ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,139
DCA No. 97-2844

GENERAL MOTOR 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, for the benefit of BRIAN W. NASH, surviving spouse of the decedent, and BRIAN W. NASK, as Guardian and next friend of BRIAN W. NASH, JR., and ALEXANDER NASH, surviving minor children of the decedent, and for the benefit of the Estate of MARIA DEL CARMEN NASH, and for the benefit of GUMERCINDO RAMOS and CARMEN RAMOS, the parents of the decedent,

Respondents.

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondents BRIAN W. NASH, as Personal Representative of the Estate of MARIA DEL CARMEN NASH, for the benefit of BRIAN W. NASH, surviving spouse of the decedent, and BRIAN W. NASH, as Guardian and next friend of BRIAN W. NASH, JR., and ALEXANDER NASH, surviving minor children of the decedent, and for the benefit of the Estate of MARIA DEL CARMEN NASH, and for the benefit of GUMERCINDO RAMOS and CARMEN RAMOS, the parents of the decedent, certify that the type size and style of this brief is 12 point Courier 10.

STATEMENT OF THE CASE AND FACTS

Maria Nash was killed while driving to church with her children. Her shoulder harness failed to lock up properly when she was hit head-on by a drunk driver; she hit her head on the A-pillar.[1/] GM knew about the defect in the shoulder harness long before, but did not recall the restraint system until just before this accident. Nash sued GM for negligent manufacture and design of the defective shoulder harness. He sought damages solely for the injuries which were caused or enhanced by the defective seatbelt. GM raised numerous issues to avoid responsibility: it claimed Mrs. Nash was not wearing her seatbelt; it claimed she would have died anyway from the injuries caused by the drunk driver.

The jury found Mrs. Nash was wearing her seatbelt, but it found there was no defect which was the legal cause of her death. Nash appealed to the Third District. Nash claimed the trial court erred by: allowing the jury to consider the fact that the other driver was drunk; giving confusing and conflicting instructions on causation which might have led the jury to believe the drunk driver was responsible for everything; permitting one of GM's experts who was not qualified, to testify that Mrs. Nash died from internal bleeding, not from hitting her head; and refusing to dismiss a juror for cause despite her obvious inability to be fair and impartial.

[1/] The A-pillar is the metal bar separating the windshield from the door.

The Third District overturned the jury verdict and granted Nash a new trial. The primary ground for reversal was the trial court's failure to excuse a juror for cause. The Third District went on to address the issue of whether the drunk driver was properly placed on the verdict form. It noted that the trial court had properly placed the drunk driver, a non-party intentional tortfeasor, on the verdict form based on the district's precedent at the time of trial. However, it was error to apportion fault under Fla.Stat. s 768.81 between a negligent tortfeasor and a non-party intentional tortfeasor based on this Court's subsequent decisions in Stellas v. Alamo-Rent-a-Car, 702 So.2d 232 (Fla. 1997), and Merrill Crossings Assoc. v. McDonald, 705 So.2d 560 (Fla. 1997). It instructed the trial court that on remand, the drunk driver should not be placed on the verdict form.[2/]

GM requested and this Court exercised its discretionary jurisdiction to resolve the alleged conflict between the Third District's decision in this case and the Second District's decision in Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999), on the apportionment issue.

The collision. On March 8, 1992, Maria Nash was driving to church in her 1989 Corsica. (T. 449, 753). Her two children were in the back seat. (T. 585). Mrs. Nash was driving east on 199th Street, near Joe Robbie Stadium. (T. 110). A west-bound Cadillac

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2/ The District Court also directed that GM's kinematics expert was not qualified to testify as to the cause of Mrs. Nash's death on retrial. This direction is not an issue in this appeal.

driven by Charles Chatfield veered suddenly across the dividing line and hit Mrs. Nash's car on the left front. (T. 55, 110, 929, 972). The Cadillac was traveling at 25 m.p.h.; the Corsica was traveling at 35 m.p.h. (T. 1024). The Corsica was severely damaged on the left front side; the force of the impact bent the roof. (T. 45, 294-95, 299-301). Mrs. Nash's head hit the A-pillar. (T. 168, 170, 305, 565-66, 996, 1000, 1014, 1083). GM's occupant kinematics expert testified clearly that her head hit the A-pillar.[3/] (T. 1024-25).

The collision was entirely the Cadillac driver's fault, not Mrs. Nash's. (T. 111, 115, 116, 933, 977, 1018). Prior to the accident the Cadillac was observed swerving from lane to lane. It was using up at least two of the three lanes. (T. 109). As the Cadillac was weaving back and forth there appeared to be an altercation going on between the driver and the female passenger. Immediately before the accident the Cadillac swerved quickly from the far right lane next to the curb, across the three westbound lanes and into the eastbound lane, striking Mrs. Nash's vehicle. (T. 110, 929).

3/ Only GM's other kinematics expert, Dr. Raddin, said Mrs. Nash's head did not hit the A-pillar. (T. 1092). He said her head went out the closed window and hit the right front portion of the Cadillac. (T. 1096-97). GM's other expert disagreed. (T. 973, 1004, 1037, 1086-87, 1097). And Dr. Raddin's opinion simply made no sense. If her head had hit the front of the Cadillac, it would have been a more severe and global injury. (T. 170, 172, 309-10). And if her head had gone through the window, she would have had an abrasion at the point of impact, skull fractures and little straight, angulated and cuboid lacerations on the side of the face from the window shattering into numerous little cubes of glass. (T. 169, 171).

Following the accident, witnesses observed that the occupants of the Cadillac were still fighting. (T. **117,** 943). Chatfield smelled of alcohol. He had red blood-shot eyes and other signs indicative of a person drinking and driving. (T. 55). Chatfield gave a blood sample at the scene and another a little over an hour later at the hospital. Chatfield's blood alcohol level immediately following the accident was .15. The one taken at the hospital was .14. (T. *63*, 64, 69, *70*).

A police officer was the first to arrive on the scene. (T. 46-47), He found Mrs. Nash unconscious. She had a large injury on the side of her head and blood on her face. (T. **50, 67,** 112). Her hands were down and she was leaning forward. Her seatbelt and shoulder harness were pulled across her body but not latched.[4/] (T. 50). She was not moving or speaking. (T. 52). Mrs. Nash was pinned in the car. Fire rescue had to extricate her with the jaws of life and a crow bar. (T. **66-67, 84-85**).

The defective shoulder harness. The shoulder harness of the seatbelt in Nash's car had a crack in the pendulum base that GM admitted was caused by either a manufacturing or design defect. (T. **417-18, 787, 1218**).

GM became aware of the problem with the lockup feature of the seat belts in its 1988 and 1989 Chevrolet Corsicas and Berettas in December 1989. (T. 424, 1223). Beginning in July 1990, GM col-

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4/ It looked as if her son might have unlatched the belt trying to get her out; the buckle was about one to two inches from the latch and she was leaning forward on the belt. (T. 50-51).

lected and tested 141 retractors. (T. 418, 1224). They came from dealerships that had replaced the belts because the owners complained they were not working. (T. 807). Six percent of the retractors had broken pendulum bases; 18% had cracks in the base. (T. 1227-28). GM tilt tested or bump tested the broken and cracked retractors to see if they still performed properly. (T. 1389). But GM did not test to see which ones would work in a crash. (T. 439).

By December 1990, GM determined that four factors influenced whether the pendulum bases would crack or break and decided to recall the seatbelt. (T. 1228-32, 1358, 418, 429, 430, 1358, 1237). GM stopped producing the vehicles with the defective seatbelts in the summer of 1990. (T. 427).

Although GM was aware of the potential retractor problem in December 1989, it did not notify the NHTSA or its dealers until late 1991. (T. 426, 444, 480, 493-95). GM waited until January 1992 to began recalling the over 700,000 vehicles which had the defective seatbelts by mailing recall notices to the owners. (T. 483, 1239, 1240).

GM did not send Mrs. Nash's recall notice until March 2, 1992. (T. 481). She did not receive it until the evening of March 6, 1992, the Friday before she died. (T. 497, 883-84).

Mrs. Nash's seat belt exhibited reduced sensitivity in the collision. (T. 802). This reduced sensitivity was increased because of the crack in the pendulum base. (T. 802). The crack permitted more belt webbing to spool-out. (T. 788, 802). It

increased the time to lock-up. (T. 839). It was not supposed to spool-out. (T. 788). It was supposed to lock and stay put. (T. 789)[5/]. While it still locked up, it did not do so in time. (T. 789). The lock-up time is critical in a dynamic situation where the vehicle is moving. (T. 789).

Mrs. Nash's injuries were consistent with wearing a lap belt and a shoulder harness that did not hold her back. (T. 584-85). The fact that her head hit the A-pillar proved the seat belt was not functioning properly. (T. 355, 356). Her head would not have hit anything if the seat belt had worked properly. (T. 266-67, 291-92, 306, 307, 323-25, 356, 391, 569, 579). GM's expert in occupant kinematics agreed, as did GM's representative, Gerald Cooper.[6/] (T. 1027-28, 1400).

The drunk driver. Charles Chatfield was drunk when he hit Mrs. Nash. (T. 70). Nash asked the trial court to exclude this evidence in a motion in limine and during voir dire; he requested

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[5/] GM claimed the harness would have functioned properly on the day of the collision because it worked at the time of trial. (T. 1220-21, 1364, 1410). But GM never tested the Nash belt, or any belt, in a crash test. (T. 439, 858, 1388).

Also, GM's claims that the seat belt functioned during the accident were inconsistent with: the fact that Mrs. Nash was wearing her belt, as the jury found; the fact that her head hit the A-pillar, as GM's expert testified; and the fact that everyone agreed a properly functioning belt would have prevented her head from hitting the A-pillar. (T. 291-92, 305-06, 352, 1014, 1024-25, 1400).

[6/] Dr. Raddin was the only one to testify that wearing a seat-belt would not have mattered because it was not a head-on frontal collision. In his opinion the seat belt would not have kept her head from going out the window. (T. 1100).

a mistrial after voir dire and made a continuing motion to exclude the evidence of intoxication following jury selection, The trial court denied the motions despite Nash's stipulation regarding the negligence of Chatfield. (R. 291-92; T. 110-14; SR. 174, 182). The trial court stated it was admitting the evidence so the jury could get the entire picture of the accident. (T. 112, 113).

The trial court allowed GM to continually focus the jury's attention on the fact that Chatfield was drunk; a drunk driver caused Mrs. Nash's death. GM began its attack during voir dire. See (SR. 85, 86, 100). GM continued hammering away about the drunk driver during opening statements. It told the jury that Chatfield was drunk and armed with a lethal weapon and the entire fault rested with him. (SR. 134,145-46, 150).

> We believe that the evidence in the case will be at the end of the day that the real fault in the case is not anything GM did or did not do with this retractor. It is instead the fault of Charles Chatfield, who, that Sunday afternoon, got drunk and then got deadly when he barrelled [sic] his 4500-pound Cadillac into the Nash Corsica.

(SR. 167).

GM also examined witnesses and introduced evidence about Chatfield's drinking. GM questioned Officer Medina extensively about the DUI aspects of the case and what he did to determine whether Chatfield was drunk, including his blood alcohol readings of .15 at 6:07 p.m. and .14 at 7:21 p.m. (T. 63, 64, 69, 70). GM also introduced the laboratory results. (Def.Ex. D-l).

The trial court acknowledged at the charge conference that Chatfield's intoxication was irrelevant and had nothing to do with

the case. (T. 1301-02). But the court did not alter its original ruling that evidence and argument about Chatfield's drinking was permissible

GM's closing arguments hammered away on Chatfield's drunkenness; it blamed everything on the drunk driver.

> We have got a drunk who gets in a car and goes out on a public thoroughfare and wipes out the life of Carmen Nash and changes the lives of **all** of those in her family. That's what we **have** got here: a drunk who aimed his car at Carmen **Nash** and killed her. And it is that which is the sole cause of the injuries in this case. That is where the blame lies, that is where the fault lies. . . .

(T. 1484-85). **See** also(T. **1455, 1456, 1461, 1486).**

Mrs. **Nash's injuries and the cause of death. Nash claimed** Mrs. **Nash's** death resulted when her head hit the A-pillar because the seatbelt did not function properly. GM claimed she would have died anyway from her other injuries.

Mrs. Nash suffered numerous injuries, predominately on her left side: fractured left femur; bruises on the left below the knee; contusions on the left breast; dislocated left elbow; lacerations on her scalp, left side of her eyebrow; swelling and bleeding around the eye and on the middle and left side of the lip; multiple white matter tears of cerebral hemispheres; right intra cerebral and right intra cellebellar hematomas; marked cerebral swelling; bilateral pulmonary collapse; bruised left kidney; and shattered spleen. (T. 145-46, 172, 201).

Mrs. Nash suffered injury to the brain in three areas: a hematoma in the right occipital area, one in the cerebellar area

and one just below that, all in the back of the brain. (T. 146-48). See also (T. 147, 149) (there was swelling of brain and blood in the lining membranes). Mrs. Nash also suffered diffuse axonal injury, white matter tears. (T. 147, 149-50). Such injuries show a very severe impact to the brain and additional motion of the brain itself. (T. 150). Diffuse axonal injury is non-survivable. (T. 150, 151, 240-41, 263, 1115).

When Mrs. Nash arrived at the hospital, she was in shock, had a rapid pulse rate, low blood pressure and had to be stabilized. (T. 210). The doctors had to treat the spleen injury first.[7/] (T. 176, 216). They had to stop the bleeding to normalize her blood pressure and heart rate. (T. 210, 220). The surgery was successful. (T. 158, 256). Her blood pressure improved when they cross clamped the spleen and removed it. (T. 175, 211). The bleeding had stopped and her vital signs were improving. (T. 176, 211). Blood loss was no longer a factor. (T. 256). The same was true of the fractured femur, which also was treated. (T. 155). The large artery that goes near the femur was not damaged; the injury was survivable. (T. 155-56).

Although the surgery on the spleen was successful, Mrs. Nash-'s blood pressure suddenly, inexplicably went down; she had bronco spasms and respiratory failure. (T. 176, 211, 257). Mrs. Nash was pronounced dead at 9:35 that night. (T. 1124; Pl.Ex. 18).

Dr. Charles Wetli, Dade County deputy chief medical examiner

7/ The spleen injury was severe because it would cause bleeding. If left untreated, it would be lethal. (T. 164, 221).

at that time, and a medical doctor certified in anatomical clinical and forensic pathology, performed the autopsy and testified at trial on the cause of death. (T. 131, 133, 143). Dr. Wetli testified that the head injuries caused Mrs. Nash's death. (T. 188, 207, 221). She would have survived all the other injuries." (T. 188). He reached that conclusion for several reasons. The symptoms that occurred after the successful spleen surgery were caused by the brain injury. (T. 176, 221, 269, 579). The brain swelled, herniated and compressed the area that controls vital functions, including the heart rate, respiration and blood pressure; Mrs. Nash's systems started shutting down, probably because the brain was dying. (T. 257). She did not bleed to death from the spleen injury. That surgery **was** successful; the bleeding stopped; her blood pressure was coming back up. (T. 175, 176, 211). See also (T. 584)(it **was** a survivable crash if the seat belt worked)."

Juror **challenge for cause.** During voir dire, Juror Robles repeatedly indicated she had several preconceived opinions about various issues and she could not be fair.

[8/] To simplify the death certificate and to expedite the process for probate and insurance purposes, the certificate simply stated the cause of death was multiple blunt impact trauma. (T. 173, 223; Pl.Ex. 18).

[9/] The only other opinion as to the cause of death was that of GM's expert, Dr. James Raddin. He testified that Mrs. Nash bled to death from the spleen injury and femur fracture. (T. 1110, 1114-15) . Dr. Raddin was not qualified to give this opinion. See (T. 1052-53, 1127, 1130). And his opinion is of no consequence since the District Court directed that on retrial Dr. Raddin may not testify as to the cause of death and GM has not challenged this direction.

MR. HALPERN: You had mentioned that you also have negative feelings about personal injury lawsuits.

JUROR ROBLES: I feel the same way; that some people take advantage. I was burned in a very bad accident. I could have sued the water heater company, but I didn't. So, you know, I was burned over 25 percent of my body, was in intensive care in the hospital for several months, but now, that doesn't particularly - I don't know if it would apply to this case. I mean, there is a death and two children without their mother, so.

MR. HALPERN: Well, are your negative feelings - - you've indicated that you had an experience where you were injured and did not make a claim?

JUROR ROBLES: Right. I was injured. Yes. Burned, not an accident.

MR. HALPERN: Did you feel that some company had done something negligently or carelessly to cause your burns? Did you feel that there was some improper action by some other party that caused your burns?

JUROR ROBLES: I didn't pursue it. It was something that happened and I really don't know. I was out of it, so.

MR. HALPERN: Okay. You mentioned you had negative feelings, though. Are those negative feelings something other than the fact that you got hurt and did not make a claim? What are your negative feelings?

JUROR ROBLES: Some people take advantage of, you know, 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.

MR. HALPERN: These feelings that you've had about people bringing claims that you didn't think were appropriate, you had these feel-

ings for a while?

JUROR ROBLES: I think a lot of people want easy money.

MR. HALPERN: Is that a feeling you've had for a while?

JUROR ROBLES: Yes.

MR. HALPERN: [Y]ou don't expect that to chance over the next couple of weeks?

JUROR ROBLES: No.

MR. HALPERN: Based on the fact that you, yourself, were injured and did not make a claim and you have these negative feelings and you're also concerned about your ability to sit here for two or three weeks, do you think that you can be totally fair and impartial in a case where there's a claim for personal injuries with regard to a defective product in an accident that was caused by another driver?

JUROR ROBLES: If it was proven that the seat belt was defective and it was recalled and the person did not go in and get it fixed, you know, I don't know which way I would go without hearing the case. It's hard to say.

MR. HALPERN: Well, I'm trying to find out if we are starting off with a strike against us because of these feelings you've expressed and because of the fact that you have a concern about people bringing claims and the fact that you, yourself, had a claim and you, yourself, were injured and did not bring a claim and the things that we discussed. I'm trying to find out if we are starting off with an even playing field or a strike against us.

JUROR ROBLES: I think so. I'm a fair person.

* * *

JUROR ROBLES: I guess I can't, as I said, I can't second guess what is going to go on.

(SR. 29-32).[10/] Juror Robles said she would have a problem with a plaintiff asking for millions of dollars: "[I] don't think you can put a price tag on a person's life." (SR. 34). She had a problem because she believed some people went after easy money. (SR. 58). And she had a problem with following the judge's instructions on the elements of damages, putting aside sympathy and basing her verdict on the evidence in the case. (SR. 69-70).

> I do, if you're putting millions of dollars. It seems to me like you say no sympathy, but at the same time you're bringing in people to show what a good mother she was. I just don't understand how one has to do with the other as far as money is concerned. Money isn't going to bring Carmen back. I could see, you know, as far as money for the kids to go to college because she worked, but it's not millions of dollars.

(SR. 70). And when Nash's counsel explained that he would show the connection between the type of injury or loss and the amount of money requested, Juror Robles said she had a problem with that. (SR. 70-71). She doesn't "equate money with love." (SR. 71).

Finally, Juror Robles said she would have a problem separating the cause of the accident from the cause of death. "I mean, it was the drunk driver that caused the accident. The seat belt alone didn't do it." (SR. 56).

Nash requested the trial court to excuse Juror Robles for cause because of the opinions she expressed and her inability to set aside her feelings. (SR. 104). The trial court disagreed. (SR. 105-07). Nash renewed his challenge for cause. (SR. 115).

[10/] Emphasis is supplied by counsel unless otherwise noted.

The trial court again denied it. (SR. 115). Nash **was** forced to exercise a peremptory challenge on Juror Robles. (SR. 115-16). Nash then requested an additional strike. (SR. 119). The trial court denied the additional challenge. (SR. 127). Nash renewed his objection at the conclusion of jury selection before the jury was sworn.

> MR. POSES: Well, just so I make a record on this, Judge, what we have requested, we are not asking for a cause excusal for [Juror Hanham]. We were asking for an additional challenge because we felt that the Court was in error in not excusing Mrs. Robles for cause and requiring us to exercise one of our challenges on Mrs. Robles.
>
> THE COURT: No. You're correct. The appellate court may **say** that you cannot complain where **a** court declines to excuse **a** juror for cause unless you make an effort to exercise an additional challenge.
>
> MR. POSES: That's what we are doing.
>
> THE COURT: So the record is complete. Therefore, the issue of appeal would be whether or not I should have allowed her to be challenged as cause.
>
> MR. POSES: Okay. And you're denying that.
>
> THE COURT: Denying it, right.

(SR. 127-28, 274-75). The jury was sworn almost immediately.

The verdict. The jury found Mrs. Nash **was** wearing her seat belt. But it also found GM did not "place the Chevrolet Corsica on the market with **a** defect which was the legal cause of enhanced injuries to Maria Del Carmen Nash which resulted in her death." (T. 1519). Nash moved for **a** new trial; the trial court denied the motion. (R. 428-39, 469-71). Nash appealed.

The District Court reversed the jury verdict and remanded for a new trial. GM filed this appeal.

SUMMARY OF ARGUMENT

The District Court correctly held that on retrial Chatfield should not be placed on the verdict form. An intentional tort is conduct which is substantially certain to result in injury or death. In Ingram v. Pettit, 340 So.2d 922 (Fla. 1976), this Court held that driving in an intoxicated condition within the purview of the criminal statutes [criminally drunk driving] is an intentional act which creates known risks and warrants the imposition of punitive damages. Driving while criminally intoxicated and causing injury or death is a culpable criminal act. Conduct demonstrating the reckless disregard warranting punitive damages or the culpability warranting punishment is considered the equivalent to intentional misconduct. Drunk driving statistics demonstrate the substantial certainty that death or injury will result from such conduct. Chatfield's blood-alcohol level was nearly twice the legal limit when he caused the accident. He should be considered an intentional tortfeasor.

This Court held in Stellas and Merrill Crossings, that Fla.Stat. § 768.81 does not apply to intentional criminal misconduct. Neither Stellas nor Merrill Crossings limited the inapplicability of § 768.81 to certain kinds of intentional criminal misconduct by nonparty tortfeasors. Therefore, a criminally drunk driver who causes injury or death should not be placed on the verdict form with a negligent defendant.

Moreover, Fla.Stat. § 768.81 only applies to joint tortfeasors. Chatfield and GM were not joint tortfeasors: (1) they did

not act concurrently; (2) there were two collisions rather than one accident; and (3) Mrs. Nash sustained separately identifiable, successive injuries as a result of the two collisions. As a result, § 768.81 does not apply here.

Finally, a manufacturer has a duty to make its vehicle crashworthy for accidents. In a crashworthiness case, the plaintiff seeks damages solely for the additional or enhanced injuries sustained because the manufacturer breached this duty. A manufacturer should not be able to escape liability by comparing its negligence to that of the person causing the accident.

Nash fulfilled every requirement established by Joiner v. State, 618 So.2d 174 (Fla. 1993), to preserve the juror issue, including renewing his objection to the trial court's refusal to strike the juror, giving the court an additional opportunity to correct the error before the jury was sworn.

The trial court should have excused the juror. She had clear reservations about awarding money damages for the death of a loved one and obviously disapproved of personal injury suits; strong feelings that she could not set aside. The failure to excuse her for cause requires a new trial. The District Court's decision in this regard was entirely correct.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT ON RETRIAL CHATFIELD SHOULD NOT BE PLACED ON THE VERDICT FORM.

GM claims that the district court erred in reversing the jury verdict based on the fact that Charles Chatfield was included on the verdict form. GM is wrong for several reasons. First, a criminally drunk driver who causes injury or death is an intentional tortfeasor. Second, this Court held in Stellas and Merrill Cross--i&& that Fla.Stat. § 768.81 does not permit a negligent defendant to reduce his liability by comparing his conduct with the conduct of a nonparty intentional tortfeasor. Neither decision limited § 768.81's inapplicability to only certain types of intentional misconduct by nonparties. Where Chatfield was a nonparty intentional tortfeasor, he should not have been included in the verdict form. Third, § 768.81 only applies to joint tortfeasors. GM and Chatfield were not joint tortfeasors; their fault could not be apportioned. Fourth, in a crashworthiness case, accident-causing fault should not be compared with injury-enhancing fault.

A. A criminally drunk driver is an intentional tortfeasor. [Petitioners' argument I.A.2.]

An intentional tort is "conduct which is substantially certain to result in injury or death." Fisher v. Shenandoah Gen. Constr., 498 So.2d 882, 883 (Fla. 1987) (citing Spivey v. Battaslia, 258 So.2d 815 (Fla. 1972)). See also Turner v. PCR, Inc., 25 Fla.L.Weekly S174, S175 (Fla. Mar. 2, 2000). As stated by this Court in Spivey, "[w]here a reasonable man would believe

that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he intended it." 258 So.2d **at 817.**

The conduct necessary to justify an award of punitive damages is the equivalent of intentional misconduct. Conduct warranting punitive **damages** is

> "[o]f a 'gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to the consequences, or which shows wantonness and recklessness, or **a** grossly careless disregard of the safety and **welfare** of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. '"

White Constr. Co. v. DuPont, 455 So.2d 1026 (Fla. 1984) (citations omitted). See Fla.Std. Jury Instr. (Civ.) PD1(a)(2).

Punitive damages are appropriate where the defendant exhibited a reckless disregard for human life equivalent to manslaughter. Manslaughter is "the killing of a human being by the act, procurement, or culpable negligence of another . . . ." CSX Transp., Inc. v. Palanik, 24 Fla.L.Weekly D1966 (Fla. 4th DCA Aug. 25, 1999). Like reckless disregard, conduct constituting culpable negligence is viewed as the equivalent of intentional misconduct. Culpable negligence is defined as:

> [M]ore than a failure to use **ordinary care** for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing a reckless disregard of human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of

> care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

Palanik, 24 Fla.L.Weekly D1966 (quoting Villafana v. State, 728 So.2d 260, 260-61(Fla. 5th DCA 1999)). See also Turner, 25 Fla.L.Weekly at S177.

The issue here is whether a criminally drunk driver who causes injury or death is an intentional tortfeasor. Unquestionably, drunk driving is a dangerous act which society severely frowns upon. "[T]he problem of drunken drivers operating motor vehicles on the highways of this state is pernicious and real." State v. Hubbard, 24 Fla.L.Weekly S575 (Fla. Dec. 16, 1999). Drunk driving is pervasively antisocial and extremely dangerous. It is

> an inherently dangerous activity in which it is reasonably foreseeable that driving while intoxicated may result in the death of an individual. The legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death. , . . So, when a person chooses to operate an automobile while under the influence of intoxicants and has done so deliberating knowing that society has through its legislature established such combined activities as dangerous and when such operation results in death, it may be punished as a felony.

24 Fla.L.Weekly at S577-S578 (quoting State v. Caibaiosai, 363 N.W.2d 574, 577-78 (Wis. 1985)) . Drunk driving is much more than mere negligent conduct.

> Intuitively, someone who is intoxicated will not be able to control his or her automobile in a safe manner and make quick decisions and execute maneuvers that will avoid accidents. Therefore, negligence is simply the wrong prism thrOUSh which the intoxicated driver's actions should be viewed. If the person's normal facilities are impaired, that person will act accordingly and almost certainly will have a greater chance of causing an accident."

24 Fla.L.Weekly at S579 (citations omitted). The act of drunk driving is such a serious threat to the public's safety it should be punished. Ingram, 340 So.2d at 924.

To combat the problem of drunk driving, in Ingram, this Court held that driving while intoxicated above the legal limit is an intentional act demonstrating a reckless disregard for human life and is sufficient in itself to warrant punitive damages.

> Drinking to the point of [criminal] intoxication is a voluntary act. Driving in an intoxicated condition is an intentional act which creates known risks to the public. We believe that the potentiality of an adverse award of punitive damages is a suitable corollary to those criminal laws designed to discourage this reckless disresard for the public safetv.

340 So.2d at 925.

A person is criminally drunk if his blood-alcohol level is .08 or above. Fla.Stat. § 316.193. Driving drunk in excess of this legal limit which results in death is a culpable criminal act. Baker v. State, 377 So.2d 17, 19 (Fla. 1979); Werhan v. State, 673 So.2d 550, 553 (Fla. 1st DCA 1999).

Here, Chatfield's blood-alcohol level was .15, nearly twice the legal limit shortly after the accident. Conceivably it was

even higher at the time of the accident. See State v. Banoub, 700 So.2d 44, 46 (Fla. 2d DCA 1997). He intentionally drove while he was almost "doubly drunk" at five p.m. on a Sunday afternoon on a busy thoroughfare. Immediately before the accident, Chatfield was weaving in and out of traffic and using up at least two of the three westbound lanes. He was not paying attention to his driving; he was fighting with his female passenger. Chatfield's erratic driving immediately before the accident made at least one other driver fear for his own safety. (T. 110-11).

Chatfield's acts of reckless driving while criminally intoxicated is certainly the type of conduct which warrants the imposition of punitive damages pursuant to Ingram. In the criminal context, it is precisely the type of culpable conduct discussed in Baker. And, as drunk driving statistics show, there was a substantial certainty that his conduct would result in injury or death.[11/] In short, Chatfield's actions, if not actually inten

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11/ Drunk driving statistics demonstrate both the pervasiveness of the problem and the substantial certainty that death or injury will result.

> In 1990, 44,529 people were killed in traffic accidents in the United States, 40% of which involved an intoxicated driver or occupant of the vehicle. At the same time, there were 58,797 drivers involved in fatal crashes, in which 14,558 of the drivers were intoxicated. . . . In Florida, out of a total of 2,951 traffic fatalities in 1990, 1,365 were alcohol related. These figures, of course, deal only with fatalities; the incidence of alcohol related, personal injury and property damage is much higher , . .

Lindsay v. State, 606 So.2d 652, 655 (Fla. 4th DCA 1992). See (continued...)

tional, should be considered the equivalent of intentional tortious conduct. This Court should find Chatfield was an intentional tortfeasor.

Contrary to GM's contention, there is ample case law in addition to those cases the District Court relied upon (which includes this Court's decision in Ingram) to support the conclusion that drunk driving which results in injury is an intentional tort. In In re Cloutier, 33 B.R. 18 (D.Me. 1983) the court held that drunk driving which causes damages is an intentional tort. When the likelihood of the conduct causing harm is so great, as in the case of driving while intoxicated, a defendant cannot claim to say that he did not intend to cause the resulting harm. The court explained the application of the willfulness and malicious or intentional standard to drunk driving cases, stating:

> An intentional act is required. It is not, however, necessary to find that personal ill will existed in order for there to be a finding of willful and malicious injury. In the case before us now we hold that the voluntary drinking by the defendant constituted an intentional act sufficient to support the conclusion that the injury caused by defendant was willful and malicious . . . . Defendant's intentional drinking unleashed the unbroken causative chain which led to the injury to

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11/ (...continued)
also State Cardinal 429 So.2d 747, 750 n.2 (Fla. 4th DCA 1983) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars) (quoting Perez v. Campbell, 402 U.S. 637, 657, 91 S.Ct. 1704, 1715 (1971) (Blackmun, J. concurring)); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485 (1990) ("Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage") (citations omitted).

> Plaintiff's vehicle. It will not avail defendant in his effort to avoid this result to argue that he did not know plaintiff prior to the accident and therefore the injury could not have been intentionally caused. One is responsible under the law for the natural outcome of his action.

Id. at 20 (citations omitted).[12/]

Numerous other courts have come to the same conclusion. See Burgess v. Porterfield. 469 S.E.2d 114 (W.V. 1996) (drunk driving which results in death is "intentional, wanton, willful or reckless") ; Walker v. Metropolitan Life Ins. Co., 24 F.Supp.2d 775, 778 (E.D. Mich. 1997) (death resulting from drunk driving is foreseeable; where decedent was the drunk driver he is considered having injured himself on purpose) ; Allstate Ins. Co. v.

12/ GM claims the District Court's reliance on bankruptcy cases which apply 11 U.S.C. § 523(a)(6) is misplaced because of the Supreme Court's holding in Kawaauhau v. Geiser, 118 S.Ct. 974 (1998). GM is wrong. Kawaauhau was a medical malpractice action. The plaintiff sought to prevent the judgment debtor from discharging his debts claiming that the malpractice was "willful and malicious" pursuant to 11 U.S.C. § 523 (a) (6). The Court merely held that for purposes of the statute, nondischargability required a deliberate or intentional injury, and not merely a deliberate or intentional act that leads to injury. The Court did not hold that drunk driving resulting in injury was not an intentional tort; it did not even address that issue. If anything should be gleaned from Kawaauhau, it should be that drunk driving which results in death is an act which Congress considered so serious it created a special subsection just for it. It certainly does not mean it is not an intentional tort. In fact, the Supreme Court likened drunk driving which causes injury to other malicious acts also covered under separate subsections. Moreover, the fact that drunk driving does not fall under subsection (a) (6) of the statute does not make the analysis applied by bankruptcy courts which found drunk driving which results in injury a willful act erroneous or irrelevant. What is relevant about those cases is that, regardless of the statute, the courts found drunk driving which results in injury is a willful act; willful being defined as an intentional act with knowledge that there is a substantial likelihood that some (rather than the specific injury required under the statute) injury will result.

Castanier, 491 N.W.2d 238 (Mich.Ct.App. 1992) (same); United States v. Mann, 113 F.3d 1046, 1049 (9th Cir. 1997) (drunk driving is intentional conduct with death a foreseeable result); In re Greenfield, 21 B.R. 419, 421 (S.D.Ohio 1982) (same); Sissle v. Stefenoni, 152 Cal.Rptr 56, 57-58 (Cal.Ct.App. 1979) (drunk driving is an intentional act with wanton and reckless disregard of its consequences); Weaver v. Phoenix Home Life Mut. Ins., 990 F.2d 154 (4th Cir. 1993)(same); Kentucky Bar Ass'n v. Jones, 759 S.W.2d 61 (Ky 1988) (drunk driving/reckless homicide is intentional misconduct); Fowler v. Metropolitan Life Ins. Co., 938 F.Supp. 476 (W.D.Tenn. 1996)(same); Cozzie v. Metropolitan Life. Ins. Co., 963 F.Supp. 647 (N.D.Ill. 1997) (same); Copeland v. Anderson, 707 P.2d 560, 567 (Okla.Ct.App. 1985), overruled on other grounds, Cooper v. Parker-Hushev, 894 P.2d 1096 (Okla. 1995) (drunk driving is an intentional act and both a crime and a tort); Sun Oil Co. v. Seamon, 84 N.W.2d 840 (Mich. 1957) (drunk driver has a "constructive intention" to cause injury and death); Sanders v. Crosstown Mkt., Inc., 850 P.2d 1061, 1064 (Okla. 1993) (drinking and then driving drunk are two intentional acts).

Quite simply, numerous courts have held that drunk driving is a willful and intentional act with a substantial likelihood of resultant injury; that drunk driving embodies all the elements of an intentional tort. The Third District correctly came to the same conclusion based on this Court's explicit holding in Ingram that: "Driving in an intoxicated condition is an intentional act which creates known risks" and demonstrates a "reckless disregard

for public safety." 340 So.2d at 925.

B. Fla.Stat. § 768.81 does not permit apportionment between a negligent defendant and a nonparty intentional tortfeasor. [Petitioners' argument I.A.1.]

Fla.Stat. § 768.81(3) requires a court to apportion liability "on the basis of such party's percentage of fault." Fault, as used in § 768.81 means negligence. In Stellas and Merrill Crossings, this Court held that Fla.Stat. § 768.81 did not authorize apportionment of fault between a negligent defendant and a nonparty guilty of intentional misconduct. The Third District's decision here merely applied Stellas. It concluded that, under Stellas, the nonparty drunk driver, guilty of an intentional criminal act, should not go on the verdict form.

Neither Stellas nor Merrill Crossings state or even suggest that their holdings are limited to only certain kinds of intentional misconduct on the part of such nonparties; they do not state or even suggest that some types of nonparty intentional tortfeasors may appropriately be included on the verdict form. Indeed, in Stellas, this Court framed the issue before it as applying to intentional tortfeasors generally:

> We have for review a decision certifying as a question of great public importance the issue of whether 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.

702 So.2d at 233. This Court's affirmative answer to this question left no room to distinguish between different kinds of non-

party intentional tortfeasors.

Nonetheless, GM claims that the Third District "extended" the holdings of Stellas and Merrill Crossinss by attempting to distinguish between the different kinds of intentional criminal conduct by nonparties. But Stellas and Merrill Crossinss, neither suggest nor support such analysis. They apply to all intentional criminal conduct. And they are based on the recognition that the negligent defendant had a duty to protect the plaintiff from the nonparty's intentional acts:

> 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 562-63. Here, GM had a duty to make its vehicle crashworthy, not just for accidents caused by negligent drivers, but also for accidents caused by criminally drunk drivers. Thus, as in Merrill Crossinss, the "intervening intentional tort," the drunk driver, "is exactly what [GM is] supposed to protect against.[13/]

The public policy considerations against permitting a negli-

13/ GM claims at 28-29 [Argument I.A.4.], that the District Court erred in reversing the jury verdict based on Chatfield's improper placement on the verdict form because Nash failed to preserve the error. GM is wrong. A review of the record demonstrates that the primary basis for reversal was the error in jury selection. Nash also raised the issue of whether the criminally drunk nonparty should be on the verdict form in light of Stellas and Merrill Crossinss, but did so only in the context of issues which needed to be addressed in the event of a reversal. See Appellant's brief at 24-25, n. 16. It was in this context that the Third District decided the issue.

gent defendant to compare its conduct with that of an intentional tortfeasor it had a duty to protect against - because the jury will allocate all fault to the intentional tortfeasor and exonerate the negligent party - support the conclusion that a negligent manufacturer who had a duty to provide a crashworthy vehicle should not be permitted to compare its negligence with the conduct of a nonparty criminally drunk driver when the plaintiff is seeking damages solely for those additional or enhanced injuries caused by the negligent manufacturer.

Evidence of intoxication in an automobile accident is highly inflammatory and extremely prejudicial. Fritts v. McKinne, 934 P.2d 371, 375 (Okla. 1997). Where liability for an automobile accident is admitted and punitive damages are not at issue, the only purpose of drunk driving evidence is to inflame the jury. Russell v. Wisconsin Mut. Ins. Co., No. 96-3538, 1997 WL 757870 (Wis.Ct.App. 1997)(unpublished opinion). See also Le Fevre v. Bear, 113 So.2d 390, 391 (Fla. 2d DCA 1959) (evidence that the defendant and decedent had been drinking "could have no effect other than to open the minds of the jurors to improper speculative excursions outside the issues developed by the pleadings and proof" where the complaint did not charge and the evidence did not show that defendant's drinking affected his conduct or caused the accident). Drunk driving is a topic constantly in the headlines. The public is well aware of the problem. If, as in this case, a negligent manufacturer is permitted to compare its negligence in causing additional or enhanced injuries with the inten-

tional conduct of the nonparty criminally drunk driver who caused the accident, the likely, if not certain, result will be that the jury will allocate all fault to the drunk driver and exonerate the negligent manufacturer. As explained by the federal court in Foreman v. Jees Corp., No. CV-83-56-GF, 1984 WL 2751, *2 (D.Mont. June 1, 1984):

> Clearly any value that such evidence [of drunk driving] might have in bringing about a just resolution to this action is far outweighed by the prejudice and confusion it would generate. Public awareness of the problems associated with driving while intoxicated might well cause a jury to give undue weight to such evidence, and could confuse the real issue in this case, i.e. whether [a particular component of the vehicle] was defective and unreasonably dangerous.

That is exactly what happened here. Chatfield's drunkenness was a linchpin of GM's case. GM hammered away at the issue and skillfully played the heartstrings of juror prejudice against drunk drivers. The result was as expected: the jurors blamed everything on the drunk driver despite the fact that GM had a duty to protect against just this type of accident. It found GM not guilty despite the fact that GM had a duty to provide Mrs. Nash with a properly functioning seatbelt and negligently gave her a defective one and, as a result of GM's negligence, Mrs. Nash's head hit the A-pillar, causing her death, in what would have otherwise been a survivable accident[14/].

[14/] GM claims at 30-32 [argument I.B.] that any error in admitting evidence of intoxication was harmless because the jury did not reach the apportionment issue. GM misses the point. Intoxication directly related to causation - did Chatfield cause Mrs. (continued...)

This result is unacceptable. The driving public should not bear the financial risk of an uncrashworthy vehicle and enhanced injuries when **a** criminally drunk driver crashes into them where the vehicle manufacturer **has a** duty to protect **against exactly** this sort of accident and negligently fails to do so.[15/]

C. Florida's comparative fault statute § 768.81 is inapplicable where the drunk driver and GM were not joint tortfeasors.

Fla.Stat. § 768.81 only applies to joint tortfeasors.[16/] Dade

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[14/] (...continued)
Nash's death. The improperly admitted evidence could not be harmless. It was the focus of GM's entire case. The jury was so distracted from the real issues in this **case** and prejudiced by GM's hammering away on Chatfield's drunk driving that it improperly concluded Chatfield should be solely liable for Mrs. Nash's death. That is what GM's evidence said; that is what GM's opening and closing arguments said. The evidence regarding Chatfield's intoxication tainted the entire trial. See Gormlev v, GTE Prod., 587 So.2d 455 (Fla. 1991); Browning v. Lewis, 582 So.2d 101 (Fla. 2d DCA 1991).

[15/] GM claims at 21 that if it is not permitted to compare its negligence with the conduct of a criminally drunk driver that it will be liable for the entire judgment. So what. The only damages a plaintiff is seeking in a crashworthiness case are for additional or enhanced injuries caused by the negligent manufacturer, not those caused by a nonparty intentional or negligent tortfeasor. But even assuming the manufacturer should not be held solely liable for those damages, if the nonparty drunk driver and negligent defendant are considered joint tortfeasors, the negligent defendant can seek contribution. If they are not joint tortfeasors, the negligent defendant can seek equitable subrogation. Thus, the only issue is who bears the risk of an uninsured insolvent drunk driver - the innocent plaintiff or the manufacturer who has a duty to design its vehicle to protect that innocent plaintiff from precisely such danger.

[16/] GM may argue that Nash waived this and the following argument by failing to raise them in the District Court. If it does, it will be wrong. An appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in defense when the appellant attacks the judgment on (continued...)

Countv School Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999). In order to be considered joint tortfeasors, three things must occur. First, the parties must act concurrently. West American Ins. Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204, 206 (Fla. 5th DCA 1986); Albertson's v. Adams, 473 So.2d 231, 233 (Fla. 2d DCA 1985). There can be no apportionment between initial and subsequent rather than concurrent tortfeasors. Stuart v. Hertz Corp., 351 So.2d 703, 706 (Fla. 1977). Second, each party must contribute to "the accident." Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 24 Fla.L.Weekly D1422 (Fla. 5th DCA June 18, 1999). Third, each of the parties must contribute to cause a common iniurv. Radio Station WQBA, 731 So.2d at 641 n.2; Fabre v. Marin, 623 So.2d 1182 (Fla. 19931, overruled on other grounds, Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 659 So.2d 249 (Fla. 1995); In other words,

> Joint and several liability exists where two or more wrongdoers negligently contribute to the injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable.

Albertson's. Inc., 473 So.2d at 233 (Fla. 2d DCA 1985) (citing Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (Fla. 1932)) . Thus, where there is more than one accident and separate, successive or enhanced injuries, the parties are independent rather than joint tortfeasors. Association for Retarded Citizens-

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16/ (...continued)
appeal. Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 645 (Fla. 1999)(on appeal appellee can argue the lower court was right for any reason).

Volusia, Inc. v. Fletcher, 24 Fla.L.Weekly D1422 (Fla. 5th DCA June 18, 1999); Najar v. State Farm Fire and Cas. Co., 697 So.2d 1270 (Fla. 2d DCA 1997); Rucks v. Pushman, 541 So.2d 673 (Fla. 5th DCA 1989).

None of the elements establishing joint tortfeasors are present here. First, GM and Chatfield were not concurrent tortfeasors. Chatfield caused the initial impact. The seatbelt should have, but because it was defective failed to, lockup immediately upon impact. As a result, additional webbing spooled out, and moments later Mrs. Nash's head struck the A-pillar. Second, there was no "accident." Rather, there were two collisions. The first when Chatfield's car hit Mrs. Nash's vehicle. The second, moments later, when Mrs. Nash's head struck the A-pillar. GM did not contribute to the first accident. And while Chatfield's conduct set in motion the chain of events which required a properly working seatbelt, he did not contribute to the second collision caused by the defective seatbelt. Everyone agreed that if the seatbelt had been functioning properly Mrs. Nash's head would not have struck the A-pillar. Finally, the injuries Mrs. Nash sustained as a result of the two collisions were separate, distinct and successive. As a result of the initial collision Mrs. Nash suffered a broken leg, shattered spleen and other minor injuries - those injuries were survivable. As a result of the second collision she suffered injury to her brain which resulted in her death. In sum, GM and Chatfield were not joint tortfeasors and the Third District correctly held that Chatfield should not have been placed on the

verdict form.[17/]

D. In a crashworthiness case, accident-causing fault should not be compared with injury-enhancing fault.

This is a second collision or crashworthiness case.[18/] "Second collision" refers to the impact of a vehicle occupant with the interior of her vehicle when it suddenly stops or changes direction due to a design defect in the vehicle itself. In a crashworthiness case, the damages sought are not for injuries sustained in the original collision but for those sustained in the second impact where some design defect caused an additional or

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[17/] For the same reasons, the Second District's decision in D'Amario, was incorrect. Livernos collided with a tree and caused the first impact. A significant amount of time passed before the car burst into flames (the second accident) because of the defective fuel tank. The plaintiff suffered minor injuries in initial impact; he suffered severe burn injuries as a result of the second accident. Quite simply, Ford and the drunk driver were not joint tortfeasors.

The Third District's decision in Kidron v. Carmona, 665 So.2d 289 (Fla. 3d DCA 1995), does not require a different result. Carmona died instantly on impact. Unlike this case, there was no evidence apparent in the decision that the initial collision was survivable absent the manufacturer's negligence; it was a single indivisible injury making Ford and Carmona joint tortfeasors.

[18/] This Court recognized a cause of action against a manufacturer for defects which cause injury but is not the cause of the primary collision in Ford Motor Co. v. Evancho, 327 So.2d 201 (Fla. 1976), adopting the holding of Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). This Court did not decide in Evancho whether the manufacturer was a joint tortfeasor. 327 So.2d at 204 n.4. In the only other crashworthiness case considered by this Court, Ford Motor Co. v. Hill, 404 So.2d 1049 (Fla. 1981), the claim for contribution was withdrawn.

The only Florida case to address the issue was Kidron v. Carmona. It held that the manufacturer could compare its negligence with that of the nonparty who caused the accident. For the reasons discussed in this brief, the district court was wrong.

exacerbated injury which would not have otherwise occurred as a result of the original collision. Thus, it is only logical that the manufacturer in a crashworthiness case should not have a defense based on the cause of the accident because the plaintiff is not making a claim that the accident or the injuries caused solely by the accident were caused by the manufacturer. Here, Nash sued GM only for the enhanced injuries Maria Nash sustained solely as a result of the second collision caused by the defective seatbelt. Chatfield's conduct in causing the accident was totally irrelevant and should not have been admitted.

Negligence in causing the initial collision should not be compared with the negligence in designing a product which causes enhanced injuries due to the "second collision" or uncrashworthiness of the vehicle. Manufacturers should foresee the fact that some of the vehicles they manufacture will be involved in collisions. Therefore, they have a duty to make reasonable efforts to design a vehicle which will minimize injuries regardless of the cause of the collision. Larsen, 391 F.2d at 501-02. The cause of the collision simply has no bearing on this duty.

> The [crashworthiness] theory, which presupposes the occurrence of accidents precipitated for myriad reasons, focuses alone on the enhancement of resulting injuries. The [theory] does not pretend that the design defect had anything to do with causing the accident. It is enough if the design defect increased the damages. So any participation by the plaintiff [or defendant] in bringing the accident about is quite beside the point.

Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992). Under this theory, any alleged negligence in causing the initial crash

is remote, and thus irrelevant, and should be excluded.[19] Jimenez v. Chrysler Corp, 74 F.Supp.2d 548, 566 (D.S.C. 1999). See also Dennis v. American Honda Motor Corp., 585 So.2d 1336, 1340 (Ala. 1991) ("[a] motorcycle helmet is a safety device designed to protect the motorcyclist's head from injury, regardless of who caused the accident. It would be wholly inconsistent to allow the manufacturer of a safety device such as motorcycle helmet to design a defective product and then allow the manufacturer to escape liability when the product is used for an intended use, i.e., the very purpose of the helmet").

In a crashworthiness case, the issue should be limited to the cause of the additional or enhanced injuries. "[P]ure crashworthiness cases should focus on the cause of the enhancement of the plaintiff's injuries and eliminate operator error or third party negligence as a defense." Theresa A. DiPaola and Edward M. Ricci, Evolution of the Automobile Crashworthiness Doctrine in Florida, 69 Fla.B.J. 40, 43-44 (Oct. 1995). This is because there are two completely separate types of proximate causation fault in a second collision case. They are accident-causing fault for the first collision and injury-enhancing fault for the second collision. Accident-causing fault refers to the liability based on a person's contribution to the proximate cause of the first collision. Injury-enhancing fault refers to the liability based on a person's

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[19] This is not to say that there should be no comparable fault when the comparable negligence relates to the second collision and enhanced injuries, i.e. failure to wear a seatbelt. See Fla.Stat. § 316.614(9)(failure to wear seatbelt is comparative negligence).

contribution to the proximate cause of the second collision enhanced injuries.

Evidence of accident-causing fault is both confusing and irrelevant in a crashworthiness **case;** the only issue is the manufacturer's liability for causing the second collision additional or enhanced injuries. The reason is clear. A manufacturer in **a** second collision case never has any accident-causing fault so there is always 100 percent accident-causing fault, be it the plaintiff's or **a** third person's, to be compared to a manuf acturer's injury-enhancing fault. The accident-causing fault will **always** constitute a superseding cause of enhanced injuries, thereby insulating a manufacturer. That should not happen. No matter what caused the initial collision, a manufacturer's duty is to minimize the effects of an accident and where its defective product enhanced the injuries it should not be permitted to escape liability. As explained by the federal district court in Jiminez v. Chrysler Corn.:

> [t]he better-reasoned rule is to exclude any evidence relating to [a person's] alleged negligence [in causing the accident]. First of all, such a rule intrinsically dovetails with the crashworthiness doctrine: Because a collision is presumed, an enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. Secondly, the concept of "enhanced injury" effectively apportions fault and damages on a comparative basis; defendant [manufacturer] is liable only for the increased injury caused by its own conduct, not for the injury resulting from the crash itself. Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part

> that was supposed to be designed to protect in case of a collision.

74 F.Supp.2d 548, 566 (D.S.C. 1999). See also Mills v. Ford Motor Corp., 142 F.R.D. 271 (M.D. Pa. 1990) (no comparative negligence between plaintiff's negligence in causing initial accident and manufacturer's negligence which resulted in enhanced injuries); Green v. General Motors Corp., 709 A.2d 1210 (N.J.Super.Ct.App. Div. 1998) (same); Andrews v. Harley Davidson, Inc., 796 P.2d 1092 (Nev. 1990) (same); Cota v. Harley Davidson, Inc., 684 P.2d 888 (Ariz.Ct.App. 1984)(same) Binakonskv v. Ford Motor Co., 133 F.3d 281 (4th Cir. 1998) (applying Maryland law; fact that the driver was intoxicated did not make the crash unforeseeable to the manufacturer and was therefore irrelevant).

Accident-causing fault should not be compared with injury-enhancing fault because there are two different harms; non-enhanced and enhanced injuries. Thus, the negligence of the manufacturer and the person causing the accident do not unite together to create a single injury; their degrees of fault should not be compared. Jimenez, 74 F.Supp.2d at 565.

Here, a criminally drunk driver crosses lanes and strikes Mrs. Nash. He is the proximate cause of the first collision. In that collision Mrs. Nash sustained survivable injuries. Then, a second collision occurred because Mrs. Nash's shoulder harness failed, allowing her head to hit the A-pillar. This second collision resulted in her death in what otherwise would have been a survivable accident. GM, the manufacturer of the defective harness, has injury-enhancing fault for the injuries caused solely as

a result of the harness failure. Where GM had a duty to provide properly functioning seatbelts based on the fact it was foreseeable that its vehicles would be involved in accidents, GM should not be permitted to avoid its liability for causing Mrs. Nash's death by comparing its negligence with the conduct, negligent or intentional, of the person causing the accident.

This approach has long been followed in analogous cases in which a physician's subsequent negligence enhances his patient's original injuries. It is based on the premise that when a person's conduct gives rise to an occasion for a second person to act, and the second person acts negligently, resulting in separate and distinct injuries, the conduct of the first person cannot be compared to that of the second person. See Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977) (person who caused automobile accident not a joint tortfeasor with doctor whose negligent treatment of plaintiff's injuries sustained in accident caused enhanced injuries); Piper v. Moore, 410 So.2d 646 (Fla. 3d DCA 1982) (decedent's negligent failure to seek medical treatment sooner could not be compared to doctor's negligence where decedent's negligence was not the cause of death); Matthews v. Williford, 318 So.2d 480 (Fla. 2d DCA 1975) (conduct by plaintiff or decedent which caused the need for medical care not a defense to negligence which causes a distinct subsequent injury); Whitehead v. Linkous, 404 So.2d 377 (Fla. 1st DCA 1981) (fact that decedent had taken an overdose of drugs irrelevant where decedent would not have died but for physician's negligence); Norman v. Mandarin Emergency Care Ctr., 490

So.2d 76 (Fla. 1st DCA 1986) (patient's negligence resulting in injury which requires medical care not a defense to the negligent medical care provided). See also Vendola v. Southern Bell Tel. and Tel. Co., 474 So.2d 275 (Fla. 4th DCA 1985) (decedent's shooting not a defense to phone company's failure to trace call once it undertook the public service of tracing all 911 calls where, but for the failure to trace the call, the decedent would not have died); Matthews, 318 So.2d at 481 ("The law is well-settled in this state that a remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of the result of the subsequent negligence").

In this case, Chatfield's conduct gave rise to the need for a properly working seatbelt. GM provided Mrs. Nash with a defective one. GM should not be permitted to compare Chatfield's conduct in causing the initial accident with its negligence in failing to provide Mrs. Nash with a properly working seatbelt when, but for that defective seatbelt, Mrs. Nash would not have died.

II. THE DISTRICT COURT CORRECTLY OVERTURNED THE JURY VERDICT ON THE BASIS THE TRIAL COURT FAILED TO EXCUSE A BIASED JUROR FOR CAUSE.

This Court accepted jurisdiction on the basis of the conflict between the Third District's opinion in this case and the Second District's holding in D'Amario. The juror issue does not form an independent basis for jurisdiction. Therefore, although once this Court accepts jurisdiction it may decide all the issues, Bould v. Touchette, 349 So.2d 1181 (Fla. 1977), Nash respectfully requests this Court decline to decide the juror issue. See Wood v. State,

24 Fla.L.Weekly S240 n.3 (Fla. May 27, 1999); Scoggins v. State, 726 So.2d 762 (Fla. 1999); Merrill Crossings, 705 So.2d at 563 n.1. The only issue should be whether a jury may apportion damages between a nonparty criminally drunk driver who causes the accident and a manufacturer whose negligence caused additional or enhanced injuries. Nonetheless, should this Court decide to review the juror issue, the District Court's decision was correct for the following reasons.

A. **Nash preserved his objection to the jury panel.** [Petitioners' argument II.A.]

GM claims at 32 that the District Court erred in overturning the jury verdict on the basis that Juror Robles should have been excused because Nash failed to renew his objection to the jury panel before it was sworn. GM is wrong. Nash fulfilled every requirement established by this Court in Joiner v. State, 618 So.2d 174 (Fla. 1993), to preserve his objection to the jury panel, including renewal of his objection at the conclusion of jury selection and immediately before the jury was sworn. Shortly before the jury was sworn, Nash objected a second time to the trial court's refusal to strike Juror Robles; the trial court had another opportunity to correct the error. (SR. 127-28, 274-75). This Court requires no more. "Joiner mandates that the claimed error be called to the trial court's attention once more prior to the swearing of the jury, so that the court will be made aware that the objecting party is insisting on the objection, and so that the court will have a last clear chance to take corrective

action if needed." Milstein v. Mutual Sec. Life Ins. Co., 705 So.2d 639 (Fla. 3d DCA 1998). Nash did not waive this argument.

B. The Third District correctly held that the trial court abused its discretion in refusing to excuse Juror Robles for cause. [Petitioners' argument II.B.]

The District Court properly overturned the jury verdict on the basis that the trial court failed to excuse a juror who had clear reservations about awarding money damages for the death of a loved one and obviously disapproved of personal injury lawsuits. Juror Robles said she had problems with personal injury cases, problems separating the cause of the accident from the cause of death when a drunk caused the accident, did not believe that awarding money for some one's death was proper and she could not be fair. She also said she chose not to sue for personal injuries she sustained from a defective product and disapproved a friend's decision to sue a manufacturer for personal injury damages.

GM claims at 36 that Juror Robles was not biased and impartial; Juror Robles had a general bias against personal injury suits, "an abstract concern about large personal injury awards," she later said she could be fair. GM is wrong. GM attempts to liken Juror Robles' bias to the negative feelings about personal injury lawsuits felt by over half the jury in Fazzolari v. City of West Palm Beach, 608 So.2d 927 (Fla. 4th DCA 1992). In Fazzolari, the court held: "A general, abstract bias about a particular class of litigation will not, in itself, disqualify a juror where it appears the bias can be set aside." 608 So.2d at 928. GM claims

Juror Robles' bias was similar. GM is wrong. Juror Robles obviously had more than a mere abstract bias or general negative feelings about personal injury suits. She had strong feelings that she could not set aside. The failure to excuse her for cause required a new trial. Jones v. State, 652 So.2d 967 (Fla. 3d DCA 1995) ; Tizon v. Roval Carribean Cruise Lines, 645 So.2d 504 (Fla. 3d DCA 1994).

In Jones, a juror stated that she would have difficulty being fair and impartial in light of her numerous and recent personal experiences with crime. She agreed to do her best to follow the law only after further questioning and after the court admonished that it was her duty to serve as a juror. The court held that the juror should have been excused because her equivocal answers failed to remove the reasonable doubt raised by her initial statements.

Similarly, in Tizon, a juror said her husband and some friends had the same back surgery as the plaintiff and had good recoveries. She thought that would be tough to put aside. She also said her husband, a doctor, had been sued and that definitely would influence her. The court held she should have been excused for cause, even though she later said she could be fair. Her conflicting comments were enough to raise a reasonable doubt about her impartiality.

The same is true here. Juror Robles expressed a variety of doubts about her ability to be fair on various issues. She should have been excused. "Impartiality of the finders of fact is

an absolute prerequisite to our system of justice." Williams v. State, 638 So.2d 976, 978 (Fla. 4th DCA 1994).

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial [,] he should be excused on motion of the party, or by [the] court on its own motion.

Sinser v. State, 109 So.2d 7, 24 (Fla. 1959). Where a juror's initial responses to voir dire show that the juror cannot be fair, the juror should be excused for cause. The initial responses are considered much more credible than some subsequent modification after close questioning by the court or opposing counsel.

> The test for juror competency is 'whether the juror can lay aside any bias or prejudice and render [a] verdict solely upon the evidence presented and the instructions on the law given . . . by the court.' The juror should be excused if there is any reasonable doubt about the juror's ability to render an impartial verdict. Furthermore 'where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion arrived at after further questioning by the parties' attorneys or the judge is properly viewed with some skepticism.'

Jones, 652 So.2d at 969 (quoting Turner v. State, 645 So.2d 444 (Fla. 1994)) (citations omitted). See also Sinser, 109 So.2d at 22 ("statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent. . ."). Nor is a juror's assurance that he or she would be able to be impartial determinative. Club West v. Tropigas of Fla., Inc., 514 So.2d 426, 427

(Fla. 3d DCA 1987).

> The test to be applied by the court is whether the prospective juror is capable of removing the opinion, bias or prejudice from his or her mind in deciding the case based solely on the evidence adduced at trial.

Id. "Close cases should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality." Svdleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

> 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 law announced at trial, he should be excused.

Levv v. Hawk's Cay, Inc., 543 So.2d 1299, 1300 (Fla. 3d DCA 1989). And a trial court's refusal to dismiss a impartial juror is harmful error.

> [I]t abridged appellant's right to peremptory challenges by reducing the number of those challenges available [to] him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Hill v. State, 477 So.2d 553, 556 (Fla. 1985).

Here, Juror Robles' responses on voir dire demonstrated that she could not be fair. She should have been excused for cause. Nash used all his peremptory challenges and requested additional challenges; the trial court denied that request. Nash was forced to accept another objectionable juror. The District Court correctly ruled that the trial court's failure to excuse Juror Robles

for cause required a new trial.

CONCLUSION

For the foregoing reasons, Nash respectfully requests this Court to affirm the district court's decision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 22nd day of March, 2000, to: all counsel on the attached list.

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