ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,139

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

Petitioners,

VS.

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

Respondents.
_____/

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

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Plaintiffs sued General Motors ("GM") and Potamkin Chevrolet (together, "the GM Defendants") for an alleged automotive design defect in the Circuit Court for Miami-Dade County, Florida. They asserted claims for negligence, strict liability, and breach of warranty arising out of the death of Maria Nash in an automobile accident. [R. 2-21] .

After an eight-day trial, the jury returned a verdict in favor of the GM Defendants. [T. 1519]. The jury was unanimous in its opinion that the seat belt manufactured by GM did not contain a defect which was the legal cause of enhanced injuries to Mrs. Nash. [T. 1519]. The court entered judgment in favor of the GM Defendants on May 9, 1997. [R. 469-70].

Plaintiffs appealed the judgment in favor of the GM Defendants to the Third District Court of Appeal. On June 23, 1999, the district court overturned the jury's verdict and remanded the case for a new trial on the basis of two perceived errors. Nash v. General Motors Corp., 734 **So.** 2d **437** (Fla. 3rd DCA 1999). The district court denied the GM Defendants' subsequent motion for rehearing, rehearing en banc, and/or for certification of a question of great importance.

II. STATEMENT OF FACTS

A. The Accident

On March 8, 1992, Charles Chatfield, legally drunk at 5:00 in the afternoon, was driving his 1983 Cadillac near Joe Robbie Stadium in Miami. He lost command of his vehicle and swerved across the center line. Maria Nash was driving her 1990 Chevrolet Corsica in the opposite direction, directly in Chatfield's path. Out of control, Chatfield slammed into the left front of Mrs. Nash's car at approximately 35 miles per hour. [T. 109-11].

As a result of the accident, Mrs. Nash suffered a shattered spleen, a closed head injury, a fractured left femur, an injured kidney, and a dislocated elbow. [T. 1107-11].[1] The spleen and femur injuries resulted in massive blood loss. [T. 1110-1117]. Although surgery was performed to repair Mrs. Nash's internal injuries, her condition never stabilized. [T. 1118-24]. She died at approximately 9:20 p.m., a little more than four hours after the collision. [T. 11241

Plaintiffs filed suit against the GM Defendants, alleging that the driver's seat belt in the 1990 Chevrolet Corsica was defective and caused Mrs. Nash's death. [R. 2-21]. Plaintiffs did not sue Charles Chatfield, the drunk driver.

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[1] Mrs. Nash's two sons, aged 7 and 12, were in the rear seat. [T. 72]. Though both were slightly injured, neither made a claim against the GM defendants. Plaintiff Brian Nash, Sr., was not in the car. He and Mrs. Nash were separated at the time of the accident. [T. 899].

B. The Trial

1. Jury Selection

Following voir dire, plaintiffs moved to strike a prospective juror for cause based on comments they viewed as prejudicial to their case. [S.R. 103-06]. Juror Robles had voiced concerns over misplaced responsibility and unwarranted damages awards in certain personal injury actions of which she was aware. After the court heard Juror Robles affirm she could decide the case on the facts and law presented to her at trial, the trial court declined to strike her for cause. Thereafter, plaintiffs used one of their peremptory strikes to remove Juror Robles from the panel. **[S.R.** 106, 116].

2. The Evidence Presented

At trial, plaintiffs contended Mrs. Nash received a fatal head injury from striking the driver's side windshield post (known as the A-pillar). [T. 266-67, 307]. They argued the only reason Mrs. Nash came in contact with the A-pillar was because her shoulder belt functioned improperly.[2] The GM Defendants denied that the seat belt was defective, that Mrs. Nash received her head injury from

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[2] The GM Defendants and plaintiffs presented conflicting evidence regarding whether Mrs. Nash was even wearing her seat belt at the time of the accident. Since the jury specifically found that Mrs. Nash was wearing her belt, and since the verdict in favor of the GM Defendants did not turn on this issue, the GM Defendants have foregone reciting the considerable evidence which supported their theory that Mrs. Nash was unbelted.

striking anything in her vehicle (as opposed to Chatfield's vehicle), and that the head injury actually caused her death. Thus, the central issues in the case were: (1) whether the seat belt was defective; *(2)* how Mrs. Nash received her head injuries; and **(3)** which of her injuries caused Mrs. Nash to die.

a. The Seat Belt

Mrs. Nash's 1990 Corsica was manufactured shortly after the federal government began requiring a phase-in of "passive" restraints, i.e., restraints which would operate without any action by the occupant(s). See 49 C.F.R. § 571 (1987). The front seat belts in Mrs. Nash's car were mounted on the doors. They could remain latched and expand by virtue of the door-mounted retractors, even when the front seat occupants were entering or exiting the vehicle.

Plaintiffs' allegations about a defect in the seat belt stemmed from a recall conducted by General Motors on 1990 Corsicas and similar vehicles. General Motors voluntarily initiated the recall after it determined that, in a small percentage of this kind of vehicle, the pendulum base (part of the locking mechanism) in the retractor for the shoulder belt could break, preventing the retractor from locking upon sudden deceleration (as in a collision). [T. 1222-23].

General Motors had analyzed a sample of 141 similar shoulder belt retractors retrieved from other Corsicas and Chevrolet Berettas in order to study the scope and the particulars of the problem and determine whether a recall was

appropriate. [T. 418]. In approximately six percent of those retractors, General Motors discovered that the high-density plastic component from which the locking pendulum was suspended had broken. [T. 13331. The fracture allowed the pendulum to drop out of place so that it was no longer able to lock the retractor. [T. 13341. An additional 18 percent of the sample had pendulum platforms which exhibited a microscopic, hairline crack -- but no fracture or break. [T. 1227-28]. Significantly, General Motors determined that it was only when the plastic actually broke off that the retractor could no longer lock up; those with the hairline crack performed as designed, continuing to lock up instantly and properly. [T. 1226]. The remainder of the sample, or 76 percent of the total, showed neither cracks nor fractures. [T. 1227].

In an abundance of caution, General Motors decided to recall all vehicles of this type to replace the subject retractor, even though the problem was demonstrated only in a small percentage of the relevant vehicles. Mrs. Nash received her recall notice on or about March 6, 1992, two days before the accident. [T. 883].

At trial, the GM Defendants challenged the relevance of the recall in this case by showing that the pendulum base in the retractor of Mrs. Nash's seat belt was ***not*** broken. [T. 1218]. Though the pendulum base exhibited an almost invisible hairline crack in part of the plastic, the components of the lock-up

mechanism remained properly aligned within specifications and the retractor worked properly. [T. 1218]. In a courtroom demonstration, the GM Defendants showed that today, even after the accident, the retractor functions exactly as it was designed, locking **up** instantly and completely when subjected to deceleration. [T. 1220-21].

b. Where Mrs. Nash ***Struck*** *Her Head*

The gravamen of plaintiffs' case was that the Corsica was not "crashworthy." This theory required a finding that plaintiffs' injuries were "enhanced" by the manufacturer's defective design or manufacture above and beyond what would otherwise would have occurred without the defect. See Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976). Because the parties were in agreement that even a properly working seat belt would not have prevented Mrs. Nash's spleen, femur, elbow, and kidney injuries, her head injury was the only possibility for the enhancement plaintiffs had to show. The parties disagreed, however, how Mrs. Nash received her head injury.

Plaintiffs' experts all testified they believed the head injury was caused by contact with the A-pillar. [T. 168,306-07, 568-69]. In contrast, the GM Defendants' expert, Dr. James Raddin, testified the force of the intruding Cadillac actually moved the A-pillar out of the path of Mrs. Nash's head. He concluded Mrs. Nash's head struck the Cadillac's hood as it tore into the occupant

compartment of the Corsica. [T. 1098]. Because of the lateral (sideways) nature of the accident, Dr. Raddin testified, Mrs. Nash would have suffered her head injury whether or not she was belted and whether or not her belt functioned properly. [T. 1099-1100].

c. *Cause of Death*

Finally, the parties also disagreed about the cause of Mrs. Nash's death. Plaintiffs offered the testimony of Dr. Charles Wetli and Dr. Joseph Burton that the head injury was the fatal injury. [T. 168, 579].[3] Based on medical records reflecting Mrs. Nash's post-accident medical treatment, the GM Defendants' biomechanic, Dr. Raddin, testified that severe loss of blood associated with the shattered spleen and fractured femur caused Mrs. Nash's death. [T. 1109-15].

3. The Verdict

After two weeks of trial, which featured the testimony of nine experts and a number of fact witnesses, the case was submitted to the jury. The plaintiffs' sole theory was that the GM Defendants were strictly liable for design defect in the driver's seat belt system in the 1990 Corsica. [T. 1257].

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[3] Before becoming involved in the litigation as an expert witness, Dr. Wetli was the medical examiner in Dade County. He had signed the Nash autopsy report indicating only that the cause of death was "multiple blunt impact injuries." [T. 225]. The autopsy report did not identify the brain or head injury as the singular or fatal cause. [T. 225-26].

The jury rendered its verdict in just two hours. After determining that Mrs. Nash was wearing her seat belt at the time of the accident, [R. 469-70, T. 15 19], the jury was asked whether the GM Defendants had placed Mrs. Nash's Corsica on the market with a defect which legally caused enhanced injuries to Maria Nash and resulted in her death. The jury answered that the GM Defendants had not. [T. 469-70, T. 15 19]. The jurors were polled and all agreed that this verdict was consistent with their individual votes. [T. 15 19].

The jury's determination mooted the remaining questions on the verdict form, including the determination of whether a percentage of fault should be apportioned under Florida's comparative fault statute to Charles Chatfield, the non-party drunk driver who caused the accident. Without a defect for which the GM Defendants could be held responsible, it did not matter the amount to which Chatfield contributed to the injuries suffered by Mrs. Nash.

C. **The Appeal**

Plaintiffs appealed the judgment entered on the jury verdict in the GM Defendants' favor to the Third District Court of Appeal. Plaintiffs raised four perceived errors committed by the trial court: (1) the admission of undisputed evidence that the striking driver, Chatfield, was drunk: (2) the giving of a special instruction on causation, which accurately described the law in a "second collision" case such as this one; (3) the admission of the testimony of Dr. Raddin, a

biomechanical expert, on Mrs. Nash's cause of death; and (4) the failure to strike for cause juror Robles, whom the plaintiffs then excused from the jury with a peremptory strike.

The district court reversed the judgment on two bases. [4] First, the district court held that the trial court erred by failing to excuse Juror Robles for cause despite her statement that she said she could be fair and follow the law. See Nash., 734 So. 2d at 440. Second, the court held the trial court erred in allowing the drunk driver, Charles Chatfield, to appear on the verdict form, an issue that was not even raised by plaintiffs in their appeal. See id. at 440-4 1. [5] The district court

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[4] Although the facts regarding the accident and the cause of Mrs. Nash's injuries were disputed by the parties, the district court, in describing the issues, accepted the plaintiffs' version as uncontested. For example, the district court stated: "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." Nash, 734 So. 2d at 438-39. Each of these "facts" was disputed by the GM Defendants.

[5] In a footnote, "[t]o preclude other errors in the retrial," the district court also stated that the GM Defendants' expert, Dr. James Raddin, was not competent to testify as to the cause of Mrs. Nash's death. See 734 So. 2d at 441 n.3. This was not a ground for reversal, but merely an advisory finding. See id. As the GM Defendants argued on appeal, Dr. Raddin is a medical doctor with 25 years of experience in analyzing the cause of injuries. [T. 1052-70]. His testimony was based on his understanding of human tolerances and his review of the medical records showing the extent of Mrs. Nash's internal injuries and the amount of blood she had lost. [T. 1124-1125].

Whether a witness is qualified to give an expert opinion is a question peculiarly for the trial court, and a trial court's ruling should not be reversed on (continued)

denied the GM Defendants' subsequent motion for rehearing, rehearing en banc, and/or certification of a question of great importance.

SUMMARY OF ARGUMENT

This Court has recognized that, under Florida law, a jury verdict should be given great deference on appeal. See Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982); see also Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109, 110 (Fla. 3rd DCA 1992) ("[A] verdict is clothed with a presumption of regularity and is not to be disturbed if supported by the evidence."); Sweeney v. Wiggins, 350 So. 2d 536, 537 (Fla. 3rd DCA 1977) (stating that a verdict in a personal injury action arrives in the appellate court "with a presumption of correctness"). Despite this required deference, the district court reversed a unanimous jury verdict, arrived at in slightly over two hours, after two weeks of trial. The district court based its reversal on two grounds:

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appeal absent a clear showing of error. See Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). The trial court's ruling here that Dr. Raddin was qualified to testify with respect to the cause of Mrs. Nash's death was correct. See Dean Witter Reynolds, Inc. v. Cichon, 692 So. 2d 3 13, 3 15 (Fla. 5th DCA 1997) (ruling that defendant's expert, as vice president of an insurance agency, was qualified to give his opinion on the value of an annuity because he possessed specialized knowledge, experience, training, and education in the area of annuities, and that plaintiffs arguments regarding expert's qualifications would have been more appropriately directed to the weight of the jury should have given the expert's testimony than its admissibility). Thus, if this case must be retried, the GM Defendants request that this Court direct that they are entitled to present the testimony of Dr. Raddin on the cause of Mrs. Nash's death during that retrial.

(1) Improper placement of Charles Chatfield, the drunk driver who caused the accident, on the verdict form despite that the jury never even reached the issue of apportionment;

(2) Failure to excuse for cause a juror who, after exhaustive questioning, stated she could be fair and follow the law and apply it to the facts, and who, because plaintiffs then struck her, did not even serve.

In deciding the first ground for reversal, the district court improperly extended this Court's holding in Merrill Crossings Association v. McDonald, 705 So. 2d 560 (Fla. 1997). That extension threatens the policy embodied in Florida's comparative fault statute and Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), and removes personal responsibility for drunk driving. The decision permits an illogical and unfair result. On the one hand, where an allegedly defective vehicle is struck by a negligent but sober driver, Fabre controls, and the manufacturer of the vehicle is entitled to have the jury apportion fault to the striking driver. Under the illogical rule announced by the district court, however, where an allegedly defective vehicle is struck by a drunk (as opposed to merely negligent) driver, the manufacturer is ***not*** entitled to apportionment.

Respectfully, and as we argue in more detail below, this makes neither good law, good policy, nor good sense. Moreover, the district court's action in overturning the jury's verdict on this issue, without providing the GM Defendants

any opportunity to present the arguments it raises in this brief, was fundamentally unfair.

The second ground required the district court to substitute its judgment as to the credibility of a prospective juror, in preference to that of the trial court, which actually saw and heard the challenged juror. The court's decision cannot be squared with Florida law, and cannot be the basis for the reversal of a jury's verdict.

Based on these misapplications of law, the GM Defendants respectfully request this Court to vacate the district court's opinion and to reinstate the jury's verdict in favor of the GM Defendants.

ARGUMENT

I. THE COURT ERRED IN REVERSING THE JURY VERDICT BASED ON THE FACT THAT CHARLES CHATFIELD WAS INCLUDED ON THE VERDICT FORM.

As a basis for its reversal of the jury verdict in the court below, the district court held that 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." See Nash, 734 So. 2d at 441. The GM Defendants respectfully contend that the district court's holding was wrong for two reasons. First, the two Supreme Court decisions on which the district court's holding was based, Stellas v. Alamo Rent-A-Car, Inc., 702 So. 2d 232 (Fla. 1997), and Merrill Crossings

Association v. McDonald, 705 So. 2d 560 (Fla. 1997), are not controlling under the circumstances of this case. Second, the jury never reached the issue of comparative fault, thus rendering harmless any error in including the drunk driver's name on the verdict form. In fact, the plaintiffs specifically admitted that any error in Chatfield's inclusion on the verdict form was ***not*** properly before the district court, so it was not even briefed or argued on appeal. See Brief of Appellants at 25 n. 16 (('Since the jury did not reach this issue [of apportionment] on the verdict form, Nash will not argue it in this appeal.").[6]

A. This Court's Decisions in Merrill Crossings and Stellas Do Not Require Exclusion of a Non-Party Drunk Driver from the Verdict Form.

1. Joint and Several Liability is Inappropriate Where the GM Defendant's Alleged Negligence Did Not "Give Rise" to Chatfield's Actions.

a. Florida 's Comparative Fault Statute and the Exception for Cases "'Based Upon an Intentional Tort. "

It is a fundamental proposition of Florida law that a defendant should pay only for his or her own wrongdoing, and not for that of others. Florida's comparative fault statute provides that judgment may be entered against a liable party for noneconomic damages only "on the basis of such party's percentage of

[6] For the Court's convenience, the GM Defendants have included relevant pages from the Brief of Appellants in the Appendix to this brief at tab 2.

fault." Fla. Stat. § 768.81(3). In 1993, this Court interpreted the statute to mean that a defendant in an action must pay "only in proportion to the percentage of fault by which that defendant contributed to the accident." Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993). Accordingly, the Court ruled, the negligent defendant in that case was entitled to include the plaintiffs husband, a non-party, on the verdict form, since his negligence contributed to her injuries. The Court held this was necessary in order that the defendant's fault, and therefore liability, be properly apportioned. See id. at 1186.

In passing the comparative fault statute in 1986 as part of its Tort Reform and Insurance Act, the Florida legislature abolished joint and several liability because the doctrine unfairly required defendants to pay more than their share of fault, contributing to a crisis of insurance availability and affordability. See Fabre, 623 So. 2d at 1185. The Court observed this could even require that non-parties be included in the apportionment:

> By eliminating joint and several liability through the enactment of section 768.8 1(3), the legislature decided that for purposes of noneconomic damages a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability of another defendant is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit. Liability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants.

Id. at 1186 (emphasis added).

The legislature made a policy decision, however, to exclude from the ambit of the statute any action that is "based upon an intentional tort." Fla. Stat. § 768.81(4)(a), (b). In recognition of the principle that intentional tortfeasors should not be entitled to receive the benefits of comparative fault, Florida courts have interpreted that language to preclude such intentional tortfeasors from limiting their liability by looking to the actions of others who contributed to an accident. See, e.g., Barton Protective Servs., Inc. v. Faber, 24 F.L. W. D 1700, 1999 Fla. App. LEXIS 9859, at * 18-22 (Fla. 4th DCA July 21, 1999); Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995).

In Merrill Crossings Associates v. McDonald, 705 So. 2d 560, a case relied on by the district court here, this Court took the exception for intentional torts a step further. In Merrill Crossings -- a case alleging negligence against the named defendants -- the court held that, in certain circumstances, a ***negligent defendant*** cannot look to an unnamed, intentional tortfeasor to limit his liability. The plaintiff, who had been attacked in the parking lot of a shopping mall, sued the mall and its tenant for failing to maintain reasonable security measures. Id. at 560. At trial, the court ruled that the defendants were not entitled to have the unknown assailant included on the verdict form. See id. at 56 1. The district court agreed,

but certified the following narrow question of premises liability to the Supreme Court as a matter of great public importance:

> Is an action alleging the negligence of the defendants in failing to employ reasonable security measures, with said omission ***resulting in*** an intentional, criminal act being perpetrated upon the plaintiff by a non-party on property controlled by the defendants, an "action based upon an intentional tort" pursuant to section 768.8 1(4)(b), Florida Statutes (1993), so that the doctrine of joint and several liability applies?

Id. at 560-61 (emphasis added). This Court answered the certified question in the affirmative and ruled that the trial court was correct to exclude the assailant from the verdict form. See id. at 562.

b. The Holding of Merrill Crossings is Limited to Cases Where the Negligent Defendant's Actions "Gave Rise" to the Intentional Tort.

The logic of the Court's decision, and therefore its inherent limitation, is evident from a closer examination of the case. In Merrill Crossings, the negligence of Wal-Mart and Merrill Crossings was a necessary precondition to the assailant's attack. That negligence facilitated and enabled the attack. The two were directly linked: without the negligent security, the attack would never have happened. In other words, the defendants' negligence "***g[a]ve*** rise ***to*** or permit[ted] an intentional tortfeasor's actions." Id. at 562 (emphasis added). Based on this interwoven factual context, the Merrill Crossings Court determined that the

substance of the action at issue made it a case of intentional tort (battery) rather than negligence, thereby rendering inapplicable the comparative fault statute, Id. at 563. In so doing, the Court gave effect to the public policy that negligent tortfeasors should not "be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a ***foreseeable result*** of their negligence." Id. at 562 (emphasis added).

Heeding the Court's reasoning, cases following Merrill Crossings have limited the reach of the exception for intentional torts to those cases in which the actions of a negligent defendant directly "gave rise" to a third party's intentional act. For example, in Stellas v. Alamo Rent-A-Car, 702 So. 2d 232 (Fla. 1997), in which tourists sued a car rental agency for failing to warn them of the dangers of driving in certain areas of Miami with a car clearly marked as a rental after they were assaulted and robbed in their rental car, this Court held that the assailant should not go on the verdict form in "this type of action," i.e., where the defendant's negligence facilitated the intentional tort. See id. at 233; see also Days Inn of Am., Inc. v. Maus, 701 So. 2d 350 (Fla. 1st DCA 1997) (affirming trial court's decision not to include intentional tortfeasor on verdict form where defendant hotel's negligence in failing to employ reasonable safety measures resulted in intentional criminal act being perpetrated against the plaintiff); Slawson v. Fast Food Enters., 671 So. 2d 255 (Fla. 4th DCA 1996) (ruling that defendant, a

restaurant charged with failing to protect a patron from a reasonably foreseeable intentional assault, was not entitled to reduce its liability by the intentional conduct of the assailant).

Courts in other jurisdictions with comparative fault schemes similar to that of Florida have likewise recognized that the exception for intentional torts applies only where the negligent defendant's actions gave rise to the intentional tort, See, e.g., McAvey v. Lee, 58 F. Supp. 2d 724,729 (E.D. La. 1998) ("If the intentional tortfeasor's conduct is within the ambit of protection encompassed by the duty owed by the negligent tortfeasor, it is inappropriate to instruct the jury to quantify the fault of the intentional tortfeasor."); Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997) ("[T]he conduct of a negligent defendant should not be compared with the intentional conduct of another in determining comparative fault where the intentional conduct is the foreseeable risk created by the negligent tortfeasor."); Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587 (Kan. 199 1) ("Negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent.").

Like this Court in Merrill Crossings, those courts based the limited exception for cases involving intentional torts on the public policy that a negligent defendant should not be permitted to reduce its fault by relying on an intentional tort it permitted (or encouraged) to occur. See, e.g., Turner, 957 S.W.2d at 821-22;

see also Sisk, Gregory C., Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 Puget Sound L. Rev. 1, 30-3 1 (1992) ("Not all cases involving the combination of negligence and intentional misconduct are alike. There may be exceptional circumstances where, by reason of the unique nature of the duty allegedly breached, it would be inappropriate to allocate fault between a party who ***negligently exposed*** another to injury from intentional harm and the intentional wrongdoer. . . . In that instance, the distinctive nature of the duty of care -- to prevent precisely such intentional wrongdoing -- is such that the negligent actor should not escape responsibility to the plaintiff by shifting the major share of the blame to the intentional wrongdoer.") (emphasis added). Where that policy is not relevant, however, i.e., where there is nothing the negligent defendant could reasonably have done to prevent the intentional tort, there is no reason to apply the exception, and the principles of comparative fault should prevail.

c. The District Court's Extension of the Holding in Merrill Crossings to Cases Where the Allegedly Negligent Defendant's Actions Did Not "Give Rise" to the Intentional Tort Produces an Anomalous Result in this Case that is Contrary to Public Policy and Negligent Defendants ' Rights of Equal Protection.

The principle of comparative fault should prevail in this case because there is nothing the GM Defendants could reasonably have done to prevent Chatfield's

drunk driving and the resulting accident. In stark contrast to Merrill Crossings and the cases following it, Chatfield's actions here were divorced from the GM Defendant's alleged liability. No one can say GM's conduct in designing a seat belt this jury found nondefective "gave rise" to or "permitted" Charles Chatfield to get drunk, drive his car, and lose control such that he would cross a median and plow into the Nash car. Therefore, this case is more akin to Fabre, where the harm resulted from the fortuitous combination of the actions of two tortfeasors, than to Merrill Crossings, where the actions of the defendant "gave rise" to the action of the assailant. No public policy would be served in this case by saying a drunk driver should be excluded from the verdict form, while a simply negligent driver would correctly appear on the same form.

Thus, the district court here did not simply apply Merrill Crossings and Stellas to analogous facts, but instead extended those holdings far beyond their intended reach. In doing so, the district court produced an anomalous result and one ***contrary*** to public policy. Where a GM car is struck by a driver with a blood alcohol level of. 15 (Chatfield's level here), GM may not include the drunk driver on the verdict form. Yet, where the driver's blood alcohol is much lower --.07 or

indeed zero --[7] GM may include the striking driver on the verdict form. This is not only bad public policy; it cannot be squared with common sense or fairness. Although GM has done nothing different in the two scenarios, the consequences to it are vastly different. In scenario one, if the jury found a defect, GM would be liable for the entire judgment. In scenario two, if the jury found a defect, GM would be liable only for the extent of its own fault. This outcome flies in the face of the comparative fault statute and this Court's reasoning in Fabre.

Not only does the decision treat manufacturers differently, it actually sweeps more broadly. 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 driver were not drunk, the allegedly negligent driver could apportion fault. Like the consequences to GM in the example above, the outcome for the negligent driver is vastly different despite the fact that the driver's conduct was the same. There is no

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[7] Under Fla. Stat. § 3 16.193(1)(b), a person is guilty of the offense of driving under the influence if he has a blood-alcohol level of .08 or more grams of alcohol per 100 milliliters of blood.

rational reason for such disparate treatment of parties in the Florida courts.* Without such a rational basis for the disparate treatment, the decision also raises serious constitutional concerns. See U.S. Const. amend. XIV; Fla. Const. Art. 1, § 2; see also Eisenstadt v. Baird, 405 U.S. 438,447 (1972) ("The Equal Protection Clause of [the Fourteenth Amendment] does . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412,415 (1920)); State v. Lee, 356 So. 2d 276,280 (Fla. 1978) (holding that statute that divided drivers of automobiles in Florida into classes of "good" and "bad" drivers for purposes of a "good drivers' incentive fund" violated United States and Florida Constitutions

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[8] The Florida Legislature has determined that public policy is best served by punishing those who drink and drive. Fla. Stat. § 768.36 prevents a plaintiff from recovery in ***any*** civil action if he or she is legally intoxicated and a jury finds the plaintiff more than fifty percent (50%) at fault. Clearly, the legislature assumes that it is appropriate to compare fault between a drunk driver and a manufacturer when the drunk driver is a plaintiff in a product liability suit.

The Nash holding is in direct contravention of this idea as a manufacturer cannot compare fault with a striking drunk driver who contributes to the plaintiffs injuries. The manufacturer's actions and the vehicle design are the same in both situations, but the outcomes are vastly different.

because it lacked a rational basis). Indeed, scholars have identified this very problem with the intentional tort exception to comparative fault and, therefore, have recommended that courts limit the exception to cases in which the negligent defendant had a specific duty to prevent the very actions of the intentional tortfeasors. See Sisk, 16 Puget Sound L. Rev. at 28 ("It may be a denial of equal protection to arbitrarily apply the modification of joint and several liability to all negligent tortfeasors except those, who through no action of their own, happen to be found at fault together with another defendant who independently engaged in intentional misconduct."); id. at 3 1-34.

Public policy and negligent defendants' guarantees of equal protection require that the exception for intentional torts be limited to cases in which the negligent defendant's actions give rise to the intentional tort. This is the limit this Court first recognized in Merrill Crossings, and that it should affirm today.

2. There Is No Precedent That Chatfield's Drunk Driving, Under These Circumstances, Should Be Considered an Intentional Tort.

Even should this Court determine it appropriate to extend the holding of Merrill Crossings to cases in which the allegedly negligent act combines fortuitously with an intentional act, the comparative fault statute remains applicable here. Under Florida law, Chatfield's action in causing injury while

driving intoxicated may have been reckless, but there is no precedent establishing that it was intentionally tortious, so as to invalidate the comparative fault statute.

Lest there be any doubt, the GM Defendants wholly agree that drunk driving is terrible, destructive conduct. But, notwithstanding the reckless nature of Chatfield's actions, there is no authority in Florida that such conduct is an "intentional" tort so as to invalidate the comparative fault statute.

The district court cited Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976), for the proposition that the act of causing injury from driving a car on public roadways while intoxicated is an intentional tort. See 734 So. 2d at 44 1-42. But Ingram never equated drinking and driving with an intentional tort. The issue in Ingram was whether a jury should be allowed to consider an award of punitive damages where negligence is "coupled with intoxication." 340 So. 2d at 923. The Court held that punitive damages are awardable where the defendant is voluntarily intoxicated because such conduct "evinces, without more, a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages." Id. at 924. Thus, the Court merely found that driving while intoxicated could be considered reckless for purposes of awarding punitive damages, not that it constitutes an intentional tort.

Under Florida law, an intentional tort is an act that the perpetrator "design[s] to result in injury or death," Kenann & Sons Demolition v. Di Paulo, 653 So. 2d

1130 (Fla. 4th DCA 1995), or conduct which is "substantially certain to result in injury or death." General Motors Acceptance Corp. v. David, 632 So. 2d 123, 125 (Fla. 1 st DCA 1994); see also Restatement (Second) of Torts § 8A (1965) (stating that intentional torts generally require that the actor desire to cause the consequences of the act, not simply the act itself). Even conduct that is considered grossly negligent or even reckless is not intentionally tortious. See Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882, 884 (Fla. 1986) ("The mere knowledge and appreciation of risk -- something short of substantial certainty -- is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but is not an intentional wrong.") (citing Prosser & Keaton on Torts 36 (5th ed.)). Therefore, Ingram cannot be relied upon for the proposition that causing an accident while driving under the influence, per se, constitutes an intentional tort.[9]

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[9] Furthermore, the district court's reliance on two bankruptcy cases for the same proposition is misplaced. See Nash, 734 So. 2d at 44 1. The issue in both cases was whether 11 U.S.C. § 532(a)(6) of the Bankruptcy Code, which disallows dischargeability for debts "involving willful and malicious injury by the debtor," included those debts resulting from voluntary intoxication. While the courts held that such debts may not be nondischargeable under § 532(a)(6) in certain situations, neither case held that causing an injury while driving drunk constitutes an intentional tort.

(continued)

Until now, no court in Florida has held that causing injury while driving under the influence of alcohol constitutes an intentional tort.[10] On the other hand, courts in other jurisdictions have determined that such action does ***not*** constitute an intentional act without further proof of intent to cause the specific accident. For example, in Booker, Inc. v. Morrill, 639 N.E.2d 358 (Ind. Ct. App. 1994), a dram shop liability case, the court focused "not on the voluntariness of [the driver's] drinking and driving" but on whether his actions in driving off the road were intentional. Id. at 362. In Booker, the defendant had argued that Indiana's

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Moreover, these cases were superseded by the United States Supreme Court in 1998. Congress amended the Bankruptcy Code in 1990 to exempt debts for death or injury caused by a debtor's operation of a motor vehicle "if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." 11 U.S.C. § 523(a)(9). Eight years later, in Kawaauhau v. Geiger, 523 U.S. 57 (1998), the Supreme Court specifically stated that nondischargeability under § 532(a)(6) requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Id. at 6 1. The Court likened the definition to the concept of intentional torts. See id. ("Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself."'). One of the Court's reasons for clarifying the language of § 532(a)(6) was the new subsection nine. The Court reasoned that including intentional acts which cause injury (as opposed to acts done with actual intent to cause injury) within § 532(a)(6) would render § 532(a)(9) superfluous. See id. By so holding, the Court necessarily decided that driving under the influence of alcohol does not constitute an intentional tort.

[10] In fact, the Third District Court of Appeal has found that driving under the influence of alcohol constitutes negligence. See Demova v. Lorenzo, 468 So. 2d 358,359 (Fla. 3rd DCA 1985) (summary judgment reversed because of the "existence of a genuine issue of material fact on the question of Lorenzo's comparative negligence for driving with a high blood alcohol level").

Comparative Fault Act did not apply because the plaintiff committed an intentional act by driving while intoxicated. Id. at 361. The court disagreed, finding instead that the driver, who had a blood alcohol level of .21 percent, did not act intentionally. See id. at 362; see also Herrick v. Superior Court, 188 Cal. App.3d 787, 791 (Cal. Ct. App. 1987) (holding that drunk driving does not amount to an intentional tort for purposes of establishing a cause of action for injury to a business employee or for intentional interference with contract).

3. The Second District Court of Appeal Applied Florida's Comparative Fault Statute Correctly in Ford Motor Co. v. D'Amario.

In Ford Motor Co. v. D'Amario, 732 So. 2d 1143 (Fla. 2nd DCA 1999), also pending before this Court and involving facts similar to those at issue here, the Second District Court of Appeal held that apportionment between the manufacturer and a drunk driver was appropriate. Id. at 1145; see also Kidron v. Carmona, 665 So. 2d 289 (Fla. 3rd DCA 1995). The D'Amario court did not even consider that Merrill Crossings and Stellas could apply to this kind of case.

In D'Amario, 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. Although the drunk driver was placed on the verdict form, the jury never reached the apportionment issue because it found no defect causing enhanced injury to the plaintiff. See id.

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. On appeal, the Second District Court of Appeal reversed, holding that the drunk driver was properly on the verdict form for apportionment. See id.

The GM Defendants contend that the Second District Court of Appeal applied Florida's comparative fault statute and principles regarding intentional torts appropriately. Like the drunk driver in D'Amario, Chatfield was properly included on the verdict form.

4. The Supreme Court's Decisions in Merrill Crossings and Stellas Should Not Be Retroactively Applied.

Finally, even if this Court determines that the district court in this case properly extended the holding of Merrill Crossings, and that drunk driving is an intentional tort, it should still reverse the court's decision because plaintiffs failed to preserve the error. The district court retroactively applied Merrill Crossings and Stellas, both decided after the trial in this case, based on its reading of Lowe v. Price, 437 So. 2d 142, 144 (Fla. 1983) ("[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"). However, nine years after Lowe was decided, this Court held in Smith v. State, 598 So. 2d 1063 (Fla. 1992), that to "benefit from the change in

law, [a party] must have timely objected at trial. . . ." Id. at 1066; 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 are sharply divided on the issue); Clay v. Prudential Ins. Co., 670 So. 2d 1153 (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).

The district court here conceded that Florida law, at the time of trial, required Chatfield to be included on the form. See 734 So.2d at 440 ("[t]he trial court accurately followed the law in Stellas as set forth by this court at that time"). When this case was submitted to the jury, it would have been error to exclude Chatfield. Id. Plaintiffs did not object at trial to the inclusion of Chatfield on the verdict form; indeed, plaintiffs admitted that Chatfield belonged on the verdict form. [See S.R. 112.1 ccordingly, plaintiffs waived their right to rely on the "new" law established by Merrill Crossings and Stellas. Respectfully, it was improper for the district court to rely on these decisions in reversing the jury verdict.

B. The Court Improperly Overturned a Jury Verdict On an Issue That Was Never Even Reached By the Jury.

As described above, the district court overturned the jury's verdict based on its perception that this Court's holding in Merrill Crossings precluded Charles Chatfield from appearing on the verdict form. But, the issue of comparative fault was never reached by the jury. Since the jury declined to find that a defect in the GM vehicle caused Ms. Nash's death, [see T. 469-70; T. 15 19], the case was over and the jury never had to reach and never did reach the issue of apportionment.

Not surprisingly, because the issue was never reached by the jury, it was never raised or argued by plaintiffs to the district court. Indeed, in their appellate brief, plaintiffs admitted the issue was not before the court: "since the jury did not reach this issue [of apportionment] on the verdict form, Nash will not argue it in this appeal." Brief of Appellants at 25 n. 16. Thus, the inclusion of Chatfield on the verdict form simply did not matter here. Accordingly, even if error, it was surely harmless.

This very issue was addressed in Hasburgh v. WJA Realty, 697 So. 2d 219 (Fla. 4th DCA 1997). In Hasburgh, the court found that any error in including unnamed non-party tortfeasors on the verdict form was harmless, because the jury found no negligence on the part of the defendant and therefore was never required to apportion liability and damages. Id. The plaintiff argued that because the non-parties were intentional tortfeasors, they should not have been on the verdict form.

The court in Hasburgh determined that it did not have to analyze that issue because the jury never reached it.

Similarly, in Loureiro v. Pools by Greg, Inc., 698 So. 2d 1262 (Fla. 4th DCA 1997), the court held that, although it was error to have included non-parties on the verdict form, reversal was not warranted. There, as here, the jury found that the defendant was not negligent. The erroneous inclusion of the non-parties was harmless because apportionment of fault never became an issue in the case. Id. at 1263.

> The non-parties' inclusion on the verdict form did not affect Loureiro's ability to litigate the issue of Pools' liability. . . . The issue of Pools' negligence was fully litigated at trial and the presence of the Fabre defendants on the verdict form did not disturb the jury's ability to consider that matter. . . . Because the jury found Pools to be without liability, it did not need to consider the fault of the Fabre defendants.

Id. at 1264; see also Aetna Cas. and Surety Co. v. Seacoast Transp. Co., 528 So. 2d 480 (Fla. 3rd DCA 1988) (instruction on contributory negligence harmless when jury did not reach issue of comparative negligence.); E.H.P. Corp. v. Cousin, 654 So. 2d 976 (Fla. 2nd DCA 1995) (although improper to include non-party tortfeasor on the verdict form, it was harmless because jury never reached issue of non-party' s fault).

This exact issue is before this Court now. After a two-week trial, involving extensive evidence of GM's design, a recall, and the performance of the restraint system in this accident (including detailed testimony from nine experts), the Nash jury quickly found that the seatbelt was not defective and that it did not cause enhanced injuries to Ms. Nash. The jury thus was never called upon to apportion fault, since all named defendants had been found not liable. As in Loureiro, the issue of the named defendants' liability was fully litigated and the presence of Charles Chatfield on the verdict form did not in any way impede the jury's determination that there was no defect. Because the jury found the named defendants to be without liability, they did not need to consider the fault of Chatfield. Thus, his inclusion on the verdict form, even if error (which it was not), was harmless.

II. THE COURT IMPROPERLY REVERSED THE JURY VERDICT BECAUSE OF THE ALLEGED BIAS OF JUROR ROBLES.

A. Plaintiffs Failed to Preserve Their Objection to the Jury Panel.

The district court's action in overturning the jury verdict on the basis that Juror Robles should have been disqualified for cause was improper because plaintiffs failed to preserve the trial court's error. In order to preserve an objection to the trial court's rulings on strikes for cause, Florida law requires that a party establish: (1) a timely motion to strike the juror for cause; (2) the improper denial of the motion; (3) the exhaustion of all peremptory challenges during the jury

selection process; (4) the request for additional peremptory challenges; (5) an identification of the juror to be stricken with the additional challenge; (6) the denial of the request for additional challenges; (7) service by the objectionable juror on the jury; and (8) renewal of the objection at the conclusion of jury selection before the jury is sworn. See Milstein v. Mutual Sec. Life Ins. Co., 705 So. 2d 639 (Fla. 3d DCA 1998); see also Joiner v. State, 618 So. 2d 174 (Fla. 1993); Trotter v. State, 576 So. 2d 691 (Fla. 1990).

Plaintiffs initially requested that Juror Robles be excused for cause. [S.R. 104]. After significant argument, the court denied the request, and plaintiffs exercised one of their peremptory strikes against her. [S.R. 106]. Later, plaintiffs requested an additional peremptory strike, which they wanted to exercise against Ms. Hanham, a juror plaintiffs never even tried to excuse for cause. [S.R. 118-20, 127]. The court denied plaintiffs' request. Later, the panel was selected and sworn in, without plaintiffs ever renewing their objection to the jury panel. [S.R. 127, 274-75].

In Joiner v. State, this Court ruled that a peremptory challenge issue was not preserved because the defendant affirmatively accepted the jury immediately prior to its being sworn, without reserving the objection he had made earlier. Joiner, 618 So. 2d at 176. The Court reasoned that had Joiner renewed his objection or

accepted the jury subject to his earlier objection, the judge could have exercised discretion as to the appropriate action to take with regard to the panel. See id.

In Milstein v. Mutual Security Life Insurance Co., the court, interpreting Joiner, stated that "it is a severe step to overturn an otherwise error-free trial based solely on a jury selection error, and particularly on an error involving peremptory challenges." Milstein, 705 So. 2d at 640. See id. On the basis of that principle, the court extended the Joiner rule to jury situations where the party fails to renew his objection prior to the time the jury is sworn, regardless of whether he affirmatively accepts the jury or not. See id. at 641 ("It is our view that the logic of Joiner requires the litigant to renew the previous objection even where, as here, the litigant has made no statement affirmatively accepting the jury."); see also Watson v. Gulf Power Co., 695 So. 2d 904,905 (Fla. 1st DCA 1997) ("The Joiner procedural requirement applies in the instant action even though the trial court did not formally ask the parties whether the jury panel was acceptable and even though nothing the appellant did or said could reasonably have caused the trial court to believe that she had waived her earlier . . . objections to the peremptory challenges.").

Thus, plaintiffs were required to renew their objection to the panel at the conclusion of jury selection, before the panel was sworn. Because they failed to follow this last prerequisite for preservation of their objection **[S.R.** 275], plaintiffs

waived any argument related to it on appeal. The district court erred in reversing the jury verdict on that basis.

B. The Trial Judge Correctly Determined that There Was No Basis to Strike Juror Robles for Cause.

Even if plaintiffs did not waive their objection to the jury panel, the district court's action in overturning the jury verdict based on the trial court's failure to excuse Juror Robles for cause was wrong because Juror Robles lacked the requisite bias. By reversing the Nash jury verdict on grounds of juror bias, the district court inappropriately substituted its judgment for that of the trial court. The trial court had the best opportunity to assess the credibility of Juror Robles in determining whether she should be stricken for cause. See Cook v. State, 542 So. 2d 964,969 (Fla. 1989) ("There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause."). The trial court properly considered Juror Robles' honest responses and determined there was no cause to strike her. See id. ("Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors."); see also James v. State, 741 So. 2d 546, 548 (Fla. 4th DCA 1999) ("An appellate court should affirm a decision to deny a challenge for cause if there is record support for the decision."). The trial court did not abuse its discretion, and its refusal to excuse

Juror Robles for cause should not have been overturned. See Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992).

Juror Robles did not convey a disqualifying bias in her responses to questioning during voir dire. What the district court interpreted as "disapproval of personal injury lawsuits" generally, see 734 So. 2d at 440, was simply concern for abuse of the insurance system in some cases with unfounded lawsuits. [S.R. 29-32 ("Some people take advantage of. . . insurance and other people's insurance, and I have a friend who was also burned and because she was, my church asked me to go and counsel her, and she was burned by a pressure cooker. She opened it at the wrong time. I saw it. I'm not going to blame her, but she sued the company and I didn't feel that she should have.").]. Juror Robles did not say that all personal injury suits were unfounded, or indeed, that this one was.

In addition, that Juror Robles stated she would "have a problem" with an award for "millions" of dollars, [S.R. 34], is neither remarkable nor disqualifying. Indeed, a number of jurors expressed the same hesitation, including two who sat on the jury without objection. [S.R. 34-37].

The most that can be argued is that Juror Robles had an abstract concern about large personal injury awards. This alleged bias is not disqualifying and the trial court's determination should not have been reversed. See Fazzolari v. City of West Palm Beach, 608 So. 2d 927,928 (Fla. 4th DCA 1992) ("A general, abstract

bias about a particular class of litigation will not, in itself, disqualify a juror where it appears that the bias can be set aside.").

Moreover, to the extent Juror Robles expressed any disqualifying beliefs, she rehabilitated herself as voir dire continued. In response to questioning by plaintiffs' counsel, Juror Robles stated that while an award in this case might be appropriate, she could not make a judgment "without hearing" the facts at issue. [S.R. 3 1, 70]. Furthermore, Juror Robles stated that she thought she "could be fair." [S.R. 32]. Finally, when asked whether she would be able to follow the law on damages, Juror Robles did not indicate a problem. [S.R. 71]. See Gore v. State, 706 So. 2d 1328, 1332 (Fla. 1997) (upholding trial court's refusal to excuse jurors who, "[a]lthough they expressed certain biases and prejudices, . . , also stated that they could set aside their personal views and follow the law in light of the evidence presented"), cert. denied, 525 U.S. 892 (1998).

It must be remembered that Juror Robles did not even sit on the jury that decided this case. Even had Juror Robles suffered from any bias (which the GM Defendants deny), that bias could not have impacted the six jurors who actually decided this case. In approximately two hours, these jurors unanimously decided

that the Nash car was not defective and that it was not the legal cause of enhanced injuries to Ms. Nash."

The trial court was in the best position to evaluate Juror Robles' objectivity. The trial judge had the opportunity to see Juror Robles' body language and hear the inflections in her voice to determine whether she was, in fact, biased.[12] The district court, in contrast, was required to make its decision based solely on a paper transcript and conflicting arguments regarding the interpretation of that transcript.

Given the superior position of the trial judge to ascertain Juror Robles' impartiality, the district court should not have "substitute[d] [its] judgment for that of the trial court." Gore, 706 So.2d at 1332; see also Cook, 542 So. 2d at 969 (acknowledging superior position of trial judge to evaluate qualifications of a particular juror). The GM Defendants, therefore, respectfully request that this Court reverse the district court's decision to upset the Nash jury verdict based on the trial court's refusal to strike Juror Robles.

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[11] In fact, Juror Hanham, the juror who sat in replacement of Juror Robles, also articulated some concerns about damage awards in the amount of millions of dollars. [S.R. 33]. Significantly, plaintiffs did not seek to challenge Juror Hanham for cause. Plaintiffs tried only to exclude Juror Hanham because of a conflict with a school sponsored trip she would miss because of the trial. [S.R. 123].

[12] Leonard Rivkind, a retired judge, presided over the Nash trial. At the time of the trial, Judge Rivkind had presided over hundreds of trials and jury selections.

CONCLUSION

For these reasons, the GM Defendants respectfully request this Court to reverse the district court's decision overturning the jury's verdict, and enter judgment in their favor.

Respectfully submitted this 27th day of January, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing PETITIONERS' BRIEF on counsel for the plaintiffs, by mailing a copy of same first class mail, postage prepaid this 24th day of January, 2000 to the following address:

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APPENDIX INDEX

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734 So. 2d 437 printed in FULL format.

BRIAN W. NASH, etc., et al., Appellants, vs. GENERAL MOTORS CORPORATION, etc., et al., Appellees.

CASE NO. 97-2844

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

734 So. 2d 437; 1999 Fla. App. LEXIS 5402; 24 Fla. Law W. D 1031

April 28, 1999, Opinion Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied June 23, 1999. Released for Publication June 23, 1999.

PRIOR HISTORY: An Appeal from the Circuit Court for Dade County, Leonard Rivkind, Judge. LOWER TRIBUNAL NO, 94-3392.

DISPOSITION: Reversed and remanded for a new trial.

CORE TERMS: juror, impartiality, driver, tort-feasor, verdict form, reasonable doubt. intoxication, intoxicated, prospective juror, feelings, seatbelt, driving, competent to testify, evidence submitted, comparative fault, intentional tort, prejudicial, apportion, nonparty, fault, products liability action, personal injury, money damages, drunk driver, head injury, new trial, voir dire, manufacturer, kinematics, windshield

COUNSEL: Poses & Halpem; Cooper & Wolfe and Sharon Wolfe and Nancy C. Ciampa, for appellants.

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

JUDGES: Before JORGENSON, LEVY, and GERSTEN, JJ. GERSTEN, J., concurs. LEVY, J., concurs in result only.

OPINIONBY: JORGENSON

OPINION: [*438] 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. [*439] Nash's head apparently struck the metal post [**2] 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 [**3] 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," 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 [**4] 940*** (Fla. 3d DCA) (holding that a non-par&y intentional tort-feasor should appear on the verdict form so as to permit the jury to apportion fault with the negligent tort-feasor), review granted, 683 ***So. 2d 485 (Flu. 1996),*** and decision quashed by ***702 So. 2d 232 (Flu.*** 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 nl 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 [**5] post adjacent to the windshield, but instead projected out the driver's window and struck the hood of the other car. [*440] 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 rather a loss of blood from her ruptured spleen and broken leg.

nl "[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).

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. [**6] Fronrath Chevrolet, Inc., 527 So, 2d 922 (Flu. 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 (Flu. 1959); Goldenberg v. Regional Import & Export Bucking Co. Inc., 674 So. 2d 761. 764 (Flu. 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 [**7] solely on the evidence submitted. Moreover, "close 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 Crossings Assoc. v. McDonald, 705 So. 2d 560 (Flu. 1997).*** In Stellas the court held that it was error to permit a nonparty intentional tort-feasor's name to appear on the verdict form so as to permit the jury to apportion fault between the nonparty and the [**8] 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, "decisional 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. n2 ***See Ingram v. Pettit, 340 So. 2d 922 [*441] (Flu. 1976)*** (holding that driving after voluntarily drinking to the point of intoxication is au 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 (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); [**9] ***In re Fielder. 799 F.2d 656 (11th Cir. 1986).*** Here, it was error for the drunk driver, an intentional tort-feasor, to appear on the same verdict form as General Motors, the negligent tort-feasor in a products liability action. n3

n2 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).

n3 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).***

[**10]

Reversed and remanded for a new trial.

GERSTEN , J., concurs.

LEVY, J., concurs in result only.

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 97-02844
L.T. CASE NO. 94-3392 CA 10

BRIAN W. NASH, as Personal Representative of the Estate of MARIA DEL CARMEN NASH, etc.,

Appellant,

vs.

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

Appellees.

BRIEF OF APPELLANTS

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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF CHATFIELD'S INTOXICATION AND ALLOWING GM TO REPEATEDLY INFLAME THE JURY ABOUT DRUNK DRIVING.

The trial court admitted the evidence about Chatfield's drinking only because "they have a right to know all the circumstances surrounding the accident: why it happened, how it happened." (T. 112-13). It acknowledged during the charge conference that Chatfield's intoxication had nothing to do with the case. (T. 1301-02). But in its effort to fulfill this limited purpose of telling the jury "all the circumstances," the trial court allowed GM to turn this case into a harangue about drunk drivers. There was no dispute that Chatfield was negligent and entirely responsible for the initial collision. There was no dispute that Mrs. Nash was not negligent. There were no allegations that GM caused the accident. The fact that Chatfield was drunk did not make him more or less negligent. Drunk driving did not make the force of the collision more severe than it would have been if a sober driver hit at the same force and angle. It had absolutely no bearing on how Mrs. Nash's injuries were enhanced by the defective seat belt. Chatfield's intoxication did not make the seat belt more or less defective. Because it was undisputed that Chatfield caused the accident, his intoxication was irrelevant.[16] See Parkansky v. Old Key Largo, Inc., 546 So.2d 1143 (Fla. 3d DCA

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[16] In fact the trial court should not even have allowed the jury to consider Chatfield's comparative fault, much less his drinking, because Chatfield was an intentional tortfeasor. "Drinking to the point of intoxication is a voluntary act. Driving in an intoxicated condition is an intentional act which creates known risks to the public." Ingram v. Petit, 340 So.2d 922, 925 (Fla. 1976)(holding that juries may award punitive damages where voluntary intoxication is involved in an automobile accident), See also In re Fielder, 799 F.2d 656 (1 lth Cir. 1986)(blood alcohol level of .208 immediately following automobile accident sufficient to establish a wanton and willful act and one in which the result can be predicted; drunk driving debt not dischargeable in bankruptcy); Taylor v. (continued...)

1989)(where insured claimed he worked as a charter boat captain, insurer could claim insured was not in that occupation because his boat was in drydock for over seven months, but could not tell jury it was drydocked because customs agents seized it; the reason for drydock was irrelevant).

While the fact of the automobile collision was certainly relevant, the cause of that accident was not. Chatfield's alcohol consumption was not a factor in GM's manufacture, design and sale of a vehicle with a defective seatbelt. The fact that Chatfield's drinking may have contributed to the initial collision simply* had no material bearing on whether Mrs. Nash's enhanced injury, her death, was the result of the defective seatbelt. See Fritts v. McKinne, 934 P.2d 371 (Okla. 1997)(trial court erred in medical malpractice case by permitting physician to focus on decedent's

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16/ (...continued)
Superior Court, 598 P.2d 854 (Cal.Ct.App. 1987)(driving while intoxicated constitutes is act of malice and is intentional tort; permitting recovery of punitive damages).

Fla.Stat. § 768.81 does not allow the jury to compare the fault of a negligent tortfeasor with that of an intentional non-party tortfeasor. Wal-Mart Stores. Inc. v. Coker, 23 Fla. L. Weekly $274 (Fla. 1998); Merrill Crossines Associates v. McDonald, 705 So.2d 560 (Fla. 1997); Stellas v. Alamo Rent-A-Car. Inc., 702 So.2d 232 (Fla. 1997). There is

> a public policy that negligent tortfeasors such as in the instant case should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence. . . . Thus, 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.

Merrill Crossings, 705 So.2d at 562.

Since the jury did not reach this issue on the verdict form, Nash will not argue it in this appeal. Should GM again pursue a comparative fault defense on re-trial, Nash will again raise the issue in the trial court.