ORIGINAL

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' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

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I. STATEMENT OF THE CASE AND FACTS

Ford's restatement of the case and facts is merely a reprise of our nitial introduction to the case, supplemented with several observations that have no real relevance to the issues before the Court, and containing some significant omissions. It challenges nothing that we said in our initial statement, and we stand by both the accuracy and adequacy of that statement.

II. ARGUMENT

A. THE JUROR MISCONDUCT.

1. The standard of review.

In our initial brief, we noted that the appropriate standard of review of the trial court's new trial order was "abuse of discretion," and that the district court had failed altogether to apply it. Ford concedes that the district court failed to apply it. It argues in a single footnote that the district court appropriately ignored it because the decisions upon which we relied deal only with new trial orders concerning "sufficiency of the evidence,'' and that new trial orders based on juror misconduct and other matters "present questions of law" (respondent's brief, p. 13, n. *7).* In making this argument, Ford simply ignores the three decisions cited at page *7* of our initial brief (including a decision of this Court), which applied an "abuse of discretion" standard of review in the *precise* context presented by the new trial order in issue here. And it offers as contrary authority this Court's decision in *Baptist Hospital of Miami, Inc. v. Maler,* 579 So.2d 97 (Fla. 1991). Most respectfully, *Maler* is poor authority for Ford's position. In fact, when read all the way through to its concluding paragraph, it squarely disproves Ford's argument.

To begin with, *Maler* did not even involve a new trial order. It involved a

defendant's motion to interview jurors which asserted that the jury's verdict was based on sympathy rather than the evidence. The trial court granted the motion. The plaintiffs then petitioned the district court for certiorari review, and the order was quashed on the ground that it impermissibly permitted inquiry into matters that inhered in the verdict, rather than on matters that were extrinsic to the jury's deliberative process. Whether the inquiry was permissible on the ground advanced by the defendant presented a legal question, to be sure. *See Dsvoney v. State,* 717 So.2d 501 (Fla. 1998). But because the law prohibited the inquiry, this Court concluded its approval of the district court's decision with the following sentence: "Accordingly, the trial court *abused its discretion* in authorizing any inquiry of the jurors." 579 So.2d at 101 (emphasis supplied).

Most respectfully, *Maler* does not even arguably support Ford's position that new trial orders based onj uror misconduct in responding falsely during their voir dire are reviewable *de novo* by a district court as a matter of law. Once a *primafacie* case has been made that a juror *did* respond falsely during voir dire, as in the instant case, a legal ground for ordering a new trial plainly exists -- and questions of relevance, materiality, concealment, diligence, and the sufficiency of the showing proving the juror misconduct are left to the discretion of the trial court. An "abuse of discretion'' standard of review was plainly required in the instant case, and the district court's failure to apply it below requires quashal of its decision here.

2. The propriety of the new trial order.

Before we reach the specifics of Ford's response to our argument on this issue, we are constrained to quarrel with a general theme that pervades the response -- Ford's frequently-repeated refrain that "there was no evidence to prove" this, and the

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"evidence was insufficient to prove'' that, and the like. We remind the Court that, in conjunction with the *primafacie* showing made in support of the motion for new trial, the plaintiffs moved for leave to interview jurors Leslie and Warwick to flesh out the specifics. If Ford were unhappy with the state of the *primafacie* showing made by the plaintiffs and wished to delve deeper into the facts, all it had to do was agree to the request for juror interviews. It did not. It opposed the request and succeeded in preventing the interviews. Ford is therefore in no position to blame the plaintiffs for the lack of additional detail. Since it was content to have the motion for new trial decided on the *primafacie* showing made by the plaintiffs below, it must be content to have the issue presented here decided on the same record -- the record that was before the trial court at the time it entered its order granting the motion. And with that off our chest, we turn to the specifics of Ford's response.

Ford first attempts to justify juror Leslie's misrepresentation concerning her husband's prior litigation history by arguing that the questions to which she replied "no" were ambiguous. The two questions to which she replied "no" were (1) "Have you or any member of your immediate family been a party to any lawsuit?," and "Has a claim for personal injuries ever been made against you or any member of your family?" The record reflects that Mr. Leslie was a defendant in a 1986 personal injury lawsuit. We will leave it to the Court to determine whether these perfectly unambiguous questions required disclosure of that proven fact.

Ford also attempts to justify juror Leslie's misrepresentation concerning her husband's prior litigation history by arguing that the Leslies were not married at the time of the prior lawsuit. That fact (*if* it was a fact) was not before the trial court at the time it granted the motion for new trial, and the parties were prevented from

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learning it by Ford's successful opposition to the plaintiffs' motion to interview the two jurors. Ford says this of no moment because it proved this fact with competent evidence after-the-fact in the Rule 1.540(b) motion it directed to the order granting a new trial. There are two things wrong with this argument. The Rule 1.540(b) motion was unauthorized, and the letter upon which it was bottomed was not competent proof of anything!

With respect to the first point, we begin with *Frazier v. Seaboard System Railroad, Inc.*, *508* So.2d 345,347,348 (Fla. 1987), in which this Court held that an order granting a new trial, although appealable (and treated as a "final order" solely for that purpose), is "not a final order" to which a Rule 1.530 motion can be directed; that "a new trial order is not subject to a motion for rehearing absent fraud or clerical error"; and that a motion for rehearing directed to an order granting a new trial is "a nullity." Ford was apparently aware of this decision. Because its motion contained no allegations of "fraud or clerical error," it recognized that it could not put the motion in the form of a Rule 1.530 motion for rehearing. **As** a result, in an obvious

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[1/] Actually, there are three things wrong with Ford's argument. The Rule 1.540(b) motion was denied by the trial court, and Ford did *not* seek reversal of the denial on appeal. Ford concedes as much in a roundabout way, arguing only that, because its Rule 1.540(b) motion sought "reversal" of the new trial order in the trial court, seeking "reversal" of the new trial order in the district court was tantamount to seeking reversal of the order denying the Rule 1.540(b) motion. We disagree. If a reversal of the denial order was desired in the separate appeal filed from it in the district court, it was necessary to demonstrate error in the order **and** ask for relief from it. Neither the demonstration nor the request appears in the initial brief that Ford filed in the district court, and the district court did not reverse the order. The so-called "facts" recited in the Rule 1.540(b) motion should therefore have been unavailable for the type of bootstrapping in which the district court engaged in reversing the new trial order.

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effort to avoid *Frazier,* it bottomed its motion on Rule 1.540(b) instead.

The problem with this attempted end run around *Frazier* is that a Rule 1.540(b) motion cannot be directed to a new trial order either. Most respectfully, it is *thoroughly* settled that a Rule 1.540(b) motion can be directed *only* to a "final order," and *not* to any other type of order?' Because *Frazier* squarely holds that an order granting a new trial is *not* a "final order" to which a Rule 1.530 motion can be directed, it undeniably follows that a Rule 1.540(b) motion cannot be directed to an order granting a new trial either. Ford's "Motion for Relief from Order Granting a New Trial" was therefore, in the words of *Frazier,* "a nullity." And with respect to the second point, the letter upon which Ford's Rule 1.540(b) motion was bottomed was unauthenticated, unsworn, and pure hearsay. It was *not* competent proof of anything -- and that point, in our judgment, is simply not debatable.

Ford attempts to finesse both points by relying upon *Snook v. Firestone Tire & Rubber* Co., 485 So.2d 496 (Fla. 5th **DCA** 1986). *Snook* provides no support for Ford's position, however. In that case, the plaintiff suffered an adverse jury verdict and (in a procedural development which plainly distinguishes the decision from the instant case), a *final judgment was entered* in the defendant's favor. The trial court thereafter denied the plaintiff's motion for new trial and motion for a jury interview. The plaintiff then discovered new evidence supporting the ground of juror misconduct he had unsuccessfully urged in his post-trial motions. To bring this evidence to

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[2/] *See Department of Corrections v. Ratliff,* 552 So.2d 302 (Fla. 2d DCA 1989); *Sterling Drug, Inc. v. Wright, 307* So.2d 494 (Fla. 2d DCA 1975); *Bell v. Broward County Personnel Review Board, etc.,* 691 So.2d 514 (Fla. 4th DCA 1997); *Hi-Tech Marketing Group, Inc. v. Thiem,* 659 So.2d 479 (Fla. 4th DCA 1995); *Nolan's Towing & Recovery v. Marino Trucking, Inc., 581* So.2d 644 (Fla. 3d DCA 1991); ***Piper*** *Aircraft* Co. *v. Whyham,* 455 So.2d *650* (Fla. 4th DCA 1984).

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the attention of the trial court, the plaintiff moved for relief *from the final* judgment under Rule 1.540(b). And, relying on Rule 1.431(h) -- which authorizes juror interviews where "grounds for legal challenge to a verdict exist" -- he sought a jury interview in order to challenge the verdict. The trial court denied the motions. The district court held that the jury interview should have been allowed, and upon remand, if the interview revealed juror misconduct, the Rule 1.540(b) motion should be granted to relieve the plaintiff from the adverse final judgment.

Most respectfully, *Snook* does not support Ford's attempted end run around Frazier. The plaintiff's motions in *Snook* were authorized motions, because the Rule 1.540(b) motion sought relief from a "final order," and the request for a juror interview was asserted as a means to challenge a verdict. In the instant case, Ford's Rule 1.540(b) motion was not directed to a "final order"; it was impermissibly directed to a non-final order granting a new trial. And Ford's request for a juror interview was not asserted as a means to challenge a verdict; it was impermissibly asserted as a means to challenge the new trial order. And, of course, while an unsworn letter which purports to be from a juror may well be enough to justify an interview of the juror under oath, there is nothing in *Snook* that even arguably suggests that an unauthenticated, unsworn letter is competent evidence of a fact that will justify a district court in reversing a new trial order entered before the letter was sent. *Snook* therefore provides no authority for Ford's attempted finesse of juror Leslie's misrepresentation of her husband's prior litigation history.

Ford next attempts to avoid juror Leslie's failure to disclose that her "family business" owned *25* Ford vehicles by arguing two things. First, it accuses us of misrepresenting the record: "Contrary to Plaintiffs' assertion, there simply was no

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evidence that McGill Plumbing was Juror Leslie's family business" (respondent's brief, p. **23).** And it repeats this assertion several times. We beg to differ. In her answers to the questionnaire, juror Leslie 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 explicitly identified McGill Plumbing as a "family business" (T. 379; see **pp.** 8-9 of our initial brief). This was the state of the record before the trial court at the time it ruled upon the motion for new trial, and it fully supported the trial court's conclusion that McGill Plumbing was the Leslies' "family business."

Second, Ford argues that McGill Plumbing was not the Leslies' "family business" because the unauthenticated, unsworn letter upon which it bottomed its Rule 1.540(b) motion recited that the Leslies were not "owners" of the business. We have already demonstrated that the new trial order was entered before receipt of this letter, that this letter was competent proof of nothing, that Ford's Rule 1.540(b) motion was unauthorized, and that the district court had no business reversing the new trial order for anything that appeared in that letter, so we will not plow that ground again. We note simply that, even if the record had reflected that the Leslies' "family business'' was owned by other members of their family, the fact remains that they were the active managers of that "family business," and that intimate association with the substantial fleet of Ford vehicles was more than enough to justify 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.

With respect to juror Warwick, Ford concedes what it must -- that she misrepresented her husband's prior litigation history in her answers to the juror

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questionnaire. It argues nevertheless that the district court correctly concluded that the misrepresentations were immaterial because the prior litigation was remote in time, involved small amounts, and (with an exception that the district court simply ignored and to which Ford has devoted only a shrug of its shoulders in a single footnote) Mr. Warwick was a claimant rather than a defendant. This, as we noted in our initial brief, is simply a reprise of Judge Schwartz's majority opinion in the *De La Rosa* case, from which Judge Baskin rather vigorously dissented -- and that opinion was quashed by this Court, which adopted Judge Baskin's dissent as its own. *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995). Most respectfully, if *De La Rosa* is still the law in this Court, the trial court plainly did not abuse its discretion in determining that juror Warwick's misrepresentations justified a new trial.

Two miscellaneous aspects of Ford's response also deserve a brief reply. Relying on *Mitchell v. State*, 458 So.2d 819 (Fla. 1st DCA 1984), Ford asserts that (although the order was not reversed below for this reason) the new trial order was properly reversed because plaintiffs' counsel did not "represent" that, had the two jurors told the truth about their spouses' prior litigation history, they would have been peremptorily challenged. We do not read *Mitchell* as absolutely *mandating* such a "representation" as a condition precedent to obtaining a new trial for juror misconduct; but even if the five-part test that it sets out could be read that way, the fact remains that this Court adopted a three-part test in *De La Rosa*, and that three-part test requires no such "representation."

In addition, of course, not one of the 15 additional decisions upon which we relied at page 15 of our initial brief contains such a requirement, so if *Mitchell* means what Ford says it means, it is a lonely wave in a sea of contrary authority. Most

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respectfully, the purpose of requiring truthful disclosure in voir dire is so that counsel can make intelligent decisions as to which of the several members of the prospective panel should be challenged with the limited number of peremptories available, not solely to elicit information that would justify the challenge of a particular juror -- and when counsel has been deprived of that opportunity by false answers to material questions, his client has not received a fairly-empaneled jury.

Ford also quarrels with our contention that counsel was entitled to rely on the jurors' "no" answers, and had no obligation to ask them during voir dire if they really meant what they said in their questionnaires. It contends that counsel *was* obligated to explore this area during voir dire; that the failure to do so amounted to a "lack of due diligence"; and (notwithstanding that the district court did *not* reverse the order for this reason) that the district court correctly reversed the new trial order for this reason. The decisions cited in support of this argument say no such thing, however. They hold that, when a juror's truthful answer plainly suggests a need to inquire ***further*** into a matter to develop its details, and counsel fails to do so, the additional details that could and should have been elicited by appropriate follow-up questions cannot be developed after trial to support a motion for new trial. The false, unequivocal "no" answers provided by jurors Leslie and Warwick did *not* suggest the need to inquire further on the subject during voir dire, and the decisions relied upon by Ford for its "lack of due diligence" argument are therefore entirely inapposite.

Most respectfully, for these reasons and the reasons argued in our initial brief, the trial court did not abuse its discretion in granting the plaintiffs' motion for new trial on the record before it at the time it did so; the district court erred in declaring the new trial order erroneous as a matter of law; and the district court's decision

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should be quashed.

B. THE EVIDENCE OF INTOXICATION.

1. The propriety of the mid-trial amendment.

In our initial brief, we demonstrated that the trial court erred in permitting Ford to amend its answer to include an apportionment defense on the fourth day of trial, and that the plaintiffs were prejudiced by the untimely amendment.[3/] Ford offers no justification whatsoever for permitting the injection of that entirely new issue into the case in the middle of trial, and it cannot. It argues only that we waived the error and the prejudice was of our own making because we objected to Ford's request at the outset of trial that it be permitted to voir dire the prospective jurors concerning drinking and driving. Most respectfully, this argument seems both desperate and silly to us. Of course we objected to this proposed line of inquiry; it was improper because Ford had not pled a proper apportionment defense -- and the objection was properly sustained because the trial court initially agreed that no apportionment defense would lie. It was not until the fourth day of trial that the trial court changed its mind -- and

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[3/] Ford contends that this argument is not properly before the Court because the district court denied our motion for leave to file a belated notice of cross-appeal -- a motion that would have been granted routinely in every other court in this state. **(As** proof that this denial was indefensible, we have included a copy of the motion in an appendix to this brief.) At oral argument, we urged the panel to reconsider this inexplicable ruling, and it appears that it did so, since its opinion explicitly states that "the appellant properly raised an apportionment defense." Because the issue was reached and resolved below, it is properly before this Court. More importantly, whether the cross-appeal was reached or not, the point was also advanced below as a "right for the wrong reason" argument in support of the new trial order, and it is properly raised here as a "right for the wrong reason" argument in support of that order as well, whether the cross-appeal was reached below or not. *See Dade County School Board v. Radio Station WQBA,* 731 So.2d 638 (Fla. 1999).

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our objections to permitting Ford to amend its answer to add the defense are spread all over the record (T. 12-64, 330-45, 1049-50, 1071-1114). The propriety of the mid-trial amendment is therefore squarely before the Court, and we respectfully urge the Court once again to hold that the mid-trial amendment was erroneous.

2. The harmfulness of the error.

Ford also seeks to finesse this entire issue on appeal by arguing that, because the jury returned a finding of no liability on its part and therefore did not reach the issue of apportionment, any error in permitting the mid-trial amendment or in admitting evidence of Stanley's intoxication was harmless -- and therefore not a legitimate ground for a new trial. This argument has a certain superficial appeal to it, but it will not withstand closer scrutiny. To begin with, the evidence that Stanley was drunk (which was admitted only because the mid-trial amendment was allowed) plainly tarnished his character and therefore tended to influence the jury favorably for Ford and unfavorably for Stanley on the liability issues. And because Clifford was riding in the car with Stanley at the time of the crash, the evidence tended to tarnish his "verdict-worthiness" as well, by association, and therefore tended to influence the jury favorably for Ford and unfavorably for Clifford on the liability issues.

Evidence like this which suggests that a party (or a so-called "non-party defendant") is a bad actor (or has bad motives, or is seeking double compensation, or the like) can interfere with the jury's ability to remain neutral and dispassionate when deciding the issues, and there are numerous circumstances in which admission of such evidence is deemed prejudicial, notwithstanding that the jury absolved the defendant, thereby justifying a new trial on all issues. *See, e.* g., *Gormley v. GTE Products Corp.*, 587 So.2d 455 (Fla. 1991); *Stanley v. United States Fidelity &*

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Guaranty Co., 425 So.2d 608 (Fla. 1st **DCA** 1982), *quashed on another* ***ground,*** 452 So.2d 514 (Fla. 1984). And as this Court made clear in *Gormley*, there is a presumption that the erroneous admission of such evidence was prejudicial, and the burden is on the party introducing the evidence to prove that it was not. Ford therefore has the burden here of convincing this Court that the error was entirely harmless, and we respectfully submit that the mere fact that the jury exonerated Ford on the hotly-contested issue of liability is not enough to shoulder that burden.

Ford's position overlooks two additional things. Because, the apportionment defense which provided the foundation for admission of the evidence was not injected into the case until the fourth day of trial, the plaintiffs were deprived of an opportunity to voir dire the prospective jurors concerning their feelings about both the defense and the evidence. That was plainly an error that tainted the initial jury selection process and therefore tainted the entire proceedings, and the mere fact that Ford prevailed on the liability issue is simply not enough to declare that all-encompassing stain wiped clean. Second, a trial court's determination that an error was prejudicial, rather than harmless, is a discretionary ruling, reviewable only for an abuse of discretion. ***See*** *Sears Roebuck & Co. v. Jackson,* 433 So.2d 1319 (Fla. 3rd DCA 1983). Ford therefore has the burden of demonstrating both that the error was harmless and that the trial court abused its discretion in concluding otherwise, and we respectfully submit that the mere fact that the jury exonerated Ford from liability comes nowhere close to satisfying that stringent burden.

3. The propriety of the apportionment defense.

In our initial brief, we offered three reasons why **an** apportionment defense would not lie on the particular facts in this case. Ford and its well-heeled amici have

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responded with a demonstration that, as a general rule, apportionment defenses do lie in crashworthiness cases. We have no quarrel with much of what Ford and its amici have argued, but we think their arguments miss the point. We conceded in our initial brief that apportionment would appear to be appropriate in crashworthiness cases where the negligence of two tortfeasors has combined to produce a single, indivisible injury. And since most of what Ford and its amici have argued here is directed to that already-conceded point (and because space is at a premium here at any event), our reply on the issue can be brief.

The critical distinction between the instant case and the general propositions upon which Ford and its amici rely is that the damages suffered by Clifford in the accident in suit were readily divisible into two separately-caused, successive injuries. And as we demonstrated in our initial brief, where two tortfeasors cause separate, distinct, successive injuries, they are not considered "joint tortfeasors" under Florida law -- and because §768.81 permits an apportionment defense only where "joint and several liability" would otherwise have existed in the common law, no apportionment defense will lie in that circumstance.

Ford and its amici attempt to distinguish the first line of authority on which we relied by arguing that it is limited to "pre-presentment" cases involving subsequent injuries caused by medical malpractice. This *cannot* be correct, and the Court need only skim its own decision in *Department of Transportation v. Anglin*, 502 So.2d 896 (Fla. 1987) -- not to mention the additional 16 decisions cited at **pp.** 37-38 of our initial brief -- to reach that conclusion. And in any event, even if Ford and its amici are correct that Stanley's driving was a *proximate* cause of all of Clifford's injuries, including his horrible burns, the second line of authority upon which we relied

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demonstrates nevertheless that, under Florida law, Stanley and Ford are still not joint tortfeasors, and that an apportionment defense therefore will not lie.

Ford and its amici have mounted a frontal assault on this second line of authority, arguing that the decisions are "obsolete" under current notions of comparative fault. In effect, they have asked this Court to overrule *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), and its extensive progeny, and to declare for the first time in the history of Florida's jurisprudence that initial tortfeasors and subsequent tortfeasors causing separate and distinct injuries are joint tortfeasors, jointly and severally liable for the whole. But the Court is not writing on a clean slate here. It has long since decided that question adversely to Ford and its amici, and the question presently before it is a narrow one -- whether, in enacting §768.81, the legislature intended to overturn the settled law on that point.

We respectfully submit that, as at least two district courts have recently held, it did not. By its terms, the statute permits apportionment only where joint and several liability would otherwise have existed in the common law. And there is not a word in it to suggest that an apportionment defense is available between parties and non-parties who would not have been considered joint tortfeasors in the common law. Ford and its amici should therefore make their argument to the next session of the legislature, rather than this Court -- and we stand upon our initial argument concerning the non-applicability of §768.81 to the particular facts in the instant case.

In our initial brief, we also offered the Court a third, "right for the wrong reason" argument supporting the trial court's post-trial conclusion that Ford had no viable apportionment defense. Since we made that argument, the Court has granted review of the conflicting decision upon which we relied, and because the issue will

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likely be thoroughly debated in that case, we will only touch briefly upon it here. Two observations are in order. First, we disagree that causing an automobile accident while intoxicated to the point that a violation of the *criminal* law has occurred does not qualify as an intentional tort. As this Court observed in *Ingram v. Petitt,* 340 So.2d **922,925** (Fla. 1976), "Driving in an intoxicated condition is an intentional act which creates known risks to the public." Surely, serious personal injuries are "substantially certain" to occur if driving while intoxicated above the "legal limit," else the legislature would not have made it a *criminal* act to do so, so Stanley's conduct in the instant case qualifies as an intentional tort under even the most rigorous definition of the concept that Ford and its amici can muster here.

Second, if Stanley's drunk driving amounted to an intentional tort, there can be no question that no apportionment defense will lie under §768.81. To begin with, no apportionment was available between intentional and negligent tortfeasors prior to the enactment of the statute. *See Slawson v. Fast Food Enterprises, 671* So.2d 255 (Fla. 4th **DCA),** *review dismissed,* 679 So.2d *773* (Fla. 1996), *approved in Merrill Crossings Associates v. McDonald,* 705 So.2d **560** (Fla. 1997). And this Court has already twice ruled that 5768.81 does not permit a negligent tortfeasor like Ford to apportion its liability with an intentional tortfeasor like Stanley. *See Merrill Crossings, supra; Stellas v. Alamo Rent-A-Car, Inc., 702* So.2d 232 (Fla. 1997). We rest our case -- and we respectfully submit once again that the district court's decision should be quashed.

Respectfully submitted,

By: Joel D. Eaton
JOEL D. EATON

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Appendix

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA SECOND DISTRICT

CASE NOS. 97-02429 & 97-02540

FORD MOTOR COMPANY,

Appellant,

vs.

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

Appellees.

MOTION FOR LEAVE TO FILE BELATED NOTICE OF CROSS-APPEAL

The appellees, plaintiffs below, Karen D'Amario, individually, and on behalf of Clifford Harris, a minor, and Clifford Harris, individually, move the Court for the entry of an order granting them leave to file a belated notice of cross-appeal, and as grounds therefor would briefly and respectfully show:

In these consolidated appeals, the defendant/appellant challenges an order granting the plaintiffs a new trial. The plaintiffs advanced several grounds for a new trial below. The trial court granted the motion on some of the grounds, but rejected one of the grounds as not well taken. Specifically, the trial court concluded that it had not erred in allowing the defendant to amend its answer after trial had commenced to add an affirmative defense seeking "apportionment" with a non-party "Fabre defendant." Undersigned counsel was not trial counsel; he was engaged as appellate counsel only after the new trial order was entered; and he was therefore unfamiliar with the case at the time

the defendant filed its notice of appeal. In his discussions with trial counsel, he initially concluded that it would only be necessary to support affirmance of the new trial order; that this adverse ruling could be challenged in support of affirmance under the familiar "right for the wrong reason" rule without the need to "cross-appeal" it; and that a notice of cross-appeal was therefore unnecessary.[1/]

After a considerable delay, the defendant filed its initial brief. The brief challenges the grounds upon which the trial court bottomed the new trial order. In anticipation of our "right for the wrong reason" argument, it also defends the adverse ruling at some length. We intend to respond by supporting the grounds upon which the new trial order is bottomed, and (as we initially concluded we should) by advancing the "right for the wrong reason" argument as well. Now that we have become familiar with the record, however, it has become apparent that we should also urge the Court to reverse the ruling permitting the in-trial amendment even if the new trial order is affirmed, so that the error does not infect the retrial of the case as well; and, as a technical matter, we may not be able to do that without leave to cross-appeal. We therefore seek leave of the Court to file a belated notice of cross-appeal.[2/]

Leave to file a belated notice of cross-appeal is both permissible and routinely granted, because it is thoroughly settled that the 10-day period provided by Rule 9.110(g) for service of such a notice is not jurisdictional, and that it can be extended by an appellate court. ***See Lopez v. State,*** **638** So.2d **931,** 932 (Fla. **1994); *Peltz v. District***

[1/] It is settled that it is unnecessary to file a notice of cross-appeal when seeking affirmance under the "right for the wrong reason" rule. ***See Hall v. Florida Board*** of *Pharmacy,* **177** So.2d **833** (Fla. 1965); ***Cerniglia v. C. & D.*** *Farms, Inc.*, **203** So.2d 1 (Fla. 1967); ***MacNeill v. O'Neal, 238*** So.2d 614 (Fla. 1970).

[2/] Because new trial orders are treated as final orders to the extent possible, it is permissible to cross-appeal adverse rulings in an appeal of a new trial order. *Bowen* ***v. Willard,*** 340 **So.2d** 110 (Fla. **1976).**

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Court of Appeal, Third District, 605 So.2d 865, 866 (Fla. 1992); *Agrico Chemical* Co. *v. Department of Environmental Regulation,* 380 So.2d 503, 504 (Fla. 2d DCA 1980); *Walker v.* State, 457 So.2d 1136 (Fla. 1st DCA 1984); *County Sanitation v.* Ross, 389 So.2d 1247, 1249 (Fla. 1st DCA 1980); *Breakstone v.* Baron's *of Surfside, Inc.*, *528* So.2d 437, 439 (Fla. 3d DCA 1988); *Puga v. Suave Shoe Corp.*, 417 So.2d 678, 682 (Fla. 3d DCA 1982) (en banc); *Brickell* Bay *Club Condominium Ass'n, Inc. v. Forte,* 379 So.2d 1334, 1335 (Fla. 3d DCA 1980); *State v. Kruger*, 615 So.2d 757, 757-58 (Fla. 4th DCA), *review denied,* 624 So.2d *266* (Fla. 1993); Safeco *Ins. Co. v. Rochow*, 384 So.2d 163, 164 (Fla. 5th DCA 1980).

The Third District has even gone so far as to hold that an issue on cross-appeal can be raised in an appellee's brief without the need to file a notice of cross-appeal at all. See *Greene v. Kolpac Builders, Inc., 549* So.2d 1150, 1152 (Fla. 3d DCA 1989); *Gregg v.* Gregg, 474 So.2d 262, 269 n. 8 (Fla. 3d DCA 1985); *McCoy v. McCoy, 468* So.2d 1032, 1032 n. 1 (Fla. 3d DCA 1985); Ash v. *Coconut Grove Bank, 448* So.2d 605, 606 n. 2 (Fla. 3d DCA 1984); *City of Hialeah v. Martinez,* 402 So.2d 602, 603 n. 4 (Fla. 3d DCA), review *dismissed,* 411 So.2d *380* (Fla. 1981).

In the First and Fifth Districts, however, a motion for leave to file a belated notice is required. See *Dellecese v. Value Rent* A Car, 543 So.2d 440, 441 (Fla. 1st DCA 1989); *Sampson v. Sampson, 566* So.2d *831,* 832 (Fla. 5th DCA 1990). Since it does not appear that this Court has taken sides on that particular.question, we have determined that the more prudent course is to seek leave from the Court before our brief is filed. We therefore respectfully request leave to file the attached notice of cross-appeal with the Clerk of the Circuit Court.

It is inconceivable that the defendant will be prejudiced in any way by our belated notice of cross-appeal. The defendant has already argued the propriety of the adverse

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ruling in its initial brief, in anticipation of our "right for the wrong reason" argument, and we intend to make the "right for the wrong reason" argument in our answer brief. The issue which we intend to raise will therefore be argued here whether the notice of cross-appeal is filed or not. The only thing that will change is the additional relief to which we will be entitled if the issue is resolved in our favor. The delay occasioned by our initial unfamiliarity with the case and our initial misapprehension as to the potential issues on appeal has therefore caused no change of position by the defendant which could conceivably be advanced as prejudice to its position here, and no good reason suggests itself why our request should not be considered routine and granted in due course.

Undersigned counsel has conferred with counsel for the defendant/appellant, Wendy F. Lumish, Esquire, in an effort to obtain her consent to this motion. She indicated that the appellant objects to the motion, but that she will file no written opposition to it.

WHEREFORE, the appellees respectfully move the Court for the entry of an order granting them leave to file the attached notice of cross-appeal with the Clerk of the Circuit Court.

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 9th day of June, 1998, 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.

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Respectfully submitted,

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By: _____
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Fla. Bar No. **203513**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of February, 2000, 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.

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