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.
_____/

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

PETITIONERS' BRIEF ON THE MERITS

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AUTHORITIES

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I. STATEMENT OF THE CASE AND FACTS

The petitioners, Karen D'Amario, individually, and on behalf of Clifford Harris, her son, and Clifford Harris, individually, were plaintiffs below in a "crashworthiness" action against Ford Motor Company.[1/] Their First Amended Complaint (R. 93-103) alleged that Clifford was a passenger in a 1988 Ford Escort driven by an underage driver, Stanley Livernois; that Stanley lost control of the car, causing it to collide with a tree; and that, after the impact, a minimal fire occurred that would have caused no additional injury to Clifford if the vehicle had functioned as intended by Ford. It alleged further that, because the vehicle malfunctioned and failed to shut off the fuel pump as Ford intended, the vehicle was ultimately engulfed in an enormous fire which caused Clifford grievous injuries (including burns over nearly 80% of his body and the loss of three of his four limbs). The plaintiffs did not sue Stanley; they sued only Ford. And damages were sought *only* for the separate injuries caused by the subsequent fire created by the malfunction of the vehicle; the complaint affirmatively

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[1/] The reason that both Clifford and his mother are petitioners here is that Clifford attained the age of majority between the date of the accident and the time of trial. For general background on "crashworthiness" actions, *see Ford Motor Co. v. Evancho*, 327 So.2d 201 (Fla. 1976); *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981).

asserted that "no claim is made in this action" for the "minor injuries" suffered in the initial impact with the tree.

In effect, the complaint alleged that Clifford suffered two separate, successive injuries -- minor injuries initially caused by Stanley and egregious burns subsequently caused by Ford -- and recovery was sought only for the latter. The case was presented to the trial court in this fashion at the outset (T. 3-64), and that is the way it was tried. The plaintiffs presented abundant evidence supporting their theory of liability -- that the post-impact fire was fuel-fed, and that the fire arose as a result of both a design defect and a defective electrical relay in the car -- and Ford's motions for directed verdict were denied for that reason (T. 2713-36, 2747-60, 3613-22).[2/] The only real dispute concerning Ford's liability at trial was whether the post-impact fire was fed by oil, as Ford contended, or by gasoline; Ford's experts conceded, in essence, that if the fire were gasoline-fed, the vehicle was defective (*see*, *e. g.*, T. 2970, 3279-93, 3469).

It was the plaintiffs' position throughout the proceeding that, because the damages suffered in the accident were readily divisible into two separately-caused injuries, there could be no "apportionment" of fault between Stanley and Ford for the injuries caused exclusively by the fire, and evidence of Stanley's conduct was therefore irrelevant and inadmissible. It was Ford's position that, despite the fact that the damages were readily divisible and the injury separately caused, it was entitled to "apportion" its liability for the injuries caused by the fire with Stanley's initial fault, and that evidence

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[2/] The sufficiency of the plaintiffs' evidence was not placed in issue in the district court of appeal, so there is no need for us to detail that evidence here. If the Court is interested, it will find a fair summary of the abundant evidence supporting the plaintiffs' theory of the case in the plaintiffs' trial brief (R. 442-598).

of Stanley's conduct was therefore relevant and admissible. During the trial, the trial court agreed with Ford and admitted evidence that Stanley was legally intoxicated at the time of the crash (T. 1461-62).

The jury returned a verdict for Ford (R. 1684). Following the verdict, the plaintiff moved for a new trial and for leave to interview two of the jurors, jurors Leslie and Warwick (R. 1746). Ford opposed both motions (R. 1941). In an order that was both thorough and thoughtful and which reflected an exceptionally conscientious analysis of the relevant portions of the record and the applicable law, the trial court granted the motion for new trial, on two grounds (R. 2086). It concluded that it had erred in admitting evidence of Stanley's intoxication, and it concluded that jurors Leslie and Warwick had engaged in misconduct by providing false answers to relevant and material questions on their juror questionnaires and in their voir dire. And, as Ford had requested, the motion for leave to interview the two jurors was denied (R. 2086). The procedural and factual backgrounds of these several rulings are fairly extensive, so we will reserve discussion of their particulars for appropriate places in our argument. And for the convenience of the Court, a copy of the new trial order is included in the appendix to this brief.

Not content simply to appeal the new trial order -- and prohibited from filing a Rule 1.530 motion for rehearing of the new trial order by this Court's decision in *Frazier v. Seaboard System Railroad, Inc.*, 508 So.2d 345 (Fla. 1987) -- Ford challenged the new trial order with a Rule 1.540(b) motion (R. 2070). The motion was bottomed upon an unsworn, unauthenticated, hearsay letter purportedly sent to the trial court by juror Leslie which took issue with some of the facts recited in a newspaper account of the new trial order (R. 2196). And, although Ford had successfully opposed the

plaintiffs' motion to interview the jurors and the time for filing a Rule 1.431 motion had long since passed, the motion requested, in the alternative, that juror Leslie be interviewed. The plaintiffs opposed this motion, and moved to strike the letter as hearsay (R. 2082). The trial court denied both motions (R. 2096).

Ford thereafter separately appealed both the new trial order and the order denying its Rule 1.540(b) motion to the District Court of Appeal, Second District, and the two appeals were consolidated (R. 2101, 2113). In its brief, Ford sought reversal only of the order granting the plaintiffs' motion for new trial; it did *not* seek reversal of the order denying its Rule 1.540(b) motion. Instead, it treated the two orders as if they were one, and utilized the (purported) factual matters submitted in the second motion to argue that the first order was wrong. We responded that this tactic was impermissible -- that the propriety of the new trial order had to be judged on the record before the trial court at the time the new trial order was entered, not on the unsworn, unauthenticated hearsay placed into the record *after* the ruling was made (appellees' 2d DCA brief, pp. 3-4). And we devoted a separate issue on appeal to a demonstration that the Rule 1.540(b) motion was procedurally improper and that, for several additional reasons, it was properly denied by the trial court (*id.*, pp. 41-47).[3/]

The District Court disagreed with both of the grounds upon which the trial court had bottomed its new trial order. *Ford Motor Co. v. D'Amario*, 732 So.2d 1143 (Fla. 2d DCA 1999). It held that Ford was entitled to apportion its liability with the drunk

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[3/] Space does not permit a reprise of that demonstration here, and because there is no mention of the motion in the district court's decision, a reprise should be unnecessary. If the propriety of the motion should become an issue here, the Court is referred to the brief we filed in the district court.

driver, and that the jurors' answers to the jury questionnaires and their voir dire did not justify the trial court's determination that a new trial was warranted for juror misconduct. The district court neither addressed nor reversed the order denying Ford's Rule 1.540(b) motion. Instead, it utilized a purported "fact" contained in the unauthenticated, unsworn, hearsay letter -- filed *after* the new trial order was entered -- to declare that the trial court's new trial order was wrong. The word "discretion" appears nowhere in the district court's opinion, and from all that appears on its face, the district court made its own *de novo* determination of whether the facts warranted a new trial. This Court thereafter granted discretionary review. A copy of the district court's decision is included in the appendix to this brief for the convenience of the Court.

II. ISSUES ON APPEAL

Ford presented two issues on appeal below, and prevailed on both of them. The same two issues are presented for review here:

A. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE PLAINTIFFS' MOTION FOR NEW TRIAL ON THE GROUND OF JUROR MISCONDUCT DURING VOIR DIRE.

B. WHETHER THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION IN GRANTING THE PLAINTIFFS' MOTION FOR NEW TRIAL ON THE GROUND THAT IT SHOULD HAVE EXCLUDED EVIDENCE OF STANLEY LIVERNOIS' BLOOD ALCOHOL CONTENT.

III. SUMMARY OF THE ARGUMENT

Because of the size of the record and the need to restate much of the factual and procedural background, space is at a premium. There is also a lot of ground to cover, and

repetition would appear to be undesirable. Respectfully requesting the Court's indulgence, we turn directly to the merits.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PLAINTIFFS' MOTION FOR NEW TRIAL ON THE GROUND OF JUROR MISCONDUCT DURING VOIR DIRE.

1. The standard of review.

n its first challenge to the new trial order below, Ford quarreled with the trial court's determination to grant the plaintiffs a new trial because of the misconduct of two jurors during voir dire. Although it devoted nearly 20 pages of highly contentious argument to the challenge, it failed to make even passing mention of the appropriate standard of review. The district court's decision also makes no mention of the standard of review. The standard of review was, of course, a rigorous one (which probably explains why Ford and the district court avoided its mention):

. . . The judicial determination on a motion for a new trial is a discretionary act of the trial court:

> When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached.

Cloud v. Fallis, 110 So.2d 669, 673 (Fla. 1959) (citations omitted). We reiterated the rule recently in *State v. Spaziano*, 692 So.2d 174 (Fla. 1977), wherein we stated:

> A motion for a new trial is addressed to the sound judicial discretion of the trial court, and the presumption is that [it] exercised that discretion properly. And the general rule

> is that unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court.
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> *Id.* at 177. . . . . The appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion, to wit, "discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990).
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> *Allstate Ins. Co. v. Manasse*, 707 So.2d 1110, 1111 (Fla. 1998). *Accord E.R. Squibb & Sons, Inc. v. Farnes*, 697 So.2d 825 (Fla. 1997); *Smith v. Brown*, 525 So.2d 868 (Fla. 1988); *Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla. 1980). And if there were ever any question about that, the question was forcefully put to rest in this Court's recent decision in *Brown v. Estate of Stuckey*, 24 Fla. L. Weekly S397 (Fla. Aug. 26, 1999).

These settled propositions also plainly apply in the precise context presented by the new trial order in issue here. *Zequeira v. De La Rosa*, 627 So.2d 531, 533 (Fla. 3d DCA 1993) ("I am unable to agree with the majority's conclusion that the trial court abused its broad discretion in granting the motion for new trial"; J. Baskin, dissenting), *quashed*, 659 So.2d 239, 242 (Fla. 1995) ("we approve and adopt [Judge Baskin's] opinion as our own"); *Castenholz v. Bergmann*, 696 So.2d 954, 955 (Fla. 4th DCA 1997) ("Our review of the record does not disclose the 'clear showing of an abuse of discretion,' . . . necessary to reverse the trial court's decision to grant a new trial [for juror misconduct]"); *Owen v. Bay Memorial Medical Center*, 443 So.2d 128, 130 (Fla. 1st DCA 1984) ("We affirm the trial court's granting of a new trial [for juror misconduct] by recognizing the trial judge's discretion to order a new trial and the well documented position that the grant of a new trial should not be disturbed on appeal absent a clear showing of abuse of discretion"), *review denied*, 450 So.2d 487 (Fla. 1984).

In short, in order to prevail on this issue on appeal in the district court, Ford had to convince that court that no reasonable person would have ruled as the trial court did -- and for the reasons which follow, we respectfully submit that it came nowhere close to shouldering that heavy burden. We also respectfully submit that the district court's failure even to acknowledge that standard of review requires quashal of its decision, without more, as this Court has routinely done in the past. *See, e. g., Baptist Memorial Hospital, Inc. v. Bell, supra*; *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981).

2. The factual and procedural background.

The factual and procedural background of this issue is straightforward. Prior to jury selection, the prospective jurors filled out a standard "Juror Voir Dire Questionnaire." In her answers to the questionnaire, juror Warwick answered "no" to the following questions: (1) "Have you or any member of your immediate family been a party to any lawsuit?"; (2) "Have you or any member of your family ever made any claim for personal injuries?" (R. 1794). In her answers to the questionnaire, juror Leslie answered "no" to the following questions: (1) "Have you or any member of your immediate family been a party to any lawsuit?"; (2) "Has a claim for personal injuries ever been made against you or any member of your family?" (R. 1759).

In her answers to the questionnaire, juror Leslie also revealed that she was the vice president and office manager, and that her husband was the general manager, of McGill Plumbing (R. 1759). And during the course of her voir dire questioning, she identified McGill Plumbing as a "family business":

MR. CABANISS [Ford's counsel]: All right. Just a few questions about your background. I know, Ms. Leslie, it looks like you and your husband are in a family business, is that accurate? Plumbing business?

PROSPECTIVE JUROR LESLIE: Yes. You could say that, yes.

MR. CABANISS: Okay. And how many folks, just generally, are in that business? You're vice president and office manager of McGill Plumbing and your husband is general manager?

PROSPECTIVE JUROR LESLIE: Yes.

(T. 379).

Because of the nature of the lawsuit, all of the prospective jurors were questioned extensively about the make of the vehicles they owned and their past experience with Ford vehicles -- and the overriding significance of this information to the jury selection process simply could not have been lost on them (e. g., T. 218-25, 432-35, 496-97, 531-33, 553-55). Plaintiffs' counsel repeatedly stressed the importance of finding out whether any of the jurors were "Ford addicts" or "dedicated Ford drivers" (T. 218-29). And in response to this expansive request by counsel, the jurors who were loyal Ford customers responded with not only their personal history with Fords, but that of their families as well. For example, one prospective juror responded, "My family just was a Ford family. There is six of us and we all just -- it was what my dad likes, so we all kind of went that route" (T. 219). And another prospective juror responded, "I am afraid I am a Ford family. My husband worked for Ford. We raised seven children and they are all driving Fords and never had problems" (T. 228).

Juror Leslie was asked twice about the vehicles she owned; she disclosed the present ownership of only one Ford; denied that she was the kind of person who always buys Fords; and denied that she was "involved in Fords or anything like that":

> [MR. WAGNER; plaintiffs' counsel]: So the issue that you are going to be asked to consider is was this a gasoline fire or oil fire. There will be many other things, but those are the main things, and with that I need to ask you a few things. I would like to find out how many of you own an Escort car. Ford Escort. How many of you own a Ford. I would like for you to tell me and start here and go this way, about your Ford. And your experiences with your Ford or Ford's general treatment. Tell me about your Ford. Tell me what goes on.
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> MS. LESLIE: A '93 Ford Bronco.
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> MR. WAGNER: How long have you had it?
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> MS. LESLIE: Since '93. I owned a Ford Bronco 2 before that.
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> MR. WAGNER: Are you the kind of person that has always looked to buy Fords?
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> MS. LESLIE: I got the Bronco because of the roominess. I like the vehicle.
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> MR. WAGNER: If you have problems with it, what -- who takes care of it?
>
> MS. LESLIE: Walker Ford.
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> MR. WAGNER: Do you, yourself, get involved in Fords or anything like that?
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> MS. LELLIE [sic]: No.
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> . . . .
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> MR. WAGNER: I got through most of the Fords. Anyone else have a Ford?
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> [no response by Ms. Leslie].

. . . .

MR. CABANISS [Ford's counsel]: Ms. Leslie, what kind of car do you own and do you know whether it has an inertia switch?

PROSPECTIVE JUROR LESLIE: Well, I own a Ford but my husband also owns a Jeep. I think that's a Chrysler product, I think.

(T. 218, 222-23, 228, 433-34).

Following trial, an investigator engaged by plaintiffs' counsel conducted a simple public records search (R. 1756, 1799). The search revealed that juror Warwick's husband had been a plaintiff and a counter-defendant in a 1985 lawsuit involving a dispute over a real estate purchase (R. 1796). The search also revealed that juror Warwick's husband had filed three successful workers' compensation claims for personal injuries suffered on the job between 1986 and 1991 (R. 1802-04). With respect to juror Leslie, the search revealed that her husband was a defendant in a 1986 personal injury lawsuit (R. 1763).[4/] It also revealed that McGill Plumbing, the "family business" of which she was an officer and which was managed by herself and her husband, owned a large fleet of 25 Ford vehicles (R. 1689-1745).

Competent proof of these facts in the form of sworn affidavits and copies of the public record documents were filed, and the plaintiffs moved the trial court for a new trial on

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[4/] Actually, the search revealed that Mr. Leslie had been a defendant in *two* companion 1986 personal injury lawsuits (R. 1761, 1763). The record of one of those suits is arguably ambiguous, however. The only defendant identified in the style of the case is McGill Plumbing; Mr. Leslie is identified as a defendant (by the symbol "D") only in the "copies furnished to" list (R. 1761). Although we are convinced that juror Leslie failed to disclose *two* personal injury lawsuits, a failure to disclose one is sufficient by itself to support the new trial order, so we will not insist upon the existence of the second.

the ground of juror misconduct, and for leave to interview jurors Warwick and Leslie (R. 1689, 1746). Of course, if Ford were unhappy with this state of the record and wished to delve deeper, or to obtain clarification or further explanation, all it had to do was agree to the request for juror interviews. It did not. Instead, it accepted the record *as is* by responding with a memorandum of law in which it *opposed both* the motion for new trial *and* the request for juror interviews (R. 1941). *This* was the state of the record before the trial court at the time it ruled on the motions, and it was on *these* facts that the trial court granted the motion for new trial -- and, as Ford had asked it to do, denied the motion for juror interviews (R. 2086).

3. The propriety of the new trial order.

In our judgment, in granting the plaintiffs' motion for new trial, the trial court did no more than (1) apply thoroughly settled principles of law to (2) a straightforward set of facts to (3) produce a result which was perfectly consistent with -- indeed, which was probably *required* by -- the decisional law on the subject. For starters, it has been settled for nearly 50 years that counsel is entitled to full and truthful answers from prospective jurors on voir dire examination, and that a false answer or the concealment of a material fact relevant to the controversy constitutes juror misconduct which will require a new trial:

> In *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953), we explained the major reasons for interviewing jurors on voir dire:
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> [T]o ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right to peremptory challenge given to parties by the law . . . .

It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since 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. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, for it impairs his right to challenge.

Id. at 192 . . . .

In determining whether a juror's non-disclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla. 1973). First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. *Id.* at 380. We agree with this general framework for analysis and note that the trial court expressly applied this test in its order granting a new trial.

On numerous occasions, our appellate courts have reversed for jury interviews or new trials, where jurors allegedly fail to disclose a prior litigation history or where other information relevant to jury service was not disclosed. . . .

De La Rosa v. Zequeira, 659 So.2d 239, 240-41 (Fla. 1995).

It is also settled that the misrepresentation or concealment need not be purposeful, but may be entirely innocent:

. . . [T]he right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; *the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established;* . . . next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects. The fact that

> the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; . . . when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law. . . .
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> *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379, 382 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla. 1973). *Accord Bernal v. Lipp,* 580 So.2d 315 (Fla. 3d DCA 1991); *Redondo v. Jessup,* 426 So.2d 1146 (Fla. 3d DCA), *review denied,* 434 So.2d 887 (Fla. 1983).

The cases are legion in which these well-settled propositions have been applied, and new trials required, in circumstances legally indistinguishable from the circumstances presented in this case. *See, e. g., De La Rosa, supra; Skiles, supra; Bernal, supra; Redondo, supra; American Medical Systems, Inc. v. Hoeffer*, 723 So.2d 852 (Fla. 3d DCA 1998); *Castenholz v. Bergmann*, 696 So.2d 954 (Fla. 4th DCA 1997); *Wilcox v. Dulcom*, 690 So.2d 1365 (Fla. 3d DCA 1997); *Industrial Fire & Casualty Ins. Co. v. Wilson*, 537 So.2d 1100 (Fla. 3d DCA 1989); *Perl v. K-Mart Corp.*, 493 So.2d 542 (Fla. 3d DCA 1986); *Owen v. Bay Memorial Medical Center*, 443 So.2d 128 (Fla. 1st DCA), *review denied*, 450 So.2d 487 (Fla. 1984); *Mobil Chemical Co. v. Hawkins*, 440 So.2d 378 (Fla. 1st DCA 1983), *review denied*, 449 So.2d 264 (Fla. 1984); *Minnis v. Jackson,* 330 So.2d 847 (Fla. 3d DCA 1976); *Ellison v. Cribb*, 271 So.2d 174 (Fla. 1st DCA 1972), *cert. denied*, 272 So.2d 160 (Fla. 1973). *Cf. Gray v. Moss*, 636 So.2d 881 (Fla. 5th DCA 1994); *Singletary v. Lewis*, 584 So.2d 634 (Fla. 1st DCA 1991); *Smiley v. McCallister*, 451 So.2d 977 (Fla. 4th DCA 1984).

In our judgment, it is simply indisputable that juror Warwick responded falsely to two questions on her juror questionnaire. Although her husband had been a plaintiff and counter-defendant in a lawsuit, she denied that any member of her immediate family had been a party to any lawsuit. And, although her husband had filed three successful workers' compensation claims for personal injuries suffered on the job, she denied that any member of her family had ever made any claim for personal injuries. The misrepresentations on juror Leslie's questionnaire are no less indisputable. Although her husband had been a defendant in a personal injury lawsuit, she denied that any member of her immediate family had been a party to any lawsuit, and she denied that a claim for personal injuries had ever been made against any member of her family.

Since questions like these are basic, core questions asked in voir dire in nearly all personal injury actions in this state (which is why the questions were presented up front in the initial juror questionnaire), it is settled that misrepresentations concerning prior litigation history -- of whatever kind, and whether similar to the action in suit or not -- are plainly material. *See, e. g., De La Rosa, supra; Skiles, supra; American Medical Systems, supra; Castenholz, supra; Wilcox, supra; Gray, supra; Bernal, supra; Industrial Fire & Casualty, supra; Perl, supra; Ellison, supra*. And, of course, where a prospective juror has answered a relevant question on a jury questionnaire with the word "no," counsel is plainly entitled to accept the answer as true; counsel cannot be accused of a lack of "due diligence" because he has not followed up during oral voir dire by asking the juror if she really meant "no" when she wrote "no" the first time the question was asked. *See Wilcox, supra; Industrial Fire & Casualty, supra*. The indisputably false answers which jurors Warwick and Leslie gave concerning their husbands' prior litigation histories therefore satisfied every prong of *De La Rosa's*

three-part test, perhaps as a matter of law; at the very least, the trial court did not abuse its broad discretion in so concluding.

By itself, of course, that was enough to require affirmance of the new trial order. There was more, however. Juror Leslie also concealed that the "family business," of which she was an officer and which was managed by herself and her husband, owned a large fleet of 25 Ford vehicles. To be sure, she was only specifically asked whether she owned a Ford vehicle, and was not directly asked whether her "family business" owned any Fords. She *was* asked if she was "involved in Fords or anything like that," however, and she denied any involvement at all. And it should have been perfectly obvious to her from the broader context in which the general inquiry was being made of her and others, as well as the considerably more expansive answers given by other prospective jurors, that a full and fair response to the question required disclosure of the large fleet of Ford vehicles owned by the "family business":

. . . . . As the First District put the point in a similar context:

> We also reject, as being entirely without merit, appellee's argument that Mobil waived its right to challenge the juror post-trial by failing to specifically ask her on her voir dire about any relationship she might have with the Crawford family or appellee's wife. It is abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through the voir dire without realizing that it was his or her duty to make known to the parties and the court any relationship with any of the named parties, witnesses or attorneys. Nevertheless, the juror failed to reveal her relationship to appellee's wife and to his former attorney. Her failure to disclose material information bearing on her possible bias and her qualifications to serve as a juror deprived Mobil of its right to intelligently participate in selection of the jury, and gives rise to an unacceptably strong inference that Mobil did not receive the fair trial to which it was entitled. Accordingly, we reverse and remand for a new trial.

Mobil Chemical Co., supra, 440 So.2d at 381. For a similar observation, *see Singletary v. Lewis*, 584 So.2d 634 (Fla. 1st DCA 1991).

Clearly, the trial court was well within its discretion in concluding, under all the circumstances presented by the thrust and focus of the extensive voir dire, that the large fleet of Ford vehicles owned by juror Leslie's "family business" was a material and relevant fact which she should have disclosed; that she concealed this fact from plaintiffs' counsel (and deflected the inquiry further by gratuitously volunteering that her husband owned a jeep); and that the failure of plaintiffs' counsel to discover this fact was not attributable to a lack of diligence. The three-part test of *De La Rosa* was therefore satisfied with respect to this additional omission by juror Leslie. At the very least, the district court could not fairly conclude that *no* reasonable person would have ruled as the trial court did on this point, so it could not legitimately declare that the trial court abused its discretion in granting the plaintiffs' motion for new trial on this additional, cumulative ground.

Most respectfully, the trial court's discretionary grant of the plaintiffs' motion for new trial was fully supported by both the law and the facts on three separate, cumulative grounds -- juror Warwick's misrepresentation of her husband's prior litigation history, juror Leslie's misrepresentation of her husband's prior litigation history, and juror Leslie's concealment of her and her husband's extensive involvement with Ford vehicles -- and the new trial order plainly should have been affirmed for any one or all of these reasons.

4. The district court's disagreement with the order.

That was the sum and substance of the argument we made in the district court. The district court was not persuaded. It concluded that, because her husband's involvement in a lawsuit occurred prior to their marriage, juror Leslie truthfully answered the question, "Have you or any member of your immediate family been a party to a lawsuit?" Quite apart from the fact that the question drew no distinction between "before marriage" and "after marriage," there are two significant additional problems with this conclusion. First, juror Leslie *also* answered "no" to a second question, "Has a claim for personal injuries *ever* been made against you or any member of your family?" (emphasis supplied), and the record reflects that Mr. Leslie had been a defendant in a personal injury lawsuit. By use of the emphasized word "ever," this second question fairly asked for disclosure of all such involvement, whether before or after marriage, and we believe it is simply undeniable that it was answered falsely. The district court appears to have overlooked (or perhaps ignored) this additional question and answer. This was unfair to the trial court and the plaintiffs.

Second, and more importantly, the fact upon which the district court rested its conclusion -- the fact that the Leslies were not married at the time of the prior lawsuit -- was *not* before the trial court at the time it granted the plaintiffs' motion for new trial. Indeed, it was *never* before the trial court in any competent form at all. We remind the Court that the evidence before the trial court at the time it granted the plaintiffs' motion proved that the Leslies were husband and wife. The plaintiffs moved for a jury interview in an effort to ferret out the details, but Ford successfully *opposed* the motion. No interview was conducted as a result, and the date of the Leslies' marriage was therefore never ascertained. It was not until *after* the new trial order was entered that Ford contended (in a procedurally impermissible Rule 1.540(b) motion, the denial

of which Ford did *not* challenge, and the district court did *not* reverse, in the consolidated companion appeal) that the Leslies were not married at the time of Mr. Leslie's prior litigation. It provided no competent evidence of this purported fact, however. It simply filed a copy of a letter purportedly written by juror Leslie which contained this information.

This letter was the purest form of inadmissible hearsay imaginable. It was simply a piece of paper. It was not authenticated. It was not sworn. For all that anyone knows, it could have been written by Ford itself. The trial court could not properly have considered it, and it properly declined to set aside its new trial order because of it. *See* §90.801 and 90.802, Fla. Stat. (1997); *Shere v. State*, 579 So.2d 86 (Fla. 1991); *Travelers Insurance Co. v. Jackson*, 610 So.2d 680 (Fla. 5th DCA 1992); *Walker v. State, Unemployment Appeals Commission*, 720 So.2d 278 (Fla. 2d DCA 1998); *Brown v. International Paper Co.*, 710 So.2d 666 (Fla. 2d DCA 1998); *Garcia v. State*, 701 So.2d 607 (Fla. 2d DCA 1997). *See also Pesci v. Maistrellis*, 672 So.2d 583 (Fla. 2d DCA 1996); *Harbour Island Security Co., Inc. v. Doe*, 652 So.2d 1198 (Fla. 2d DCA), *review denied*, 662 So.2d 341 (Fla. 1995).

On appeal, however, the district court simply accepted the contents of the unauthenticated, unsworn, hearsay letter as an established fact, and then reversed the trial court's new trial order because of it. Because this fact was not before the trial court at the time it granted the plaintiffs' motion for new trial, the district court actually reversed the trial court for a ruling it never made. And worse still, it reversed the trial court for a fact which was never proven to the trial court in any competent form at all, either before or after the new trial order was entered. Most respectfully, this was terribly unfair to the trial court and the plaintiffs; and because the fact upon which the district court

reversed the trial court is no fact at all on the record made below, it should have concluded that the trial court committed no error in concluding that juror Leslie *did* respond falsely on her juror questionnaire.

The district court also concluded that juror Leslie did not conceal the fact that, in its words,

> "the business for which she worked" had a fleet of 25 Ford vehicles. The district court acknowledged that juror Leslie was a vice-president of the business, but described the business only as "her employer." This, we respectfully submit, is a highly sanitized version of the facts which overlooks the actual facts upon which the trial court bottomed its contrary conclusion. The evidence before the trial court at the time it granted the plaintiffs' motion for new trial was that the fleet of 25 Ford vehicles was owned by the Leslies' "family business"; that Mr. Leslie was the general manager of the "family business"; and that Mrs. Leslie was the office manager of the "family business." These facts establish a far more intimate association with the substantial fleet of Ford vehicles than the district court's opinion discloses, and a far sounder basis for the trial court's conclusion that juror Leslie should have revealed this fact in response to the persistent questioning of the entire panel on the subject. To sanitize them out of existence was unfair to the trial court and the plaintiffs; and because of these additional facts, the district court should have concluded that juror Leslie *did* conceal the undeniably material fact that the "family business" managed by the Leslies owned a fleet of 25 Ford vehicles.

The district court also concluded that juror Leslie's non-disclosure of the 25 Ford vehicles

> owned by her "family business" was not material. This fact was plainly material, however, and Ford nowhere contended in its brief that it was not. In overlooking this aspect of Ford's position on appeal, and in declaring immaterial what Ford conceded

to be material, the district court departed from its role as a neutral arbiter and became an advocate for Ford. This was also unfair to the trial court and the plaintiffs.

With respect to juror Warwick, the district court conceded that she falsely concealed her husband's involvement in a prior lawsuit. It concluded that the lawsuit was not material, however, because Mr. Warwick was a plaintiff in the lawsuit -- and, according to the district court, a plaintiff in a prior lawsuit would be expected to be favorable to a plaintiff. The district court overlooked (or perhaps ignored) the fact that Mr. Warwick was also a counter-defendant in the lawsuit. That fact, we respectfully submit, should have made a considerable difference in the district court's analysis of the issue.

The district court also concluded that juror Warwick was not required to disclose her husband's three prior workers' compensation claims because he was "not a 'party to a lawsuit'." There are two significant problems with this conclusion. First, juror Warwick *also* answered "no" to a second question, "Have you or any member of your family ever made a *claim* for personal injuries?" (emphasis supplied). That is an entirely different question than the question about "prior lawsuits," and it was obviously designed to ferret out the existence of Mr. Warwick's prior workers' compensation claims -- and we believe it is simply undeniable that it was answered falsely. The district court appears to have overlooked (or perhaps ignored) this question and answer as well.

Second, Ford nowhere contended in its brief that juror Warwick was not required to disclose this information; it acquiesced in the trial court's conclusion that she responded falsely concerning all four of the prior proceedings in which her husband had been involved. In overlooking this aspect of Ford's position on appeal, and in declaring true what

Ford conceded to be false, the district court departed from its role as a neutral arbiter and became an advocate for Ford. Neither of these things was fair to the trial court or the plaintiffs, and because of juror Warwick's additional false answer, the district court should have concluded that she *did* respond falsely on her jury questionnaire.

The district court also dismissed juror Leslie's misrepresentation concerning her husband's prior lawsuit as immaterial because, among other reasons, it was remote in time. It also dismissed juror Warwick's misrepresentations concerning her husband's prior lawsuit and multiple workers' compensation claims as immaterial because her husband's prior litigation was remote in time, small in amounts, dissimilar to the instant suit, and "asserted by one seeking monies, to wit: one customarily favorable to a plaintiff." It is here that the district court misapprehended a critical aspect of *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), and reached a conclusion inarguably in conflict with it. Its declaration of immateriality, we respectfully submit, was essentially a reprise of Judge Schwartz's opinion for the majority in *Zequeira v. De La Rosa*, 627 So.2d 531 (Fla. 3d DCA 1993), *quashed*, 659 So.2d 239 (Fla. 1995), in which he declared a juror's misrepresentations concerning seven prior lawsuits -- six of which were clearly unrelated to the issues in suit; one of which involved a similar personal injury suit in which the juror (who voted against the plaintiff) had been a plaintiff; and some of which were five, seven, 14 and 15 years in the past -- to be immaterial, and therefore insufficient to support a new trial order.

The late Judge Baskin vigorously dissented from this position, however, concluding instead that the juror's misrepresentation of his prior litigation history was material as a matter of law -- whether the prior litigation was related to the present litigation or not; whether the juror was similarly situated to the complaining litigant in the related suit or not; and

however remote in time the prior litigation might have been. Judge Baskin's dissent is now undeniably the law in Florida, because this Court said so in *De La Rosa v. Zequeira*, 659 So.2d 239, 242 (Fla. 1995): "Judge Baskin's dissenting opinion contains a complete yet concise analysis of all the issues involved herein. Rather than repeat that analysis, we approve and adopt her opinion as our own." As a result, Judge Schwartz's majority opinion was quashed.

In our judgment, the district court's opinion in the instant case echoes Judge Schwartz's analysis of the issue in numerous respects; it is inconsistent with Judge Baskin's analysis of the issue; and it is therefore inconsistent with this Court's ultimate approval of Judge Baskin's dissent. And because the Third District has accepted the lesson of this Court's quashal of its decision in *De La Rosa*, the decision sought to be reviewed here conflicts with at least two of the Third District's post-*De La Rosa* decisions as well.

For example, in *Wilcox v. Dulcom*, 690 So.2d 1365, 1366 (Fla. 3d DCA 1997), the Third District wrote:

> The litigation history of a potential juror is relevant and material to jury service, even if that history involves a different type of case. "A person involved in prior litigation may sympathize with similarly situated litigants who develop a bias against legal proceedings in general." *De La Rosa*, 659 So.2d at 241 (Fla. 1995) (quoting *Zequeira v. De La Rosa*, 627 So.2d 531, 533 (Fla. 3d DCA 1993). (Baskin, J., dissenting). Accordingly, the materiality prong of the test was satisfied in the instant [personal injury] case when the juror failed to reveal the fact that she had been involved in a collections dispute and a party in a domestic action.

In addition, *see American Medical Systems, Inc. v. Hoeffer*, 723 So.2d 852 (Fla. 3d DCA 1998) (in a products liability action, juror's failure to disclose her prior

involvement in a debt-collection action was a material concealment supporting trial court's grant of a new trial).

In its analysis of the misconduct of both jurors, the district court also twice observed that plaintiffs' counsel failed to inquire about prior litigation history when other potential jurors acknowledged prior litigation in their questionnaires, and then used this observation to conclude that the two jurors' false answers were immaterial. We must respectfully insist that the latter does not follow from the former, and that neither the observation nor the conclusion were appropriate grounds for reversing the new trial order, for two reasons.

First, the time allotted for jury voir dire is limited, and repetition by counsel is strictly prohibited. Because defense counsel *always* inquire about prior litigation history, plaintiff's counsel almost always leave that inquiry to defense counsel and spend their limited time on other matters. That is what happened in the instant case, and Ford's counsel *did* conduct the inquiry, exactly as plaintiffs' counsel knew he would (and then challenged every prospective juror he questioned on the subject) (T. 360-61, 402-03, 457-59). We fail to see how such a sensible and practical tactical decision should result in a waiver of juror misconduct represented by lying on a jury questionnaire -- and there is *no* prior decision of any Florida court which even arguably suggests such a thing.

Second, and more importantly, because jurors Leslie and Warwick falsely represented their spouses' prior litigation histories, the subject was not explored by *either* side below. If the district court is correct that exploration of this issue with other prospective jurors who have not lied on their jury questionnaires is a necessary condition to obtaining a new trial for the misconduct of jurors who *have* lied on their question-

naires, then Ford would have been entitled to a new trial in this case if it had lost below, but the plaintiffs, because they lost below, are not. That, we submit, is the undeniable effect of the district court's observation and conclusion.

If that is to be the law in this state, then plaintiffs' counsel are no longer free to leave *any* subject to defense counsel in voir dire -- not even those questions that are *always* asked by defense counsel. Neither will defense counsel dare to forego inquiry on any subject previously addressed by plaintiffs' counsel. And the unintended effect of the district court's decision will be that both sides must ask exactly the same questions in their voir dire in order to avoid a waiver of the type the district court has endorsed in this case. As a result, and as a matter of necessity, voir dire will become highly extended and unduly repetitive, and we doubt that the trial judges in this state will stand for that. Surely the district court overlooked this unintended but inevitable consequence of its observation and conclusion, and we respectfully urge the Court to disapprove it as a ground for reversing the new trial order in this case.

In short and in sum, the trial court did no more than apply thoroughly settled principles of law to a straightforward set of facts to produce a result which was perfectly consistent with the decisional law on the subject. Its determination to order a new trial for the misrepresentations of jurors Warwick and Leslie was a discretionary determination, reviewable on appeal only for an abuse of discretion. The district court did not apply that standard of review. And to explain its conclusion that a reversal was required, the district court was forced to ignore some of the facts, sanitize others, and add a "fact" that was not proven with competent evidence and that was not even before the trial court at the time the new trial order was entered. Most respectfully, the district court's decision is erroneous in multiple respects, and it should be quashed.

B. THE TRIAL COURT NEITHER ERRED NOR ABUSED ITS DISCRETION IN GRANTING THE PLAINTIFFS' MOTION FOR NEW TRIAL ON THE GROUND THAT IT SHOULD HAVE EXCLUDED EVIDENCE OF STANLEY LIVERNOIS' BLOOD ALCOHOL CONTENT.

1. The standard of review.

The new trial order rests on an additional, alternative ground -- the trial court's determination that it should have excluded evidence of Stanley Livernois' blood alcohol content. Two reasons were given for this conclusion: (1) that Stanley's collision with the tree was merely a "remote condition" and not a proximate cause of Clifford's horrible burns, so Ford was not entitled to apportion its liability for the burns with Stanley's fault in causing the initial impact; and (2) that admission of the evidence was highly prejudicial and the error was therefore not harmless.

To the extent that the order turns upon a purely *legal* question -- whether Ford was entitled to apportion its liability with Stanley -- it was reviewable in the district court *de novo*, as a matter of law. To the extent that the order concludes that the error was prejudicial, it was reviewable only for an abuse of discretion. *See Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983). The district court's decision mentions neither standard of review, and it reverses this aspect of the new trial order with a single sentence: "On the facts in this crash-worthiness case, the appellant properly raised an apportionment defense. *See Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995)." For the reasons that follow, we believe this conclusion was erroneous.

2. The procedural background.

As noted at the outset of this brief, the plaintiffs did not sue Stanley, and their claim for damages against Ford was limited to the injuries caused exclusively by the post-impact fire resulting from an alleged defect in its vehicle (R. 93-103). In its answer to the first amended complaint, Ford raised an "apportionment" defense, but it sought apportionment only generally with "third parties, either known or unknown" (R. 110-15, 113). Of course, the generality of this allegation, and its failure to specifically identify Stanley as the non-party whose liability was to be an issue at trial, rendered it legally insufficient. *See Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996). Because the liability of Stanley had not been specifically pled, plaintiffs' counsel prepared and proposed a pre-trial stipulation which did not include Stanley's fault as an issue to be tried (T. 330-36). Ford's counsel, who was under the impression that the liability of Stanley had been specifically pled, requested that the stipulation include the issue (*Id.*).

A dispute arose over the state of the pleadings; plaintiffs' counsel was convinced that the issue had not been specifically pled, and Ford's counsel was convinced that it had (*Id.*). Because of time constraints, and based upon Ford's counsel's representation that the issue had been properly pled, the issue of Stanley's fault was included in the pre-trial stipulation as follows: ". . . the negligence of STANLEY LIVERNOIS . . . *as pled by Defendant*" (emphasis supplied) (R. 646; *Id.*). The purpose of including the emphasized modifier was to allow the pleadings to control at trial: if the issue had been pled, it was an issue for trial; if not, then not (T. 330-36). At trial, Ford's counsel conceded on the record that the foregoing discussion of the genesis of the stipulation, as well as the meaning and purpose of the emphasized modifier, was correct (T. 333).

At the beginning of trial, plaintiffs' counsel sought the exclusion of all evidence of Stanley's fault on two grounds: (1) Ford had failed to plead an affirmative defense seeking "apportionment" with Stanley's fault, so there was no issue to be tried in that regard; and (2) even if the issue had been pled, it was not a legal defense to the plaintiffs' claim because Clifford suffered two separate, distinct, and successive injuries, and there could be no "apportionment" of fault between Stanley and Ford for the injuries caused exclusively by the fire (T. 12-49). Ford's position was that it was entitled to "apportion" its liability for the injuries caused by the fire with Stanley's initial fault, and that evidence of Stanley's intoxication was therefore relevant and admissible (*Id.*). After hearing extensive argument, the trial court agreed with the plaintiffs that there were two separate, successive injuries; that Ford was a subsequent tortfeasor rather than a joint tortfeasor; that no "apportionment" defense was available under the law as a result; and that evidence of Stanley's fault would therefore be excluded (T. 49-56, 60-64). Because that ruling effectively mooted the plaintiffs' alternative contention that the defense had not been pled in the first instance, the trial court did not rule on the sufficiency of the pleadings to support the defense (*Id.*).

On the second day of trial, after plaintiffs' counsel had completed his voir dire of the prospective jurors, Ford moved the trial court for leave to amend its pleadings to add an affirmative defense specifically identifying Stanley as the non-party with whom it wished to "apportion" its liability (T. 339-45). The motion was taken under advisement, and the voir dire continued (*Id.*). On the fourth day of trial, after the plaintiffs had begun presentation of their case, Ford was permitted to proffer the excluded evidence of Stanley's fault (T. 1049-50). At the conclusion of the proffer, there was a lengthy discussion concerning the legal viability of Ford's proposed

"apportionment" defense and the state of the pleadings, during which the trial court reversed itself and ruled that an "apportionment" defense was available; that evidence of Stanley's fault was admissible, but would be limited in order to reduce its prejudicial effect; and that Ford would be permitted to amend its pleadings to allege its "apportionment" defense (T. 1071-1101). Over the plaintiffs' objection, the jury was thereafter informed (in language to which the parties stipulated), that the cause of the collision with the tree was the excessive speed of Stanley, and that Stanley had a blood alcohol level of .14% (T. 1102-14, 1461-62). (In the same stipulation, the jury was advised that there was no evidence that Clifford had consumed any alcohol before the accident -- T. 1462).

After trial, the plaintiff moved for a new trial on the grounds that the trial court had erred in concluding that an "apportionment" defense would lie on the facts in the case, and that it had erred in permitting Ford to amend its answer to raise the defense in the middle of trial -- both errors combining to result in the admission of the irrelevant and highly prejudicial evidence of Stanley's blood alcohol content (R. 1752-53, 1915-18). In its new trial order, the trial court ruled that the amendment had been properly allowed; however, relying upon the decision upon which the plaintiffs had persistently and consistently relied for their position that an "apportionment" defense simply would not lie on the facts in the case, it concluded that it had been correct at the outset of the trial when it had concluded that Stanley's fault was merely a "remote condition" for Ford's subsequent, supervening fault; that the prejudicial value of the evidence outweighed its probative value; that it had therefore erred in admitting the highly prejudicial evidence of Stanley's blood alcohol content; and that a new trial was required (R. 2092-94).

3. The propriety of the new trial order.

As noted above, two rulings combined to result in the admission of Stanley's blood alcohol content -- the trial court's mid-trial conclusion that an "apportionment" defense would lie on the facts in the case, and its mid-trial conclusion that Ford would be permitted to amend its answer to raise the defense. Had *either* mid-trial ruling gone the other way, of course, there would have been no issue of "apportionment" in the case at all, and the highly prejudicial evidence of Stanley's blood alcohol content would have been properly excluded. In our judgment, *both* of these mid-trial rulings were erroneous. However, the trial court ultimately concluded post-trial that only one of them was erroneous -- that it had correctly allowed the amendment, but had erred in concluding that the amendment stated a legally viable defense on the facts of the case.

Because the trial court resolved our two, either/or contentions in this manner post-trial, Ford recognized below that it had to convince the district court of *two* things in order to prevail on this issue: (1) that the trial court did *not* err in allowing the amendment in mid-trial; and (2) that it *did* err in concluding post-trial that the amendment failed to state a legally cognizable defense. Conversely, we were entitled to support the new trial order in two ways: (1) by demonstrating, under the familiar "right for the wrong reason" rule, that the trial court erred in allowing the amendment in mid-trial. *See Dade County School Board v. Radio Station WQBA*, 731 So.2d 638 (Fla. 1999); and (2) by demonstrating that the trial court correctly concluded post-trial that the amendment failed to state a legally cognizable defense. We intend to argue both things in defense of the new trial order's bottom line -- that evidence of Stanley's blood alcohol content was erroneously admitted, and that a new trial was therefore required. An additional "right for the wrong reason" argument, supported by recent developments in the decisional law, will be advanced in conclusion.

a. The propriety of the mid-trial amendment.

At the beginning of trial, Stanley's negligence was not an issue to be tried because Ford's "apportionment" defense lacked the specificity required by *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262, 1264 (Fla. 1996) ("We . . . hold that in order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and *specifically identify the nonparty*") (emphasis supplied). Had the issue been properly pled in that manner, the attitudes of prospective jurors concerning youthful driving, excessive speed, and teenage drinking would plainly have been obligatory subjects for exploration during voir dire.

Although Ford asked the trial court for leave to question the panel on these subjects, the plaintiffs opposed the request on the perfectly legitimate ground (at that time) that no "apportionment" defense had been pled, and neither party was permitted to inquire because of the initial ruling that there was no "apportionment" issue to be tried (T. 53-55). The jury was therefore questioned and selected, opening statements were delivered, and the plaintiffs began presentation of their case without reference to any of the several issues implicated by the defense that Ford had plainly waived. *See* Rule 1.140(h), Fla. R. Civ. P. ("A party waives all defenses . . . that the party does not present either by motion . . . under this rule or . . . in a responsive pleading . . ."), quoted in *Nash, supra* at 1264.

Notwithstanding that the defense had been waived before trial, the trial court permitted Ford to inject it into the proceeding on the fourth day of trial. Most respectfully, this was

error. Amendments to pleadings are liberally permitted, to be sure, but in the specific context presented here, mid-trial amendments are simply prohibited:

> . . . The defendant may move to amend pleadings to assert the negligence of a nonparty subject to the requirements of Florida Rule of Civil Procedure 1.190. However, *notice prior to trial is necessary* because the assertion that noneconomic damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's ruling on evidentiary issues.

Nash, supra at 1262 (emphasis supplied).

Although this aspect of *Nash* was brought to its attention, the trial court concluded (as Ford urged) that the mid-trial amendment was permissible because "no real prejudice was present . . . since there was no doubt from the pleadings before amendment as to whom the driver was" (R. 2093-94). Most respectfully, this attempted finesse of the plain mandate of *Nash* missed the point. Of course the plaintiffs knew the identity of the driver -- but they also knew that the details of his conduct would not be an issue at trial, and they prepared their case for trial accordingly. They did not prepare to defend against the defense, and they had no opportunity to voir dire the prospective jurors on their attitudes concerning the driver's conduct.

For all that can be known, one of the jurors ultimately selected may have lost a child to a drunk teenage driver -- a fact which, if the opportunity to elicit it had been presented, would have been of critical significance in the jury selection process. In short, the plaintiffs were plainly prejudiced by the mid-trial amendment. *Cf. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561 (Fla. 1988) (issues required to be raised in pleadings must be raised before trial in order that a defense can be prepared, and verdicts cannot rest on new issues raised over objection during trial). The amendment was also squarely prohibited by

Nash, and the trial court was therefore "right for the wrong reason" in ordering a new trial on the ground that Ford had no viable "apportionment" defense to support admission of evidence of Stanley's blood alcohol content.

b. The propriety of the "apportionment" defense.

The trial court was also "right for the right reason" in concluding that Ford had no viable "apportionment" defense on the facts in this case. As we have repeatedly stressed, although Stanley was certainly a cause of the *accident* -- the initial impact with the tree -- Clifford suffered only minor injuries in the initial impact (and no damages were sought for those injuries). A significant amount of time then passed before the vehicle turned into a raging inferno because of the alleged defect in the vehicle, and Clifford then suffered burns over nearly 80% of his body and the loss of three of his four limbs (and damages were sought from Ford only for those injuries). The damages suffered in the accident were therefore readily divisible into two separately-caused, successive injuries. And we respectfully submit, where separately-caused, successive injuries are concerned, the two tortfeasors are not considered "joint tortfeasors," and there can be no "apportionment" of damages between them under §768.81, Fla. Stat.

To begin with, we take it to be self-evident that, because the plain purpose of §768.81 was to abrogate the doctrine of joint and several liability and to replace the remedy of "apportionment" by contribution with the remedy of "apportionment" within the initial suit (and thereby, curiously, to shift the risk of an insolvent tortfeasor from the wrongdoer to the victim), the "apportionment" of damages which the statute mandates in lieu of joint and several liability is required only in those cases where joint and several liability for those damages would have existed without benefit of the statute.

See §768.81(3), Fla. Stat. (". . . the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability"); *Beverly Enterprises-Florida, Inc. v. McVey,* 739 So.2d 646 (Fla. 2d DCA 1999); *Ass'n for Retarded Citizens-Volusia, Inc.*, 741 So.2d 520 (Fla. 5th DCA), *review denied*, ____ So.2d ____ (Fla. 1999). *See generally Fabre v. Marin,* 623 So.2d 1182 (Fla. 1993); *Smith v. Department of Insurance,* 507 So.2d 1080 (Fla. 1987); *Messmer v. Teacher's Insurance Co.*, 588 So.2d 610 (Fla. 5th DCA 1991), *review denied,* 598 So.2d 77 (Fla. 1992). In short, if Stanley and Ford -- each of whom caused separate, distinct, successive injuries -- are not joint tortfeasors, then no "apportionment" defense is available to Ford.

1. There are two lines of authority demonstrating that no "apportionment" defense is available to Ford on the facts in this case -- each of which approaches the problem in a somewhat different way. One line of authority is represented by the principal decision upon which the plaintiffs relied below, and upon which the trial court ultimately relied in the new trial order: *Whitehead v. Linkous,* 404 So.2d 377 (Fla. 1st DCA 1981). In that case, the plaintiff's decedent attempted suicide by overdosing on drugs and alcohol; the defendant-physician and defendant-hospital negligently allowed him to die; and the issue on appeal was whether the trial court erred in submitting the issue of comparative negligence to the jury and in "apportioning" damages between the plaintiff and the defendants thereafter. The district court held that no "apportionment" would lie.

It explained its reasoning in language which is particularly appropriate to the similar "apportionment" issue presented in the instant case:

> A remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of the result of the subsequent negligence. *See e.g., McClain v. McDermott,* 232 So.2d 161 (Fla. 1970). Both Dr. Linkous and the hospital assert that the decedent's acts in attempting to commit suicide were a contributing legal cause of his death and thus subject to the preceding instruction regarding the comparative negligence to the decedent. We think this argument confuses the difference between a contributing cause in fact and a contributing legal or proximate cause. While the latter is subject to an instruction on comparative negligence [for purposes of apportioning damages], the former certainly is not. The Second District Court of Appeal has succinctly stated the applicable standard:
>
> In short, conduct prior to an injury or death is not legally significant in an action for damages like this, unless it is a legal or proximate cause of the injury or death -- as opposed to a cause of the remote conditions or occasion for the later negligence. So it is with conduct of a patient which may have contributed to his illness or medical condition, which furnishes the occasion for medical treatment. *That conduct is not available as a defense to malpractice which causes a distinct subsequent injury* -- here the ultimate injury, wrongful death.
>
> *Matthews v. Williford,* 318 So.2d 480, 483 (Fla. 2d DCA 1975). . . .
>
> 404 So.2d at 379 (emphasis supplied).

When that analysis is applied to the instant case, the correctness of the trial court's ultimate conclusion is inescapable. Because the alleged defect in Ford's vehicle caused a "distinct subsequent injury" -- here, horrible burns which would not have occurred but for the defect -- Stanley's intoxicated driving, while a cause in fact, was not a *proximate* cause of that subsequent injury; the two tortfeasors were therefore not joint tortfeasors with respect to the "distinct subsequent injury"; and no "apportionment" defense was available to Ford.[5/]

[5/] There is nothing unusual about this conclusion. Causal effects can generally be traced backwards *ad infinitum* (or at least to the "Big Bang"). As a practical matter, the law of torts simply must draw a line somewhere -- and the line, although always

This proposition -- that negligent conduct which provides only a remote condition furnishing the occasion for the supervening fault of another is not a *proximate* cause of the injury -- was explicitly endorsed by this Court in *Department of Transportation v. Anglin,* 502 So.2d 896 (Fla. 1987). Indeed, there are *numerous* decisions which say the same thing in various circumstances analogous to those presented in the instant case. *See, e.g., Memorial Park, Inc. v. Spinelli,* 342 So.2d 829 (Fla. 2d DCA 1977), *cert. denied,* 354 So.2d 986 (Fla. 1978); *Matthews v. Williford,* 318 So.2d 480 (Fla. 2d DCA 1975); *Barnes v. Gulf Power Co.,* 517 So.2d 717 (Fla. 1st DCA 1987); *Pearce v. State of Florida, Department of Transportation,* 494 So.2d 264 (Fla. 1st DCA 1986); *Wright v. Metropolitan Dade County,* 547 So.2d 304 (Fla. 3d DCA), *review dismissed,* 553 So.2d 1168 (Fla. 1989); *Derrer v. Georgia Electric Co.,* 537 So.2d 593 (Fla. 3d DCA 1988), *review denied,* 545 So.2d 1366 (Fla. 1989); *Ruiz v. Taracomo Townhomes Condominium Ass'n, Inc.,* 525 So.2d 445 (Fla. 3d DCA 1988); *Borges v. Jacobs,* 483 So.2d 773 (Fla. 3d DCA 1986); *Metropolitan Dade County v. Colina,* 456 So.2d 1233 (Fla. 3d DCA 1984), *review denied,* 464 So.2d 554 (Fla. 1985); *Banat v. Armando,* 430 So.2d 503 (Fla. 3d DCA 1983), *review denied,* 446 So.2d 99 (Fla. 1984); *Pope v. Cruise Boat Co., Inc.,* 380 So.2d 1151 (Fla. 3d DCA 1980); *Vendola v. Southern Bell Telephone & Telegraph Co.,* 474 So.2d 275 (Fla. 4th DCA 1985), *review denied,* 486 So.2d 597 (Fla. 1986); *Hohn v. Amcar, Inc.,*

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problematically drawn, is generally drawn between the proximate (which means near or immediate), and the remote (which, in this context, means not near, not immediate, not proximate). *See generally Stahl v. Metropolitan Dade County,* 438 So.2d 14 (Fla. 3d DCA 1983); *Gath v. St. Lucie County-Ft. Pierce Fire Dist.,* 640 So.2d 138 (Fla. 4th DCA 1994) (J. Anstead, specially concurring); *Prosser & Keeton on Torts,* §§41-44 (5th Ed. 1984).

584 So.2d 1089 (Fla. 4th DCA 1991); *Barati v. Aero Industries, Inc.*, 579 So.2d 176 (Fla. 5th DCA), *review denied*, 591 So.2d 180 (Fla. 1991).[6/]

Most respectfully, Stanley's intoxicated driving certainly set in motion a chain of events which ultimately resulted in Clifford's horrible burns. But that chain was broken for purposes of the law of *proximate* causation when the vehicle came to rest after impacting the tree and causing only minor injuries. At that point, all of the preceding events had reached a position of rest. It was only thereafter that the vehicle failed to perform as Ford intended by design, and the defect in the vehicle then created an enormous fire which caused a "distinct subsequent injury," horrible burns which would not have occurred but for the defect. While Stanley's conduct was certainly a cause in fact, it was not a *proximate* cause of that subsequent injury. Stanley and Ford were therefore not joint tortfeasors with respect to that injury, and the trial court correctly concluded as a result that no "apportionment" defense was available to Ford.

2. The second line of authority supporting this conclusion is represented by *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977). In that case, this Court held that an initial tortfeasor is, as a matter of law, the proximate cause of any additional injuries suffered as a result of the readily *foreseeable* negligence of a subsequent actor (like a physician's negligent treatment of the initial injuries), but that no action for indemnity (or, by implication, contribution) will lie against the subsequent actor because he cannot be considered a "joint tortfeasor":

[6/] *Cf. Gordon v. Marvin M. Rosenberg, D.D.S., P.A.*, 654 So.2d 643 (Fla. 4th DCA 1995) (parties causing separate and distinct injuries are not joint tortfeasors, and recovery from one therefore cannot be set off against recovery from the other); *Lauth v. Olsten Home Healthcare, Inc.*, 678 So.2d 447 (Fla. 2d DCA 1996) (same).

> The negligent action of the defendant tortfeasor in the case *sub judice* was the proximate cause of the plaintiff's injuries, however, the action of petitioner doctor was in fact an aggravating intervening cause of the ultimate condition of the plaintiff. *The parties causing plaintiff's injuries were not joint tortfeasors but distinct and independent tortfeasors.*
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> . . . .
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> Having finally decided the issue in favor of contribution among joint tortfeasors in *Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975), the Court here finds itself faced with the question of whether to apportion the loss between initial and subsequent rather than joint or concurrent tortfeasors. *This cannot be done.*
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> 351 So.2d at 705-06 (emphasis partially supplied).

This Court's holding in *Stuart* was later extended to bar an action for contribution as well, on the same rationale, in *Stuart v. Hertz Corp.*, 381 So.2d 1161 (Fla. 4th DCA 1980). This Court later held that the initial tortfeasor, if held liable for the whole, could sue the subsequent treating physician under a theory of equitable subrogation for the separate and independent tort inflicted upon the plaintiff, but it stuck to its guns that neither indemnity nor contribution would lie because the subsequent treating physician could not be considered a joint tortfeasor, in *Underwriters at Lloyd's v. City of Lauderdale Lakes*, 382 So.2d 702 (Fla. 1980).

There are *numerous* similar decisions which refuse to allow "apportionment" between initial and subsequent tortfeasors who cannot be considered joint tortfeasors. *See, e.g., Beverly Enterprises-Florida, Inc. v. McVey*, 739 So.2d 646 (Fla. 2d DCA 1999) (construing §768.81, Fla. Stat.); *Ass'n for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So.2d 520 (Fla. 5th DCA), *review denied*, ____ So.2d ____ (Fla. 1999) (construing §768.81); *Albertson's, Inc. v. Adams*, 473 So.2d 231 (Fla. 2d DCA 1985), *review denied*, 482 So.2d 347 (Fla. 1986); *VTN Consolidated, Inc. v. Coastal*

Engineering Associates, Inc., 341 So.2d 226 (Fla. 2d DCA 1976), *cert. denied*, 345 So.2d 428 (Fla. 1977); *Farina v. Zann*, 609 So.2d 629 (Fla. 4th DCA 1992); *Davidson v. Gaillard*, 584 So.2d 71 (Fla. 1st DCA), *review denied*, 591 So.2d 181, 182 (Fla. 1991); *Gonzalez v. Leon*, 511 So.2d 606 (Fla. 3d DCA 1987), *review denied*, 523 So.2d 577 (Fla. 1988); *Touche Ross & Co. v. Sun Bank of Riverside*, 366 So.2d 465 (Fla. 3d DCA), *cert. denied*, 378 So.2d 350 (Fla. 1979).[7/]

There is a difference between these two lines of authority in one significant respect. Under the first line of authority, where the subsequent supervening fault is not readily foreseeable, the initial tortfeasor is not a proximate cause of the "distinct subsequent injury" and he is therefore not liable for that injury. Under the second line of authority, where the subsequent fault is readily foreseeable, the initial tortfeasor *is* a proximate cause of the "distinct subsequent injury," and he is therefore liable for the whole. This case fits more readily under the first line of authority, since Ford intended by design that no gasoline-fed fire would follow an impact with a tree, and the fire was therefore not readily foreseeable. *See Binakonsky v. Ford Motor Co.*, 133 F.3d 281 (4th Cir. 1998). But in the final analysis it makes no difference which line of authority applies, because under neither line of authority are the two tortfeasors considered joint tortfeasors; they are considered as initial and subsequent tortfeasors, and no "apportionment" defense is available between them as a result. Both lines of authority

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[7/] *Cf. Leesburg Hospital Association, Inc. v. Carter*, 321 So.2d 433, 434 (Fla. 2d DCA 1975) (parties are "joint tortfeasors" in medical malpractice cases only when their actions combine to produce "a single injury"); *De Almeida v. Graham*, 524 So.2d 666 (Fla. 4th DCA) (without a claim for contribution between joint tortfeasors, there is no basis for apportioning liability between co-defendants), *review denied*, 519 So.2d 988 (Fla. 1987).

therefore fully support the trial court's ultimate conclusion in this case that no "apportionment" defense was available to Ford for the "distinct subsequent injury" caused by the alleged gasoline-fed fire resulting from the defect in its vehicle.

Ford will no doubt observe in reply that many of the cases under both lines of authority pre-date enactment of §768.81. The observation will be correct, but it will be of no moment. There is no language in the statute even arguably purporting to disturb the common law doctrines which both lines of authority endorse, and when confronted with the contention that §768.81 changed the legal landscape in this regard, at least two district courts have recently held that it did not. *See Beverly Enterprises-Florida, supra,* and *Ass'n for Retarded Citizens-Volusia, supra*. In addition, absent explicit language displacing the doctrines, of course, the statute cannot be construed as displacing them. *See, e. g., Merrill Crossings Associates v. McDonald,* 705 So.2d 560 (Fla. 1997); *Kitchen v. K-Mart Corp.,* 697 So.2d 1200 (Fla. 1977); *Carlile v. Game & Freshwater Fish Commission,* 354 So.2d 362 (Fla. 1977).

And, we would add, if the statute were subject to "construction" at all to permit "apportionment" on the facts in this case, the only logical result suggested by common sense would be to apportion the minor injuries to Stanley, and the horrible burns to Ford. Any other conclusion would allow Ford to escape liability in substantial part for causing the very injuries which its vehicle was supposed to prevent, but which it failed to prevent -- which would be entirely illogical. *See Merrill Crossings, supra* at 562-63 (relying on §449 of the *Restatement (Second) of Torts*; ". . . it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against").

It remains for us to distinguish the single basket into which the district court placed all of its eggs below: *Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995). In that case, on a clear, sunny, dry day, and on a straight roadway, the plaintiff's inattentive decedent drove his automobile directly into the rear of a stalled truck. He suffered only a single, indivisible injury in the impact -- the ultimate injury, instantaneous death. His estate sued, among others, the manufacturer of the stalled truck, contending that the absence of an under-ride guard on the rear of the truck rendered it "uncrashworthy." The issue on appeal was whether the defendant's comparative negligence defense should have been submitted to the jury. The district court held that a comparative negligence defense was available in a "crashworthiness" case like the one before it, and that, upon a favorable finding on the defense, damages should be "apportioned" under §768.81.

We have no quarrel with this decision. It is, as the trial court ultimately concluded below, simply inapposite here. Surely, when the conduct of two separate tortfeasors combines to cause a single, indivisible injury -- as the conduct of the plaintiff's decedent and the manufacturer did in *Kidron* -- the tortfeasors are joint tortfeasors, and "apportionment" between them is appropriate. But as the two lines of authority explored above make perfectly clear, when the conduct of the second tortfeasor causes a "distinct subsequent injury" which is readily divisible from a different injury caused by the initial tortfeasor -- a subsequent injury which would not have occurred but for the conduct of the second tortfeasor, as in the instant case -- the tortfeasors

are not joint tortfeasors, and "apportionment" between them is therefore inappropriate. And that should be true in any case, including a "crashworthiness" case.[8/]

The district court therefore read *Kidron* much too broadly. It is easily distinguished from the instant case by the nature of the single, indivisible injury which was at issue there; and the trial court correctly declined to apply it to the quite different "distinct subsequent injury" at issue here simply because both cases were "crashworthiness" cases. Most respectfully, the trial court did not err in concluding that no "apportionment" defense was available to Ford on the facts in this case, and that a new trial was therefore required.

3. There is an additional reason why the trial court correctly concluded post-trial that Ford had no viable apportionment defense. This case was tried in February, 1997. The trial

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[8/] The difference between the two types of cases deserves to be emphasized with a simpler hypothetical. Assume that two automobile drivers negligently collide at an intersection; an innocent pedestrian is struck in the aftermath; and the pedestrian suffers a broken arm and a broken leg. Because the injuries are indivisible with respect to their causes, the drivers would be considered joint tortfeasors, and the pedestrian's total damages would be "apportionable" between the two drivers under §768.81. That is the *Kidron* case.

Assume a different set of facts. A driver negligently knocks a pedestrian down at an intersection and breaks his leg. While lying in the roadway, the immobile pedestrian is negligently run over by a second driver, who breaks the pedestrian's arm. Because the two injuries are separate and distinct, and readily divisible with respect to their separate causes, the two drivers are not considered joint tortfeasors, and the pedestrian's total damages are not "apportionable" under §768.81. Because the second driver's negligence was foreseeable, the first driver is responsible for both broken limbs -- but the second driver is only responsible for the broken arm. (And if the pedestrian's broken arm was caused by an unforeseeable happenstance, like an object falling from an airplane, the first driver is only responsible for the broken leg). That (or the parenthetical alternative) is the instant case. Whether the fire was foreseeable to Stanley or not, Ford is not a joint tortfeasor with Stanley and Clifford's separate and distinct burn injuries are not "apportionable."

court's new trial order was entered in April, 1997. In December, 1997, this Court decided *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So.2d 232 (Fla. 1997), in which it held that §768.81 does not permit apportionment between negligent tortfeasors and intentional tortfeasors. The district court's decision notes on its face that Stanley was intoxicated, and it holds that, "[o]n the facts in this crash-worthiness case, the appellant [Ford] properly raised an apportionment defense." This conclusion is in express and direct conflict with a recent decision of the Third District, decided one month later.

In *Nash v. General Motors Corp.*, 734 So.2d 437 (Fla. 3d DCA 1999), *review granted* (case no. 96,139), the driver of an automobile died of head injuries suffered in an accident caused by a drunk driver. Her survivors brought a "crashworthiness" action against General Motors, contending that her death was an "enhanced injury" caused by a design defect in the automobile's seat belt system which permitted her head to strike the door post. The district court held that General Motors was *not* entitled to an apportionment defense on those facts:

> . . . [T]he estate argues that the evidence of the other driver's intoxication was too prejudicial and irrelevant as to General Motor's [sic] negligence in designing a defective seatbelt. That issue is resolved by the supreme court's recent decision in *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So.2d 232 (Fla. 1997) *relying on Merrill Crossings Assoc. v. McDonald*, 705 So.2d 560 (Fla. 1997). In *Stellas*, the court held that it was error to permit a nonparty intentional tortfeasor's name to appear on the verdict form so as to permit the jury to apportion fault between the nonparty and the negligent tortfeasor. *Id.* The trial judge in this case did not have the benefit of the supreme court's *Stellas* decision when he made his ruling. In fact, the trial court accurately followed the law in *Stellas* as set forth by this court at that time. Nonetheless, "[d]ecisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since time of trial." *Lowe v. Price*, 437 So.2d 142, 144 (Fla. 1983); *see also Wheeler v. State*, 344 So.2d 244 (Fla. 1977); *Collins v. Wainwright*, 311 So.2d 787 (Fla. 4th DCA 1975).

> Moreover, the act of causing injury from driving a motor vehicle on the public roadways while intoxicated is an intentional tort. *See Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976) (holding that driving after voluntarily drinking to the point of intoxication is an intentional act creating known risks to the public thereby warranting punitive damages for injuries resulting from such act). *See also In Re Ray*, 51 B.R. 236 (9th Cir. B.A.P. 1985) (holding that injuries caused by the act of driving while intoxicated is an intentional tort rendering debts arising therefrom nondischargeable in bankruptcy); *In Re Fielder*, 799 F.2d 656 (11th Cir. 1986). Here, it was error for the drunk driver, an intentional tortfeasor, to appear on the same verdict form as General Motors, the negligent tortfeasor in a products liability action.
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> 734 So.2d at 440-41 (footnotes omitted).

Most respectfully, the two decisions cannot be reconciled in any way. In the Second District, evidence of the intoxication of a driver is admissible in a "crashworthiness" case; the drunk driver can be placed on the verdict form; and the defendant is permitted to apportion its liability with the drunk driver. In the Third District, evidence of the intoxication of a driver is inadmissible in a "crashworthiness" case; the drunk driver cannot be placed on the verdict form; and the defendant is not permitted to apportion its liability with the drunk driver. This is plainly a conflict in need of resolution, and we respectfully urge the Court to disapprove the district court's decision in the instant case, and approve the Third District's resolution of the identical question in *Nash*.

Ford will respond that, although we argued rather vigorously below that Ford had no viable apportionment defense on the facts in this case, we did not advance this *particular* argument below. The observation will be correct, but it should be of no moment. A "right for the wrong reason" argument is available in the appellate courts of this state, whether raised below or not:

> . . . In some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. In *In Re Estate of Yohn*, this Court stated:
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> It is elementary that the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor.
>
> 238 So.2d 290, 295 (Fla. 1970). Stated another way, if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record. This Court has adhered to this principle on many other occasions. . . .
>
> If an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons, it follows that an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court.
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> *Dade County School Board v. Radio Station WQBA*, 731So.2d 638, 644-45 (Fla. 1999).

This discretionary review proceeding is simply a continuation of a single case, which began

> in the trial court, progressed through the district court, and arrived here for final disposition. If it would have been permissible for us to raise a new "right for the wrong reason" argument in the district court, it should be permissible for us to raise the same argument here -- and we should be permitted to defend the trial court's new trial order by reliance on these post-trial developments in the decisional law, whether or not the point was raised with particularity below, just as the Third District permitted

the argument in *Nash*. *See also Hendeles v. Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978); *Florida East Coast Railway Co. v. Rouse*, 194 So.2d 260 (Fla. 1967).

In addition, of course, if the argument is not entertained by this Court, the conflict may remain on the books for years to come, which will serve no useful purpose at all -- and it will ultimately have to be resolved by this Court in any event, in a future case. There is therefore every good reason to resolve it in this case -- and we respectfully urge the Court to resolve the conflict, approve *Nash*, and quash the conflicting decision presently before it.

V. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the District Court's decision should be quashed, and the cause remanded to the District Court with directions to affirm the new trial order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of December, 1999, to: Wendy F. Lumish, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 4000 NationsBank Tower, 100 SE Second Street, Miami, FL 33131; and to Ronald E. Cabaniss, Esq., Cabaniss, McDonald, Smith & Wiggins, P.A., One Orlando Centre, Suite 1800, 800 North Magnolia Avenue, P.O. Box 2513, Orlando, FL 32802-2513.

By:_____
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