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IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,139

GENERAL MOTORS CORPORATION, a foreign corporation and POTAMKIN CHEVROLET, INCORPORATED, a domestic corporation,

Defendants/Petitioners,

vs.

BRIAN W. NASH, as Personal Representative of the Estate of MARIA DEL CARMEN **NASH,** et al.

Plaintiffs/Respondents.
_____/

PETITIONERS' BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

On March 8, 1992, a drunk driver lost control of his vehicle, crossed the center line, and slammed into the left front of a 1990 Corsica driven by Maria Nash. Mrs. Nash later died of internal injuries she suffered during the crash.

Mrs. Nash's estate filed suit against General Motors Corporation and Potamkin Chevrolet Incorporated (the "GM Defendants") alleging that a defective seat belt in the 1990 Corsica caused Mrs. Nash's fatal injury. The plaintiffs did not include the drunk driver as a party to the action.

Following a two-week trial, the jury determined that the seat belt was not defective. Plaintiffs appealed the judgment in favor of the GM Defendants to the Third District Court of Appeal. The District Court of Appeal overturned the jury's verdict based on two perceived errors, one of which was the inclusion of the non-party drunk driver's name on the verdict form. See Dist. Ct. Opin. at 5-8.[1] The District Court of Appeal denied the GM Defendants' subsequent motion for rehearing en banc, rehearing, and/or for certification of a question of great importance.

11. SUMMARY OF THE ARGUMENT

The District Court of Appeal's holding that it was reversible error to include the non-party drunk driver on the verdict form along with the GM Defendants presents no less than three separate conflicts with decisions of this Court and other

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[1] The District Court of Appeal's opinion is attached hereto at Appendix **A.**

district courts of appeal. Under article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court has jurisdiction to review such express and direct conflicts. The GM Defendants respectfully request the Court to exercise that jurisdiction and to grant review of the District Court of Appeal's holding in this case.

III. ARGUMENT

A. The District Court of Appeal's Decision Creates an Express and Direct Conflict with Ford Motor Co. v. D'Amario, 732 So. 2d 1143 (Fla. 2nd DCA 1999).

In holding that it was error to list the non-party drunk driver on the verdict form, the District Court of Appeal reasoned that because the drunk driver was an "intentional tort[feasor]," GM was not entitled to apportionment under Florida's comparative fault statute. Dist. Ct. Opin. at 6-8. Yet, just one month before the District Court of Appeal rendered its decision in Nash, the Second District Court of Appeal determined, under very similar facts, that apportionment between a manufacturer and a drunk driver in a crashworthiness case *is* appropriate.

In Ford Motor Co. v. D'Amario, 732 So. 2d 1143 (Fla. 2nd DCA 1999) presently pending before this Court as Case No. 95,881, a drunk driver collided with a tree, seriously injuring the car's passenger. The passenger sued Ford, alleging that a defect in the relay switch failed to prevent the fire that occurred after the crash. See id. at 1145. The jury returned a verdict for the defendant.

Like the plaintiffs in this case, the passenger in D'Amario challenged the jury verdict in part based on the introduction of evidence that the driver of the vehicle was drunk. The trial court granted the plaintiff a new trial based on the drunk driving evidence, as well as a juror misconduct issue. See id. at 1144.

On appeal, the Second District Court of Appeal reversed, holding that the drunk driver was properly on the verdict form. See id. at 1144-45. The court stated that "[o]n the facts of this crashworthiness case, the appellant [Ford] properly raised an apportionment defense." Id at 1145.

Accordingly, while non-party drunk drivers are allowed to be placed on verdict forms in product liability cases against automobile manufacturers in the Second District, they are not in the Third. While automobile manufacturers are entitled to apportion their liability with that of drunk drivers in the Second District, they are not in the Third. The decisions in Nash and D'Amario present this Court with exactly the type of direct conflict the discretionary review jurisdiction of this Court was intended to embrace. The GM Defendants respectfully request the Court to exercise that jurisdiction and resolve the conflict.

B. The District Court of Appeal's Decision Improperly Extends the Holding of Stellas v. Alamo Rent-a-Car, 702 So. 2d 232 (Fla. 1997), and Merrill Crossings Assoc. v. McDonald, 705 So. 2d 560 (Fla. 1997).

Not only may this Court review the District Court of Appeal's decision based on the express and direct conflict it created with the decision of another district court of appeal; it may also review the decision as an improper extension

of Supreme Court precedent. See Department of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987).[2]

The District Court of Appeal based its holding in Nash on two decisions of this Court, Stellas v. Alamo Rent-a-Car, 702 So. 2d 232 (Fla. 1997), and Merrill Crossings Assoc. v. McDonald, 705 So. 2d 560 (Fla. 1997). But the District Court of Appeal did not merely apply Stellas and Merrill Crossings to the set of facts at issue here. Rather, to support its decision that the drunk driver was improperly included on the verdict form, the court ***extended*** the holdings of the two cases, and in so doing, created a conflict between its decision and Supreme Court precedent.

In Merrill Crossings, the plaintiff, who had been attacked by an unknown assailant in the parking lot of a shopping mall, sued the mall and its tenant for failing to maintain reasonable security measures. Id. at **56**1. The issue on appeal was whether the defendants were entitled to apportion their fault with that of the unknown assailant, an intentional tortfeasor, under Florida's comparative fault statute. This Court determined that they were not because the action was "based upon an intentional tort," and therefore, excluded from the statute. Id. at 562-3 (discussing Fla. Stat. § 768.81(4), which provides that comparative fault does not apply to "any action based upon an intentional tort"). The Court reasoned that the negligent defendants should not be entitled to benefit from the comparative fault

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[2] In Anglin, this Court asserted conflict jurisdiction and quashed the decision in a case where the district court of appeal had read Supreme Court precedent " too broadly" and applied it to a materially different factual situation. Id. at 897-98. This is exactly what the District Court of Appeal did here.

statute because their actions "***g[a]ve rise to*** or permit[ted the] intentional tortfeasor's actions." Id. at *562* (emphasis added).

The Court's holding in Stellas also rested on the connection between the defendants' negligence and the intentional tortfeasor's actions. There, a rental car agency was not allowed to apportion its fault with that of a non-party intentional tortfeasor where the agency's actions in failing to warn plaintiffs of the dangers of driving in certain areas of Miami with a car clearly marked as a rental ***gave rise*** to plaintiffs' subsequent assault by the non-party intentional tortfeasor. 702 So. 2d at 233.

In stark contrast to Merrill Crossings and Stellas, the drunk driver's actions in this case were completely unconnected to GM's alleged negligence. It can hardly be said that GM's actions in designing a seat belt "gave rise" to or "permitted" the driver to get drunk, drive his car, and lose control such that he would cross the center line and plow into the Nash car. Thus, the District Court of Appeal did not simply apply Merrill Crossings and Stellas to analogous facts, but instead ***extended*** those holdings far beyond their intended reach.[3] The District

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[3] In addition, to extend the holding of Merrill Crossings and Stellas, the District Court of Appeal determined, without any precedent, *that* drunk driving is an intentional tort. The GM defendants submit that this conclusion is erroneous, and without it, the District Court of Appeal could not have made the leap to apply Merrill Crossings and Stellas to the Nash case.

Court of Appeal thereby created a conflict which this Court is entitled to review and resolve.

C. The District Court of Appeal's Decision is in Express and Direct Conflict with Smith v. State, 598 So. 2d 1063 (Fla. 1992).

The District Court of Appeal's application of Stellas and Merrill Crossings to Nash also creates an express and direct conflict with this Court's decision in Smith v. State, 598 So. 2d 1063 (Fla. 1992), and provides this Court with a third basis for jurisdiction. Stellas and Merrill Crossings were both decided ***after*** the trial in this case. To apply those cases retroactively, the District Court of Appeal relied on Lowe v. Price, 437 So. 2d 142, 144 (Fla. 1983), and its holding that "[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 the time of trial."

Nine years after Lowe was decided, however, this Court held in Smith v. State that to "benefit from the change in law, [a party] ***must have timely objected at trial. . . .***" 598 So. 2d at 1066 (emphasis added); see also Gray Mart. Inc. v. Fireman's Fund Ins. Co., 703 So. 2d 1170, 1173 (Fla. 3rd DCA 1997) (holding that plaintiff waived its right to rely on new law where it had failed to preserve the issue and noting that the party's obligation to preserve an issue is especially necessary where district courts of appeal are sharply divided on the issue); Clay v. Prudential Ins. Co., 670 So. 2d 1153, 1154-55 (Fla. 4th DCA 1996) (ruling that plaintiff waived her ability to rely on new jury instruction where she failed to object to the old jury instruction in the court below). Despite Smith's specific

requirement that a party must have preserved the issue for appeal in order to benefit from a change in law, the District Court of Appeal could point to no objection on the part of plaintiffs to the inclusion of the drunk driver on the verdict form during the trial. Indeed, plaintiffs admitted that the drunk driver ***belonged*** on the verdict form, see S.R. 112, and their argument on appeal, as the District Court of Appeal's opinion acknowledges, was only that "the evidence of the other driver's intoxication was too prejudicial and irrelevant as to General Motors' negligence. . . ." Dist. Ct. Opin. at ***6***. The District Court of Appeal reached out on its own to decide that the verdict form should not have contained the name of the drunk driver.

Because the plaintiffs in this case did not object to the inclusion of the drunk driver on the verdict form during the trial, they waived their right to rely on the "new" law established by Merrill Crossings and Stellas. The District Court of Appeal's decision to apply those cases notwithstanding and reverse the jury's verdict thus places it squarely in conflict with this Court's decision in Smith v. State.

Plaintiffs will likely argue that the trial court's inclusion of the drunk driver on the verdict form was not an independent basis for the District Court of Appeal's reversal; rather, that the District Court of Appeal was merely instructing the trial court not to include drunk driver's name on the verdict form on retrial. Such a claim ignores the plain language of the District Court of Appeal's opinion. The District Court of Appeal began its examination of the drunk driver issue with the

word, "[s]econd," as though it considered the discussion to follow as a second basis for its holding. Dist. Ct. Opin. at 6. Indeed, nowhere in that discussion did the District Court of Appeal use language typical of an advisory opinion. By contrast, the District Court of Appeal specifically used such "advisory" language when, in a footnote, it wrote: "To preclude other errors in the retrial, we consider the admissibility of Dr. Raddin's testimony as an expert witness." Dist. Ct. Opin. at **8.**

Furthermore, that the District Court of Appeal explained its application of Stellas and Merrill Crossings by relying on Lowe v. Price further indicates that the court intended its discussion of the drunk driver issue to serve as an independent basis for reversal. Quoting Lowe, the District Court of Appeal stated that "'[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 [the] time of trial.'" Dist. Ct. Opin. at *7* (emphasis added). Thus, the District Court of Appeal clearly determined that Stellas and Merrill Crossings ***governed*** the issue on appeal. Were the court only providing instructions to the trial court, retroactive application of Stellas and Merrill Crossings would not be at issue because the two decisions would apply automatically on retrial. Thus, the District Court of Appeal's decision with respect to the drunk driver was an independent basis for reversal which this Court is permitted to review.

But even if the District Court of Appeal was merely providing guidance for the retrial, the GM Defendants contend that this Court may still exercise its

jurisdiction over this conflict because it is one of great importance that is likely to be presented to Florida courts again -- indeed, as it now stands, in this very case upon retrial. See Pace v. King, 38 So. 2d 823, 827 (Fla. 1949) ("Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court, unless . . . they are affected with a public interest or are of moment to the profession, or unless some useful result will follow decision. Thus, abstract, moot, academic, or hypothetical questions will not be considered or decided, unless . . . it is clear that the litigation will be advanced by such consideration, or the question is of great public interest, or is likely to recur . . . ."); In re Matter of Patricia Dubreuil, 629 So.2d 819, 821-22 (Fla. 1993) (accepting jurisdiction over a case despite the fact that it was moot where the issue was "one of great public importance [and] capable of repetition"j. The District Court of Appeal's decision that the drunk driver was not allowed to appear on the verdict form permits an illogical and unfair result: where an allegedly defective vehicle is struck by a negligent but sober driver, the manufacturer of the vehicle is entitled to have the jury apportion fault to the striking driver; but where an allegedly defective vehicle is struck by a drunk driver, the manufacturer is not entitled to apportionment.[4]

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[4] Moreover, the District Court of Appeal's decision sweeps more broadly than automobile manufacturers. Consider a case in which the passenger in a vehicle struck by an uninsured, drunk driver sues, under a negligence theory, the driver of the car in which he was a passenger. The Court's decision prohibits that defendant from apportioning fault to the drunk driver. However, if the striking

There is no rational reason, either in law or policy, for such disparate treatment of parties in the Florida courts. The outcome not only flies in the face of the comparative fault statute and this Court's reasoning in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), it also absolves drunk drivers from personal responsibility. The GM Defendants respectfully request this Court to grant review and resolve this conflict.

IV. CONCLUSION

This Court has discretionary jurisdiction to review the District Court of Appeal's decision based on the express and direct conflicts it creates with decisions of this Court and other Florida courts on a number of points of law. The conflicts raise issues of great public importance in the State of Florida, and therefore, the GM Defendants urge the Court to exercise its discretionary jurisdiction and resolve the conflicts.

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driver were not drunk, the allegedly negligent driver could apportion fault. Like the consequences to the manufacturer in the example above, the outcome for the negligent driver is vastly different despite the fact that the driver's conduct was the same.

Respectfully submitted this 9th day of August, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **PETITIONERS' BRIEF ON JURISDICTION** on counsel for the plaintiffs, by mailing a copy of same first class mail, postage prepaid this 9th day of August, 1999 to the following address:

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

BRIAN W. NASH, etc., et al.,	**	
Appellants,	**	CASE NO. 97-2844
vs.	**	LOWER TRIBUNAL NO. 94-3392
GENERAL MOTORS CORPORATION, etc., et al.,	**	
Appellees.	**	

Opinion filed April 28, 1999.

An Appeal from the Circuit Court for Dade County, Leonard Rivkind, Judge.

Poses & Halpern; Cooper & Wolfe and Sharon Wolfe and Nancy C. Ciampa, for appellants.

King & Spalding and Chilton Davis Varner and S. Samuel Griffin and Halli-Cohn; Weissman, Dervishi, Shepherd, Borgo & Nordlund, for appellees.

Before JORGENSON, LEVY, and GERSTEN, JJ.

JORGENSON, Judge.

Appellant, Brian Nash, as the personal representative of the

Estate of Maria Nash, appeals a final judgment in favor of the defendants, General Motors, Inc., and Potamkin Chevrolet, Inc., and the denial of his motion for new trial in a products liability action. For the reasons that follow, we reverse.

One Sunday, Maria Nash was driving to church with her two children in the back seat of her 1990 Chevrolet Corsica. Suddenly, a drunk driver crossed the center line and crashed into Ms. Nash's car. Although she was wearing her seatbelt, Ms. Nash's head apparently struck the metal post that separates the windshield from the driver's door. According to the medical examiner, Ms. Nash later died as a result of her head injuries. In addition to the fatal head injury, Ms. Nash also suffered a ruptured spleen and a broken leg. Her two children survived. Ms. Nash's estate filed suit against the manufacturer of her vehicle, General Motors, on the theory that General Motors was strictly liable for a design defect which had been discovered in the seatbelt of the 1990 Chevrolet Corsica.

Following voir dire, the estate challenged a prospective juror for cause. Prospective juror Robles initially indicated that she harbored certain prejudices about personal injury lawsuits. For example, she explained how she was hospitalized in an intensive care unit due to an accident involving a hot water heater; however, despite her belief that there was a cause of action against the manufacturer, she felt compelled not to bring suit. Nevertheless,

her more pointed comments indicated that she was unable to follow Florida law which provides for money damages as compensation for someone's wrongful death. Juror Robles was quite clear that she disapproved of awarding money as a means by which to compensate someone for the loss of a loved one. Conversely, in response to the estate's counsel's attempt to determine whether the estate was "starting off with an even playing field or a strike against [it]" as to juror Robles, Robles responded that she was a "fair person.11 The estate's counsel continued this line of questioning:

> PLAINTIFF'S COUNSEL: I'm not suggesting that you're not a fair person, and I've asked if any of you have feelings and opinions about these things. Everybody has feelings and opinions. . . . I'm just trying to find out how they would play in terms of hearing a case of this magnitude.
>
> JUROR ROBLES: I think I could be fair.

The trial court denied the estate's challenge for cause of juror Robles and, as a result, required the estate to expend one of its peremptory strikes.

Before voir dire and again before the trial started, the estate asked the trial court to exclude evidence of the other driver's intoxication. The estate argued that such evidence would be too prejudicial in the jury's consideration of comparative fault. In ruling on this matter, the trial court relied on this court's decision in Stellas v. Alamo Rent-A-Car Inc., 673 So. 2d 940 (Fla. 3d DCA) (holding that a non-party intentional tortfeasor should appear on the verdict form so as to permit the jury to

apportion fault with the negligent tortfeasor), review qranted, 683 so. 2d 485 (Fla. 1996), and decision quashed by 702 So. 2d 232 (Fla. 1997). Accordingly, the trial court found that the jury "had a right to know all the facts" concerning someone who appears on the verdict form.

At trial, General Motors presented Dr. Raddin as an expert to contest the origin of Ms. Nash's head injury and to oppose the medical examiner's finding as to the cause of Ms. Nash's death. Dr. Raddin was a kinematics' expert who held dual degrees in engineering and medicine. As part of his medical education, which he completed in 1975, Dr. Raddin participated in a general surgery internship. Since medical school, however, Dr. Raddin's career has exclusively dealt with the health issues of pilots who are exposed to unusual stress environments'associated with flight and the study of how the human body responds to various impacts. Based on his investigation and understanding of kinematics, Dr. Raddin testified that he believed that Ms. Nash's head did not strike the metal post adjacent to the windshield, but instead projected out the driver's window and struck the hood of the other car. The trial court allowed Dr. Raddin to further testify that he believed that the cause of Ms. Nash's death was not the trauma to her head, but

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[1] "[A] branch of dynamics that deals with aspects of motion (as acceleration and velocity) apart from considerations of mass and force." Webster's Third New International Dictionary 1243 (1986).

rather a loss of blood from her ruptured spleen and broken leg.

First, the estate argues that the' trial court erred by refusing to excuse prospective juror Robles for cause. It contends that juror Robles was not sufficiently rehabilitated after reasonable doubt as to impartiality was raised. We agree. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused. See Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922 (Fla. 4th DCA 1988); Club West v. Tropigas of Florida, Inc., 514 so. 2d 426 (Fla. 3d DCA 1987). Here, juror Robles' clear reservations about awarding money damages for the death of a loved one, let alone her apparent disapproval of personal injury lawsuits, was sufficient to raise a reasonable doubt as to her impartiality and ability to follow the law.

Naturally, most everyone considers themselves to be a "fair person." Juror Robles' statement that she is a "fair person" may generally describe her personal philosophy, but was far from sufficient to demonstrate her ability and/or willingness to set aside-her biases and render a fair and impartial verdict in the case before her. See Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) ; Goldenberg v. Regional Import & Export Trucking Co. Inc., 674 So. 2d 761, 764 (Fla. 4th DCA 1996).

Similarly, juror Robles' follow-up statement, "I think I could be fair," also fails. Though it approaches the issue, that statement, in light of her other remarks that certainly cast doubt as to her impartiality, does not unequivocally indicate that she could set aside her feelings and decide the case solely on the evidence submitted. Moreover, "[c]lose cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." Goldenberg, 674 So. 2d at 764. See also Coggins v. State, 677 So. 2d 926 (Fla. 3d DCA 1996). Accordingly, we hold that the trial court erred by failing to excuse juror Robles for cause, thereby potentially jeopardizing the impartiality of the jury and causing the plaintiff to use a peremptory challenge that he later needed in order to strike an objectionable juror.

Second, the estate argues that the evidence of the other driver's intoxication was too prejudicial and irrelevant as to General Motor's 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 Crossinss Assoc. v. Wal-Mart Stores, Inc., 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.[2] 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 Rav, 51 B.R. 236 (B.A.P. 9th Cir. 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

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[2] The record reflects that the driver of the other car had a blood alcohol content of .15 percent at 6:07 p.m. and .14 percent at 7:21 p.m. Thus, at the time of the accident, approximately 5:00 p.m., the other driver was clearly intoxicated as a matter of law. See § 316.193(1)(b), Fla. Stat, (1995).

General Motors, the negligent tortfeasor in a products liability action.[3]

Reversed and remanded for a new trial.

GERSTEN, J., concurs.

LEVY, J., concurs in result only.

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[3] This also moots the estate's complaint regarding the special jury instructions granted General Motors on the issue of comparative fault.

To preclude other errors in the retrial, we consider the admissibility of Dr. Raddin's testimony as an expert witness. We agree with the estate in that Dr. Raddin was not competent to testify as to the cause of Ms. Nash's death; however, Dr. Raddin was indeed competent to testify as to injury causation. See, e.g., Goodyear Tire & Rubber Co. v. Ross, 660 So. 2d 1109 (Fla. 4th DCA 1995) ; Smithson v. V.M.S. Realty, Inc., 536 So. 2d 260 (Fla. 3d DCA 1989) ; United Technologies Communications Co. v. Industrial Risk Insurers, 501 So. 2d 46 (Fla. 3d DCA 1987).

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

WEDNESDAY, JUNE 23, 1999

BRIAN W. NASH, etc., et al.,

Appellants,

vs.

GENERAL MOTORS CORPORATION, etc., et al.,

Appellees.

** CASE NO. 97-2844

** LOWER TRIBUNAL NO. 94-3392

Upon consideration, appellees' motion for rehearing and/or certification of a question of great importance is hereby denied. JORGENSON, LEVY and GERSTEN, JJ., concur. Appellees' motion for rehearing en banc is denied.

A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of Appeal, Third District

BY _____
Deputy Clerk

CC: Brian Dervish
Marc Cooper
Halli Cohn
Nancy C. Ciampa

Mark Poses
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