Chrysler is wrong to assert (brief at 17 n.6) that there was "no evidence" that its design choices "were based on anything other than the best judgment of its engineers." To the contrary, as the following discussion makes clear, they were based on meeting the minimal federal test, despite ***better*** design choices which Chrysler used on other cars and even tested on this car.

[35/] *See* R. 35; R. 82, S.A. 14; R. 94-95, S.A. 15; R. 181-82; R. 1125; R. 1129; R. 1138-39, S.A. 16; R. 1141, S.A. 17; R. 1146-47, S.A. 18; R. 1158, S.A. 19; R. 320; R. 334; R. 1146; R. 1158A; R. 1169-70; R. 1179; R. 1412; R. 1681.

why the Wolmer car did not have such a design, his only answer was that it met the minimal federal standard (R. 80). The same employee was reminded that Chrysler uses a breakaway filler-tube connection at the rear quarter panel of most of its other cars; his only response was that the Wolmer car met the minimal federal standard (R. 82, *see* A. 14). The vehicle-structure supervisor was asked about the breakaway connection. His answer: "we met the Federal Standards with the system as we had on the car. There was no need to consider a breakaway type" (R. 181). There was no need even to ***consider*** another design, because the car met the minimum federal standard--and that was the only criterion. And when asked about the separation of the floor pan in Chrysler's testing of this car, the same witness answered that such separation did not affect compliance with the federal standard (R. 1141, A. 17).

Yet another Chrysler officer was asked why it conducts tests at all. The answer: "To demonstrate compliance to the standard" (R. 320). The same witness was asked whether Chrysler's engineers had made any recommendations about the fuel tank after one test in which the tank had contacted the shock absorber. The answer: "Not in this test. And there wouldn't be, because it met all the requirements of the fuel system performance standards" (R. 1179). There "wouldn't be" ***any*** recommendations so long as the tests complied with the minimum §301 standard. And finally, one of Chrysler's experts was asked whether Chrysler had ever tested to see at what speed the filler tube would pull out of the tank. His answer: "Yeah. They tested to find that at 30 miles an hour it did not come out. There was no violation of the fuel system [standard], no leakage. So that's the criteria" (R. 1681). This witness perfectly captured Chrysler's attitude toward the safety of its customers. So long as the car passed the minimum test, "that's the criteria."[36/]

36/ Of course there are other places in the transcript in which Chrysler employees profess their concern for human life, but those passages are irrelevant to the posture of this appeal--which reviews the evidence most favorable to the jury's verdict. It is interesting, moreover, that most of the quotations about Chrysler's concern for safety come toward the end of the transcript, at a point at which Chrysler's counsel might have

From these quotations, there can be little doubt that Chrysler's officers and witnesses revealed their company's attitude to the jury far better by their own testimony than could any extrinsic evidence on the point. Anyone who heard this testimony, or who reads the actual quotations to get a sense of the language and flavor conveyed, will have no doubt about the propriety of the punitive award in this case. Time and again these witnesses revealed that Chrysler's only concern is whether or not its cars will pass the federal test, and not whether those cars are a danger to people.

Thus, Chrysler did not confirm what the 30 m.p.h. moving-barrier tests told it, because the government did not require it. Chrysler did not change the configuration of this car, because the car passed the minimal federal test anyway. Chrysler had no regard for the safety of human beings, because it had exclusive regard for meeting the minimal governmental standard. As Dr. Ball testified: "I would say they showed a reckless disregard for safety. They were seeking to meet the letter of the law but not the intent of the law" (R. 912). The result was Mary Wolmer's death. If ever there were a case which illustrates that mere compliance with minimal federal standards should not preclude an award of punitive damages, this is it. Such a rule would undermine the Congress' purpose by permitting all manufacturers to do what Chrysler did in this case--to hide behind the minimal federal standard--to use that very standard as an excuse for inaction--despite its actual knowledge that it was marketing a car which posed substantial risks to the lives of those who drove it.

II
SUMMARY OF THE ARGUMENT

In this particular case, the propriety of the jury's award of punitive damages must be judged against the legal standard to which Chrysler agreed at the trial, and Chrysler has conceded by its silence that the evidence satisfied that standard. Moreover, the

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finally become sensitive to the attitude which Chrysler's witnesses were projecting to the jury. Only as the trial progresses do Chrysler's witnesses develop less and less obsession with the satisfaction of the federal standard, and more and more concern for human life. By that time, the jury had the true picture.

district court's opinion is faithful to the harsher standard which Chrysler advocates for the first time on appeal, and Wolmer's evidence satisfied that standard. This is true whether or not Chrysler complied with the minimal federal regulations governing the design of this car, because in proper cases a manufacturer may be willful or wanton despite such compliance. The jury's exoneration of Chrysler on the strict-liability count should not forestall this conclusion, because the jury's punitive award must be judged against all of the evidence, taken in the light most favorable to that award, especially since Chrysler raised no claim of inconsistent verdicts at the trial. Nor did Chrysler raise any claim at the trial that an award of punitive damages is pre-empted by the applicable federal regulations, a claim which is not well-taken anyway.

III
ARGUMENT

A. THE DISTRICT COURT DID NOT APPLY AN ERRONEOUS LEGAL STANDARD IN REVERSING THE ENTRY OF THE DIRECTED VERDICT.

Chrysler observes (brief at 12-17) that this Court has required, as a predicate for punitive damages, proof that the defendant's actions were not merely reckless, but so wanton or willful as to be equivalent to intentional misconduct--the kind of conduct which would sustain a manslaughter conviction. In contrast, Chrysler contends, the district court ignored this standard by upholding the punitive award solely because of the evidence that Chrysler was aware that the Wolmer car posed a risk of death, but continued to market it anyway. We have 3 responses.

First, this argument is not preserved for appellate review. At no time in either the trial court or the district court did Chrysler ever argue that something more than reckless or wanton conduct is required to support an award of punitive damages. To the contrary, at both the close of Wolmer's case (R. 975), and at the close of all the evidence (R. 1705), and in its post trial argument (R. 1788), Chrysler's sole contention was that the evidence did not prove recklessness--but only negligence or gross negligence. Indeed, Chrylser raised no objection (*see* R. 1715-29) to the trial court's jury instruction (R.

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1758-59), taken directly from Florida Standard Jury Instruction (Civ.) 6.12, that punitive damages were appropriate if the jury found "that Chrysler acted with wantonness, willfullness or reckless indifference to the rights of others . . ." (R. 1758). Nor did Chrysler raise any objection to the verdict form submitted to the jury, allowing an award of punitive damages if Chrysler acted "with wantonness, willfulness, or reckless indifference to the rights of others . . ." (R. 1765-66). And in its brief in the district court (pp. 23-40), Chrysler argued only that the evidence was insufficient to satisfy the standard of reckless conduct about which the trial court had charged the jury.

In these many ways, Chrysler itself has defined the legal standard against which the jury's punitive award ***in this particular case*** must be measured. If Chrysler's present contention is that something "further aggravating" than recklessness is required (brief at 12 n.3), that contention is simply not preserved for appellate review, because it was not raised at trial.[37/] Indeed, Chrysler is doubly estopped to argue here for a stricter standard because it affirmatively tried its case and argued its motions solely against a standard of recklessness.[38/] And Chrysler is triply estopped to argue for a stricter standard because it raised no objection to the trial court's charge to the jury. That

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[37/] *See generally Clark & Bostic v. State*, 363 So.2d 331 (Fla. 1978); *Lineberger v. Domino Canning Co.*, 68 So.2d 357, 359 (Fla. 1953); *Atlantic Coast Line R. Co. v. Shouse*, 91 So. 90, 95 (Fla. 1922); *Marks v. Del Castillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981).

[38/] *See generally Palm Beach Co. v. Palm Beach Estates*, 110 Fla. 77, 148 So. 544 (1933); *McClanahan v. Mayne*, 103 Fla. 600, 138 So. 36, 37 (1931); *Polk County National Bank v. Darrah*, 52 Fla. 581, 42 So. 323 (1906); *Behar v. Southeast Banks Trust Co., N.A.*, 374 So.2d 572, 575 (Fla. 3rd DCA 1979), *cert. denied*, 379 So.2d 202 (Fla. 1980); *Holmes v. School Board of Orange County*, 301 So.2d 145 (Fla. 4th DCA 1974), *cert. denied*, 312 So.2d 755 (Fla. 1975); *Hevia v. Palm Terrace Fruit Co.*, 119 So.2d 795, 798 (Fla. 2nd DCA 1960). *Cf. Wagner v. Nottingham Associates*, 464 So.2d 166 (Fla. 3rd DCA), *review denied*, 475 So.2d 696 (Fla. 1985). *See also Francois v. Wainwright*, 741 F.2d 1275, 1282 (11th Cir. 1984) (Florida law). The federal courts have long enforced the rule that a party who tries his case on one theory will not be permitted to advance a new theory on appeal. *See Wolf v. Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S. Ct. 287, 38 L. Ed.2d 218 (1973); *Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972); *Pardo v. Wilson Line of Washington, Inc.*, 134 U.S. App. D.C. 249, 414 F.2d 1145 (1969); *Roberson v. United States*, 382 F.2d 714 (9th Cir. 1967); *Poston v. Caraker*, 378 F.2d 439 (5th Cir. 1967); *Connecticut General Life Ins. Co. v. Breslin*, 332 F.2d 928 (5th Cir. 1964).

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omission not only precludes Chrysler from challenging the charge itself under Rule 1.470(b), Fla. R. Civ. P.;[39/] it also constitutes Chrysler's concession of the ***legal standard*** against which the jury's punitive award must be measured.[40/] As these cases hold, the appellant cannot, for the first time on appeal, invoke a legal standard which is inconsistent with a jury instruction to which the appellant had offered no objection.

To the contrary, the standard embraced in such a jury instruction becomes the law of the case for purposes of appeal: "[W]here no objections are made to instructions at trial, the substance of the instructions become part of the law of the case."[41/] Of course, in cases in which the appellant ***did*** raise an argument at the trial level in support of an unsuccessful motion for directed verdict, his point is preserved for review even if the appellant failed later to object to an inconsistent jury instruction--for the obvious reason that a second objection would have been fruitless.[42/] In this case, however,

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39/ *See Administration of Estate of Lollie v. General Motors Corp.*, 407 So.2d 613 (Fla. 1st DCA), *review denied*, 413 So.2d 876 (Fla. 1982); *Johnson v. Lasher Milling Co.*, 379 So.2d 1048 (Fla. 1st DCA), *cert. denied*, 388 So.2d 1114 (Fla. 1980); *Barth v. Florida State Constructors Service*, 363 So.2d 199 (Fla. 3rd DCA 1978), *cert. denied*, 368 So.2d 1362 (Fla. 1979).

40/ *See Bould v. Touchette*, 349 So.2d 1181, 1186 (Fla. 1977); *Wagner v. Nottingham Associates*, 464 So.2d 166, 169-70 (Fla. 3rd DCA), *review denied*, 475 So.2d 696 (Fla. 1985); *Johnson v. Lasher Milling Co.*, 379 So.2d 1048, 1050 (Fla. 1st DCA), *cert. denied*, 388 So.2d 1114 (Fla. 1980); *Henningsen v. Smith*, 174 So.2d 85, 87 (Fla. 2nd DCA 1965); *Karl v. David Ritter, Sportservice, Inc.*, 164 So.2d 23, 24 (Fla. 3rd DCA 1964) (per curiam).

41/ *Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471, 1477 (10th Cir. 1985). *Accord, Music Research, Inc. v. Vanguard Recording Society, Inc.*, 547 F.2d 192, 194-95 (2nd Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118, 97 S. Ct. 514, 50 L. Ed.2d 269 (1976); *Moomey v. Massey Ferguson, Inc.*, 429 F.2d 1184, 1187 (10th Cir. 1970); *Murphy v. Dyer*, 409 F.2d 747, 748 (10th Cir. 1969); *Green v. American Tobacco Co.*, 325 F.2d 673, 676 (5th Cir. 1963) (Florida law), *cert. denied*, 377 U.S. 943, 84 S. Ct. 1349, 1351, 12 L. Ed.2d 306 (1964). *See United States v. Gates*, 376 F.2d 65, 75 (10th Cir. 1967); *Ellsworth Freight Lines, Inc. v. Coney*, 376 F.2d 475, 478 (7th Cir. 1967).

42/ *See Krock v. Electric Motor & Repair Co.*, 327 F.2d 213, 215-16 (1st Cir.), *cert. denied*, 377 U.S. 934, 84 S. Ct. 1338, 12 L. Ed.2d 298 (1964). Thus, it is settled that "a ***proper*** motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury." *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953) (our emphasis). *Accord, Aspen*

Chrysler's motions for directed verdict were consistent with the jury instruction which Chrysler accepted; at no time in any context did Chrysler argue for a standard stricter than wantonness or recklessness. In that context, its accession to the jury instruction on that standard became the law of this case for all appellate purposes.43/

In light of the foregoing, Chrysler has waived any contention that either the trial court or the district court departed from the "appropriate" standard for assessing an award of punitive damages. The only relevant standard is the standard of recklessness, to which Chrysler agreed. And since Chrysler has raised no argument here that it's conduct was not at least reckless, no such claim is before this Court.44/ For this reason, the jury's punitive award--at least as against this first argument--should be affirmed.

Second, Chrysler is wrong on the merits, because the district court's opinion is perfectly consistent with this Court's pronouncements on the issue of punitive damages. As the standard jury instruction provides, and as this Court noted in *Carraway v. Revell*, 116 So.2d 16, 20 n.12 (Fla. 1959) (citations omitted):

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character,

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Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1517-18 (10th Cir. 1984) (and cases cited), *aff'd*, ___ U.S. ___, 105 S. Ct. 2847, 86 L. Ed.2d 467 (1985); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 593 (8th Cir. 1960); *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 65 (5th Cir. 1972); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1040 n.5 (5th Cir. 1970), *cert. denied*, 407 U.S. 921, 92 S. Ct. 2463, 32 L. Ed.2d 807 (1972).

43/ To put the same point in a different way, Chrysler's argument in such a context is necessarily that the trial court's charge to the jury was erroneous. *See Wagner v. Nottingham Associates*, 464 So.2d 166, 170 (Fla. 3rd DCA), *review denied*, 475 So.2d 696 (Fla. 1985). Indeed, the Corporate Amici brief makes that point explicit (pp. 7, 9, 28), by contending directly that the trial court's punitive charge to the jury was erroneous. Thus, even the Corporate Amici admit that the argument which Chrysler is advancing here in support of a ***directed verdict*** necessarily implies that the trial court's charge to the jury was erroneous. As we have noted, however, Chrysler agreed to that charge. While we are on the subject of the Corporate Amici brief, we should emphasize that an amicus has no standing to raise an argument which was not raised by the appellant below, and is not raised by the appellant on appeal. *See Higbee v. Housing Authority of Jacksonville*, 143 Fla. 560, 197 So. 479, 485 (1940); *Acton v. Ft. Lauderdale Hospital*, 418 So.2d 1099, 1101 (Fla. 1st DCA 1982), *approved*, 440 So.2d 1282 (Fla. 1983).

44/ *See Gifford v. Galaxie Homes of Tampa, Inc.*, 204 So.2d 1 (Fla. 1967); *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959).

> 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 of 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" (our emphasis).

Accord, *Como Oil Co. v. O'Loughlin*, 466 So.2d 1061, 1062 (Fla. 1985) (per curiam); *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984). And in *White Construction*, 455 So.2d at 1028, the Court reaffirmed its earlier pronouncement in *Carraway*, 116 So.2d at 20, that there is "a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter."

Of course, this acknowledgement of a "real affinity" does ***not*** mean that an award of punitive damages in a civil case must be predicated upon proof that the defendant has committed a criminal offense. As this Court noted in *Campbell v. Government Employees Ins. Co.*, 306 So.2d 525, 535 (Fla. 1975), "[t]he incentive to bring actions for punitive damages is favored because it has been determined to be the most satisfactory way to correct evil-doing in cases ***not covered*** by the criminal law" (our emphasis). The appropriate question in the civil context is not whether the defendant has committed a criminal offense, but whether there is a "real affinity" between the defendant's conduct and the kind of wanton or reckless conduct which would support conviction for manslaughter. At the very least, we would hope that the Court would make clear that punitive awards in civil cases do not depend upon proof of criminal behavior, but only upon analogous behavior.[45/]

[45/] In making this request, we are thinking of the recent decision in *Gerber Children's Centers, Inc. v. Harris*, 484 So.2d 91 (Fla. 5th DCA 1986), in which the court reversed a punitive award because "[t]he operative question . . . is whether we would sustain a manslaughter conviction in the instant case against the [defendants] had Harris died from the cuts received in his fall. The answer is no." With all respect, that is ***not*** the question at all. Similarly, we refer the Court to the Brief of Amicus Curiae Florida Defense Lawyers Association (hereinafter "Defense Amicus brief"), which argues with a straight face that in light of this Court's analogy between punitive damages and manslaughter

In this spirit, it is instructive to note that the standard manslaughter charge, allowing conviction for "culpable negligence," provides that

> culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.[46/]

Admittedly, conviction for manslaughter--and by analogy, punitive damages--will not be sustained by proof of simple recklessness alone--that is, by carelessness in the course of ***unintentional*** conduct which connotes only "disregard of the safety of others." *Rushton v. State*, 395 So.2d 610, 613 (Fla. 5th DCA 1981), *citing McCreary v. State*, 371 So.2d 1024 (Fla. 1979). To the contrary, it is well settled that a punitive award must be predicated upon either "[t]he intentional infliction of harm, or a recklessness which is the result of an intentional act . . . ."[47/] In the ordinary case, even in the criminal context, such "[i]ntent is almost always inferred from circumstantial evidence."[48/] In this case,

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convictions, "the privilege against self-incrimination and other safeguards available to criminal defendants should be afforded to the defendant in punitive damage cases." These pronouncements reflect a fundamental misunderstanding of the "real affinity" between punitive damages and criminal manslaughter. We strongly urge the Court to set the record straight.

46/ Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *Florida Standard Jury Instructions in Criminal Cases* at 68 (1981 ed.). The manslaughter standard is thus virtually identical to the civil standard governing punitive damages. *See Charlton v. Wainwright*, 588 F.2d 162, 164 (5th Cir.1979) (Florida law); *Fulton v. State*, 108 So.2d 473, 475 (Fla. 1959); *Tongay v. State*, 79 So.2d 673, 674 (Fla. 1955); *Miller v. State*, 75 So.2d 312, 313-14 (Fla. 1954).

47/ *Ingram v. Pettit*, 340 So.2d 922, 924 (Fla. 1976). *See Id.* at 925 ("an intentional act which creates known risks to the public"); *Restatement (Second) of the Law of Torts* §500, Comment (f.), at 590 (1965) ("While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it").

48/ *State v. Alexander*, 406 So.2d 1192, 1194 (Fla. 4th DCA 1981). *Accord, Thomson v. State*, 398 So.2d 514, 517 (Fla. 2nd DCA 1981). This is almost always a question for the jury. *See State v. Sokos*, 426 So.2d 1044, 1045 (Fla. 2nd DCA 1983); *State v. West*, 262 So.2d 457, 458 (Fla. 4th DCA 1972). The same is true in the civil context. *See Entron, Inc. v. General Cablevision of Palatka*, 435 F.2d 995, 998 (5th Cir. 1970) (Florida law); *ABC-Paramount Records, Inc. v. Topps Record Distributing Co.*, 374 F.2d 455, 462-63 (5th Cir. 1967) (Florida law); *Associated Heavy Equipment Schools, Inc. v. Masiello*, 219 So.2d 465, 467 (Fla. 3rd DCA 1969).

however, no such inference is necessary, because the undisputed evidence is that Chrysler purposefully marketed this car. The question, then, is whether that intentional conduct "evince[d] . . . a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages . . . ." *Ingram v. Pettit*, 340 So.2d 922, 924 (Fla. 1976) (drunken driving "sufficiently reckless" to warrant punitive award).[49/] The answer to that question depends on whether Chrysler's intentional conduct in marketing the car was coupled with actual or constructive knowledge ***not*** that it was ***certain*** to cause injury or death, but that it constituted a "substantial threat" or "substantial danger" of such injury.[50/] *A fortiori*, the plaintiff is not required to prove that the defendant knowingly or intentionally caused injury, but only, as the Court noted in *Carraway v. Revell*, 116 So.2d at 20, that he exhibited a "reckless indifference to the rights of others which is equivalent to an intentional violation of them." This formulation reflects the principle that "the means of knowledge are the same as knowledge itself."[51/]

49/ *Accord*, *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 247 (Fla. 4th DCA 1981), *review denied*, 467 So.2d 999 (Fla. 1985). *See Maxey v. Freightliner Corp.*, 722 F.2d 1238, 1242 (5th Cir. 1984) (Texas law) ("conscious and studied indifference . . . to the grave danger").

50/ *Piper Aircraft Corp. v. Coulter*, 426 So.2d 1108, 1110 (Fla. 4th DCA), *review denied*, 436 So.2d 100 (Fla. 1983). *Accord*, *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981) (Florida law) ("unreasonable risk of harm"), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed.2d 145 (1982); *Tampa Drug Co. v. Wait*, 103 So.2d 603, 608 (Fla. 1958). *Compare Mobil Oil Corp. v. Patrick*, 442 So.2d 242 (Fla. 4th DCA 1983) (no evidence defendant's conduct "actually constituted a danger to human safety up until the time of the incident involved herein"). Of course, the plaintiff need not show that the defendant should have anticipated the precise sequence of events leading to injury--but only the probability of injury by some sequence of events. *See Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981); *Concord Florida, Inc. v. Lewin*, 341 So.2d 242 (Fla. 3rd DCA), *cert. denied*, 348 So.2d 946 (Fla. 1977).

51/ *Nardone v. Reynolds*, 333 So.2d 25, 34 (Fla. 1976). *Accord*, *Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47, 52 n.4 (Fla. 3rd DCA 1978), *cert. denied*, 373 So.2d 461 (Fla. 1979). *Cf. Nesbitt v. Auto-Owners Ins. Co.*, 390 So.2d 1209 (Fla. 5th DCA 1980) ("willfull or wanton conduct or conduct which displays a reckless indifference to the rights of others is tantamount to intentional conduct for the purposes of [the contribution] statute"). *See generally Restatement (Second) of the Law of Torts* §500, at 587 ("knowing or having reason to know"), and Comment (a.) ("the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act or to fail to act, in conscious disregard, or indifference to, that risk"); *Maxey v. Freightliner*, 722 F.2d 1238, 1241-42 (5th Cir. 1984).

The same principles apply in the criminal area; conviction of manslaughter may be sustained for something less than knowing or intentional injury to the decedent. In such cases, the defendant "set the stage for the tragedy which ultimately and inevitably followed, and he must be held criminally responsible therefore, even though he had no intention of killing [the decedent]."[52/] As the standard jury instruction quoted above makes clear, "[c]ulpable negligence is consciously doing an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person, even though done without the intent to injure any person but with utter disregard for the safety of another."[53/] Thus the Florida courts repeatedly have sustained conviction for manslaughter based on conduct which was neither knowing or intentional.[54/]

In light of the foregoing, and mindful that every case must be decided on its own facts,[55/] we can generalize that punitive damages may not be based on mere recklessness, but instead depend on proof that the defendant has intentionally engaged in

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52/ *Dolan v. State*, 85 So.2d 139 (Fla. 1956). *Accord*, *McBride v. State*, 191 So.2d 70, 71 (Fla. 1st DCA 1966) (defendant "set the stage for the tragedy which ultimately followed even though he may have had not [sic] intention of killing the decedent").

53/ *Marasa v. State*, 394 So.2d 544, 545 (Fla. 5th DCA 1981), *review denied*, 402 So.2d 613 (Fla. 1982). *Accord*, *O'Berry v. State*, 348 So.2d 670 (Fla. 3rd DCA 1977) (the question is, "notwithstanding her belief, whether [the defendant] was culpably negligent in proceeding with the aforementioned course of conduct").

54/ *See, e.g.*, *Tongay v. State*, 79 So.2d 673 (Fla. 1955) (allowing child to jump off high tower into pool); *Hulst v. State*, 123 Fla. 115, 166 So. 828, 830 (1936) (failure to see pedestrian on road in front of car); *Hamilton v. State*, 439 So.2d 238 (Fla. 2nd DCA 1983) (grossly excessive speed in residential neighborhood); *Pritchett v. State*, 414 So.2d 2 (Fla. 3rd DCA) (per curiam) (flying aircraft at low altitude), *review denied*, 424 So.2d 762 (Fla. 1982); *O'Berry v. State*, 348 So.2d 670 (Fla. 3rd DCA 1977) (firing gun defendant thought was not loaded); *Williams v. State*, 336 So.2d 1261, 1262 (Fla. 1st DCA 1961) (holding shotgun in midst of bar altercation, mistakenly thinking safety was on). *See also* *Charlton v. Wainwright*, 588 F.2d 162, 163 (5th Cir. 1979) (per curiam) (Florida law) (excessive force in evicting intoxicated patron from lounge).

55/ *See Carraway v. Revell*, 116 So.2d at 19. The same is true in the context of criminal manslaughter. *See Filmon v. State*, 336 So.2d 586, 589-90 (Fla. 1976), *cert. denied*, 430 U.S. 980, 97 S. Ct. 1675, 52 L. Ed.2d 375 (1977); *Fulton v. State*, 108 So.2d 473, 475 (Fla. 1959).

conduct with a conscious or reckless indifference to the probable consequence that such conduct will cause death or serious bodily injury. We think there can be no question that the district court's opinion in this case is faithful to that general concept. We refer the Court to Wolmer's Respondent's Brief on Jurisdiction, which we have reprinted at S.A. 20. Chrysler's argument is that the district court affirmed the punitive award solely because the Wolmer car posed some danger to its customers, yet Chrysler continued to market it anyway. Since all cars pose some dangers, Chrysler argues that the district court applied the wrong test, especially in its reliance upon *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984), *review denied*, 467 So.2d 999 (Fla. 1985).

But as we note (S.A. 28), the *Johns-Manville* court, *id.* at 247, expressly acknowledged the standard articulated in *Carraway* and *White Construction*, in holding that mere knowledge of a dangerous 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." *Id.* As *Johns-Manville* therefore concludes, *id.* at 249, the defendant's knowledge of a 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 . . . ." Indeed, *Johns-Manville* expressly distinguishes *White Construction* on that basis, *id.* at 263-64.

The instant case is no different. After acknowledging the requirements of *Como Oil*, *White Construction* and *Carraway* (A. 9), 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 "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" (A. 9).[56/] Thus, the district court's

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56/ That knowledge--not just of the defects but of the overwhelming danger--came in part from Chrysler's own tests--which disclosed that Chrysler's practice in this case was "'an attrocious violation of accepted practices and safety engineering'" and reflected "'a reckless disregard for safety'" (A. 9).

opinion is faithful to this Court's pronouncements on the issue of punitive damages. We refer the Court to S.A. 27-29 for a more-detail discussion of this point.

Third and finally, even if Chrysler were correct that the district court applied the wrong legal standard, that point alone would not require reversal of the jury's punitive award. Even if the district court had applied the wrong legal standard, the jury's award would still be affirmed if Wolmer's evidence satisfied the ***right*** legal standard. Under such circumstances, this Court might issue an opinion correcting the district court's reasoning, but remanding with instructions to affirm the jury's punitive award.[57/] Chrysler can secure reversal of that award only if it shows that Wolmer's evidence fails to satisfy the right legal standard.

Chrysler approaches that question at pages 14-17 of its brief, in which it argues that this case reveals none of the "aggravating factors" (brief at 17) which warranted a punitive award in a number of other cases. Of course, as we have noted, Chrysler has long since waived any claim that such an award must be predicated upon "aggravating factors," by trying its case solely on the question of recklessness. But putting that point aside for the moment, we think there can be no question that the circumstances in this case were no less "aggravating" than those in the other cases whose holdings Chrysler approves. For example, in *American Motors Corp. v. Ellis*, 403 So.2d 459, 467 (Fla. 5th DCA 1981), *review denied*, 415 So.2d 1359 (1982), "the jury could have found that AMC was aware of the catastrophic results of fuel tank fires in its vehicles from its own crash test, and that AMC chose not to implement the recommendation of its engineers to relocate the fuel tank in order to maximize profits."[58/] Such knowledge was not based

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57/ *See generally Department of Transportation v. Webb*, 438 So.2d 780 (Fla. 1983); *Duncan v. Duncan*, 379 So.2d 949, 953 (Fla. 1980); *Firestone v. Firestone*, 263 So.2d 223, 228 (Fla. 1972); *Consolidated Development & Engineering Corp. v. Ortega Co.*, 117 Fla. 438, 158 So. 94, 98 (1934); *Adams v. Wolf*, 104 Fla. 142, 139 So. 582 (1932) (per curiam). This is simply a variation of the right-for-the-wrong-reason theory. *See In Re Estate of Yohn*, 238 So.2d 290, 295 (Fla. 1970).

58/ In this case, Chrysler's engineers "recommended" the filler-tube refinement by using it on almost every other Chrysler car, and by testing that refinement, along with a

on what actually happened in the test, but on a "reasonable inference" of the dangerous condition on the basis of the test results, 403 So.2d at 468. There were no additional "aggravating circumstances." In our case the shocks actually broke off in the tests, and in addition were severely bent, and repeatedly were banging into the fuel tank; and the filler tube was pulling out enough to cause fuel leakage; and the floor pan was separating to some extent, and that was more than enough to give Chrysler knowledge of the problem and the danger.

Similarly, in *Toyota Motor Co. v. Moll*, 438 So.2d 192 (Fla. 4th DCA 1983), Toyota conducted tests in which "the gas cap remained on," *id.* at 195 n.3, but those tests nevertheless "indicated that the gas cap would be pried off as the filler neck rotated forward," as it rotated even in low-speed tests. *Id.* at 195. And Toyota's imputed knowledge of the problem was reinforced by the fact that it "changed the [dangerous] configuration" in every one of its other cars; "for reasons that were never satisfactorily explained at trial . . . the '73 Corona was the only vehicle in the entire line" which was not changed. *Id.* There were no additional "aggravating circumstances." Our case, of course, is virtually identical. The test results gave Chrysler actual knowledge of what ***would*** happen in higher-speed crashes, and Chrysler adopted the safer alternatives in almost all of its other cars.[59/]

Likewise in *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981) (Florida law), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed.2d 145 (1982), there was "substantial evidence that tests carried out by Honda demonstrated that, apart from being small, the AN 600 had serious design deficiencies creating unreasonable risk of

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redesigned fuel tank, in the crash tests of this very car. In both cases, therefore, the manufacturer had actual or constructive knowledge of the propriety of an alternative design.

59/ Chrysler is right (brief at 17) that the *Moll* accident occurred at lower speeds than this one, but that is a distinction without a difference, in light of the overwhelming evidence that the defects of which it had actual knowledge could have been corrected in a manner which would have prevented this tragedy even at the speed of the Wolmer crash (which was less than highway speed). As we have noted, Chrysler was certainly on notice of the probability of rear-end collisions at the speed of this one. *See* note 21, *supra*.

harm to passengers." As Chrysler recognizes (brief at 16), Honda's tests "revealed the existence and substantial danger of the very design defect that was later to cause plaintiff's injury," but nevertheless "took no steps whatsoever to eliminate or even reduce the hazards." There were no additional "aggravating circumstances." This case is identical; Chrysler knew of the problems from its tests, and took no steps whatsoever to eliminate them.[60/]

Moreover, there are additional "aggravating circumstances" in this case which were *not* present in these other cases. For one thing, there was Chrysler's singleminded obsession with the minimal §301 compliance, to the exclusion of any other consideration--Chrysler's refusal to correct a known dangerous condition precisely because the car had met the minimal federal tests, which Chrysler hoped to use as a shield against liability. That evidence alone adds a dimension of almost-inhuman callousness which is not present in the other cases.

Moreover, there is in this case explicit expert testimony, to which no objection was offered, that Chrysler's use of a breakaway attachment at the fuel tank was "a gross violation of the very basic safety engineering principle," "the very opposite" of the safest failure mode, and "a gross design defect" that posed a "[t]otally unreasonable danger" (R. 904-05); and that the three defects in this case were "an atrocious violation of accepted practices and safety engineering" (R. 911), demonstrating Chrysler's "reckless disregard for safety. They were seeking to meet the letter of the law but not the intent of the law" (R. 912). This testimony was admitted without any objection whatsoever from Chrysler--either on the ground that it concerned an ultimate issue in the case, or that it

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[60/] For additional analogous cases, see *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985) (opinion upon remand from Supreme Court); *Cathey v. Johns-Manville Corp.*, 776 F.2d 1565, 1570-71 (6th Cir. 1985); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S. Ct. 1113, 47 L. Ed.2d 318 (1976); *Airco, Inc. v. Simmons First National Bank, Guardian*, 638 S.W.2d 660 (Ark. 1982); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

was unsupported by the evidence of record, or any other basis.[61]

When expert testimony is properly admitted, it constitutes independent substantive evidence on the point for which it is offered, which ***alone*** is sufficient to forestall a summary judgment or a directed verdict on the question, or to sustain a jury's verdict on appeal.[62] In this case, if Chrysler ***had*** chosen to object to the expert's testimony that its conduct was reckless--for example on the ground that such testimony was not supported by the evidence of record--such an objection would properly have been overruled. This was an expert on safety standards in automotive engineering, and he was certainly competent to testify about the ***degree*** of Chrysler's departure from those standards.[63] The fact is, however, that Chrysler raised no objection whatsoever to the

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61/ Of course, there could be no objection that the expert testified about an ultimate issue, which is explicitly permitted by §90.703, Fla. Stat. (1981). *See Tongay v. State*, 79 So.2d 673, 676 (Fla. 1955) (recklessness in permitting child to jump off high dive); *North v. State*, 65 So.2d 77, 87-88 (Fla. 1952), *aff'd*, 346 U.S. 932, 74 S. Ct. 376, 98 L. Ed. 423 (1954); *Lopez v. Cohen*, 406 So.2d 1253, 1357 (Fla. 4th DCA 1981) (per curiam); *Johnson v. Hatoum*, 239 So.2d 22, 24 (Fla. 4th DCA 1970) (negligence), *cert. dismissed*, 244 So.2d 740 (Fla. 1971); *Gifford v. Galaxie Homes of Tampa, Inc.*, 223 So.2d 108, 111 (Fla. 2nd DCA) (safe construction standards), *cert. denied*, 229 So.2d 869 (Fla. 1969); *Maas Brothers, Inc. v. Bishop*, 204 So.2d 16 (Fla. 2nd DCA 1967) (causation); *Mozer v. Semenza*, 177 So.2d 880 (Fla. 3rd DCA 1965) (negligence).

62/ *See Cromarty v. Ford Motor Co.*, 341 So.2d 507, 508-09 (Fla. 1977); *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973); *City of Hialeah v. Weatherford*, 10 FLW 757 (Fla. 3rd DCA March 19, 1985); *Bryant v. First Realty Investment Corp.*, 396 So.2d 1223, 1224 (Fla. 4th DCA 1981); *Zack v. Centro Espanol Hospital, Inc.*, 319 So.2d 34, 36 (Fla. 2nd DCA 1975); *Gifford v. Galaxie Homes of Tampa, Inc.*, 223 So.2d 108, 112 (Fla. 2nd DCA), *cert. denied*, 229 So.2d 869 (Fla. 1969). Of course, the factfinder is not required to accept such evidence, although it "should not ignore uncontested expert testimony particularly when strongly supported by other relevant evidence." *Trucci v. State*, 438 So.2d 396, 397 (Fla. 4th DCA 1983), *citing Lane v. State*, 388 So.2d 1022 (Fla. 1980). *Accord*, *Poynter v. State*, 443 So.2d 219 (Fla. 4th DCA 1983). As the above-cited cases make clear, however, when the factfinder ***does*** accept such testimony, that testimony alone is sufficient to support the verdict.

63/ *See Airco, Inc. v. Simmons First National Bank*, 638 S.W.2d 660 (Ark. 1982); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470, 475 (1984) (experts' testimony sufficient to support punitive award because "based upon their professional analysis of the process by which the corporate decisions regarding the 1975 Mustang II were made"). *Cf. Buccery v. General Motors Corp.*, 60 Cal. App.3d 533, 547, 132 Cal. Rptr. 605, 614 (1976) (expert alone created jury question on issue of defect); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 507 (Tex. Civ. App. 1974), *writ ref'd n.r.e.* (same). *See also* cases cited in note 61, *supra*. Even the Corporate Amici brief admits that the question for the factfinder was whether Chrysler's asserted departure from

expert's testimony, and thus waived any such objection, under the general rule that "a failure to object to evidence at the trial precludes appellate review of the propriety of its admission."[64/]

In this case Chrysler stood silent, inviting the jury to accept or disbelieve the expert's testimony as it wished, and cannot argue now that such testimony had no independent evidentiary value. As this Court noted regarding a district-court decision in *Golden Hills Turf and Country Club v. Buchanan*, 273 So.2d 375, 376 (Fla. 1973) (per curiam):

> In the instant case, the District Court below determined that it could render an independent judgment on the facts, even though the evidence adduced below was not challenged. It also determined that certain unchallenged expert testimony was "so unpracticable that the trial court should have rejected such testimony." The inherent danger of this approach, of course, is that it weakens the appellate process by suggesting that deviation from neutral standards of appellate review is permissible if the appellate court is offended by evidence and testimony unchallenged by the litigants within the adversary process, and accepted by the trial judge.[65/]

The same rule adheres in the federal system.[66/] Thus in *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, *supra* note 66, 708 F.2d at 819-20, the defendant did not raise any objection to the expert's method of calculating damages at the trial, and

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safety standards was "extreme" or not (p. 19). The Corporate Amici brief (pp. 23-24), however, launches an extended attack upon the use of expert testimony as a predicate for punitive damages, without citing a single case which has ever disallowed it. The factfinder is not ***required*** to accept such testimony, *see* note 62, *supra*, but it should certainly not be precluded either. In any event, as we note next, this point is simply not preserved for appellate review.

64/ *Marks v. Delcastillo*, 386 So.2d 1259, 1267 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981). *Accord*, *McSwain v. Howell*, 29 Fla. 248, 10 So. 488, 489-90 (1892).

65/ *Accord*, *Atlantic Coast Line R. Co. v. Shouse*, 83 Fla. 156, 91 So. 90, 93-95 (Fla. 1922); *City of Hialeah v. Weatherford*, 10 FLW 757 (Fla. 3rd DCA March 19, 1985); *Nat Harris and Associates, Inc. v. Byrd*, 256 So.2d 50 (Fla. 4th DCA 1971).

66/ *See G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1538 (11th Cir. 1985); *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 819-20 (1st Cir.), *cert. denied*, 464 U.S. 894, 104 S. Ct. 241, 78 L. Ed.2d 231 (1982); *Nanda v. Ford Motor Co.*, 509 F.2d 213, 222 (7th Cir. 1975), *citing Hoosier Home Improvement Co. v. United States*, 350 F.2d 640, 644 (7th Cir. 1965). *See also Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 723-24 (8th Cir. 1976).

"[u]nder these circumstances, we are unwilling to say, as a matter of law, that the jury was barred from awarding damages based on [the expert's testimony]."

Chrysler argues (brief at 28), and the Corporate Amici agree (brief at 22-26), that an expert's testimony cannot supply proof on a point for which there is an insufficient predicate in the other evidence of record. Of course there ***was*** such a predicate here; but even accepting this contention *arguendo*, the dispositive answer is that Chrysler raised absolutely no such objection at the trial level, and thus, under the authorities we have cited, waived any such contention on appeal.[67/] Both Chrysler and the Corporate Amici have totally missed the point that Chrysler waived any objection to the admissibility and thus the probative value of the expert's testimony, thus leaving that decision to the jury. They would have the Court consider their arguments in precisely the same posture as if Chrysler had objected to the testimony. They would have this Court ignore the fundamental rules of appellate procedure. Chrysler has failed to cite a single case which holds that an expert's testimony may be rejected by an appellate court as devoid of all evidentiary value even in the absence of an objection to its admission at the trial. The unanimous authority is to the contrary. This expert's testimony was ***alone*** sufficient to warrant the award of punitive damages.

As we have noted, however, that award would have been appropriate even in the absence of such testimony, in light of Chrysler's intentional marketing of a car which Chrysler knew or should have known posed a significant threat of death or serious bodily

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[67/] Moreover, the only opposing cases cited on the point (Chrysler's brief at 28; Corporate Amici brief at 25) are cases in which the expert purported to testify on an ***issue of law***. In our case the expert testified on a question for the factfinder--that is, whether Chrysler was sufficiently reckless to permit an award of punitive damages. *See Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Moreover, in Florida an expert may testify even on an issue of law, *see Guy v. Kight*, 431 So.2d 653, 656 (Fla. 5th DCA 1983), *review denied*, 440 So.2d 352 (Fla. 1983). This Court did not hold otherwise in *Palm Beach County v. Town of Palm Beach*, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983)--only that the trial court should not have placed ***dispositive*** reliance upon the expert's expression of a legal conclusion, but should have weighed that testimony along with all the rest. There is no holding that the expert testimony, even on a legal issue, should have been excluded. And in any event, the testimony here concerns an issue of fact--not of law.

injury. Thus, this case contrasts sharply with the three decisions upon which Chrysler relies. For example, in *Como Oil Co. v. O'Loughlin*, 466 So.2d 1061, the driver was negligent or even grossly negligent when he overfilled his gas tank, *see id.* at 1062, but there was no evidence that he overfilled the tank as the result of an ***intentional*** act, which is a prerequisite for a punitive award. *See* note 47, *supra*. To the contrary, the driver "watched the flow meter on the truck rather than the actual filling operation," *id.* at 1062, and thus was simply careless. In our case, Chrysler marketed the car intentionally despite actual or constructive knowledge of the significant danger. That is a dispositive difference.

In *White Construction Co. v. Dupont*, 455 So.2d 1026, the driver did back up his loader "at top speed" despite actual knowledge that the brakes were not working, but neither this Court's opinion nor the district court's opinion[68/] contains any suggestion that the collision occurred because of the defective brakes rather than the "top speed" of the loader. There is no suggestion that the brakes might not have functioned if the driver had been proceeding at a lower speed. Thus, *White Construction* "merely characterized the particular facts of that case as nothing more than a single isolated instance of negligence . . . ." *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 263 (Fla. 1st DCA 1984), *review denied*, 467 So.2d 999 (Fla. 1985).

Finally, in *Detroit Marine Engineering, Inc. v. Maloy*, 419 So.2d 687 (Fla. 1st DCA 1982), the central question was whether the boat's steering wheel was even defective at all, in light of significant conflicting evidence on the point. There was no evidence of any failure in tests, no evidence of similar accidents, no evidence of actual or constructive knowledge of the alleged defect--but only a clash of experts. Under these circumstances, there was obviously no predicate for punitive damages, and the case contrasts sharply with this one. We think there can be no question that the cases relied upon by

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68/ *White Construction Co., Inc. v. Dupont*, 430 So.2d 915, 916 (Fla. 1st DCA 1983), *quashed*, 455 So.2d 1026 (Fla. 1984).

Chrysler are easily distinguishable, and that the cases endorsed by Chrysler are directly analogous to this one. The district court applied the right standard in reviewing Wolmer's evidence, which was easily sufficient to warrant the award of punitive damages under that standard.

B. THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT AS A MATTER OF LAW TO SUPPORT A FINDING THAT CHRYSLER ACTED WITH "RECKLESS DISREGARD" IN DESIGNING AND MARKETING THE VOLARE.

1. As a Matter of Law Chrysler Can Be Held Liable for Punitive Damages for Failing to Exceed Federal Performance Standards. Chrysler contends (brief at 18-23) that the federal statutes and regulations concerning motor-vehicle safety reflect exhaustive study by relevant federal officers of the appropriate design and construction of cars; that such laws and regulations purport to be specific and comprehensive in governing motor-vehicle design; that if the Congress had wanted a higher standard than that prescribed, it would have created such a standard; that the existing standard gives the automobile manufacturing community a degree of certainty about the level of safety which it is required to insure; and that to impose liability above that standard will remove such certainty, substituting in its place a potentially unlimited obligation, which at its extreme would require that all manufacturers build a perfect car.[69/] Chrysler's argument is that compliance with the federal regulations always, as a matter of law, connotes the manufacturer's good faith, and therefore can never be consistent with an award of punitive damages. We respectfully disagree.

Perhaps the best way to illustrate the fallacy of Chrysler's reasoning is to point out that despite Chrysler's repeated protests to the contrary, its argument applies no less to the issue of ***liability*** for ***compensatory*** damages than it does to the issue of punitive

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69/ This argument is not identical to the pre-emption argument which Chrysler makes later. The argument here is that even if state common-law actions are not pre-empted by the federal scheme, this Court should hold, as a matter of state law, that such compliance is inherently inconsistent with the state-law criteria for an award of punitive damages. *See Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1456-58 (10th Cir. 1985) (decision upon remand from Supreme Court).

damages. For if regulatory compliance necessarily precludes a finding that a manufacturer was ***very negligent***--so negligent as to be wanton and willful--then such compliance necessarily precludes a finding that the manufacturer was negligent at all. As this Court has pointed out, the two standards are simply differences of degree.[70/] Thus, although Chrysler has already conceded its liability in this case by paying Wolmer his compensatory damages, it is advancing an argument whose acceptance would invoke the applicable federal regulations as an absolute bar to liability. The fallacy of that position is that a manufacturer may be careless, as Chrysler concedes, even if it has complied with the regulations, and for the same reason--as a case quoted a few pages later says explicitly--may be so careless as to be wanton and willful.

To begin with, the argument that compliance with the federal standard is inconsistent with neglience has been rejected by every court ever to consider it.[71/] The

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[70/] *See Ingram v. Pettit*, 340 So.2d 922, 924 (Fla. 1976). Indeed, as we have noted, the standard jury instruction on manslaughter defines it as "culpable negligence"--a ***degree*** of negligence. Thus, it is not at all coincidental that the only cases which Chrysler has cited in support of its position on this point (*see* brief at 20) are cases which do ***not*** deal with the issue of punitive damages in a product-liability case, but rather with the issue of liability for compensatory damages.

[71/] *See, e.g., Dawson v. Chrysler Corp.*, 630 F.2d 950, 958 (3rd Cir. 1980), *cert. denied*, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed.2d 383 (1981); *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659, 670 n.13 (6th Cir. 1972); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Buccery v. General Motors Corp.*, 60 Cal. App.3d 533, 541, 132 Cal. Rptr. 605, 609 (1976); *Roberts v. May*, 583 P.2d 305, 308 (Colo. Ct. App. 1978); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683 (1976); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 506 (Tex. Civ. App. 1974), *writ ref'd n.r.e.; Albet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1975). *See generally Rigby v. Beech Aircraft Co.*, 548 F.2d 288 (10th Cir. 1977); *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 446 (10th Cir. 1976); *Salmon v. Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975); *Bibler v. Young*, 492 F.2d 1351 (6th Cir.), *cert. denied*, 419 U.S. 996, 95 S. Ct. 309, 42 L. Ed.2d 269 (1974); *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1027 (1st Cir. 1973); *Banko v. Continental Motors Corp.*, 373 F.2d 314 (4th Cir. 1966); *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 605 (3rd Cir.), *cert. denied*, 358 U.S. 910, 79 S.Ct. 236, 3 L. Ed.2d 230 (1958); *Citrola v. Eastesrn Air Lines, Inc.*, 264 F.2d 815, 817 (2nd Cir. 1959); *Silkwood v. Kerr-McGee Corp.*, 484 F. Supp. 566, 578, 580, 586 (W.D. Ok. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed.2d 443 (1984) (affirming district-court decision); *Brick v. Barnes-Hines Pharmaceutical Co.*, 428 F. Supp. 496, 498 (D.D.C. 1977); *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377, 383 (D.M.D. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977); *In Re Paris Aircrash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975); *Todd v. United States*, 384 F. Supp. 1284, 1291 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977); *Manos v. Trans*

reasoning lies in understanding the purpose of the federal scheme. Section 1391(2) of title 15 provides that the federal regulations are only "a minimum standard for motor vehicle performance"; and §1397(c) 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." Of course, "[i]t is obvious from this language that the federal standards were meant to supplement rather than obviate the law of negligence and products liability." *Turner v. General Motors Corp.*, *supra* note 71. And the reason for that, as Chrysler discovered in another case, is that Congress created these standards not to provide a ceiling under which the auto manufacturers can hide, but rather a floor upon which they are expected to build. *See Chrysler Corp. v. Department of Transportation*, 472 F.2d 659, 671-72 (6th Cir. 1972). As the Senate Report on the legislation notes:

> [T]his legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles.
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> While the bill reported by the committee authorizes the Secretary to make grants or award contracts for research in certain cases, a principal aim is to encourage the auto industry itself to engage in greater auto safety and safety-related research.[72/]

Since the manufacturers know that the federal standards are minimal, designed to encourage their best efforts, they know that a car may be unsafe despite compliance with those standards, and thus that they may be found negligent for marketing it. As the district court noted in *Silkwood v. Kerr-McGee Corp.*, *supra* note 71, 484 F. Supp. at 586, the "[i]mposition of common law liability is thus consistent with the virtually unanimous

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World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971); *Stromsodt v. Parke, Davis & Co.*, 257 F. Supp. 991, 997 (D.N.D. 1966), *aff'd*, 411 F.2d 1390 (8th Cir. 1969); *Gonzales v. Virginia-Carolina Chemical Co.*, 239 F. Supp. 567, 575 (E.D.S.C. 1965); *Rubin v. Brutus Corp.*, 11 FLW 903 (Fla. 1st DCA 1986).

[72/] S. Rep. 1301, 89th Cong., 2d Sess., 2 U.S. Code, Cong. and Admin. News 2709, 2718 (1966).

legal analysis and expectation extant in both the legal and industrial communities."

Chrysler is correct, of course, that the availability of a state remedy creates more uncertainty for auto manufacturers than would exclusive reliance upon the federal regulations--because the state system imposes a standard of reasonableness in favor of any fixed criteria. That, we submit, was precisely Congress' purpose; in the recognition that general nationwide standards governing all cars and all manufacturing processes could not possibly provide as much protection as a case-by-case development of the standard of care,[73/] Congress ***purposefully*** preserved the threat of state-law actions in preference to a regulatory scheme which would afford manufacturers the very kind of excuse for inaction which Chrysler offers here. As the court noted in *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968):

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time.

Chrysler is wrong to suggest, however (brief at 20, *see also* Corporate Amici brief at 5, 8, 11), that the availability of such a state remedy gives the manufacturers no reliable compass against which to measure their own performance, and therefore potentially subjects them to liability whenever a car is less than perfect. To the contrary, there is a compass, which is called the standard of reasonable care, and it is the same compass to which all of the other manufacturers of products--and indeed, everyone in our society--are subject.[74/] It is that very standard which protects

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[73/] As Chrysler learned in another case, and as 15 U.S.C. §1381 provides, the primary purpose of the federal scheme is *not* to achieve nationwide uniformity--but to protect lives. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2nd Cir. 1969). *Accord, United States v. General Motors Corp.*, 574 F. Supp. 1047, 1049 (D.D.C. 1983).

[74/] *See Huff v. White Motor Corp.*, 565 F.2d 104, 108 (7th Cir. 1977) ("The courts have held as to other types of products that manufacturers must anticipate and take precautions against reasonably foreseeable risks in the use of their products"); *Larsen v. General Motors Corp.*, 391 F.2d 495, 504 (8th Cir. 1968) (duty of care "is equally applicable to all manufacturers . . .").

manufacturers against liability for merely being less than perfect:

> We do agree that under the present state of the art an automobile manufacturer is under no duty to design an accident-proof or fool-proof vehicle or even one that floats on water, but such manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.
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> * * *
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> The manufacturers are not insurers but should be held to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel. . . . At least, the unreasonable risks should be eliminated and reasonable steps in design taken to minimize the injury-producing effect of impacts.
>
> This duty of reasonable care in design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury. The duty of reasonable care in design should be viewed in light of the risk. While all risks cannot be eliminated nor can a crash-proof vehicle be designed under the present state of the art, there are many common-sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision. The standard of reasonable care is applied in many other negligence situations and should be applied here.[75/]

Thus, "[m]anufacturers are not required to produce automobiles with the 'strength and crash-damage resistance of an M-2 Army tank,'" but only a car which is reasonably safe under ordinary circumstances. *Roberts v. May*, 583 P.2d 305, 308 (Colo. Ct. App. 1978), *quoting Melia v. Ford Motor Co.*, 534 F.2d 795, 805 (8th Cir. 1976) (Bright, J., dissenting). This standard of reasonable care is informed in part by the availability, cost, feasibility and appearance of alternative designs. *Turner v. General Motors Corp.*, 514

75/ *Larsen v. General Motors Corp.*, 391 F.2d at 502, 503. *Accord*, *Dawson v. Chrysler Corp.*, 630 F.2d 950, 956 (2nd Cir. 1980), *cert. denied*, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed.2d 383 (1981); *Huff v. White Motor Corp.*, 565 F.2d 104, 110 (7th Cir. 1977) ("This rule does not make manufacturers insurers of their products"); *Huddell v. Levin*, 537 F.2d 726, 735 (3rd Cir. 1976); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071, 1072 n.8 (4th Cir. 1974); *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 558 (8th Cir. 1968); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 504 (Tex. Civ. App. 1974), *writ ref'd n.r.e.*; *Arbet v. Gussarson*, 66 Wis.2d 551, 221 N.W.2d 431 (1975). *See* Noel, *Manufacturer's Negligence in Design or Directions for Use of a Product*, 71 Yale L. J. 816, 818 (1962).

S.W.2d at 504. The manufacturer *is* required to adopt "an alternative design or device at no substantial increase in price." Note, *Liability for Negligent Auto Design*, 52 Iowa L. Rev. 953, 972 (1967). But "if a change in design would appreciably add to cost, add little to safety, and take an article out of the price range of the market to which it was intended to appeal, it may be 'unreasonable' as well as 'impractical' for the courts to require the manufacturer to adopt such change." *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d at 1073. *See Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976) (no way of correcting problem). Thus, the standard of reasonableness provides a limit on liability, and that "should dispell [the manufacturers'] fears of absolute liability." *Turner v. General Motors Corp.*, 514 S.W.2d 497.[76/]

As we have noted, all of the points made above logically apply no less to the issue of punitive damages than to the issue of liability for compensatory damages. That was the conclusion of the district court which originally heard the *Silkwood* case, which opinion was eventually approved by the Supreme Court, *see* note 71, *supra:*

> For the same reason that mere compliance with government regulations cannot necessarily be found consistent with the reasonable person standard, so too it cannot necessarily be found consistent with an attitude and conduct devoid of that state of mind for which an award of punitive damages is appropriate.
>
> As in the drug and aviation cases noted above, a manufacturer may be found to have duties in addition to or different from those prescribed by regulation. A mere failure to act as a reasonable person in conformity with that duty would constitute negligence. A knowing and intentional disregard of that duty might under some circumstances constitute the gross recklessness and indifference to the safety of others that render punitive damages appropriate.

76/ In this case, of course, Chrysler has not contested the finding of liability, and in fact has paid Wolmer his compensatory damages, and thus effectively has conceded that its conduct was at least unreasonable in light of the available cost-effective alternative designs for this car. And even apart from that concession, we have summarized the readily-available cost-effective alternatives which Chrysler should have employed, tested on this very car, and adopted on its other cars. Thus, Chrysler's plea is not well taken that the availability of state remedies would subject it to liability for being less than perfect.

> No one could argue, for example, that a manufacturer who knew that its drug would cause blindness would not be responsible for punitive damages for knowingly marketing that product for profit, even though the drug had been approved for distribution and marketing after compliance with all FDA regulations. Similarly, no one would question the propriety of punitive damages assessed against an airline manufacturer who, for example, knew that its plane was defectively designed and could crash during flight, notwithstanding that the manufacturer had complied with all government regulations and obtained an FAA certificate for the craft as airworthy.
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> Similarly, if a licensee were aware of defects within its facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it, as some evidence in this case indicated, punitive damages might be considered, regardless whether government regulations required those changes to be made. The character of the conduct and the state of the actor's mind control the propriety of punitive damages, and not merely whether that conduct complies or fails to comply with a government regulation. . . .
>
> Defendants argue that the Court's instructions would result in imposition of punitive damages on a defendant who relied on the government standards in good faith. This is not the case. Good faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages. Defendants placed this matter in issue and introduced evidence in this regard. Defendants were free to argue their good faith conduct in operating their facility safely. The jury was instructed to judge that conduct in light of the standards for the imposition of punitive damages. Had the jury believed this evidence, an award of punitive damages would not have been appropriate. . . .
>
> Defendants' argument that no liability for actual damages may be imposed when a plaintiff's exposure is within governmental regulatory limits has been shown to be erroneous. Defendants' further argument that no punitive damages may be awarded on these facts similarly misses the point.[77/]

This reasoning applies equally to the federal regulatory scheme at issue here. Every court to consider the effect of that scheme upon state-law actions for negligence

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77/ *Silkwood v. Kerr-McGee Corp.*, *supra* note 71, 485 F. Supp. at 583-84. This reasoning was explicitly adopted by the circuit court upon remand of the *Silkwood* decision from the Supreme Court. *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985).

has found no barrier to the prosecution of such actions. It follows that compliance with the regulatory scheme should not as a matter of law preclude punitive damages, as the one court to consider the question has held:

> Generally speaking, compliance with regulatory standards may be admissible on the issue of care, but does not require a jury to find a defendant's conduct reasonable. . . . Honda offers no persuasive reason why compliance will as a matter of law be merely admissible on the issue of whether the defendant's conduct is reasonable but an absolute defense on the issue of whether its conduct is willfull, reckless, or outrageous.
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> * * *
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> [W]e believe that Florida would not hold as a matter of law that compliance with the applicable regulations, which were far from comprehensive, precluded any finding of recklessness no matter how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature.[78/]

This is simply a matter of common sense. If a manufacturer can be careless despite its compliance with the minimal federal regulations, then *a fortiori* a manufacturer may be careless to a ***greater degree***--so careless as to be reckless or wanton.

Of course, as the quotation above from the district-court *Silkwood* opinion makes clear, none of this is to preclude the manufacturer from arguing to the jury that its compliance with the federal regulations was evidence of its good faith. In proper cases, such compliance may well reflect a good-faith effort to make the car safe. The only relevant point is that such compliance should not create an irrebutable presumption of good faith; it should not alone preclude a finding that the manufacturer was wanton and reckless despite such compliance.

78/ *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656, 657 (5th Cir. 1981), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed.2d 145 (1982). *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed.2d 443 (1984); *Louisville & Nashville R. Co. v. Hickman*, 445 So.2d 1023, 1027 (Fla. 1st DCA 1983), *review denied*, 447 So.2d 887 (Fla. 1984). Chrysler argues (brief at 22 n.8) that *Dorsey* reached this conclusion only because the particular design defects at issue in that case were not covered by the applicable federal regulations. That is false. The opinion notes, as an ***alternative*** holding, that some of the defects were not covered by the regulations, *id.* at 656, but its primary holding is that even compliance with applicable regulations should not preclude a punitive award.

As we have noted, this case is a perfect example. This is a case in which the jury obviously found that Chrysler consciously marketed a deadly car, knowing that it was reasonably likely to cause a fuel-fed fire upon a rear-end collision at less than highway speeds, despite its compliance with the minimum federal tests. Indeed, the jury might have found that Chrysler ignored the danger precisely because of its minimal federal compliance, in the belief that such compliance would insulate Chrysler from liability. Under such circumstances, the jury could properly find that Chrysler was wanton and willful despite such compliance. It follows that Florida law should not sanction an inviolable rule that such compliance is always a bar to punitive damages.

2. The Evidence Was Sufficient as a Matter of Law to Establish Chrysler's Knowledge or Constructive Knowledge of the Defects. Chrysler's argument is that the evidence was insufficient to establish ***actual*** knowledge of the defects, both because the car satisfied the minimal federal tests, and because the jury found on the strict-liability count that there was no defect at all. The second point, concerning the asserted inconsistency of the jury verdict, is also the subject of an entirely separate argument, which we will address later. The first argument--that Chrysler could not have known of the defects because the car passed the minimal federal test--is not only wrong but irrelevant.

It is irrelevant because Chrysler is wrong to suggest (brief at 25) that Wolmer's "claim for punitive damages rests exclusively on his contention that Chrysler had actual knowledge" of these problems. As we have pointed out, a punitive award need not be predicated upon actual knowledge of a dangerous condition, but may also be based upon constructive knowledge--upon facts which should reasonably have provided such knowledge. Even the standard jury instruction on manslaughter, *see* note 46, *supra*, allows conviction if the defendant has engaged in conduct which he "must have known, or reasonably should have known, was likely to cause death or great bodily injury." *See* notes 52-54, *supra*. As this Court has stated, "[t]he means of knowledge are the same as knowledge itself." *Nardone v. Reynolds*, 333 So.2d 25, 34 (Fla. 1976). *See* note 51,

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supra. Thus, so long as the defendant's conduct is intentional, *see* note 47, *supra*, he may be liable for punitive damages if he engages in such conduct with either actual ***or constructive*** knowledge that his conduct is creating a significant risk of death or serious injury. At the least in this case, Chrysler intentionally marketed this car with either actual or constructive knowledge that its design configuration would likely cause death or serious injury in rear-end collisions at less than highway speeds.

Moreover, Chrysler's point would be wrong even if Florida law required *actual knowledge* of a defect, because the evidence here does show actual knowledge, despite compliance with the minimal test. After all, the shock absorber actually broke off in some of Chrysler's tests, and in any event was repeatedly banging into the fuel tank with substantial force. At the same time the filler tube was pulling out, even at low speeds, enough to cause fuel leakage, and the floor pan was deforming. What more did Chrysler have to know? The jury was easily permitted to find that Chrysler had actual knowledge of these problems.[79/] And as we have noted, such knowledge rendered Chrysler's conduct wanton and willful despite its "marginal" compliance with the federal standards.

C. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE ORDER OF THE TRIAL COURT GRANTING A DIRECTED VERDICT AND JUDGMENT N.O.V. COULD NOT BE SUPPORTED BY THE SPECIFIC FINDING OF THE JURY THAT NO DEFECT OR DANGEROUS CONDITION EXISTED IN THE VOLARE.

Chrysler's argument is ***not*** that the jury's finding of no defect on the strict-liability count is inconsistent with its finding of negligence, and thus that Chrysler is entitled to a new trial. At no time at the trial level, the district-court level, or in this Court has Chrysler ever raised such an argument. To the contrary, Chrysler attempted in open

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79/ *See Piper Aircraft Corp. v. Coulter*, 426 So.2d 1108, 1110 (Fla. 4th DCA), *review denied*, 436 So.2d 100 (Fla. 1983); *Atlas Properties, Inc. v. Didich*, 213 So.2d 278, 279 (Fla. 3rd DCA 1968), *cert. denied*, 226 So.2d 684 (1969). *See generally Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S. Ct. 1113, 47 L. Ed.2d 318 (1976); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 444 (1980). *Cf. Jonat Properties v. Gateman*, 226 So.2d 703 (Fla. 3rd DCA), *cert. denied*, 234 So.2d 123 (Fla. 1969).

court to frame a verdict form which would not allow an inconsistent verdict (R. 1516); and Chrysler listened to the jury's verdict being read in open court (R. 1775); and yet Chrysler stood silent, and did not ask that the jury be sent back to resolve the asserted inconsistency. At that point, under overwhelming authority, Chrysler waived any argument for a new trial based upon an alleged inconsistency of verdicts.[80/] And although there is now a single district-court decision suggesting that an inconsistency of verdicts may constitute fundamental error, *see North American Catamarin Racing Association, Inc. v. McCollister*, 10 FLW 2665 (Fla. 5th DCA 1985), the fact is that Chrysler is not raising an inconsistent-verdict argument. To the contrary, Chrysler has not contested the finding of liability against it, and in fact has paid Wolmer his compensatory damages. Since the only conceivable outcome of an appellate reversal for inconsistent verdicts is a new trial, it is not surprising that Chrysler has raised no such claim.[81/]

[80/] *See Higbee v. Dorigo*, 66 So.2d 684 (Fla. 1953); *Papcun v. Piggy Bank Discount Souvenirs Food and Gas Corp.*, 472 So.2d 880 (Fla. 5th DCA 1985); *Gould v. National Bank of Florida*, 421 So.2d 798 (Fla. 3rd DCA 1982); *Thomas v. Fowler*, 414 So.2d 215 (Fla. 4th DCA 1982); *Keller Industries, Inc. v. Morgart*, 412 So.2d 950, 951 (Fla. 5th DCA 1982); *Keyes Co. v. Rocky Graziani, Inc.*, 406 So.2d 100 (Fla. 3rd DCA 1981); *Robbins v. Graham*, 404 So.2d 769, 771 (Fla. 4th DCA 1981); *Wiggs & Maale Construction Co. v. Harris*, 348 So.2d 914, 915 (Fla. 1st DCA 1977); *Valdez v. Fesler*, 298 So.2d 512, 513-14 (Fla. 2nd DCA 1974), *cert. discharged*, 335 So.2d 553 (Fla. 1976); *Lindquist v. Covert*, 279 So.2d 44 (Fla. 4th DCA 1973); *Crawford v. DiMicco*, 216 So.2d 769 (Fla. 4th DCA 1968). *See also Francois v. Wainwright*, 741 F.2d 1275, 1282 (11th Cir. 1984) (Florida law). *Cf. Atlantic Coast Line R. Co. v. Price*, 46 So.2d 481 (Fla. 1950); *McDonough Power Equipment, Inc. v. Brown*, 11 FLW 531 (Fla. 5th DCA February 26, 1986). There is some authority in the federal system that even if objected to, an inconsistent verdict should not be disturbed. *See United States v. Powell*, 469 U.S. ___, 105 S. Ct. 471, 83 L. Ed.2d 461 (1984); *Fairmount Glassworks v. Cub Fork Coal Co.*, 287 U.S. 474, 485, 53 S. Ct. 25, 77 L. Ed.2d 439 (1983); *Harris v. Rivera*, 454 U.S. 339, 345, 102 S. Ct. 460, 70 L. Ed.2d 530 (1981); *United States v. Dunn*, 284 U.S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356 (1932); *Jayne v. Mason & Dixon Lines, Inc.*, 124 F.2d 317, 319 (2nd Cir. 1941) (L. Hand, J.). *See also Karcesky v. Laria*, 382 Pa. 227, 235, 114 A.2d 150, 154 (1955).

[81/] *See Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA), *review denied*, 455 So.2d 1033 (Fla. 1984). The same rule adheres in the federal system. *See Malley-Duff & Associates v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3rd Cir.), *cert. denied*, 469 U.S. ____, 105 S. Ct. 564, 83 L. Ed.2d 505 (1984); *Dickerson v. Pritchard*, 706 F.2d 256, 259 (7th Cir. 1983); *Global Van Lines Inc. v. Nebeker*, 541 F.2d 865, 868 (10th Cir. 1976); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5th Cir. 1975); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 547 (5th Cir. 1974); *Hopkins v.*

The sole argument raised by Chrysler in the district court, and resurrected here, is that the alleged inconsistency of verdict should operate to mandate the ***entry of judgment*** for Chrysler on the issue of punitive damages as a matter of law. Chrysler's argument is that because the jury found no defect on the strict-liability count, an appellate court should not consider any of the evidence relevant to that count in reviewing the propriety of the jury's punitive award on the negligence count. Of course, if Chrysler is correct that in this case the negligence claim and the strict-liability claim were identical--and therefore that the verdicts were inconsistent--then Chrysler's real argument is that the trial court and the appellate court should ignore ***all*** the evidence relevant to the negligence count, because ***all*** of that evidence was also relevant to the strict-liability count. Having failed to seek the jury's reconsideration of the alleged inconsistency, and having failed to argue for a new trial on the point, Chrysler is seeking to employ the alleged inconsistency in a context in which it might have escaped liability altogether. For if Chrysler had not already paid the compensatory award, its argument here would be no less applicable to the issues of liability and compensatory damages than it is to the issue of punitive damages.

As the district court pointed out (A. 10), this argument conflicts with the well-settled principle that in reviewing a motion for directed verdict, the appellate court must consider all of the evidence of record in the light most favorable to the non-moving party.[82/] Thus, Chrysler's argument is that this Court should carve out an exception to the well-settled rule, by holding that the reviewing court should consider all of the evidence which best supports a verdict for the plaintiff ***only*** if such evidence is not also relevant to a count on which the jury has exonerated the defendant.

Coen, 431 F.2d 1055, 1059 (6th Cir. 1970); *Alston v. West*, 340 F.2d 856, 858 (7th Cir. 1965).

82/ *See Arab Termite and Pest Control v. Jenkins*, 409 So.2d 1039, 1041 (Fla. 1982); *Wackenhut Corp. v. Canty*, 359 So.2d 430, 435 (Fla. 1978); *Bourgeois v. Dade County*, 99 So.2d 575, 577 (Fla. 1957).

We submit that such a rule is nonsensical, because it fails to appreciate that although the plaintiff may have lost one of his claims against the defendant in such circumstances, he has *won* another. If the verdicts are inconsistent, it is not at all clear whether the jury intended to exonerate the defendant completely, or to hold the defendant completely liable. The rule suggested by Chrysler necessarily assumes that the jury intended to exonerate the defendant completely, because it necessarily requires that the court employ the no-liability verdict as a weapon with which to overturn the liability verdict. Thus, when verdicts are inconsistent, the plaintiff always loses.

That outcome is absurd. If the verdicts are inconsistent, the jury should be given the opportunity to correct the inconsistency, which can be done "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). That is the only conceivable way to find out whether the jury intended to exonerate the defendant completely, or to hold him liable. If the defendant requests such a resubmission, but the trial court disallows it, then a successfull appellate claim of inconsistency will entitle the defendant to a new trial, so that a new jury will have a chance to evaluate the claim. If the defendant fails to make such a request at the trial level, to give the jury an opportunity to resolve the apparent conflict, then he has waived any right to a new trial. In no event, however, should the defendant be entitled to a directed verdict on the count upon which the jury has found him liable. As the district court pointed out (A. 10), this Court has observed that a motion for directed verdict is simply not the proper vehicle through which to challenge an alleged inconsistency of verdicts. *See Cutchins v. Seaboard Air Line R. Co.*, 101 So.2d 857, 861 (Fla. 1958). This Court has never held otherwise, because such a holding would be nonsensical and fundamentally unfair.[83/]

[83/] Certainly there is no such suggestion in *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530 (Fla. 1985). The ***holding*** of *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. Chrysler finds in *Farish* a suggestion in *dictum* that if there had not been such direct evidence of

D. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE FEDERAL STATUTES AT ISSUE DO NOT PRE-EMPT WOLMER'S CLAIM FOR PUNITIVE DAMAGES.

We already have discussed several aspects of this question in rebutting Chrysler's argument that compliance with federal regulations should preclude liability as a matter of law. In addition, this question of pre-emption will occupy the entirety of the Amicus Curiae Brief of the Academy of Florida Trial Lawyers, which we hereby adopt and incorporate by reference. For this reason, so as not to burden the Court with repetitive argument, we will confine our discussion to the following brief points:

1. At no time at the trial, in any context, did Chrysler raise this argument in any way. Thus, Chrysler's argument is not preserved for review by this Court. *See* note 44, *supra*. Although the district court for some reason decided to address the point on the merits, that does not in any way require this Court to do so, or excuse Chrysler's failure to raise the point at trial. It has simply been waived. *See also Sanchez v. Wimpy*, 409 So.2d 20 (Fla. 1982).

2. Every one of Chrysler's arguments would apply no less to the issues of liability and compensatory damages than to the issue of punitive damages. Thus, if well-taken, Chrysler's argument would require this Court to abolish all common-law actions arising out of the design or manufacture of cars, so long as the defendant has not violated any applicable federal standard. It is vital to understand the radical nature of Chrysler's position.

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wrongdoing, the principal would have been entitled to a directed verdict in light of the jury's exoneration of the agent. But *Farish* contains no such suggestion. It does say that in the absence of any evidence of direct wrongdoing by the principal, his claim of inconsistent verdicts might have been well taken; and it also says, 464 So.2d at 532 n.2, that such a claim was not waived at the trial level because the principal did sufficiently raise the claim of inconsistent verdicts below. But the *Farish* opinion says absolutely nothing about what the appropriate ***remedy*** would have been if such a claim of inconsistent verdicts had been well taken in *Farish.* It does not say anything about the propriety of a directed verdict in such circumstances, and Chrysler's representation to the contrary is inexcusable. As the unanimous Florida authorities hold, the appropriate outcome in such circumstances is either a resubmission to the jury, or a new trial.

3. We find it inconceivable that such a position could be reconciled with the statutory declarations that the federal standards are "minimum," and that "[c]ompliance with [them] does not exempt any person from ***any liability*** under common law" (our emphasis). At least on the issue of liability for compensatory damages, every court ever to consider the question has found no pre-emption.[84/] There is no reasonable basis for distinguishing Congress' intention regarding state-law claims for compensatory damages from Congress' intention regarding state-law claims for punitive damages. If Congress was unconcerned with subjecting manufacturers to the uncertainties of attempting to conform their conduct to a standard of reasonableness, it certainly was not concerned with the threat of state-law liability for conduct which is ***worse*** than unreasonable, because that could hardly create additional uncertainty. If Congress intended that the auto manufacturers not be permitted to hide behind minimal federal compliance in shielding their own negligence, it certainly did not intend those regulations to be a shield against wanton and reckless conduct. All of the arguments for finding no pre-emption of liability apply with even greater force to the issue of punitive damages. Thus, the one court to consider the question has found no pre-emption.[85/]

4. Chrysler points out that the savings clause of the act must be reconciled with the supremacy clause of the act, 15 U.S.C. §92(d), providing that wherever the federal scheme operates, the states may not promulgate safety standards which are "not

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[84/] *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, ___ U.S. ___, 105 S. Ct. 237, 85 L. Ed.2d 714 (1985) (53 U.S.L.W. 4612); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 506 (Tex. Civ. App. 1974), *writ ref'd n.r.e. See generally Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985); *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519 (D.D.C. 1986); *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).

[85/] *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). *See generally Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed.2d 443 (1984); *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519 (D.D.C. 1986); *Rubin v. Brutus Corp.*, 11 FLW 903 (Fla. 1st DCA 1986); *Louisville & Nashville R. Co. v. Hichman*, 445 So.2d 1023, 1027 (Fla. 1st DCA 1983), *review denied*, 447 So.2d 887 (Fla. 1984).

identical to the Federal standard." Ignoring the unanimous authorities cited above, Chrysler contends (brief at 41-43) that the only "reasonable accommodation" of the savings clause and the pre-emption clause is to construe the statute to permit state common-law remedies only in areas not regulated at all by the federal scheme. And Chrysler cites a number of decisions, ***none*** of them involving this particular federal scheme, in which pre-emption clauses and saving clauses have been reconciled in that way, in light of a clear and irreconcilable conflict between state and federal involvement on a question.[86/]

What Chrysler omits, however, is any demonstration that the prosecution of state actions involving automobiles presents any conflict with the purposes of ***this particular*** federal scheme. In all of the cases cited by Chrysler, such an accommodation was necessary in light of that conflict. And similarly, in those cases which do involve this particular statute, such an accommodation has been made ***only*** if the state has attempted

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[86/] Although Chrysler does not admit it, this suggestion would require the abolition of punitive damages (and by the same reasoning, the abolition of liability for compensatory damages too) in all products cases involving automobiles. If Chrysler is correct (brief at 42) that the federal scheme is "comprehensive[]," then there will rarely if ever be a case in which compliance with some applicable federal regulation will not provide an argument for pre-emption of both liability and punitive-damage claims. Although Chrysler leaves this conclusion to inference, the Defense Amicus brief is less circumspect, arguing for the abolition of punitive damages in product-liability cases. *See, e.g.*, Defense Amicus brief at 2 ("Punitive damages is a wart on the nose of product liability law . . ."). Since Chrysler does not expressly raise this argument, of course, it is not properly before the Court. *See* note 43, *supra*. Moreover, mindful that this Court would not lightly undertake such a radical step, *see Hoffman v. Jones*, 280 So.2d 431, 433-34 (Fla. 1973); *McPhail v. Jenkins*, 382 So.2d 1329 (Fla. 1st DCA), *review denied*, 388 So.2d 1115 (Fla. 1980), we submit the following authorities in support of punitive awards in proper cases governing products liability. *See generally Acosta v. Honda Motor Co.*, 717 F.2d 828, 833-38 (3rd Cir. 1983); *Dorsey v. Honda Motor Co., Ltd.*, *supra*, 655 F.2d at 655; *Campus Sweater & Sportswear v. M.B. Kahn Construction*, 515 F. Supp. 64, 109 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *Campbell v. Government Employees Ins. Co.*, 306 So.2d 525, 535 (Fla. 1975); *Johns-Manville Sales Corp. v. Janssens*, *supra*, 463 So.2d at 252-54; *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wisc. 1980); Owen, *Deterrence and Desert in Tort: A Comment*, 73 Cal. Rev. 665, 670 (1985); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 59 (1982); American Bar Association, *The Special Committee on the Tort Liability System, Toward a Jurisprudence of Inquiry: The Continuing Creation of a System of Substantive Justice in American Tort Law* (1984).

IV
CONCLUSION

It is respectfully submitted that the opinion of the district court should be approved.

Respectfully submitted,

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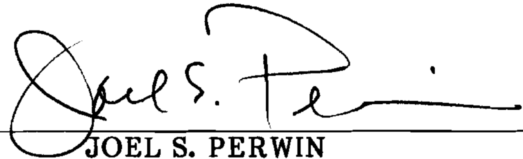
BY: 
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