IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,881

KAREN D'AMARIO, individually,
and on behalf of CLIFFORD
HARRIS, a minor, and
CLIFFORD HARRIS, individually,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.
_____/

RESPONDENT, FORD MOTOR COMPANY'S BRIEF ON THE MERITS

On Discretionary Review from a
Decision of the District Court of Appeal,
Second District

CABANISS, CONROY, & MCDONALD, P.A.
Barnett Bank Center, Suite 1600
390 North Orange Ave.
Orlando, FL 32801
(407) 246-1800
Attorneys for FORD MOTOR COMPANY

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
4000 NationsBank Tower
100 SE Second Street
Miami, Florida 33131
(305) 530-0050
Attorneys for FORD MOTOR COMPANY
By: WENDY F. LUMISH
JEFFREY A. COHEN

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INTRODUCTION

After a three-week trial in this products liability action, the jury returned a verdict in favor of Defendant, Ford Motor Company ("Ford"). The trial court granted Plaintiffs' motion for a new trial and denied Ford's motion for relief from the new trial order. The Second District reversed and this Court granted review.

The parties will be referred to by proper name or as they appeared below. The following symbols will be used:

"R. ___-___" Record on Appeal

"S.R. ___-___" Supplemental Record [1]

"T. ___-___" Trial Transcript

For the Court's convenience, Ford has included the order granting a new trial and denying Ford's motion for relief from order as an Appendix to this brief.

[1] Ford had filed a motion to supplement the record to include a deposition which was inadvertently omitted from the record on appeal.

STATEMENT OF THE CASE AND FACTS

A. The Accident.

Clifford Harris, then 15, was a passenger in a 1988 Ford Escort LX driven by his friend, Stanley Livernois. (T. 2429, R. 94) Eyewitness Richard Lopez described Livernois' driving:

> We heard a car sort of winding up, really coming up Bayshore . . . And this car was really winding up. Made a big noise. And was probably about a mile and a half away. And we remarked, boy, that car is flying. And we hope he makes it, whoever he is.
>
> And I guess . . . maybe a minute or so passed and we heard some squealing of the tires and we heard a loud crash. (S.R. 5)

What Lopez heard was the vehicle crashing into a 7½ foot wide tree. (S.R. 10; T. 2860) Lopez circled the car twice before noticing a fire in the engine the size of a gallon jug. (S.R. 15-17) After about five minutes, the fire had grown to three times its original size. Thereafter, there was a muffled explosion and the vehicle became engulfed in flames. (S.R. 22-25)

B. Evidence Concerning the Alleged Defect.

Harris and his mother, Karen D'Amario, brought this products liability action against Ford claiming the Escort was defective because the fuel pump continued to pump fuel after impact. (R. 93-103; T. 1684-88) Plaintiffs' experts claimed that an inertial switch, intended to immediately interrupt power to the

fuel pump in the event of a collision, should have been placed in direct line with the fuel pump. Instead, the inertial switch signal was first sent to a relay switch, which then interrupted power to the fuel pump. (T. 1553) Plaintiffs theorized that the relay switch failed, preventing it from disrupting the flow of power to the pump causing a fuel-fed fire. (T. 1558, 1559)

Ford presented abundant evidence in support of their defense that the relay switch did not fail and that the fire was not fuel fed. Ford described testing of the fuel pump relay switch from the accident vehicle, as well as crash tests performed using exemplar parts. The switches functioned properly in all of the tests. (T. 2653, 3103, 3278) Also, Ford's accident reconstructionist presented evidence of crash simulations to support his conclusion that the vehicle hit the tree at 40 mph. This was twice as severe in its effect as the 28 mph speed theorized by Plaintiffs' expert. (T. 2804-08, 2891, 2899-2945)

Next, Ford's fire expert explained the origin and cause of the fire. He explained that the severity of the collision caused the oil pan to burst, which allowed engine oil to spill into the engine compartment where they were ignited by the exhaust system and catalytic converter. (T. 3134-41, 3407, 3452-60) The expert also explained that gasoline would have caused a quick flash fire, rather than the "one-gallon-jug-size" fire described by the eyewitness. (T. 3133, 3434-42) In fact, the burn patterns reflected that the fire was slow moving, which was inconsistent with a gasoline fire. (T. 3417, 3422, 3430)

[2]

Ford's final point was that there was not enough fuel in the tank to have been drawn into the engine by the pump. Ford's experts opined that there was only 2.5 gallons of gasoline in the tank at the time of the accident. (T. 3194, 3322) Using a plexiglas mold of a fuel tank, Ford showed that even if the fuel pump continued to operate, it would have been pumping air. (T. 3196-3217) Approximately six gallons of gasoline was needed before the pump would have been able to pump fuel. (T. 3217)

Having considered all of the evidence, the jury determined that there was no negligence or defect which was a cause of Plaintiffs' damages. (R. 1684-88)

C. Post-Trial Proceedings.

Plaintiffs' post-trial motion challenged a number of rulings, but the court awarded a new trial on only two grounds — alleged juror nondisclosure and admission of evidence of the driver's alcohol use. (R. 2086-94)

1. Alleged Juror Nondisclosure. Voir dire was conducted over one and one-half days. (T. 106-567) Each prospective juror had earlier completed a questionnaire that included background information such as address, marital status, employer, spouse's name, spouse's employer, and litigation history. (R. 1759, 1794)

With the questionnaires in hand, the parties were provided unlimited voir dire. (T. 212-62, 297-312, 312-23, 349-452, 486-567)

[3] Plaintiffs' inquiry focused on the jurors' attitudes about lawsuits generally, their views on car safety, and their experiences with burns. (T. 212-62, 297-312, 486-522) They made no inquiries concerning jurors'

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[2] While Plaintiffs state that "after the impact, a minimal fire occurred that would have caused no additional injury to Clifford if the vehicle had functioned as intended" (Plfs' Br. at 1), there is no evidence that the collision resulted in a minimal fire which would not have caused harm independent of a gasoline fire.

[3] Plaintiffs were also aided in this process by a jury consultant. (T. 213, 267)

previous lawsuits or claims, even where a juror had answered affirmatively on the questionnaire. The jury was selected without incident.

Following the verdict and without any prompting by the jurors, Plaintiffs' counsel hired an investigator to delve into the background of each panel member. (R. 1756) After engaging in this fly-specking exercise, Plaintiffs filed a Motion for New Trial and for Juror Interview and several later filings. (R. 1689-1745, 1746-1828, 1829-32, 1837-1914) Plaintiffs asserted that two jurors were untruthful when they answered "no" to the written questions: (1) Have you or any member of your immediate family been a party to any lawsuit? and (2) Have you or any member of your immediate family ever made any claim for personal injuries? (R. 1759, 1794)

As to Juror Leslie, Plaintiffs claimed her husband was a defendant in a 1986 lawsuit, and that she failed to disclose that her family-owned business, McGill Plumbing, owned Ford vehicles. (R. 1746-52) As to Juror Warwick, Plaintiffs asserted her husband filed suit in 1985 for the return of a $1,000 deposit and, as a firefighter, had filed workers' compensation claims in 1986, 1988, and 1991. (R. 1750-51)
[4]

Ford responded that Plaintiffs had not established any nondisclosure. Ford pointed out that Plaintiffs assumed the Leslies were owners of McGill Plumbing, but had filed no documents showing the company's ownership. Ford further contended that even if there was a nondisclosure, Plaintiffs had not demonstrated the materiality of the omission and their own due diligence. (R. 1941-2059)

The court denied the request for juror interviews, but granted a new trial. (R. 2091) It found that counsel should not be criticized for failing to inquire further, that the facts were "self evident" from the motion, and that prior litigation is a material part of voir dire, invariably pursued by counsel. The court ruled

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[4] Actually, Plaintiff's shotgun motion asserted several other grounds which have since been abandoned, including speculation that these two jurors must have known each other because Leslie's employer lived on the same street as Warwick ten years earlier and an assertion that Plaintiff's local counsel had sued Leslie's employer and Leslie must have been involved in that litigation.

that it did not matter if Juror Warwick's omission was unintentional or "arguably slight" because any doubt as Warwick was "more than made up by the omissions of Juror Leslie's failure to mention the twenty-five Ford trucks in her business life as well as past litigation." (R. 2086-92)

When the media reported the new trial order, Juror Leslie contacted Ford's counsel to advise there was "misinformation in the newspaper and [Plaintiffs' counsel] Florin had a lot of misinformation."(R. 2070-2081) She also forwarded defense counsel a copy of a letter she had sent to the court [5] advising:

> I feel I must respond to the articles that have been written by the local newspapers concerning jury misconduct on my part and Chris Warwick's.
>
> May I clear up a few things? First of all, neither myself or my husband own any part of McGill Plumbing. Therefore, when I was asked how many Ford vehicles I owned, I responded truthfully. Secondly, the lawsuit my husband was involved in as an employee driving a company vehicle was before we were married and I have positively no recollection of it even now. Third, the lawsuits brought against this company are just that; I do not get personally involved since they are handled primarily by our insurance company. I do not commit attorney's names to memory.
>
> I answered every questions I was asked truthfully. I accepted the responsibility seriously. The jury decided the case on the facts and the facts alone. (R. 2081)

Based on this new evidence, Ford immediately filed a motion for relief from order granting a new trial with an affidavit of counsel. (R. 2070-2081) Ford argued that the factual predicate underlying Plaintiffs' new trial motion was false in that: (a) the assumption concerning ownership of McGill Plumbing were wrong; (b) the allegation that Juror Leslie's husband had been a defendant in a lawsuit was wrong, and (c) the allegation that Juror Leslie's "family-owned business" owns a fleet of 25 Fords was false since she does not own the business. (R. 2070-2084)

Plaintiffs responded and moved to strike the letter. (R. 2085-85) The court found that the letter could constitute newly discovered evidence,, but denied the requested relief. (R. 2096-2100) The court reiterated that it had not ruled based on Leslie's ownership, but rather had relied on the "inference of intimate association with Ford vehicles." According to the court, Leslie was an officer of McGill Plumbing,

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[5] The court never notified the parties of the existence of this letter. (R. 2072)

a corporation is run by its officers and there is no distinction between an "officer who is not a stockholder versus one who is." (R. 2097) Further, it found that the suit against Mr. Leslie before their marriage was required to be disclosed in response to the "simple and direct question" on the Supreme Court approved form. (R. 2099)

2. Admission of Evidence Regarding the Driver's Intoxication. There was no dispute that the driver was intoxicated, he was speeding and he was driving at night without adult supervision required by law. Plaintiffs sought to exclude this evidence as irrelevant reasoning that they were not seeking recovery for injuries caused by the collision with the tree. (R. 1299-1306; T. 12-13) Plaintiffs further claimed Ford had not properly pled the driver as a culpable third party. (T. 26)

Ford argued that under controlling law, the jury was required to consider the driver's negligence on the issues of causation **and** apportionment of fault. (T. 32-41, 338-44) See Kidron v. Carmona, 665 So. 2d 289 (Fla. 3d DCA 1995); Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). Moreover, Ford argued it had raised the driver's negligence by its affirmative defense of third parties' negligence, (R. 20-23), by its responses to two sets of interrogatories, (R. 2017-22, 2024-26) and by the pretrial stipulation which expressly identified this as an issue for trial. (R. 2031)

The court initially concluded that the evidence of Plaintiffs' negligence was "too remote," and that the existence of a wine bottle in the car was irrelevant. (T. 49-53). But, the court advised that its ruling was only preliminary. (T. 53) Ford's counsel then asked whether he could voir dire the jury about driving habits, teenage drinking, and familiarity with a particular alcohol product. (T. 54) Plaintiffs objected, arguing it would focus the jury on the driver's drinking. (T. 54) The court ruled: "Let's leave that — **at this stage in the proceeding** let's leave the alcohol out." (T. 55) (emphasis added). Ford's counsel clarified that: "I won't get into alcohol until you all open the door or the judge lets me later." (T. 61)

Ford made a proffer through the investigating officer who stated the vehicle left the roadway because of excessive speed. He stated that the driver was legally intoxicated because his blood alcohol level was .14, (T. 1051-52, 1055) and indeed, because the driver was underage, he should not have been in possession of alcohol at all. (T. 1055, 1057) The officer testified that, in his experience, where a 15 year

old has a blood-alcohol level of 0.14 and is speeding, he would consider alcohol as a contributing cause of the accident. (T. 1070)

After additional argument, (T. 1072-1116), the court addressed the claimed procedural deficiency by granting Ford's motion to amend its affirmative defenses to specifically name the driver as the negligent non-party.

[6] The court ruled that "[a]t this stage in the trial, there has not been shown a sufficient prejudice that would make it inequitable or improper for the court to allow an amendment." (T. 1111)

The court also concluded that evidence of alcohol consumption was relevant to causation, but:

> It has to be done, in my humble opinion, on such a basis that it doesn't become a prejudicial or the central part of the court introducing a collateral issue that becomes, all of a sudden, the central part of the litigation. It is not. It is merely an element. (T. 1073-74)
>
> * * *
>
> I'm going to make it abundantly clear. What I said is it's relevant, but I'm not going to make a central issue of the trial about whether there's a Red Dog [sic] wine bottle or a beer can, uncrushed or crushed or something. (T. 1083)

Based on this concern, the court asked the parties to stipulate to the alcohol evidence. (T. 083, 1461-62) The parties stipulated that "the cause of the accident was the negligent and excessive speed of the driver and that the driver's blood alcohol level was .14%." (T. 1461-62) No further testimony concerning alcohol was introduced. The only other reference to alcohol was one unobjected-to comment in closing to the effect that the cause of Plaintiff's injury was alcohol. (T. 4019)

Post-trial, Plaintiffs challenged the inclusion of the non-party driver on the verdict form and argued the late pleading amendment was prejudicial. (R. 1752-53, 1915-19) The court found no prejudice by the late amendment, but reversed itself on the admissibility of alcohol. (T. 2093-94) The court first noted that as a result of its own confusion, it believed the driver's alcohol content had already been introduced and therefore the court "caused" the parties to stipulate to this fact. (R. 2093) The court further ruled:

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[6] In an abundance of caution, Ford had filed this motion after the issue was raised by Plaintiffs' counsel. (R. 2037-41)

> [B]y permitting the publication of the blood alcohol content to the jury coupled with the remarks of defense counsel in closing arguments . . . caused undue emphasis to be placed on alcohol as a primary cause of the injury. . . . The Court found that under the Kidron case that the Defendant was entitled to a jury finding of percentage fault, if any on the part of anyone whose negligence was the proximate cause of Plaintiffs' damages . . . Nothing in the evidence offered before or after the amendment changes now the conclusion that under F.S. 90.403, the court should have excluded the remote condition of alcohol from the case. Whitehead v. Linkous, 404 So. 2d 377, 379 (Fla. 1st DCA 1981). Id. at 2093-94.

Ford appealed the new trial order and the denial of its motion for relief from judgment. Citing Kidron v. Carmona, 665 So. 2d 289 (Fla. 3d DCA 1995) the Second District concluded that "on the facts of this crashworthiness case, [Ford] properly raised an apportionment defense." Ford v. D'Amario, 732 So. 2d 1143 (Fla. 2d DCA), rev. granted, 743 So. 2d 508 (Fla. 1999). The district court further concluded that Plaintiff had not met the test for juror misconduct set forth in De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995) and thus reversed the new trial order on this basis as well.

Plaintiffs' petition for review argued conflict as to both issues.

SUMMARY OF ARGUMENT

This lawsuit involved hotly contested issues of design defect and highly emotional damage claims. Plaintiffs had every opportunity to present their claim to the jury and, in many instances, that evidence was presented over Ford's objections. Ultimately, the jury rejected Plaintiffs' claim and found that Plaintiffs' damages were not caused by a defect in the vehicle.

Applying the three-party test of De La Rosa, the Second District correctly concluded that a new trial should not be ordered. First, as to Juror Leslie's nondisclosure of her current husband's 1986 lawsuit: (a) the juror was not married to her husband at the time he was sued and there was no evidence the juror was even aware of the suit; (b) the suit was immaterial to counsel's selection of a jury as demonstrated by the fact that he made no inquiry of any jurors as to prior litigation and given the fact that the juror was not even a party to this 10-year-old suit; and (c) Plaintiffs failed to demonstrate due diligence in pursuing this line of questioning.

As to Juror Leslie's failure to disclose her employer's ownership of Ford vehicles: (a) the juror answered truthfully as to her ownership of Ford vehicles and she was not asked about her employer's

ownership of Fords; (b) there was no evidence that Juror Leslie was "involved" with the company vehicles so as to render her response to that inquiry false; (c) the employer's ownership of Fords was not material to Plaintiffs' counsel or he would have inquired on the subject; and (d) by failing to inquire about the company's ownership of vehicles, Plaintiffs failed to act with due diligence.

Finally, as to Juror Warwick's failure to disclose her husband's 1985 lawsuit seeking the return of $1,000 and failure to disclose his three worker's compensation claims: (a) the existence of prior lawsuits was not material to counsel or he would have inquired on the subject; (b) a prospective juror would not even know that filing the paperwork for worker's compensation benefits constituted a "claim for personal injury"; (c) there is no basis to conclude that these disclosures which were remote in time, small in amount and related to the juror's spouse could have had any impact on the decision to select that juror; and (d) had counsel wanted information concerning these minute matters, he should have asked.

Rather than acknowledge the deficiencies in their claim, the thrust of Plaintiffs' argument is that pursuant to De La Rosa, **any** nondisclosure of prior litigation is per se material. Clearly, that was not the intent of De La Rosa, nor could such a rule be imposed. This Court should reject Plaintiffs' invitation to open the floodgates on the losing party's ability to overturn an adverse verdict, by the use of the most trivial omission.

Additionally, the Second District correctly reversed the trial court's decision to order a new trial based on the admission of the driver's negligence. Once the jury found in Ford's favor, issues concerning allocation of fault amongst tortfeasors becomes irrelevant.

In addition, the evidence of intoxication was admissible on the issue of apportionment of fault. As the Third District correctly concluded in Kidron, principles of comparative fault must be applied to all entities who have contributed to the accident. Plaintiffs do not dispute the holding in Kidron and their attempts to distinguish that case must fail. The negligent driver and the manufacturer are joint tortfeasors as to any alleged enhanced injuries and the fault of both must be compared.

Based on the foregoing, Defendant respectfully submits that the Second District decision should be affirmed.

ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH THE ELEMENTS NECESSARY TO OBTAIN A NEW TRIAL BASED ON NONDISCLOSURE BY JURORS.

De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995) sets forth three factors that must be established in order to obtain a new trial based on the nondisclosure of information by a prospective juror: (a) the juror concealed the information during questioning, (b) the undisclosed information was relevant and material to jury service, and (c) the failure to disclose was not attributable to the complaining party's lack of diligence. Relying on flimsy and/or nonexistent proof of nondisclosure, the trial court found that two jurors' alleged failure to disclose prior lawsuits involving their spouses and one of those juror's failure to divulge that her employer owned Ford vehicles was sufficient to meet this test.

Under any standard of review[7], none of Plaintiffs' claimed nondisclosures satisfy all three factors. As to each, there was either full disclosure, or Plaintiffs' counsel never sought the information, or it was so trivial and unrelated to jury

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[7] Although Plaintiffs contend that the standard of review is abuse of discretion, the cases they cite deal with sufficiency of the evidence, which was not the basis for the ruling below. See, e.g., E.R. Squibb & Sons Inc. v. Farnes, 697 So. 2d 825 (Fla. 1997). The focus of a new trial motion based on juror conduct is always on whether the movant established the requisite elements of juror misconduct to support an interview or new trial. See Baptist Hosp. of Miami v. Maler, 579 So. 2d 97 (Fla. 1991) (as a matter of law, affidavits did not state legally sufficient basis for a juror interview). Clearly, the issues here, like the standard of knowledge to which the jury will be held and whether De La Rosa intended a per se test of materiality, present questions of law.

service as to not possibly support a new trial. To reverse the Second District would contravene well-established law and common sense. Indeed, if left unchecked, Plaintiffs' approach would literally put every jury verdict "up for grabs" and destroy the finality of verdicts in this state. Ford submits that De La Rosa was never intended to lead to this result.

A. Plaintiffs' Claim of Juror Leslie's Failure to Disclosure a 1986 Lawsuit Involving her Current Spouse Does not Support a New Trial.

Plaintiffs first complain that Juror Leslie did not disclose a 1986 lawsuit in which her current husband was a defendant. The Second District rejected this argument finding that: (a) the juror's response was truthful because the lawsuit occurred before her marriage; (b) the alleged nondisclosure was not material since Plaintiff's counsel had failed to inquire on the subject of prior lawsuits of potential jurors, and the lawsuit was dismissed more than a decade before this case. 732 So. 2d at 1146-46. There is no basis to reverse this ruling.

1. Plaintiffs Failed to Satisfy Any of the Elements of De La Rosa With Respect to Juror Leslie's Alleged Nondisclosure.

The Second District's decision was correct and must be affirmed because:

The Leslies were not married at the time of the lawsuit. (R. 2081) Thus, there had been no prior lawsuit against a member of Leslie's "immediate family" and the juror's response was truthful. See Baptist Hosp. of Miami v. Maler, 579 So. 2d 97, 100, n.1 (Fla. 1991) (moving party must establish actual misconduct); Harbour Island Security Co. v. Doe, 652 So. 2d 1198 (Fla. 2d DCA), rev. denied, 662 So. 2d 341 (Fla. 1995) (denying juror interview because record was unclear whether the jurors were, in fact, those named in the prior lawsuits).

Since the Leslies were not married, there was no reason to

believe, and Plaintiffs submitted no evidence that Leslie even knew about the lawsuit. And, in fact, Juror Leslie advised the court that she had no recollection of the suit. (R. 2081) As a result, there can be no finding of misconduct. See Beyel Bros. Inc. v. Lemenze, 720 So. 2d 556 (Fla. 4th DCA 1998), rev. denied, 737 So. 2d 550 (Fla. 1999) (absent proof that the jury was aware of the undisclosed information, there can be no finding of misconduct).

Plaintiffs failed to ask about litigation history, even when a juror answered affirmatively on the questionnaire. As such, Plaintiffs failed to establish that the existence of prior lawsuits was material to counsel's selection of the jurors.

The lawsuit was immaterial to jury service because the juror herself was not a party to the suit, there was no proof she even knew about it, and it terminated 10 years earlier.

The questionnaire was, at best, ambiguous about litigation involving spouses before marriage and clearly did not ask about any exposure to litigation not involving "immediate family"; yet counsel failed to inquire on these subjects about which he now claims to have a great interest. As such, Plaintiffs' counsel failed to act with due diligence. See Hampton v. Kennard, 633 So. 2d 535, 536 (Fla. 2d DCA 1994) (counsel's failure to follow up on a juror’s indication that he "had dealings" with one of the attorneys, precluded a jury interview); Schofield v. Carnival Cruise Lines, Inc., 461 So. 2d 152 (Fla. 3d DCA 1984), rev. denied, 472 So. 2d 1182 (Fla. 1985)(counsel's failure to

follow up concerning jurors' relationship with plaintiff's witness precluded interview which was sought based on additional information concerning that relationship); Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988), rev. denied, 547 So. 2d 1209 (Fla. 1989) (where counsel chose not to inquire further on the issue of whether prospective jurors had been "exposed" to mental illness, defendant was not entitled to a "second bite" when counsel later learned that the juror had suffered from problems).

2. Plaintiffs Have Provided no Basis Upon Which to Reverse the Second District's Decision.

Plaintiffs challenge the court's finding that there had been no nondisclosure by arguing that the juror's marital status is irrelevant to the question whether a claim for personal injury had **ever** been made against a family member. (Plfs' Br. at 18-19) However, this argument ignores the very premise of the Second District's decision -- that a claim against a "family member," before he is a "family" does not fall within the parameters of the question. It also sidesteps the underlying policy rationale that it would be impossible to hold jurors to a standard of awareness about matters they have no reason to know. Thus, as the court noted, "requiring a potential juror to disclose matters in a juror questionnaire relating to family members before they become family would impose an impractical, if not impossible standard." 732 So. 2d at 1146.

Plaintiffs' reading also ignores the purpose behind the disclosure rule -- to allow parties to learn of particular views

and biases held by the jurors so the lawyers can make a reasonable decision as to jury challenges. See Mitchell v. State, 458 So. 2d 819, 821 (Fla. 1st DCA 1984). Events occurring to a spouse before marriage, particularly when unknown to the juror, are irrelevant to this decision process. Thus, the Second District did not overlook the wording of the juror questionnaire; rather it made a reasoned decision as to how far a juror's knowledge and responses can reasonably extend.

Plaintiffs further argue that the marital status of the Leslies was not properly before the trial court. (Plfs' Br. at 19-20) Plaintiffs are wrong, because this was newly discovered evidence which the trial court properly considered.[8] See Snook v. Firestone Tire and Rubber Co., 485 So. 2d 496 (Fla. 3d DCA 1986) (newly discovered evidence of juror misconduct properly raised by Rule 1.540). And, because the trial court did consider the letter, it is simply incorrect for Plaintiffs to continue to argue that the district court "reversed the trial court for a ruling it never made." (Plfs' Br. at 20)

[9]

Plaintiffs' challenge to the competency of the letter is also misguided. As in Snook, where a signed letter from a juror overcame a hearsay problem, so too here, the letter is competent proof on the issue of

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[8] Unfortunately, the court then erred by failing to recognize the significance of, and failing to correctly utilize, these facts in deciding the issues before it.

[9] Plaintiffs also continue to argue that Ford's appeal to the Second District did not challenge the denial of its Rule 1.540 motion. (Plfs' Br. at 19) This argument is specious. Ford's 1.540 motion sought relief from (i.e., reversal of) the new trial order. Ford's appeal from the order granting a new trial sought the same relief -- reversal of the new trial order.

juror misconduct.

Plaintiffs also disagree with the conclusion that the alleged nondisclosure was not material, arguing first that their lack of inquiry did not establish that the undisclosed information was immaterial.[10] Rather, Plaintiffs seek to excuse their lack of questioning by arguing voir dire is limited, repetition is prohibited and defense counsel always inquires about prior litigation history. (Plfs' Br. at 25) Unfortunately for Plaintiffs, the record in this case is to the contrary. As the district court reminded Plaintiffs' counsel at oral argument, there were **no** restrictions on voir dire and, Plaintiffs were free to inquire on any subject. Thus, nothing precluded Plaintiffs' counsel from inquiring on this issue **if**, in fact, it truly was important to them.[11]

Moreover, once again, Plaintiffs have lost sight of the purpose behind De La Rosa's materiality requirement. The ultimate issue is whether counsel would have exercised a challenge had counsel known the omitted information. See Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953)("full knowledge of all **material** and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause"); De La Rosa, 659 So. 2d at 242 (omission was material where it prevented counsel from making informed judgment); Blaylock. The district court's decision simply recognizes that the party seeking to overturn a jury verdict based on juror misconduct must prove the materiality of the claimed omission.

On this issue, Plaintiffs' suggestion that both sides must now ask identical questions to avoid a

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[10] Of course, if this Court agrees that there has not been a nondisclosure, then the Court need not reach the materiality prong.

[11] Contrary to Plaintiffs' suggestion, materiality does not turn on whether counsel specifically asked **this** juror about **her husband's** litigation history. Rather, the determination of materiality turns on whether there is **any** record evidence that the subject was significant to Plaintiffs' counsel's decision as to challenges.

waiver is absurd. This case has not changed existing law. Then, as now, a party has always been required to ask questions they deem necessary to select the jury or be barred from challenging the nondisclosure. See Hampton; Schofield.

Next, Plaintiffs argue that the court was precluded by De La Rosa from addressing such issues as remoteness or the juror's lack of connection to the prior litigation. (Plfs' Br. at 23-24) In essence, Plaintiffs' position is that under De La Rosa, nondisclosure of prior litigation is material as a matter of law. Plaintiffs' position is untenable for several reasons.

First, De La Rosa did not establish a per se rule. To the contrary, this Court looked to the facts of that particular case, including the number of undisclosed suits and the jurors' involvement on the defense side in each of those suits.

[12] In fact, had it been a per se rule, there would have been no need to identify materiality as an element to be met. As such, it was not inconsistent with De La Rosa for the Second District to consider the remoteness of the prior lawsuit as to both time and persons involved.

Moreover, since the reason for requiring jurors to be forthright is to enable counsel to make an informed decision as to the jury, evaluating each case on its facts is the only means to achieve this purpose. And, this approach is consistent with the manner in which this Court has reviewed other alleged acts of juror misconduct. See, e.g., State v. Hamilton, 574 So. 2d 124 (Fla. 1991)(presence of improper material in jury room constitutes misconduct, but does not always require a new trial). Because there is no reason to carve out a per se rule for this category of misconduct and not other acts of juror misconduct, Plaintiffs' interpretation of De La Rosa should be rejected.

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[12] Indeed, courts have routinely determined the materiality of the omission of prior suits on an individual basis. See, e.g., Wilcox v. Dulcom, 690 So. 2d 1365, 1366 (Fla. 3d DCA 1997)(materiality satisfied in "instant case"); American Medical Sys., Inc. v. Hoeffler, 723 So. 2d 852 (Fla. 3d DCA 1998) (affirming new trial based on nondisclosure of prior litigation which resulted in a substantial judgment against her since that omission prevented counsel from making an informed judgment).

Finally, even if there were a per se rule of materiality where jurors' nondisclosure of prior litigation was shown, De La Rosa does not hold that prior litigation related to a family member or future spouse is material per se. And this is even more true where the juror was not shown to have been aware of it. Indeed, in the cases cited by Plaintiffs as being "legally indistinguishable," it was the juror himself who was involved in prior litigation. (Plfs' Br. at 15)

Finally, Plaintiffs challenge Ford's contention that counsel failed to act with due diligence by arguing they had a right to accept the jurors' answers to the questionnaire. (Plfs' Br. at 16) However, the law is well established that a party can only rely on answers where the question propounded is straightforward and not reasonably susceptible to misinterpretation. Mitchell, 458 So. 2d at 821. Here, the question Plaintiffs rely upon is ambiguous because it fails to define the term "family members." If, as counsel now suggests, he truly cared about such trivial matters as a lawsuit against a current spouse before marriage, then he had the burden to specifically ask about these matters. Plaintiffs cannot now hide behind the questionnaire. [13] Thus, as in Schofield, Blaylock, and Hampton, Plaintiffs' claim of due diligence should be rejected.

B. Plaintiffs' Claim of Juror Leslie's Alleged "Involvement" with Ford Vehicles Does Not Support the New Trial.

Plaintiffs' additional allegation of misconduct as to Juror Leslie is that she failed to disclose that her employer, McGill Plumbing, which Plaintiffs inaccurately asserts is Juror Leslie's "family business" owned Ford vehicles and she denied "involvement" with Ford vehicles. (Plfs' Br. at 16-17) Plaintiffs' argument is factually and legally without merit.

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[13] The trial court's inability to correctly analyze this issue is best reflected in its attempt to make excuses for Plaintiffs by noting how hard everyone was working to prepare for trial, that there was no time for "random thought" and that jurors do not like extensive voir dire. (See, e.g., T. 2087, 2090) The court's willingness to make allowances for Plaintiffs' counsel on these bases is ludicrous at best, particularly when the court placed no limits on counsel's voir dire.

1. Plaintiffs Failed to Satisfy the Test of De La Rosa With Respect to Juror Leslie's Alleged "Involvement" With Ford Vehicles.

The Second District correctly found no basis to award a new trial because:

Juror Leslie truthfully answered the questions posed to her with respect to her ownership of Ford vehicles by advising counsel that she owned a 1993 Ford Bronco.

Juror Leslie was not asked about her employers' ownership of Ford vehicles and thus, it did not constitute a nondisclosure for her to fail to provide this information. See Mazzouccolo v. Gardner, 714 So. 2d 534 (Fla. 4th DCA 1998) (since counsel did not ask about litigation involving the juror's work, no concealment was shown).

The fact that the company she worked for owned Ford vehicles, and/or that she was the "office manager" at the company, does not establish that Juror Leslie had any "involvement" or "intimate association" with Ford vehicles. There was no proof, for example, that she had anything to do with choosing, buying, using, driving, or servicing McGill Plumbing's vehicles (or for that matter that she even knew or cared what kind of vehicles the company owned). Obviously, Plaintiffs' counsel at trial did not believe that the juror's position in the company created an "intimate association" with company vehicles or he would have asked about McGill Plumbing's vehicles.

Plaintiffs could have, but chose not to inquire about the company's ownership of vehicles. As such, this issue was clearly

not material to counsel's decision as to prospective jurors until he sought an excuse for a new trial.

For the same reason, it is indisputable that counsel failed to act with due diligence. Moreover, because counsel failed to clarify what was meant by his vague question concerning "involvement" with Ford vehicles, any failure to obtain specific information on this subject was a result of counsel's lack of due diligence.

2. Plaintiffs Have Provided no Basis Upon Which to Reverse the Second District's Decision on This Issue.

Plaintiffs quarrel with the district court's version of the facts related to this issue. Specifically, Plaintiffs claim that while the court described McGill Plumbing as the business for which Leslie had worked, in fact, according to Plaintiffs, it was the Leslie "family business" and both Leslies were managers. Thus, in Plaintiffs' view, this established an "intimate association" with the McGill Plumbing vehicles sufficient to evidence a nondisclosure. (Plfs' Br. at 21) This analysis is wrong in several significant respects.

Contrary to Plaintiffs' assertion, there simply was no evidence that McGill Plumbing was Juror Leslie's family business. At best, the record reflects that McGill Plumbing is **a** family business, but does not explain whose family has the ownership. (T. 379) And, the letter Juror Leslie sent to the court reveals conclusively that she did not own the company. (R. 2081) Thus, counsel's conclusion as to the ownership of the

company was mere speculation which was later proven to be wrong. See Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2d DCA 1996) (rejecting new trial based on speculative allegations of misconduct); Hackman v. City of St. Petersburg, 632 So. 2d 84 (Fla. 2d DCA 1993).

Indeed, when challenged as to the absence of proof of ownership in the trial court, Plaintiffs retreated from this position, and focused instead on Leslie's alleged "extensive involvement with Ford" through the business. (R. 1840) (emphasis added). But even there, Plaintiffs proof is deficient because there was not a scintilla of evidence to establish that Juror Leslie had anything to do with the Ford vehicles. And, the trial court's gap-filling argument that the company acts through officers and Leslie was an officer (R. 2091), presents further impermissible speculation. See Harbour Island; Pesci.

Plaintiffs also complain about the district court's finding that the nondisclosure was not material.(Plfs' Br. at 21) But, Plaintiffs' objection is based on the unsubstantiated assumption that this was Leslie's family business and that she was involved with Ford vehicles. Instead, the district court's ruling is properly based on the fact that while the juror's personal "involvement" with Ford vehicles might have been material, such an involvement was not shown and McGill Plumbing's mere ownership of Fords was not material.

Finally, while Plaintiffs suggest that "it should have been obvious" to Juror Leslie that she needed to disclose the

company's ownership of Fords, the problem once again is that Plaintiffs' counsel did not ask this question. And, the question concerning "involvement" with Ford vehicles was sufficiently vague that a juror would essentially have to read counsel's mind to know that "involved" would include working for a company that owned Ford vehicles (assuming she even knew this), even though she was not "involved" with those vehicles. Thus, like the defendant in Blaylock who asked if the juror had been "exposed" to mental illness and then inquired no further, so too Plaintiffs here are barred from a second chance to conduct a different voir dire.

C. Plaintiffs' Claim of Misconduct as to Juror Warwick Does Not Support a New Trial.

Plaintiffs' third basis for seeking a new trial was that Juror Warwick failed to disclose her husband's 1985 lawsuit seeking the return of a $1,000 deposit and, the fact that as a firefighter, her husband had filed workers' compensation claims in 1986, 1988, and 1991. The district court ruled that neither matter was material, that Plaintiffs failed to inquire about litigation history and that the juror was not required to disclose information concerning workers' compensation claims. 732 So. 2d 1146. That decision should be affirmed.

1. Juror Warwick's Alleged Nondisclosures Fail to Meet the Test of De La Rosa.

With respect to Plaintiffs' allegations that Juror Warwick failed to disclose her husband's worker's compensation claims, the Second District was correct because:

There is no basis upon which a prospective juror should interpret a question about a "claim for personal injuries" to include the filing of paperwork to receive worker's compensation benefits.

[14] Thus, a nondisclosure has not been shown.

Counsel failed to inquire of jurors, even where they had disclosed prior litigation. As such, it is clear that this information was not material to counsel's selection of a jury.

As a matter of law, counsel's failure to assert that they would have exercised a preemptory challenge as to Juror Warwick, if the worker's compensation claims or the 1985 lawsuit had been disclosed, precludes Plaintiffs from obtaining a new trial on this basis. See Mitchell(counsel must represent that he would have excused the juror, had the juror truthfully responded).

Indeed, there is simply no basis in law or fact to conclude that a juror could be prejudiced for or against a party based on the fact that her spouse made several claims for worker's compensation benefits and those claims involved no litigation and were for minimal amounts of money ($1,759, $2,527, and $1,083).

Given the vagueness of the inquiry on the questionnaire, Plaintiffs' counsel failed to act with due diligence in pursuing this line of inquiry if indeed he considered worker's compensation claims important.

Plaintiffs' allegation with respect to her husband's 1985 lawsuit to recover a $1000 deposit is equally unavailing because:

Like the other assertions relating to prior lawsuits, Plaintiffs' failure to inquire of any jurors on prior litigation precludes a finding of materiality. And, counsel's failure to assert that he would have exercised a challenge is fatal to Plaintiffs' claim.

It is inconceivable that this lawsuit could have been material because: (a) the juror herself was not

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[14] In a newspaper article filed by Plaintiffs' counsel, Juror Warwick stated that she did not consider worker's compensation claims to be claims because they did not go to court. (R. 1829-30)

involved in the lawsuit; (b) it involved a small sum of money, and (c) it was remote in time. Given the trivial nature of the suit, it is likely that the juror had simply forgotten about it.

2. Plaintiffs Have Provided no Basis to Reverse the Second District's Decision.

Plaintiffs' primary response to the district court's decision as to Juror Warwick's alleged non-disclosures is, once again, that pursuant to De La Rosa, these nondisclosures are material as a matter of law. For the reasons discussed supra, Plaintiffs are wrong in their conclusion that De La Rosa reflects a per se rule.

This case illustrates perfectly why a per se rule cannot exist. It is hard to imagine how a spouse's 12-year-old county court suit seeking reimbursement for $1,000 would affect the juror's ability to decide this case.

[15] It is the type of old trivial litigation that could easily be forgotten, creating the risk of this type of minor nondisclosure in virtually every case. Moreover, Plaintiffs' counsel cannot seriously contend that he would have excused a juror because her husband sought worker's compensation benefits for on-the-job injuries. This is especially true given the minimal value of the claims ($1,759, $2,527, and $1,083) Indeed, if this is the type of "nondisclosure" which will support a new trial, then every jury verdict is at risk. Accordingly, the district court was correct in finding that the omissions which the trial court deemed to be "arguably slight" were, in fact, "remote in time, small in amounts," and, as to the workers' compensation claims, "asserted by one seeking monies." 732 So. 2d 1146.

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[15] Plaintiffs ask this Court to find that the fact that Warwick was a counter-defendant in the 1985 lawsuit, makes "a considerable difference" in the analysis. (Plfs' Br. at 22) Given all of the other deficiencies in Plaintiffs' proof, this fact would not be sufficient to support a new trial.

In sum, when each of the De La Rosa criteria are analyzed against the facts of this case, the deficiencies become glaring. Plaintiffs' counsel, by his lack of relevant inquiries during voir dire, exhibited patent disinterest in the matters that he now claims entitle him to a new trial. This Court should not encourage the practice of allowing litigants, after an adverse verdict, to avoid the verdict by unsubstantiated and unsustainable accusations about trivial matters leveled at individuals who are doing their best to satisfy their civic responsibility. In light of the foregoing, the only result which is consistent with Florida's policies concerning juror interviews and the granting of new trials is to affirm the district court's decision.

II. EVIDENCE OF THE DRIVER'S CONDUCT WAS PROPERLY ADMITTED.

Plaintiffs also seek reversal of the Second District's finding that Ford was entitled to raise an apportionment defense. Despite the fact that the "[e]vils of intoxication are of record as far back as Noah," State v. Hatfield, 78 A.2d 754, 756 (Md. 1951), Plaintiffs argue that evidence of the driver's intoxication should have been excluded because Ford was not entitled to raise apportionment at all.

Plaintiffs are not entitled to relief for several reasons. First, because the jury found in Ford's favor that there was no defect that caused Plaintiff's burn injuries, any issue with respect to apportionment became moot. Therefore, this Court need not even reach the issue. But, assuming the Court reaches the merits of the apportionment defense, the law requiring apportionment amongst all those who caused the claimed injury applies equally in a crashworthiness enhanced injury case. The medical malpractice cases and intentional tort cases relied upon by Plaintiffs are inapplicable and do not change the result in this case.

A. The Apportionment Issue is Moot Because the Jury Found for Ford on Liability.

Plaintiffs only argument as to why intoxication evidence was inadmissible is that Ford was not entitled to seek apportionment with the driver. (See Plfs' Br. at 31) Because the jury found Ford was not liable to Plaintiffs at all, any issues as to apportionment are moot. See Loureiro v. Pools By Greg, Inc., 698 So. 2d 1262 (Fla. 4th DCA 1997), rev. denied, 707 So. 2d 1125 (Fla. 1998) (although it was error to include the non-party on the verdict form, the error was harmless; once the jury found defendant not liable, it did not need to consider the fault of the non-parties). Accord Hasburgh v. WSA Realty, 697 So. 2d 219 (Fla. 4th DCA), rev. denied, 705 So. 2d 8 (Fla. 1997). Therefore, this Court need not even address the apportionment issue that Plaintiffs raise because it cannot affect the jury's verdict on liability. In any event, apportionment was properly raised.

B. An Apportionment Defense was Proper in this Crashworthiness Case.

In Kidron v. Carmona, 665 So. 2d 289 (Fla. 3d DCA 1995), the court held that the conduct of the driver is admissible in a crashworthiness case and that fault for an "enhanced injury" must be apportioned between the driver and the product manufacturer. (R. 1073-74) Plaintiffs do not contest Kidron -- "we have no quarrel with this decision." (Plfs' Br. at 42) Because Kidron is indistinguishable from this case, the Second District decision following Kidron should be affirmed.

1. Existing Florida Law Demonstrates the Applicability of Section 768.81 to a Crashworthiness Case.

In Kidron, plaintiff's decedent rear-ended a stalled truck. Plaintiff sued the truck manufacturer alleging the vehicle was defective due to lack of a rear under-ride guard. Because the alleged defect did not cause the accident, but rather allegedly caused plaintiff's injury to be enhanced, the trial court struck the manufacturer's comparative negligence defense which was based on the driver's negligence in causing the accident.

The Third District began by reviewing the development of Florida law concerning comparative fault and products liability claims. The district court noted that this Court had adopted the crashworthiness doctrine in Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976), it had confirmed that comparative fault was a defense to a strict liability action in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976) and finally, it had clarified that strict liability applied to enhanced injury claims in Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981).

Given these developments, the Third District concluded that pure comparative negligence and allocation of fault among all participants to the accident must be applied, "regardless of whether the injury at issue has resulted from the primary or secondary collision." 665 So. 2d at 292. The court reasoned:

> This view is based on the belief, as outlined in West, that fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other **with respect to all damages and injuries for which the conduct of each party is a**

> **cause in fact and a proximate cause**. See § 768.81, Fla. Stat. (1993) . . . Id. (emphasis added).

Thus, the "driver's responsibility [in the accident must] be considered along with the manufacturer's liability in designing a vehicle which may have enhanced injury on impact as well as 'all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.'" Id. at 293 (quoting Fabre). See also Delisa v. Stewart Agency, Inc., 515 So. 2d 426, 427 (Fla. 4th DCA 1987), rev. denied, 523 So. 2d 576 (Fla. 1988) (driver's intoxication was relevant in case alleging negligence of automobile dealer in failing to repair seat belts despite claim that the causation was irrelevant, particularly since the occurrence of an accident was inherent to the purpose of using seat belts).

As the Second District's decision recognizes, Kidron is correct. The enhanced injury -- i.e. the injury that would not have occurred but for the alleged defect - is caused by **both** the accident **and** the alleged defect. As this Court recognized in Hill, "the collision, the defect and the injury are interdependent and should be viewed as a combined event." 404 So. 2d at 1052 (citing Huff v. White, 565 F.2d 104, 109 (7th Cir. 1966). Thus, assuming arguendo that there were a defect (which the jury found was not the case here), each entity's conduct would be a proximate cause of Plaintiffs' alleged enhanced injury and the driver and manufacturer are joint tortfeasors whose fault must be compared and apportioned.

This holding is compelled by Florida's well-established judicial and legislative policy of apportioning liability based on fault. See, e.g., Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973) (apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise); West, 336 So. 2d at 92 (the comparative negligence is available to the apportion the negligence/strict liability of the manufacturer and the consumer's negligence in using the product); Fabre, 623 So. 2d at 1185 (section 768.81 replaces joint and several liability with a system requiring each party to pay only in proportion to the percentage of fault that the defendant contributed to the plaintiff's injuries).

2. Application of 768.81 to a Crashworthiness Case is Consistent With the Majority View, the Restatement and Commentators.

Kidron and the Second District's decision are also consistent with the overwhelming majority of jurisdictions which hold that comparative fault should be applied in an enhanced injury case. For example, in Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 694, 695 (Tenn. 1995), the court observed:

> Any claim for "enhanced injuries" is nothing more than a claim for injuries that were actually and proximately caused by the defective product . . . the name given to the action has no real significance . . . because it merely represents the portion of the total damages for which the manufacturer is potentially liable. . . Therefore, it is illogical to hold that comparative fault applies to products liability actions generally, but does not apply to "enhanced injury" claims. The questions are, in reality, the same.

The court in Meekins v. Ford Motor Co., 699 A.2d 339 (Del. Super. Ct. 1997), reached the same conclusion. Noting that tort law had historically recognized that there may be more than one proximate cause of an injury for which the jury is required to apportion fault, the court found that the existence of other causes of an injury does not relieve a plaintiff driver from responsibility for his own conduct. The court also observed that public policy "seeks to deter not only manufacturers from producing a defective product but to encourage those who use the product to do so in a responsible manner." Id. at 345-46. See also Zuern v. Ford Motor Co., 937 P.2d 676 (Ariz. Ct. App. 1996), motion denied, 951 P.2d 479 (Ariz. 1997) (properly admitted evidence of non-party's intoxication in crashworthiness case); Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984) (the ultimate objective of comparing negligence in a product liability case is to apportion, on a percentage basis, all causes of the mishap resulting in damages); Zalut v. Anderson & Assoc., 463 N.W.2d 236 (Mich. Ct. App. 1990) (if plaintiffs' negligent conduct contributed to the crash, then his conduct was one of the causal factors in his injury and is relevant in determining liability for the injuries); Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981) (obligation to make product crashworthy does not excuse user from responsible operation; all of plaintiff's conduct regardless of labels must be compared to defendant's liability).

[16]

The majority rule is consistent with the Restatement (Third) of Torts: Products Liability § 16, comment f, which provides "the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties." Similarly, the newly adopted Restatement (Third) of Torts: Apportionment of Liability (Proposed Final Draft (Revised 3/22/99)) notes that the comparative fault of the plaintiff, the manufacturer and any other tortfeasor must be assessed in enhanced injury cases. § 7, cmt. e, Ill. 1, § 50, cmt. c, Ill. 1.

Finally, this view is supported by recognized scholars. E.g., Michael Hoenig, The American Law Institute Restatement Draft, 211 N.Y.L.J. 88 (May 9, 1994) (noting that there is no basis to allow comparative negligence where the tortfeasor causes all the harm, but deny the defense where the manufacturer only caused part of the harm); Victor E. Schwartz, Comparative Negligence § 11-5(a)(3d ed. 1994); Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 481 (1953) (once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution).

Based on the foregoing well-established and well-reasoned law, this Court should confirm Kidron

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[16] Other representative cases expressing this view include: Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir.), cert. denied, 519 U.S. 814 (1996) (Colorado); Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989), cert. denied, 510 U.S. 908 (1993) (New Mexico); Harvey v. General Motors Corp., 873 F.2d 1343 (10th Cir. 1989) (Wyoming); Keltner v. Ford Motor Co., 748 F.2d 1265 (8th Cir. 1984)(Arkansas); Fietzer v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978) (Wisconsin); Kolesar v. Navistar Int'l Transp. Corp., 815 F. Supp. 818 (M.D. Penn. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993); Hinkamp v. American Motors Corp., 735 F. Supp. 176 (E.D.N.C. 1989), aff'd, 900 F.2d 252 (4th Cir. 1990); Daly v. General Motors Corp., 144 Cal.Rptr. 380, 20 Cal.3d 725, 575 P.2d 1162 (1978); Moore v. Chrysler Corp., 596 So. 2d 225 (La. Ct. App.), writ denied, 599 So. 2d 316 (La. 1992); Albertson v. Volkswagenwerk AG, 634 P.2d 1127 (Kan. 1981); Oltz v. Toyota Motor Sales, U.S.A., Inc., 531 P.2d 1341 (Mont. 1975); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Dahl v. Bayerische Motoren Werke, 748 P.2d 77 (Or. 1987).

as a correct statement of Florida law and affirm its application in this case. Because it is undeniable that the driver's negligence was the cause of the accident which led directly to the fire and burn injuries, evidence of the driver's conduct was properly admitted in this case.

C. Plaintiffs Have Failed to Articulate a Basis Upon Which the Apportionment Defense Would be Improper.

1. Kidron is Indistinguishable and Directly Applicable to This Case.

Because Plaintiffs agree that Kidron is correct, they can only prevail by distinguishing their case from Kidron. This Plaintiffs have not and cannot do.

Plaintiffs agree that the driver's "intoxicated driving certainly set in motion a chain of events" that led to Plaintiffs' burn injury when he negligently crashed head on into a tree. (Plfs' Br. at 38) That makes his conduct a proximate cause of the burn injury under Florida law. As a result of the forces unleashed in the accident, a fire began resulting in Plaintiffs' injury. The fire would not have occurred but for the drivers' conduct in causing the accident. Plaintiffs claimed that the fire **also** would not have occurred but for a defect in the fuel pump (although the jury found against them on this claim). Thus, even under Plaintiffs' own theory, Plaintiffs' burn injury was a "natural and probable consequence" of the combined effects of the driver's negligence **and** the alleged defect.

This fact pattern mirrors Kidron, where the negligent driver struck the rear end of a vehicle resulting in an enhanced injury -- death -- that allegedly would not have occurred but for a

design defect. Plaintiffs seek to set this case apart on the basis that Kidron involved only a "single indivisible injury-death," while this case allegedly involves a "distinct subsequent injury." (Plfs' Br. at 42-44) But, the only difference is that Plaintiffs claim that the accident in this case caused some minor, unenhanced injuries, in addition to the indivisible burn injury.

[17] (Plfs' Br. at 43) This is no distinction at all, since the driver's negligence has the same causal relationship to the alleged enhanced injury in both cases.

The presence of "unenhanced" injuries does not magically sever the otherwise obvious, causal relationship between the driver's negligence and Plaintiffs' alleged enhanced injuries recognized in Kidron. The driver alone would be responsible for any injuries to Plaintiffs that were caused independently of the fire. But the fact that the driver caused injuries **in addition to** the burn injuries cannot, and does not, relieve the driver of causal responsibility for the injuries caused by the fire.

Plaintiffs also argue that the vehicle came to rest after impacting the tree and the fire erupted "several minutes" after the crash. (Plfs' Br. at 34) But a short delay before the full effects of a negligent act are felt does not break the causal chain. Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980). In any event, the "short delay" that Plaintiffs assert, only reflects the fact that the natural causal chain being played out inside the mangled automobile was not readily visible or observed. That irrelevant circumstance is not a basis for a legal distinction. Kidron is on all fours with the apportionment issue in this case.

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[17] There actually is no evidence in this case, and nothing legally in Kidron, that supports the existence of this distinction. But it is legally immaterial in any event.

a. The driver's conduct is a proximate, cause of any enhanced injury and the driver and manufacturer are joint tortfeasors.

Trying to distance themselves from Kidron, Plaintiffs rely on a medical malpractice case, Whitehead v. Linkous, 404 So. 2d 377, 379 (Fla. 1st DCA 1981) to argue that the driver's negligence in a crashworthiness case is at most a "remote condition" of Plaintiffs' enhanced injury and is thus irrelevant. Relying on another medical malpractice case, Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977), Plaintiffs also argue that the driver and Ford are successive, rather than joint, tortfeasors. These are really two sides of the same argument and both are equally without merit.

[18] If Plaintiffs' argument were accepted, it would mean that Plaintiffs could not recover from a negligent driver at least some of the injuries suffered in an accident that he caused. This is a potently absurd result not supported by any law or policy.

In contrast to certain medical malpractice cases, and other "remote condition" or "successive tortfeasor" cases, there is nothing in a "crashworthiness" case that breaks the proximate causal chain between the driver's negligence and an "enhanced injury." Because "the collision, the defect, and the injury

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[18] Linkous is one of a series of medical malpractice cases in which the courts have concluded that the initial tortfeasor merely provided the occasion for the subsequent physician malpractice. 404 So. 2d at 379. As the Restatement (Third) of Torts: Apportionment of Liability (Proposed Final Draft (Revised) 3/22/99) (adopted 5/99) makes clear, this rule applies **only** to claims against physicians and medical service providers, and only where the plaintiff's negligence caused the preexisting condition that the doctor undertook to treat. Id. at § 7, cmt m. They are not remotely analogous to crashworthiness cases in which a manufacturer's design decisions occur long before the injury-causing accident, and the manufacturer has no opportunity to tailor its design to the particular condition of the driver. Medical malpractice cases are distinguishable because Florida has traditionally treated those cases differently and they have been subject to their own set of rules. Indeed, in the medical malpractice context, there has been a policy decision that a plaintiff should not be forced to concurrently litigate a complex malpractice suit in order to recover on a simple negligence claim. Stuart v. Hertz Corp., 351 So. 2d 703(Fla. 1977). Such rationale has never been applied in products liability cases, which are themselves complex actions.

are interdependent and should be viewed as a combined event," Hill, 404 So. 2d at 1052 (quoting with approval Huff, 565 F.2d at 109), the driver's negligence in causing the collision cannot be a remote cause or condition. See also General Motors Corp. v. Lahocki, 410 A.2d 1039, 1051 (Md. 1980) ("But for the alleged negligence of [the driver] the design defect would not have been manifested and there would have been no injury").

For this reason, it has been universally recognized that the negligent driver who causes an accident and an automobile manufacturer who allegedly enhances the accident injuries by its design, are joint tortfeasors as to any enhanced injury. See Restatement (Third) of Torts: Products Liability § 16(d) and Reporters Note cmt. e (citing "a plethora" of authorities); Restatement (Third) of Torts: Apportionment of Liability § 50. As the Eighth Circuit has explained, "the negligent driver of the other car [is] a joint tortfeasor with . . . respect to the enhanced injuries since there [is] no sufficient intervening cause to limit the driver's liability. On the other hand, [the manufacturer] [is] not a joint tortfeasor in respect to any damages occurring prior to the fire; it is only the enhanced injuries for which [the manufacturer] may be held liable." Bass v. General Motors Corp., 150 F.3d 842, 847 (8th Cir. 1998) (citing Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir. 1976).

As a Georgia court further explained:

> [D]efendants in a "crashworthiness" case are properly sued as joint tortfeasors . . . in "crashworthiness" cases alleged negligence of a defendant manufacturer and a defendant driver **converge** at the time of a single accident. . . .

Brinks, Inc. v. Robinson, 452 S.E.2d 788, 790 (Ga. Ct. App. 1994). See also Mitchell v. Volkswagenwerk, A.G., 669 F.2d 1199 (8th Cir. 1982) (Michigan); Polston v. Boomershine Pontiac-GMC Truck, 423 S.E.2d 659 (Ga. 1992); General Motors Corp. v. Edwards, 482 So. 2d 1176 (Ala. 1985); McDowell v. Kawasaki Motor Corp. USA, 799 S.W.2d 854 (Mo. Ct. App. 1990); Oakes v. General Motors Corp., 628 N.E.2d 341 (Ill. App. Ct. 1993), appeal denied, 633 N.E.2d 4 (Ill. 1994).

This authority and reasoning is completely consistent with the Florida law of proximate cause which cuts off the causal chain only when a result is "highly unusual, extraordinary, bizarre, or . . . beyond the scope of any fair assessment of the danger created by the defendant's negligence." Department of Transp.

v. Anglin, 502 So. 2d 896 (1987). There is nothing highly unusual or bizarre, even unforeseeable, about a design defect that would render it an independent intervening cause in an automobile accident. Moreover, serious injuries including fires and burns, are the natural and foreseeable result of negligent driving and fall directly within the "scope of the danger" created by such negligence (as this case compellingly demonstrates). Thus, there is no basis on which to cut off the causal responsibility of the driver, simply because it is alleged that the accident injuries were enhanced in a product defect.

Citing Stuart, Plaintiffs also argue that the manufacturer should not be permitted to escape liability for causing the very injury it was intended to prevent. (Plfs' Br. at 42) But apportionment does not allow anyone to "escape" liability; it apportions fault and damages between **all** those who are liable. The intoxicated driver in this case had at least as great a duty as Ford (and certainly a more proximate one) to prevent **all** of Plaintiff's injuries by not driving negligently. Indeed, it is Plaintiffs' argument that would relieve a patently negligent party of responsibility for the results of his own breach of duty.

[19] Nor surprisingly then, in many contexts, Plaintiffs' illogical argument has not precluded comparative fault from being applied. See, e.g., Metropolitan Dade County v. Zapata, 601 So. 2d 239 (Fla. 3d DCA 1992) (trial court improperly precluded evidence of decedent's comparative fault in action against life guard for failing to come to decedent's rescue).

Accordingly, as a matter of well-settled, uniform, products liability law, the tortfeasor who causes the accident and the negligent/strictly liable manufacturer are joint tortfeasors with respect to enhanced injuries. This well-reasoned principle requires affirmance of the Second District's decision.

2. Nash does not Require a Contrary Result.

Failing all else, Plaintiffs now point to the Third District's recent decision in Nash v. General Motors Corp., 734 So. 2d 437 (Fla. 3d DCA 1999), rev. granted, (Fla. Case No.

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[19] Virtually any negligent act can be characterized as a failure to prevent an injury that one had a duty to prevent. Thus, this reasoning would effectively write section 768.81 out of Florida law.

96,139) and urge, without any analysis of why it is correct, that Nash requires reversal. The court in Nash was asked to resolve the question of whether alcohol use was admissible in a crashworthiness case. Id. at 440. Skipping over that question, and the court instead held that driving drunk was an intentional tort and therefore, a drunk third party should not be placed on the verdict form pursuant to Merrill Crossings, Ass'n. v. McDonald, 705 So. 2d 560 (Fla. 1997). Id. at 440-41. Nash is pending before this Court for review, Case No. 96,0139.

Although these Plaintiffs did not raise this issue until seeking conflict jurisdiction before this Court, Plaintiffs seek to reap the benefits of that errant decision before this Court.[20] Plaintiffs' effort must be rejected for a host of reasons.

a. Plaintiffs have failed to preserve the "Nash" issue for review.

The law is well settled that parties may not raise issues for the first time on appeal. See Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494, 499 n.1 (Fla. 1999) (issue raised for the first time in this Court was not preserved for appellate review); Dober v. Worrell, 401 So. 2d 1322, 1323-24 (Fla. 1981); Simmons v. State, 305 So. 2d 178, 180 (Fla. 1974). Plaintiffs herein did not raise the Nash issues until a motion for rehearing in the district court, and thus this issue cannot be used to obtain a reversal of the Second District decision.

Plaintiffs try to slip out from under this established law by relying on Dade County School Bd. v.

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[20] That Plaintiffs' never raised this argument below underscores the very absurdity of the Nash decision. Had there been any logical support for the result in Nash, Ford has no doubt that Plaintiffs' able trial and appellate counsel would have raised the issue before now.

Radio Station WQBA, 731 So. 2d 638 (Fla. 1999), for the proposition that they can assert any ground to support the trial court's ruling. Plaintiffs have apparently lost sight of the fact that they are not trying to support the trial court's decision here. Rather, Plaintiffs are trying to overturn the Second District's well-reasoned decision by raising unpreserved arguments. This Court should not permit Plaintiffs to do so.

b. Nash is not relevant to this case.

In addition, the Second District's decision is affirmable irrespective of whether this Court approves Nash. As discussed above, because the jury found no liability against Ford, any error with respect to placing non-parties on the verdict form was harmless since the jury never considered the allocation of fault. See Loureiro, 698 So. 2d at 1264. Thus, Nash is not even implicated here.

Finally, it was undisputed that the driver in this case was speeding. Because excessive speeding constitutes negligence, Defendants were warranted in placing the driver's name on the verdict form on that basis alone.

c. Nash was wrongly decided.

Plaintiffs do not present any argument on the merits of Nash and that issue will be fully briefed and decided in Nash itself. Nonetheless, Ford will briefly explain why Nash was wrongly decided and should not be followed by this Court here.

First, the Third District went astray in finding that, pursuant to Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976), driving while drunk constitutes an intentional tort. To the contrary, although Ingram notes that becoming intoxicated is an intentional **act**, it does not hold that driving drunk constitutes an intentional **tort**. Rather, the court explained that driving drunk constituted a heightened form of **negligence**. Id. at 924.

Moreover, it is clear that the act of driving while intoxicated does not meet the test of intentionality. Under Florida law, an intentional tort is one "design[ed] to result in injury or death" or conduct which is "substantially certain to result in injury or death." General Motors Acceptance Corp. v. David, 632 So. 2d 123, 125 (Fla. 1st DCA), rev. denied. 639 So. 2d 976 (Fla. 1994) The mere knowledge and appreciation of the risk is not enough. See Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882 (Fla. 1986). Because drunk drivers may intent to drive drunk, this does not mean that they intend to cause injury. As

such, it is clear that the court in Nash erred in its conclusion that drunk driving was an intentional tort.

Instead, numerous Florida decisions are in accord that drunk driving is a species of negligence. E.g., DeMoya v. Lorenzo, 468 So. 2d 358 (Fla. 3d DCA 1985) (evidence of alcohol use admissible to establish comparative negligence); Thunderbird Drive-In Theatre v. Reed, 571 So. 2d 1341, 1345 (Fla. 4th DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991) (same), overruled on other grounds, Love v. Garcia, 634 So. 2d 158(Fla. 1994); Mauro v. Deer Park Spring Water, 667 So. 2d 416 (Fla. 3d DCA 1996) (evidence of alcohol use admissible).

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And, the law is clear that even heightened forms of negligence can be compared by the jury to ordinary negligence. See American Cyanamid Co. v. Roy, 466 So. 2d 1079, 1085 (Fla. 4th DCA 1984), quashed in part on other grounds, 498 So. 2d 859 (Fla. 1986) (comparatively negligent plaintiff should bear a fair share of the loss even when the defendants tortfeasor's conduct has been egregious, egregious having been defined as "willful and wanton"); Tampa Elec. Co. v. Stone & Webster Eng'g Corp., 367 F. Supp. 27, 38 (M.D. Fla. 1973) (under Florida law, comparative negligence operates even where the defendant's conduct is termed gross negligence). Accord White v. Hansen, 837 P.2d 1229, 1234 (Colo. 1992) (evidence of drunk driving, which constituted willful, wanton negligence can be compared to ordinary negligent conduct, and holding that the jury "must weigh the conduct of the parties, be it slightly, grossly, recklessly or willfully negligent, and make the appropriate percentage allocation of fault"); Vining v. City

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[21] Other jurisdictions agree. E.g., Ballou v. Henri Studios, 656 F.2d 1147, 1155 (5th Cir. Unit A 1981) (intoxication "is unquestionably a legitimate ground for a finding of contributory negligence"); Tyler v. City of Enterprise, 577 So. 2d 876 (Ala. 1991) (drunk driving constituted contributory negligence); Conley v. American Motor corp., 769 S.W.2d 75 (Ky. Ct. App. 1989) (same); Wallace v. Ford Motor Co., 723 A.2d 1226 (N.J. App. Div. 1999) (driver's intoxication is evidence of comparative negligence); accord Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934 (Tenn. 1994) (driving drunk is gross negligence); and Am. Law Prod. Liab. 3d § 40:19 (citing cases).

of Detroit, 413 N.W.2d 486 (Mich. Ct. App. 1986) (same); Sorenson v. Allred, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980) (same). See also W. Page Keeton, et al., Prosser & Keeton on the Law of Torts, § 34, at 210 (5th ed. 1984) ("there are such things as major or minor departures from reasonable conduct; but the difficulty of classification, because of the very real difficulty of drawing satisfactory lines of demarcation, together with the unhappy history justifies the rejection of distinctions in most situations"). Accord Ingram, 340 So. 2d at 924 (noting difficulty in drawing lines to distinguish forms of negligence); Carraway v. Revell, 116 So. 2d 16, 19-20 (Fla. 1959) (same).

Nash is also wrong in its reliance on Merrill. In Merrill, the defendant's negligence allegedly gave rise to and allowed the occurrence of an intentional tort. As such, this Court held that it was an action "based on an intentional tort" under section 768.81(3). Id. In contrast, Ford's alleged fault in designing its product did not give rise to or allow the driver's intoxication and drunk driving. Ford had no duty, and there is nothing Ford could have done, to prevent the driver's actions. Thus, the limited intentional tort exception to section 768.81(3) is inapplicable to Plaintiffs' claim against Ford, even if drunk driving were considered an intentional tort.

Finally, strong public policy reasons militate against the Nash result. It is undeniably the policy of this state is to apportion liability in accordance with fault. The Nash decision undercuts that policy. Worse, it is inappropriate to selectively apply the policy only when a negligent tortfeasor is fortunate enough to share liability with the "right" other tortfeasor. Indeed, it defies common sense to penalize the manufacturer more when the conduct of the other tortfeasor is more egregious.

Moreover, because there is nothing the manufacturer could do to prevent the drunk driving, there is no basis to find section 768.81 effective to benefit a negligent tortfeasor when there are other negligent tortfeasors, but to eliminate the benefit where the other tortfeasor acted intentionally. Indeed to do so would constitute a denial of equal protection. See U.S. Const. amend. XIV, Fla. Const. art. 1, § 2.

3. The Trial Court did not Abuse its Discretion in Permitting Ford to Amend its Affirmative Defenses.

Plaintiffs also attempt to assert a procedural roadblock to

Ford's apportionment defense, arguing that Ford's pleadings were not timely amended to assert this defense.

[22] See Nash v. Wells Fargo, 678 So. 2d 1262 (Fla. 1996). To the contrary, it was not an abuse of discretion for the court to permit Ford's amendment given that "there was no doubt from the pleadings before amendment as to whom the driver was." (R. 20, 94) Thus, to agree with Plaintiffs would be to exalt form over substance.

Plaintiffs also argue they were prejudiced because they had no opportunity to conduct voir dire on this subject. However, when the court heard argument on Ford's motion to amend, Plaintiffs never complained of a lost opportunity to conduct voir dire. Plaintiffs' failure to argue this point until after the jury was discharged, effectively waived this issue. See Allstate Ins. Co. v. Hinchey, 701 So. 2d 1263 (Fla. 3d DCA 1997).

Moreover, any claimed prejudice was of Plaintiffs' own making. When the court initially ruled that alcohol evidence was inadmissible, it stated that the ruling was preliminary and applied only to opening statement. (T. 53)

[23] Thus, it was perfectly clear that the court would revisit the issue. Despite the tentative nature of the ruling,

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[22] In the Second District, Plaintiffs attempted to assert error in this ruling by way of a belated cross appeal. Despite the fact that the Court did not permit the cross-appeal, Plaintiffs have persisted on this issue. It is not properly before this Court.

[23] THE COURT: You want to wait till a more appropriate time to make a proffer of the evidence, and I'll allow you to make a proper proffer on the record. You're entitled to that under the rules.

MR. CABANISS: Oh, yes, I will. I mean, before I get -- before Your Honor makes his **final** ruling, I certainly want to explain to the Court and I --

THE COURT: Well, we're talking about now the **preliminaries** of what you're going to tell on opening statement and what you're going to tell – what you want the court to tell the jury is or is not the issue. (T. 53) (emphasis added)

Plaintiffs objected when Ford's counsel again stated that he wanted to ask the jurors questions concerning alcohol. (T. 54) Thus, it was Plaintiffs' own conduct that precluded them from learning of the juror's views concerning alcohol and the trial court did not abuse its discretion in rejecting Plaintiffs' claims of prejudice.

CONCLUSION

Based on the foregoing, Ford respectfully requests this Court to affirm the Second District's decision.

CABANISS, CONROY & MCDONALD, P.A.
Barnett Bank Center,
Suite 1600
390 North Orange Ave.
Orlando, FL 32801
Attorneys for FORD MOTOR COMPANY

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
4000 NationsBank Tower
100 SE Second Street
Miami, Florida 33131
(305) 530-0050
Attorneys for FORD MOTOR COMPANY

By: _____
WENDY F. LUMISH
Florida Bar No. 334332
JEFFREY A. COHEN
Florida Bar No. 057355

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent via U.S. Mail on this ___ day of January, 2000, to **BILL WAGNER, ESQ.,** Counsel for Plaintiffs, WAGNER, VAUGHAN & McLAUGHLIN, 601 Bayshore Boulevard, Suite 910, Tampa, Florida 33606; **WIL FLORIN, ESQ.**, 777 Alderman Dr., Palm Harbor, Florida 34683; **JOEL D. EATON, ESQ.,** Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130-1780; and **BENJAMIN H. HILL, III, ESQ. and MARIE A. BORLAND, ESQ.,** Attorneys for Product Liability Advisory Council, Hill, Ward & Henderson, P.A., Suite 3700 -- Barnett Plaza, 101 E. Kennedy Blvd., P.O. Box 2231, Tampa, FL 33601, **PROFESSOR STEVE GOODE and PROFESSOR WILLIAM POWERS, JR.,** 727 East Dean Keeton St., Austin, Texas 78705; and **HUGH F. YOUNG, JR., ESQ.,** 1050 Centennial Park Drive, Suite 510, Reston, VA 20191.

CABANISS, CONROY & MCDONALD, P.A.
Barnett Bank Center,
Suite 1600
390 North Orange Ave.
Orlando, FL 32801
Attorneys for FORD MOTOR COMPANY

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
4000 NationsBank Tower
100 SE Second Street
Miami, Florida 33131
(305) 530-0050
Attorneys for FORD MOTOR COMPANY

By: _____
WENDY F. LUMISH
Florida Bar No. 334332
JEFFREY A. COHEN
Florida Bar No. 057355

2054450