O/G 6-3-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,761

CHRYSLER CORPORATION, a foreign corporation,

Petitioner,

v.

JACK E. WOLMER, Personal Representative of the Estate of MARY WOLMER and JACK E. WOLMER, Individually,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON MERITS

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TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

PREFACE

Under the pretext of presenting this Court with a Statement of the Case and Facts, the Plaintiff has indulged in 26 pages of undisguized argument. Of more serious concern, however, is the accuracy of the matters which he asserts as "facts". A careful review of some 412 cited Record references[1/], disclosed 146, or nearly 35%, in which the Record did not state what the Plaintiff claimed for it. In some instances the reference was completely contrary to the representation, in others the descriptions in the brief failed to mention essential aspects of the evidence in the citation thus substantially altering the character of the evidence, and in others the citation bore no reference to facts asserted in the text in the brief. A number of those matters are addressed below. Constraints of space require the omission of many. Consequently the Appellant would urge this Court to review with care the citations on any points it deems critical and to which a specific response has not been made.[2/]

Before addressing specific errors as they appear in order in the Plaintiff's Brief, several matters bear noting. Throughout his brief, the Plaintiff refers to the speed at which tests were conducted under FMVSS 301 as 30 mph. This speed, he implies, is substantially below that which vehicles travel on the highway. Omitted from mention, however, is the fact that the expert witnesses who testified upon the subject indicated that a movable barrier impact speed of 30 mph was equivalent to an impact of one vehicle striking another at nearly 45 mph (R: 1298; see also 230, 831-832, 1173).

The Plaintiff contends that Chrysler made no efforts to improve the Volare's fuel system performance and cites improvements suggested by his witnesses which Chrysler did

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1/ Not all references were checked; about 60 which related to non-controverted matters were not.

2/ The same caution would apply to the unnumerable but wholly inapposite authorities cited by Plaintiff and Amicus Curiae Academy of Florida Trial Lawyers, which do not provide any guidance whatever to resolution of the issues raised in this appeal.

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not employ. As will be shown, the evidence was clear that Chrysler had worked to improve the performance of both the fuel tank (by improving the undercarriage environment and strengthening the side rails) and the filler tube (by reducing movement of the tank and designing a tube which inserted much further into the tank than previous designs). Thus, while Chrysler did not utilize the exact designs recommended by Plaintiff's witnesses at the time of trial, it did incorporate a substantial number of design aspects which unquestionably improved rear end impact performance. The most that the Record legitimately allows to the Plaintiff's argument is a possible conclusion that while Chrysler made some design improvements, its failure to make others might be regarded as negligence. It does not permit a conclusion that Chrysler ignored potential problems, and taking no steps to improve the safety of the 1977 Volare. Hence, while the Record might support a claim of negligence, it does not suggest the degree of egregiousness necessary to support punitive damages.

Finally, in his Statement of Facts, the Plaintiff continually argues the existence of certain defects or dangerous conditions that he contends existed in the Volare. As noted in the Argument, the jury specifically found no defect and no dangerous condition. Consequently, the Plaintiff is relying upon certain conclusions specifically rejected by the jury as well as the Trial Judge.

The following response is organized in respect to the Plaintiff's headings.

[B. THE ACCIDENT]

Plaintiff's factual argument regarding impact speed is plainly designed to give the impression that the truck struck the Wolmer vehicle at a low speed (Plaintiff's Brief, p. 2). He refers to the driver's estimate of his speed prior to impact (50-55 mph) and suggests that this figure was substantially reduced by braking. In fact, the truck left no skid mark indicative of braking (R: 55-57), and there was no evidence to indicate that braking reduced the speed. The Plaintiff's presentation ignores the direct testimony of actual impact velocity; the lowest estimate of any expert was from something under 50 to 55

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mph (R: 493). There was no evidence that would support a finding that the speed was substantially below 50 mph.[3/]

The Plaintiff's statement that "damage" to the rear compartment of the Wolmer stationwagon was minor misstates not only the reference,[4/] but also the facts (Plaintiff's Brief, p. 3). The Court is referred to Defendants' Exhibits 9 and 21 illustrating the substantial deformation to the rear of the stationwagon (shortened 2 1/2 - 3 feet by the impact). Clearly, the damage shown cannot be described as minor.

[C. DEATH BY FIRE - HOW IT HAPPENED]

Through a careful misconstruction of the testimony, the Plaintiff gives the impression that the fuel system in the 1977 Volare -- and the Wolmer vehicle in particular -- contained no changes from 1976 (Plaintiff's Brief, p. 3). In the cited testimony of Mark Nobel, the Chrysler witness stated that major parts of the fuel system were carried over; he did not state that there were no changes (R: 312). In his further testimony, Nobel was specific about the changes that were initiated in the 1977 Volare: steel channels were used to stiffen the rear rails and reduce forward movement of the fuel tank; the axle surface was smoothed, a flange was removed from the differential, boltheads were rounded and covers were placed on brackets -- creating a "friendlier" environment for contact by the fuel tank; tank retention straps were contoured to prevent their cutting into the tanks; the fuel cap was redesigned to be retained on the filler tube and the rollover valve, which prevents venting of fuel in rollovers, was repositioned (R: 1320-21). Every one of these changes was aimed at improving safety in rear-end collisions. He further testified that

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3/ It is significant that the FMVSS 301 tests conducted by Chrysler with a moving barrier at 30-32 mph (which replicates a vehicle-to-vehicle impact of 45 mph) resulted in rear-end crush ranging from 9.5 to 12.5 inches (Plaintiff's Ex. 20, Test No. 1139 CB; Plaintiff's Ex. 52, Test No. VC 1270); the rear-end crush on the Wolmer vehicle was 30-36 inches (R: 729, 1446). Clearly, the Wolmer impact involved forces substantially greater than those generated in collisions duplicating 45 mph vehicle-to-vehicle impacts. (See R: 1298, 1313)

4/ The cited testimony was that reduction in volume was minor (R: 491).

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each of these changes was found on the Wolmer vehicle; no witness testified to the contrary (R: 1322-1330).

The interrogatory answers cited do not contradict this testimony; they indicated only that Chrysler did not "formally consider" an alternative to the fuel tank design[5/] and that Chrysler did not conduct any tests to choose amongst competing designs for a fuel system in the 1977 Volare (R: 104-5). Finally, Gilbert Laine simply stated that he did not know of any changes between 1976 and 1977 aimed at reducing contact between the shocks and fuel tank, he did not state whether there were any changes or not.[6/]

[1. PENETRATION OF THE FUEL TANK BY LEFT SHOCK ABSORBER]

The Plaintiff notes that the Volare fuel tank tended to ride up and over the differential on impact; he neglects to advise that the only alternative to this would be for the tank to impact the differential directly, leading to bursting of the tank (R: 1461).

In footnote 7, the Plaintiff argues that his expert was misquoted in the Transcript. It is noteworthy that he has never previously sought to correct this alleged "error". A review of the testimony shows that Arndt clearly acknowledged on page 620 that the Volare fuel tank/shock absorber configuration comported with good engineering practice at the time the car was designed; on the following page he does not contradict this, but states that the system minimally met generally accepted engineering practice (R: 621). Contrary to the Plaintiff's bald assertion, there is no statement in Arndt's testimony on pages 619-21 describing Chrysler's design as "reckless". As he does throughout the "factual" statement in his brief, the Plaintiff shamelessly misrepresents the facts to the Court under the guise of allegedly correcting errors in Chrysler's brief.

5/ Meaning, as defined in the interrogatory, that Chrysler considered no formal requests for an engineering study of an alternative such as incorporation of a thermal barrier between tank and passenger compartment. Of course, this interrogatory did not address other design changes in the fuel system.

6/ It is not surprising that Laine would not be familiar with this detail since his position was that of a supervisor of vehicle structural analysis (R: 160); Nobel was the design supervisor of the Fuel Systems Department (R: 303).

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[2. HOW THE FUEL FILLER TUBE PULLED OUT OF THE FUEL TANK]

The Plaintiff's contention that the filler tube "easily" gives way to force is not supported by a single citation given (Plaintiff's Brief, p. 5); the testimony indicated that the tube would come out of the tank only if it displaces more than 5-6 inches (R: 569). Further, Severy's testimony (R: 1656) cited by the Plaintiff does not even refer to the Volare; as Severy made quite clear, his published paper indicating problems with withdrawal of filler tubes in car accidents addressed designs with only minimal insertion lengths of 1 3/4 inches, not the 5-6 inches of the Volare (R: 1680).

[3. DEFORMATION OF THE FLOOR PAN]

The Plaintiff's argument that the separation of several welds attaching the floor pan to the rails constituted a defect is totally without support in the Record. While testimony indicated that a continuous fusion weld was stronger than spot welding, there was not an iota of evidence that a continuous weld was feasible in this situation or that good engineering practice -- or any other standard -- called for its use; nor was there any evidence that use of a continuous weld would have prevented separation in this accident. The Plaintiff's only expert to testify about the weld separation expressly declared it not to be a defect (R: 603). The argument that the pan failed in its function to keep fire out of the car because it separated proves nothing; deformation and separation of structures is a natural consequence of severe impact. The matter to be proven is not whether it separated, but whether it should not have separated under the specific impact conditions in this accident. The uniform testimony of the witnesses who addressed this issue was that separation would be an expected condition in forces of this severity no matter what was used (R: 777, 784-785).7/

7/ In footnote 11, the Plaintiff alleges that a witness found the failure of Chrysler to provide an adequate fire wall to be "intolerable". In fact, the witness, Gilbert Laine, testified that Chrysler would not tolerate the failure of welds in the pan in the area above the tank in 30 mph barrier impacts. There was no characterization of the Chrylser design in his testimony as inadequate and no opinion as to whether a floor pan should be expected to remain secure at impacts of 50 mph or above.

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It is significant that even the District Court failed to accept the Plaintiff's contention in respect to the floor pan.

[D. WHAT CHRYSLER KNEW]

As previously noted, Plaintiff's representation that there were no changes in the fuel system between 1976 and 1977 Volare is contrary to the Record. The Plaintiff relies upon evidence regarding whether one aspect of the system was changed (R: 104) or to testimony that one individual did not know whether there were any changes (R: 164) -- neither of which proves whether there were any changes in the system. While Severy testified that there were 13 changes incorporated in the 1976 to 1977 model compared to the 1975 design, he does not state that there were no changes in 1977 (R: 1590-91). Nobel, whose duty it was to design the changes in 1977, identified 8 changes -- all of which he found, upon inspection, to have been in the Wolmer vehicle (R: 1320-21; 1322-30). The incorporation of these changes was conceded by the Plaintiff's leading witness, Fred Arndt (R: 584, 783).[8/]

The Plaintiff's argument that none of these changes affected the safety of the fuel system in respect to the filler tube or shock absorber (Plaintiff's Brief, p. 10) is clearly belied in the Record. The stiffening of the rear rails substantially reduced the tendency of the fuel tank to displace forward and to contact other underbody members -- thus reducing the severity of any relative impact between the tank and other structures (R: 1320-1330; 1336-37).[9/] The development of contoured straps eliminated the problem of release of the fuel tank from the body -- thereby reducing the problem of tube withdrawal found in the earlier testing (R: 1137-1138). The new filler cap and

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8/ It must be noted that whether Chrysler effected all of the improvements between 1976 and 1977 or whether it effected some between 1975 and 1976 and others between 1976 and 1977, the undisputable fact remains that Chrysler was clearly concerned with improving the safety performance of its vehicles.

9/ The tendency of the tank to displace forward can only be reduced and not eliminated since to achieve the latter would require designing the body structure to be so rigid that vehicle occupants would be liable to severe injury in relatively light impacts (R: 1364, 852-53).

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attachment assembly to the quarter panel, further minimized the tendency of tube withdrawal (R: 571-572, 1320-1330).

The Plaintiff's bald statement that Chrysler "rushed this car to market" (ftn. 14) is totally without support in the Record and, significantly, no citation is given.

One of the Plaintiff's most egregious fabrications is that there was testimony that Chrysler's testing revealed two instances of shocks breaking in addition to those shown in the test reports (Plaintiff's Brief, p. 11). In fact, the cited testimony said nothing of the sort:

> *Well, I guess the breaking of a shock absorber is something that we did not see very frequently, if at all in the '77 Volare testing. And in those instances where we have seen it, it really never caused any problem to the tank.* (R: 309-310)
>
> (emphasis added)

This testimony is perfectly consistent with the documentary evidence showing no shock failure until after sale of the Wolmer vehicle (Plaintiff's Ex. 33, Tests 3475 and VC 1665).[10/] Nobody ever testified that Chrysler knew of a shock breaking or even bending before the sale of the Wolmer vehicle.

The Plaintiff's statement that Chrysler's overall testing program showed failure of welds on the floor pan is also misleading (Plaintiff's Brief, p. 12). Evidence showed failure of some welds on only one test -- V.C. 1247 (Plaintiff's Ex. 47) -- out of the twenty tests which were in evidence. Thus, the overall testing program showed that the wels very seldom failed even in substantial impacts.

[TEST REPORTS]

The Plaintiff's discussion of the test results (Plaintiff's Brief, p. 13-16) is replete with errors and misstatements. His attempt to suggest that leakage in test 1084 was due to any cause other than the retention strap cutting into the tank is without support in the evidence (see Plaintiff's Ex. 28).

10/ It is noteworthy that test 1665, performed after the Wolmer accident on 10/24/77, involved a test of a modified plate on the shock which broke.

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The sled test reports -- 2854, 2855, 2862, 2982 -- each states that the straps or attachments holding the fuel tank broke or deformed; each also states that this lead to tank displacement (Plaintiff's Ex. 22, 23, 24, 27). In 2854 and 2855, the resultant tank displacement was rearward -- away from the shocks -- while in the Wolmer accident and all crash tests the displacement was forward (Plaintiff's Ex. 23, 24).

Similarly the sled test report -- 2967 (Plaintiff's Ex. 25 & 26) -- states that fuel leakage occurred after the tank displaced following release of the straps.[11/]

A summary review of all the tests cited by the Plaintiff as involving fuel leaks shows the following: five sled tests involved strap retention problems not found in the Wolmer vehicle; one crash test involved the cutting of the tank by the straps; one crash test (1247 - Plaintiff's Ex. 47) involved strap retention problems and an "unmeasurable" fuel leak after 30 minutes, and only one involved a failure not associated with the retention straps (1288 - Plaintiff's Ex. 31), and in that test, the leak occurred only on rollover. A reader not familiar with these omissions and mischaracterizations might be induced by the Plaintiff's argument to conclude that the 1977 Volare fuel system design had major problems with leakage in rear impacts that were simply repeated in the Wolmer accident. In fact, every test but one in which a leak occurred had a retention strap failure -- a design problem which was corrected and did not occur on the Wolmer vehicle. In the one leak not involving fuel strap retention, a leak occurred during rollover in an early development test. Of course, Wolmer did not involve a rollover.

The Plaintiff's suggestion (Plaintiff's Brief, p. 15) that the issue of failure to warn was tried to the jury is not supported by the jury instructions and his effort to suggest that the instructions could be expansively interpreted to include such an issue is patently

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11/ Significantly, the straps on the Wolmer vehicle, the design which resulted from these sled tests, did not fail (R: 1137, 1328).

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erroneous.[12/] The further argument that failure to warn or recall was tried by consent is improper. Evidence of the tests subsequent to sale of the Wolmer vehicle were arguably relevant to the issue of whether a defect or dangerous condition existed since those tests involved generally similar vehicles. An admission, without objection, of evidence relevant to an issue in the pleadings -- even if also potentially relevant to an issue not framed in the pleadings -- does not constitute trial by consent of the unframed issue. *Fearing v. De Lugar Neuvo*, 106 So.2d 873 (Fla. 2d DCA 1958). Here the evidence was relevant to a framed issue -- existence of a defect; that it was potentially relevant to an unframed issue -- subsequent knowledge by Chrysler of an alleged defect -- does not constitute trial by consent of the latter.[13/]

[F. CHRYSLER'S STATE OF MIND]

The argument that Chrysler had impacted vehicles at speeds in excess of 30 mph prior to adoption of FMVSS 301 omits essential facts which, in fact, disprove the point the Plaintiff attempts to make. One barrier test was conducted at 57 mph to determine what would happen in such impacts: it totally demolished a full size car leaving nothing to analyze (R: 1184A-85A; 1166). One test was conducted by crashing two vehicles together at a closing speed of 60 mph to demonstrate the result would be the same as with a 30 mph fixed barrier test (R: 1166). Other tests conducted at about 40 mph were vehicle to vehicle crashes -- not the more severe barrier crashes (R: 1167-68). It is noteworthy that all sled tests on the 1977 Volare replicated speeds in excess of 40 mph (Plaintiff's Ex. 22, 23, 24, 25, 27). Thus, only two tests involved impacts more severe than those mandated in FMVSS 301. One left no data for analysis, and the other was conducted to prove the

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12/ Nor did the pleadings encompass knowledge of tests subsequent to the sale of the Wolmer vehicle as a basis for punitive damages since paragraph 33 of the Amended Complaint limited the claim to tests conducted prior to sale (R: 2011).

13/ As at least one other court has observed, it is difficult to find a causal nexus between failure to warn a purchaser of an automobile of a potential hazard arising in a rear-end collision and injuries suffered in such an accident. Knowledge gained from a warning will not avoid the accident which produces it. American Motors Corp. v. Ellis, 403 So.2d 459, 466 (Fla. 2d DCA 1981).

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validity of barrier tests. There was no evidence that Chrysler had ever utilized impact tests more severe than those of FMVSS 301 for analysis.

The insinuation that FMVSS 301 was "watered down" by the lobbying of Chrysler or any other manufacturer is totally unsupported in the Record. Plaintiff's attorney attempted to elicit such testimony but was unsuccessful (R:). No connection was shown between Chrysler, any "lobbying effort" and the adoption of the standard.

There was no discussion by any Chrysler employee of a "necessity" of testing at higher speeds (Plaintiff's Brief, p. 23). The testimony was that there had been little discussion of whether to test at higher speeds -- not that it was a necessity to do so (R: 316). The Plaintiff's transparent purpose in misrelating this testimony is clearly to leave an impression that Chrysler management ignored recommendations of its staff. The Record simply does not support this.

The document which the Plaintiff claims (Plaintiff's Brief, p. 23) to contain a staff recommendation for higher speed testing is appended (A-1). The page is entitled: "Fuel System Integrity Regulation History" (emphasis added). The second paragraph is entitled "FMVSS 301 Standards". It is in that paragraph, following a listing of the performance requirements under that standard and the date of the adoption of each, that the following is stated:

> *Proposed future standards include 40 mph rear and 30 mph angular rear requirements.*

In its context, this can only refer to a proposed change of the rear impact standard of FMVSS 301. Of course, no such proposal was ever adopted by the federal agency charged with the responsibility of promulgating safety standards.

The contention that the Memorandum by Les Parr states that the Volare (F Body under Chrysler coding) marginally met the FMVSS 301 standard for rear impacts is a similar misrepresentation. The memorandum is appended (A-2) and shows that F and B bodies with six cylinder engines and B and C bodies with A engines marginally met the

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angular test. Only the B and C bodies had marginal compliance on rear impact tests. The angular test impacts the front engine compartment (R: 1184A).

Finally, the Plaintiff suggests that the Court read selective quotations from Mr. Laine regarding whether it was Chrysler policy to take remedial measures if tests showed minor contact between the shock absorber and fuel tank. Since Mr. Laine said that Chrysler would not do so as long as the situation would not violate FMVSS 301 requirements, the Plaintiff suggests that this demonstrates that Chrysler would only concern itself with blind compliance with the standard. He totally ignores -- and selectively omits from the rest of this witness's testimony in his Appendix -- Laine's testimony that if heavy contact between the shock and tank were shown, then Chrysler would take remedial action (R: 155).[14/]

The Plaintiff's suggestion that:

> *(a)nyone 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*
>
> (Plaintiff's Brief, p. 26)

ignores the fact that the Trial Judge who did hear all of this testimony -- and not just the selective quotations chosen by the Plaintiff -- had more than doubts as to the punitive damage award. The Plaintiff is strangely silent here as to the Trial Judge's carefully considered decision that the evidence did not support the award.[15/]

14/ Of course, even heavy contact between the two does not violate the requirements of FMVSS 301. Thus, the very testimony which the Plaintiff cites to show that Chrysler would only correct a situation if it violated FMVSS 301 shows precisely the opposite!

15/ The Plaintiff, in a last gasp, tries to gather support from Mr. Ball's characterization of Chrysler's design as "reckless". This characterization constitutes an opinion upon a legal issue. Only facts can support a verdict, not legal conclusions. While failure to object may waive the right to claim error in admitting the testimony, it does not endow what is a legal conclusion with the factual status necessary to support a verdict. See Ehrhardt, Florida Evidence, Section 703.1; Town of Palm Beach v. Palm Beach County, 460 So.2d 879 (Fla. 1984).

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ARGUMENT

I.

THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN REVERSING THE ENTRY OF THE DIRECTED VERDICT.

The Plaintiff argues that, by not objecting to use of the standard jury instruction on punitive damages, Chrysler waived its right to assert that the measure of conduct necessary to support an award of punitive damages requires an element of egregiousness over and above mere recklessness. This argument can only be characterized as sheer nonsense. The right to a directed verdict is determined by the nature and effect of the evidence and not the nature of the jury instructions.

Chrysler is not in the posture of complaining here of error in the jury verdict: a directed verdict assumes that there is no basis for a jury to consider an issue and, hence, no function for jury instructions.

The Plaintiff's contention that Chrysler did not argue in the District Court that the standard for supporting punitive damages requires an element of aggravation, egregiousness or outrageousness can only be characterized as a misrepresentation. Pages 28 and 29 of Chrysler's Brief in that Court are appended (A: 3-4) and sufficiently refute this contention.

The only portions of the Plaintiff's argument addressing the merits of this first point which require a response are three:

First, the legal standard the Plaintiff formulates for application to manslaughter and punitive damage liability (Plaintiff's Brief, p. 34-35) clearly violates this Court's holding in *McCreary v. State*, 371 So.2d 1024 (Fla. 1979).

Second, in an effort to find some aggravating factor in Chrysler's conduct sufficient to meet the standard for punitive damages, the Plaintiff can point only to the fact that Chrysler was concerned with FMVSS 301 compliance and that it allegedly failed

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to correct a "known" dangerous condition so long as the Volare met the Federal requirement. Looking through this rhetoric to the precise nature of the so-called "dangerous condition"[16/] that the Plaintiff contended below, it was simply that while the Volare's fuel system could survive rear-end impacts of up to 30 mph with a moving barrier (equivalent to 45 mph in vehicle-to-vehicle accidents), Chrysler should have known that, at some undefined speed above this, the system would fail. Since failure is bound to occur at some speed no matter what the design, the true issue on this contention is whether the FMVSS 301 standard requires performance at a level so low as to render compliance outrageous and egregious. This is addressed in Argument II.

Third, the Plaintiff argues that the testimony of Ball that Chrysler's conduct was "reckless" and a "gross violation" in and of itself supports the right to punitive damages. The fallacy here is that "recklessness" alone does not support a claim for punitive damages -- as the Plaintiff admits (Plaintiff's Brief, p. 31), and this Court has held that gross negligence does not suffice as well. *United States Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla. 1983).[17/]

II.

THE IMPOSITION OF PUNITIVE DAMGES IN THIS CASE IS INCONSISTENT WITH THE LAW AND PUBLIC POLICY OF FLORIDA.

In response to Chrysler's argument that it could not, as a matter of law, be held liable for punitive damages for failing to exceed federal motor vehicle safety standards, Plaintiff offers the following syllogism: (i) since the only difference between liability for compensatory damages and liability for punitive damages is the degree of the defendant's negligence, and (ii) since neither Chrysler nor controlling case law disputes

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16/ Found not to exist by the jury.

17/ Chrysler has previously addressed the fact that since recklessness, like negligence, is a legal standard, testimony that Chrysler's conduct was reckless does not provide factual evidence but only a legal conclusion. Hence, whether there was an objection to such testimony is irrelevant: since it was not factual, it was not evidence.

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that compliance with a federal standard may nevertheless support a finding of negligence, it follows that (iii) failure to exceed a federal standard may involve a degree of negligence sufficient to give rise to punitive liability (See Plaintiff's Brief at 43-44). Notwithstanding whatever merit this analytic scheme may have in the abstract, when applied to the facts of this case, it is clear that its primary utility is to avoid altogether any consideration of the crucial legal and public policy issues raised in this appeal.

When viewed in context, two principal flaws in Plaintiff's argument become apparent. First, it assumes, erroneously, that the only difference between liability in negligence and liability for punitive damages is the degree of negligence involved. Second, it assumes, again erroneously, that the imposition of punitive damages in this case therefore presents no more than the application of the general rule that mere compliance with a federal standard is not an absolute defense to a claim based upon negligence. Both assumptions share the same critical deficiency -- i.e., they fail to take account of the fact that negligence liability for compensatory damages and punitive liability for exemplary damages, although certainly implicating different "degrees" of wrongful conduct, are more fundamentally distinguished by the very different societal goals and public policies they are each designed to serve.

As this Court has held, "The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money . . . . Punitive damages, on the other hand, go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others." *Mercury Motors Express, Inc. v. Smith*, 339 So.2d 545, 547 (Fla. 1981). Such punishment is warranted in circumstances where the wrongdoing of the defendant, although perhaps not covered by the criminal law, nevertheless constitutes a public wrong. See *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1042 (Fla. 1982). Indeed, under the law of this State, there is a "real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or

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warrant a conviction of manslaughter. Both have, as a basic purpose, the punishment of the offender." *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984), quoting *Carraway v. Revell*, 116 So.2d 16, 20 (Fla. 1959). The punishment is imposed "as a measure of society's disapproval" of the tortfeasor's egregious conduct. *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061, 1066 (Fla. 1983) (Ehrlich, J., concurring).

As the foregoing authorities suggest, the distinction between negligence liability and punitive liability is not, as Plaintiff would have it, simply a matter of some vague notion of the "degree" of negligence involved, but rather necessitates inquiry into public policy -- into a determination of whether the defendant's conduct, in light of the circumstances presented, compels punishment and societal approbation. As this Court has held: "Our jurisprudence reflects a history of difficulty in dividing negligence into degrees. The distinctions articulated in labeling particular conduct as 'simple negligence', 'gross negligence', and 'willful and wanton misconduct' are best viewed as statements of public policy." *Ingram v. Pettit*, 340 So.2d 922, 924 (Fla. 1976) (citations omitted).

Chrysler respectfully submits that when, as urged in *Ingram*, supra, public policy rather than vague rhetoric is taken as the guide, no proper basis can be found in this case for the imposition of punitive damages. Although Plaintiff impugns Chrysler's relentless efforts to assure that its vehicle complied with the federal performance standard governing fuel system integrity in rear-end collisions, there is no evidence whatever in the Record to support even an inference that the applicable safety standard was so woefully and patently inadequate to protect the public that Chrysler's failure to exceed the standard could be construed as reflecting egregious conduct worthy of societal disapproval and punishment. Indeed, there is no proof in this Record that the federal standard with which Chrysler sought to, and did, comply with was anything other than what Congress mandated: that is, a standard enacted with safety as its "overriding consideration." Senate Report (Commerce Committee) No. 1301, 89th Cong., 2d Sess., reprinted in [1966] U.S. Cong. & Ad. News 2709, 2714. See also 15 U.S.C. Section 1392(a) (each performance

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standard promulgated under the Safety Act "shall meet the need for motor vehicle safety").

Chrysler does not contend on this appeal that the jury was precluded from deciding that the level of safety encompassed by the federal standard could not have been higher. Nor is Chrysler contending that the jury was precluded from deciding that it was imprudent of Chrysler not to exceed the federal standard. Instead, what Chrysler is contending is that although the federal safety standard does not eliminate all risk to vehicle occupants in rear-end collisions, and although this fact was certainly obvious to Chrysler from its testing, it is irrational to conclude that compliance with a standard specifically designed with the safety of the public as its overriding consideration constitutes "willful and wanton misconduct equivalent to criminal manslaughter." See *Como Oil Co. v. O'Loughlin*, 446 So.2d 1061, 1062 (Fla. 1985).

Surely the development and marketing of an automobile in compliance with a performance standard, which, by statutory definition, "meets the need for motor vehicle safety" (15 U.S.C. Section 1391(2)), cannot "partake of public wrongs." See *Carraway v. Revell*, 116 So.2d 16, 20 (Fla. 1959). Indeed, the concept of "motor vehicle safety" is further defined under the Safety Act as meaning: "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur . . . ." 15 U.S.C. Section 1391(1).

In light of the foregoing, even if compliance with a federal safety standard may, in the circumstances presented, nevertheless support a finding of negligence, such negligence cannot, as a matter of law -- if not sheer common sense -- be deemed to comprehend conduct in the nature of a public wrong, so egregious as to command society's disapproval and punishment. A conclusion to the contrary would be particularly absurd in the instant case. Although Plaintiff asserts that the "jury obviously found that Chrysler

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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 test" (Plaintiff's Brief at 51), the fact of the matter is that the jury found no such thing. What the jury did conclude was that although Chrysler was negligent, the vehicle it distributed into the stream of commerce was neither defective nor unreasonably dangerous. To conclude that the public policy of this State would find the development and marketing of such a vehicle equivalent to criminal manslaughter and worthy of punishment would mark an unwarranted and unsound departure from settled law governing punitive liability in Florida.

III.

THE DISTRICT COURT ERRED 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 FINDINGS OF THE JURY THAT NO DEFECT OR DANGEROUS CONDITION EXISTED ON THE VOLARE.

The Plaintiff subtlely misconstrues Chrysler's Argument on this point. Simply stated, Chrysler argues that the determination of the specific issues addressed in the special interrogatory verdict are binding as a resolution of those issues. Thus, when the jury found specifically that there was no defect and no unreasonably dangerous condition in the Wolmer vehicle, those issues were settled. In determining whether there was evidence to support an award of punitive damages, the District Court should have proceeded in a manner consistent with the jury's special verdict and not contrary to it. This procedure, as previously noted in the Initial Brief, was precisely that which this Court utilized in analyzing the right to a post-trial motion for judgment in accordance with motion for directed verdict in *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530 (Fla. 1985).

The Plaintiff's further argument that the proper procedure in the event that there is inconsistency between the jury's special verdict findings and the punitive damage

verdict is to grant a new trial is erroneous (Plaintiff's Brief, p. 55). Although never addressed by courts of this State, the generally accepted rule throughout the United States is that where findings in a special verdict are inconsistent with the finding of a general verdict, then judgment should be entered notwithstanding the general verdict and in accordance with the special verdict. 89 C.J.S., *Trial*, Section 562(a); 49 C.J.S., *Judgments*, Section 60(e).

IV.

AN AWARD OF PUNITIVE DAMAGES IN THIS CASE STANDS AS AN IMPERMISSIBLE IMPEDIMENT TO THE FEDERAL STATUTORY SCHEME GOVERNING MOTOR VEHICLE SAFETY.

A.

The Issue of Federal Preemption Has Been Preserved for Review by This Court.

Plaintiff argues that "[a]lthough the district court for some reason" addressed Chrysler's contention that punitive damages are barred int his case under the doctrine of federal preemption, Chrysler's failure to raise the issue in the Trial Court constituted a waiver, and therefore the issue was not properly before the District Court and thus not preserved for consideration by this Court. Plaintiff is wrong.

First, Chrysler raised the issue of federal preemption before the District Court under the well settled rule "that it is the obligation of an appellate court to approve and affirm a final judgment of a Trial Court which achieves a correct result even though the basis or reasoning applied by the Trial Court is erroneous." *New Magnolia Baptist Church, Inc. v. Ellerker*, 353 So.2d 204, 205 (Fla. 1st DCA 1978) (citation omitted). This rule applies even where the issue raised in the appellate court was not addressed by the Trial Court. *Medlin v. Rucks*, 397 So.2d 950, 952 (Fla. 4th DCA 1981).

Second, the District Court's ruling that punitive damages are not barred by the Supremacy Clause of the United States Constitution constitutes fundamental error -- that is, error that goes to the very merits or foundation of the Plaintiff's claim. See *Sanford v.*

Rubin, 237 So.2d 134, (Fla. 1970); *Marks v. Delcastillo*, 386 So.2d 1259, 1268 (Fla. 3d DCA 1980) (imposing damages upon a defendant that are contrary to law "goes to the ultimate merits of the cause"). As such, the constitutional issue of federal preemption falls squarely within the purview of the doctrine governing appellate consideration of fundamental error:

> *The rule that questions not presented to and ruled upon by the trial court are not reviewable on appeal is subject to the exception that an appellate court may consider and rule upon a constitutional or fundamental error when first raised or revealed on the record on appeal. Love v. Hannah, 72 So.2d 39, 43 (Fla. 1934); Ewing v. Dupee, 104 So.2d 672 (Fla. 2d DCA 1958); Florio v. State ex rel. Epperson, 119 So.2d 305, 309 (Fla. 2d DCA 1960); In re: Kionka's Estate, 121 So.2d 644, 647 (Fla. 1960); Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970); American Home Assurance Co. v. Keller Industries, 347 So.2d 767, 772 (Fla. 3d DCA 1977).*

Keyes Co. v. Sens, 382 So.2d 1273, 1276 (Fla. 3d DCA 1980).

B.

State Regulation of Motor Vehicle Safety Through Punitive Damage Liability Frustrates the Federal Goal of Achieving Nationwide Uniformity of Safety Standards.

The arguments advanced by Plaintiff and in the brief submitted by Amicus Curiae, The Academy of Florida Trial Lawyers ("AFTL"), may be distilled to two key points: (i) because the preemption analysis advanced by Chrysler would apply equally well to compensatory damage liability and punitive damage liability, adoption by this Court of Chrysler's argument would require abolition of all common law actions arising out of allegedly defective vehicles that are in compliance with federal regulations; (ii) Chrysler has failed to demonstrate how the prosecution of common law actions under state law would frustrate the goals and purposes of the federal regulatory scheme.

The first argument ignores the very different results sought to be achieved by compensatory and punitive damages. As set forth in the preceding section of this brief, compensatory damages are aimed exclusively at attempting to make the injured party whole. Punitive damages, on the other hand, have as their specific purpose the goal of punishing the wrongdoer and deterring the commission of similar acts in the future. *St.*

Regis Paper Co. v. Watson, 428 So.2d 243, 247 (Fla. 1983); *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981); *Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla. 1978); *Campbell v. Government Employees Insurance Co.*, 306 So.2d 525 (Fla. 1974).

By the imposition of compensatory damages, society does not seek to change the conduct of the defendant. Indeed, particularly in the area of products liability law, liability for compensatory damages even in the absence of proof of negligence is often justified on the premise that the defendant will be able to shift the loss through insurance. *Restatement* (Second) *of Torts*, Section 402A (commment C). With punitive damages, on the other hand, so vital is the societal goal of coercing a change in the defendant's conduct, that in many jurisdictions, including Florida, the manufacturer will not be permitted to rely upon insurance to shift a loss incurred as the result of egregious conduct. See e.g. *Ford Motor Co. v. Home Ins. Co.*, 116 Cal.App.3d 374, 172 Cal.Rptr. 59 (1981). As this Court has observed: "If the burden of paying that penalty [punitive damages] may be shifted to an insurer (and ultimately to society at large), the wrongdoer has no impetus to 'learn his lesson' and change his behavior." *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061, 1066 (Fla. 1983) (Ehrlich, J., concurring).

Thus, contrary to the arguments set forth by the Plaintiff and AFTL, the rationale supporting federal preemption of punitive damage awards in the circumstances presented here would not necessarily require preemption of compensatory awards. It is only the former that are, as a matter of public policy, aimed at coercing the defendant to meet a higher standard of care. What the Safety Act, by its express terms, prohibits, however, are just such attempts under the authority of state law to establish, with respect to a particular aspect of vehicular performance, a safety standard not identical to the federal standard. 15 U.S.C. Section 1392(d). As set forth in Chrysler's original brief (at 33-36), a punitive damage award in this case would have precisely that proscribed effect.

In their second argument in opposition to federal preemption, Plaintiff and the AFTL assert that Chrysler has failed to demonstrate how common law adjudications

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under Florida law could have the effect of frustrating accomplishment of the full purposes and objectives of the Safety Act. In their view, because the purpose of the Safety Act is vehicular safety, attempts under Florida law to regulate vehicular safety must be viewed as complementary, and not as inconsistent with or in conflict with, the federal scheme. Despite its surface appeal, this argument is grounded on the erroneous premise that safety is the principal, if not exclusive, purpose of the Safety Act. Although, as set forth in the foregoing section of this brief, safety is the "overriding consideration" in the issuance of each performance standard, this is not to say that other congressionally mandated goals can be disregarded. Indeed, when the legislative history of the Safety Act is examined, it is clear that the entire scheme of federal regulation, as distinguished from its component elements, is built upon the express goal of achieving one, uniform set of criteria to govern vehicular safety on the nation's highways.

As Chrysler pointed out in its original brief (at 36-37), the need for uniformity was precisely the reason given by Congress for enacting the preemption provision in the Safety Act. Thus although vehicular safety is certainly the principal purpose behind each performance standard, Congress intended that the entirety of the Safety Act would achieve the goal of guiding the public as well as industry "by one set of criteria rather than by a multiplicity of diverse standards." H.R. Rep. No., 1776, 89th Cong., 2d Sess. 17 (1966). As the Senate Committee observed in a report outlining the "basic needs to be served by the Federal legislation": "While the contribution of the several States to automobile safety has been significant, and justifies securing to the States a consultative role in the setting of standards, the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No., 1301, 89 Cong., 2d Sess., reprinted in [1966] U.S. Cong. & Ad. News, 2709, 2712.

Where, as here, "congressional intention to establish a uniform federal regime" is evident from the legislative history of the federal act, state efforts to impose different or more stringent standards are foreclosed. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151,

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163 (1978). Although Plaintiff and the AFTL would ignore the goal of uniformity underlying the Safety Act, the courts have not. In holding that state regulations governing motor vehicles were preempted by the Safety Act, the court, in *Juvenile Products Manufacturing Association v. Edmisten*, 568 F. Supp. 714 (E.D. N.C. 1983), observed: "[T]he National Safety Act reflected a congressional vision for a comprehensive regulatory approach to motor vehicle safety. Congress designed a scheme which insured national uniformity. This approach, evidenced conclusively by the language of the federal statute and its accompanying regulations, provides perhaps the strongest indication of congressional intent to preempt state regulations." See also *Truck Safety Equipment Institute v. Kane*, 466 F. Supp. 1242, 1248 (M. D. Pa. 1979) (the Safety Act "is a most detailed and pervasive regulatory scheme designed to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents throughout the United States by the requirement of uniform national standards) (emphasis in original).

The congressional objective of assuring national uniformity in motor vehicle safety standards plainly would be frustrated by permitting individual state regulation through common law adjudications of punitive damage liability. Moreover, requiring automobile manufacturers to comply with a multiplicity of state standards would create an intolerable burden on interstate commerce. Neither of these concerns, of course, were present in *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (1984), the case upon which the AFTL places principal reliance.

Because of the repeated mischaracterizations of Chrysler's arguments by Plaintiff and the AFTL, it bears repeating that Chrysler does not seek a ruling from the Court holding that all common law actions, or even that all punitive damage actions, are preempted by the Safety Act. Chrysler urges, instead, that the express preemption and "savings" clauses in the Safety Act can be reconciled in a manner consistent with logic and congressional objectives by preempting punitive damage awards under circumstances such as those presented in the instant case -- that is, where Plaintiff challenges as

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defective an aspect of vehicular performance specifically governed by a federally-mandated regulation in the Safety Act, and it is established that the challenged product complied in all relevant respects with the requirements of that regulation.

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CONCLUSION

For the reasons set forth herein and in its Initial Brief, Chrysler urges this Court to quash the decision of the District Court and to reinstitute the order of the Trial Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 30th day of May, 1986, to GILBERT A. HADDAD, ESQUIRE, Post Office Box 345118, Coral Gables, FL 33114; JOEL S. PERWIN, ESQUIRE, 1201 City National Bank Bldg., 25 West Flagler Street, Miami, FL 33130; EDWARD T. O'DONNELL, ESQUIRE, Suite 4500, 200 South Biscayne Blvd., Miami, FL 33131-2378, and JOSEPH S. KASHI, ESQUIRE, Post Office Box 14723, Fort Lauderdale, FL 33302.

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