ORAL ARGUMENT - 11/21/96
96-0545
FORD MOTOR CO. V. MILES

LAWYER: Ford is here today requesting this court to grant it a new trial. A new trial not just on gross negligence, malice, and punitive damages as the CA has done. Rather Ford is requesting that it have the opportunity to have a jury assess its conduct under the correct legal standard and with properly admitted and excluded evidence. Ford has advanced numerous points of error requesting that relief and this court has granted Ford's application on 9 of them.

In the brief time I have today, I plan to principally address two of those points of error. The first is our contention that the TC incorrectly instructed the jury as to Ford's legal duties. And the second are our points of error challenging the propriety of a limited remand on the gross negligence punitive damages and malice issues.

But before I do that, I offer the following brief background. In April, 1993, a serious car crash occurred in Dallas. A car went out of control, veered across the median into the path of a 1988 Ford Ranger pickup, driven by Kenneth Miles, and occupied by his 2 step-sons, Jermaine and Willie Searcy. All were injured - Willie the most seriously. Less than 1 year later, the plaintiffs' filed suit against Ford and the Dallas dealer that sold the Ford vehicle to the Miles in this suit was filed in Rusk County.

Trial was to a jury within 10 months of the suits having been filed. The plaintiffs' theory of liability was basically this: A tension eliminator, a comfort feature in Willie's Searcy's shoulder belts had operated like a window shade to allow the occupant to reduce the tension on the belt, and then lock it in a comfortable position with a small amount of slack was defective. The plaintiff's theorized that Willie Searcy had been able to inadvertently introduce approximately 6-8 inches of slack in the belt, which went unnoticed. When the collision occurred, he was essentially unrestrained.

Ford vigorously disputed this contention. The case was closely and hotly contested. The evidence as discussed in detail in our briefs with regard to our points of error concerning the evidentiary issues, which are numbers 5, 6, 7, 8 and 9, which this court has granted our application on. After a lengthy trial the jury found Ford liable to the plaintiff on theories of negligence, warranty, and strict liability, and awarded damages of about $30 million. The jury also found that Ford was grossly negligent, acted with malice and assessed punitive damages of $10 million. Ford appealed. The Texarkana court agreed that numerous errors had been committed in the TC and that although the evidence was (and I'm quoting) "barely sufficient" to find ordinary negligence, all of the errors were harmless and that the judgment on liability for

actual damages was affirmed.

The court did however reverse and remand the punitive damages, gross negligence and malice issues for a separate new trial.

GONZALEZ: In that regard are you going to argue about the conditional remittitur?

LAWYER: I can your honor, yes. I don't particularly think that's germane.

GONZALEZ: Of course I know you want us to vacate the judgment in toto, but at some point I wish you would address the conditional remittitur.

LAWYER: I will your honor. And if I may I will reserve that to my partial remand argument. First I would like to talk about the jury charge and our jury instruction error. The jury was instructed: "That the manufacturer of a motor vehicle has a duty to reasonably design, manufacture, and market a vehicle so as not to subject occupants of the vehicle to unnecessary and avoidable injuries in the event of a collision." Ford objected to this instruction as an incorrect statement of the law because it is. The CA agreed with Ford that this was an incorrect instruction of the law. But the CA held that the error was harmless, concluding that somehow in its entirety the jest of the charge was consistent with the instructions in cases such as this.

ENOCH: What is the correct instruction?

LAWYER: The correct instruction is what this court set forth in General Motors v. Turner for design defect in crashworthiness cases.

ENOCH: And that is?

LAWYER: On design defect, the issue and instruction are: Do you find from a preponderance of the evidence that at the time the product in question was manufactured by the manufacturer, the product was defectively designed? By the term defectively designed as used in this issue has meant a product that is unreasonably dangerous as designed, taken into consideration the utility of the product and the risk involved in its use.

ENOCH: So there is not a separate instruction regarding crashworthiness at all?

LAWYER: No. In fact GM v. Turner is a crashworthiness case and the Turner court itself in the opinion at page 848 states: That irrespective of whether the inquiry is about a defect that caused the collision, which would be a design defect case verses an inquiry as to whether a defect caused the injury, which is a crashworthiness case, "there is no rational basis for a difference in the manner of submission of the issues to be determined by the fact finder." So clearly there should be no

difference.

CORNYN: How does the instruction misstate the law?

LAWYER: It misstates the law fundamentally we submit because neither the restatement nor any body of Texas law requires a manufacturer to build a vehicle, or design, or manufacture, or market a vehicle so as not to subject its occupants to unnecessary and avoidable injuries. This court has laid down in numerous decisions and set down in numerous decisions what the specific instructions the jury should be given, and what standards the jury should be guided by. And those are whether the product is unreasonably dangerous. Unreasonably dangerous does not mean and no court has held to my knowledge and the restatement does not say that unreasonably dangerous means: that to not be unreasonably dangerous a vehicle must prevent its occupants from being subject to unnecessary and avoidable injuries. Otherwise as we argue in our brief, the Caterpillar case and others couldn't be on the books the way they are. The manufacturers would have to design fail-safe products, and that is certainly not what the law requires of them.

CORNYN: So your argument is essentially that this instruction says it's the manufacturer's duty to avoid all injuries in the event of a collision?

LAWYER: Unnecessary and avoidable ones is how the instruction reads, yes. Because certainly for example your honor assume that you have a convertible car. Well injuries from roll-over could be deemed to be unnecessary and avoidable if the manufacturer had designed it in such a way as to prevent them. But then you wouldn't have a convertible any more. You would have a car. And the logic continues. You cannot have this jury instruction and correctly state Texas law. Manufacturers aren't to be held to the standard. The question is whether a product is unreasonably dangerous. And in the design and crashworthiness context it is a function of balancing utility verses risks.

CORNYN: So you're saying that General Motors v. Turner is the only correct submission?

LAWYER: It's the only correct submission for design. Yes your honor it is.

CORNYN: Including a crashworthiness case?

LAWYER: Yes your honor it is.

ABBOTT: And did your objection clearly apprize the TC of the specific area you're complaining of now?

LAWYER: Yes it did. I can't imagine how it could be clearer. In fact at 17 Statement of Facts 28.02, we object as follows: Our objection to this sentence focuses on the use of the words "unnecessary", and "avoidable." And the objections are these. First of all by using that phrase this

instruction is a materially incorrect statement of Texas law. There was further objection that there is no duty in Texas of a manufacturer to undertake without qualifications all steps no matter how costly or cumbersome that might avoid an injury in the event of a collision. There was also objections to the instructions that it was surplusage and not only was it surplusage but it was designed and had the effect of nudging the jury towards a plaintiff's verdict. So clearly your honor we believe that the objections were properly before the court. Certainly under Payne or any cases of that sort we would have satisfactorily apprised the TC and giving him notice of the problem.

For over a decade this court has repeatedly rejected attempts to add to the pattern jury charge in the area of products liability and negligence cases. In Accord v. General Motors this court set forth the appropriate products liability charge a court should submit. Indeed in a Accord this court said that even if surplus language correctly states the law, it is error to submit it. Accord also used an analysis which is particulary instructive here and that is there's a greater likelihood of error being harmful if the case is closely contested.

Respondents suggest to our argument that the language was surplusage and was not harmful. They cite this court's recent Reinhart case on this point. And I think contrasting Reinhard to this case starkly demonstrates why it's harmful error to have submitted the case this way in Miles and it wasn't harmful in Reinhart.

In Reinhart most fundamentally the instruction that was complained about was a correct statement of the law. Here the instruction is incorrect. Secondly in Reinhart the court found that there was tremendous of evidence of liability. Here it was a hotly contested case. The CA after doing its review concluded that there was barely sufficient evidence of ordinary negligence. In Reinhart again there was little mention of the term that was in dispute in the plaintiff's closing argument. Here the instruction was the only one that the plaintiff's counsel read to the jury. It was a centerpiece. Furthermore, and finally in Reinhart there were other instructions in the case. There is a sudden emergency instruction, that was substantially similar and to the same effect as the unavoidable accident instruction to which the objection was made in the case pertained. In Miles this case there was only one duty instruction that was given.

The plaintiffs also suggest that a different jury instruction from that set forth in Accord needed to be given because of Duncan. I believe that I have addressed that point in my response to Justice Cornyn, and to Justice Enoch. Every liability question asked about the injuries, not the occurrence.

The plaintiffs' arguments missed the mark. The harmful nature of this error we submit is inescapable. And I would point to the CA opinion at pages 30-31, but I want quote them to you. On those pages the court talks about how Ford went to great lengths to _____ the relevant risks and benefits of the restraint system and how we relied on studies of NITZA that consistently show the risk utility balance of tension eliminators. The fact that the court gave an incorrect statement of the

law and asked the jury to judge Ford's conduct based on a higher and different standard of care that it owed is clearly harmful error.

I will now turn to the partial remand issue and address your question Justice Gonzalez. First Ford requests that its new trial be on all the issues, not on just the liability for punitive, and malice and the damages themselves. It was error for the CA to have partially remanded the case. The CA premised its decision to partially remand the case on the assumption that the issues of simple negligence, strict liability, gross negligence and malice were not intertwined.

HECHT: Should plaintiffs be allowed to remit?

LAWYER: No your honor.

HECHT: Why not?

LAWYER: Two reasons. First of all the plaintiffs have nothing to remit.

HECHT: They can nonsuit in the TC?

LAWYER: They could. They have always been able to dismiss the claim.

CORNYN: What's the difference?

LAWYER: Well there's a difference in remittitur and dismissal in that...remittitur first of all is a creature of statute under 85.

CORNYN: That's not the only source. This court has previously allowed remittiturs not strictly complying with the rules of appellate procedure.

LAWYER: Prior to Rule 85 is what you're referring to.

CORNYN: Yes.

LAWYER: Prior to rule 85 this court did remit certain claims. We submit that after the passage of rule 85 this court wrote the rules and delegated to the CA the power to grant such remittiturs within 15 days of the entry of the judgment or opinion of the court.

CORNYN: That necessarily deprived this court of the power?

LAWYER: That's certainly an argument that was left unaddressed after Redman. And we submit that the proper place for them to have done so was at the CA.

ABBOTT: If they were to dismiss, drop, otherwise eliminate their claim for punitive damages their claim for malice, their claim for gross negligence would that then eliminate this particular point of error on your part?

LAWYER: As a technical point your honor probably it would. I think it would be...certainly it's their obviously desired result to have that do away with the entire application in this case so that the remaining damages of $30 million would stand. We submit that that certainly would not be the result. That we have raised errors of importance to the jurisprudence in the remaining parts of our application. They would not be at all affected by that. And that for policy reasons it would allow potentially a bad result to be perpetuated in the jurisprudence. But technically it would probably moot the issue, yes.

CORNYN: Hypothetically if we thought there was no error in the actual damages awarded in the liability issues, what prejudice is there to separate the trial of punitive damage claim and the underlying actual damage claim?

LAWYER: I submit that to separate punitive damages and their liability requirements - gross negligence, malice, or what have you - from negligence and the basis for liability would violate Moriel in toto, and cannot be done without undoing Moriel.

CORNYN: That seems a little counter-intuitive since now we've said you have to bifurcate those claims for trial.

LAWYER: At first blush(?) that would seem correct. But when you read Moriel and particularly what appears to me to be the courts having grappled with the issue about how to appropriately set forth Texas' procedure for bifurcation, as you will recall certainly the court considered teachings from other jurisdictions. And particularly looked at the two different kinds of bifurcations those which had bifurcated only damages so that net worth evidence could be considered as we have now, and those that bifurcated it so that evidence of gross negligence and damages would be in the bifurcated separate phase.

In concluding that Texas preferred the first method which we now have, this court said that if the jury answers the punitive damages liability question in the plaintiff's favor, that same jury is then presented evidence relevant only to the amount of punitive damages considering the totality of the evidence presented at both phases of the trial. Moriel continued to say that some evidence relevant to punitive damage liability such as evidence of gross negligence will also be relevant to liability for actual damages. Clearly Moriel instructs us that that same jury needs to hear all the evidence and can only assess the punitive damages after having heard all that evidence and considering the totality of all that evidence. So we submit that the partial remand cannot be harmonized with Moriel. And it is also something that our US SC teaches we should not do under Champlin if it results in unfairness to the defendant or the parties.

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RESPONDENT

LAWYER: May it please the court. On behalf of Willie Searcy and his family we first would like to thank the court for its presumed expedited consideration of this matter in view of his situation. We are truly grateful for that. We ask the court's further indulgence in that regard in the disposition of this case because for Willie Searcy justice delayed may very well be justice denied.

I would like to address the issues that Ms. Frost has raised in reverse order if I might, because I think that the first issue is dispositive of this case. I intend no disrespect to Ford's application to suggest and I will talk about the instruction point momentarily, that all the other evidentiary issues that they raise as stated in the briefs do not rise to the level that this court would ordinarily take a case on or grant, or reversal.

Let me talk about the question of remand. We do not intend to argue before the court today the fascinating question that Judge Cornyn posited to Mrs. Frost for 3 reasons. It will never arise it's hypothetical in this case for 3 reasons. One, if we are correct in our Jaffe analysis before the court and the CA used an incorrect legal standard to evaluate the evidence of exemplary damages in liability for exemplary damages, then this court under Jaffe would remand the decision of the CA for further consideration in light of whatever opinion it might write. If the CA at that time comes forth with another analysis saying that the evidence is factually insufficient to support the exemplary damages as they have said in the first case, we intend to remit the exemplary damages at that level. So that would not arise. Secondly, if the court accepts our voluntary conditional remittitur and finds no error in the case that requires reversal other than that, the case is over. Again the analysis or supposition of the CA of a separate trial on exemplary damages would never arise. Finally, if the court should say no there is other error in the case that requires reversal and reverses the entire case, again the situation posited by the CA would never arise because we would have one trial under a Moriel standard. So for those 3 reasons, we don't find it necessary to address the question further.

I would like to address something. I don't remember if it was Judge Cornyn or Judge Gonzalez raised and that is can we file a remittitur as we have done in this case? The most recent expression by this court on that subject was by Justice Gonzalez for a unanimous court in the Redman case. And in that case Justice Gonzalez in fairly scholarly detail went through the history of remittitur in the SC and pointed out that on many occasions dating back almost to the inception of the court from its terms of its inherent power the court had granted remittitur. And we cited in our brief some other cases which you have noticed all have to do with remittiturs usually on rehearing in the SC. The SC says a certain item of damage was not recoverable. This court has historically allowed a plaintiff under those circumstances to remit those damages to avoid a new trial.

If I understand what counsel is saying she is saying in effect that Redman was wrongly decided by this court. And in fact Justice Gonzalez's discussion in Redman was all dicta.

PHILLIPS: Have you found a single case where our court has accepted a remittitur prior to making a determination about the merits of the case?

LAWYER: I can't recall. I do think one of the very old cases may very well have done that. I will check that, and if I may, give you a postsubmission memo on it. I don't recall that specifically. Not well enough that I would be comfortable saying it to you.

Let me get back to what I was saying about Redman. What Ford is really saying to you...

GONZALEZ: Counsel your time would be better used if you address the jury instruction because that's the main issue that the court is interested in.

LAWYER: I will certainly do that your honor. I just want the court to understand that we think Redman stands for exactly the opposite proposition than the one the court advocates. Let's talk about the jury instruction. This is something that's not in our brief. It's brand new. My copy of the preliminary final draft of the restatement third, which I am sure the Chief Justice is familiar with only came the day before yesterday and I think that counsel said that the instruction the TC gave was a materially incorrect statement of the law. We disagree with that.

If I might direct the court's attention and we will put this in a post-submission brief. Under §12, at page 522 of the preliminary draft, which came out Oct. 18, 1996, the American Law Institute uses this language to describe the duty of a manufacturer in what they call an enhanced harm case. That's what they call crashworthiness now. I think you asked that Justice Abbott just a minute ago. Here's what they said: A manufacturer has a duty to design and manufacture its product so as reasonably to reduce the foreseeable harm that may occur in an accident brought about by causes other than a product defect. In effect the instruction that we gave in the TC was far more restrictive and far more conservative than the one that the restatement endorses. And I believe that Mrs. Frost's first point was that this instruction violated the restatement. It clearly does not.

BAKER: You say it's a preliminary draft?

LAWYER: Yes it is. Well I say it's a preliminary. It's proposed final draft (preliminary version). The chief justice could tell me more about what that means. It says it hasn't been adopted by the counsel I think is what it says.

BAKER: Would that in any way affect the applicability in this case to try it under a different...

LAWYER: Well it's been my impression over the years your honor that the court generally is in agreement with the restatement position. What we were trying to do was bring you the most current information we have on what the current state of the law is because the court is asked to decide that question here. And we presume that the court would desire to decide it in a manner which is

consistent if it thinks the restatement is correct with the restatement...

PHILLIPS: I think we have cited preliminary drafts. But barring the restatement as the law stands do you agree or disagree that Turner stands for a charge for a both design and crashworthiness?

LAWYER: I do not. Turner stands for a charge in strict liability portions of the case. This was not just a strict liability case. This was a negligence case. This was a breach of warrant case. That's what Ford ignores. And the instruction that we needed was not just an instruction that applied only to design defects. We gave the Turner instruction verbatim as Mrs. Frost said it should be given. The TC gave that instruction exactly as the pattern jury charge said it should. The question was here and let me just acquaint you if you're not familiar with it. If you doubt what I say - I doubt you will - but if you do go back and read the opening statement of Ford's attorney to the jury: Ladies & Gentlemen we don't really know why we're here. This truck didn't cause these horrible injuries that this child sustained. This truck is just a static object. It's a product. What caused these injuries was this car coming across the road and being in collision with the truck. If the wreck hadn't happened, this child would never have been injured. Ford has nothing to do with it. And he several times said Ford had no responsibility whatever in regard to things that happened inside the vehicle after a collision. It was essential for the jury to be instructed as to what the legal duty that Ford had was not only in strict liability, but in negligence and warranty. So Turner certainly speaks to the 402a aspects of the case. It does not speak to the risk.

Let me ask another question. One of the members of the court, I think it was Judge Abbott asked: Was this properly preserved? And Mrs. Frost assured you that it was. I couldn't disagree more. There are two objections, don't rely on what I say, go back and look at the record yourself and you will find that this is what was said. The first objection made by Ford at the TC to this instruction was that it is a materially incorrect statement of Texas law. That is almost a per se quotation from this court's opinion in Castleberry v. Branscomb which it said was absolutely ineffective to preserve any error. That is to state that something is an incorrect statement of the law. or is improper. or illegal, or doesn't correctly state the law without stating why, or in what particular it's improper preserves absolutely nothing. That's what the court said in Castleberry. I think it's a good rule.

What this court has always said is if you don't make a proper objection to inform the TC of what specifically is wrong with the charge you waive your error. And they waived this one as clearly as it could be waived. The only other objection that they make is they say that a manufacturer doesn't have an absolute duty to design and market in a certain way. The trial judge himself said: reasonably design. It wasn't an absolute thing. And reasonably was defined in terms of your risk utility analysis.

And finally they said, well the issue involves nudging. Now unless you're pretty _____ as a trial judge you would have to know that that's a paraphrase of Accord. But again they don't tell the trial judge how or why it nudges. What is it about it that nudges the jury one way or the other?

I respectfully submit to you that you will find it very difficult consistent with existing precedent to find that these claimed errors were preserved. One thing that Mrs. Frost doesn't mention that you might find interesting is the second sentence in that same area of the instruction about a manufacturer is not an insurer of the automobile, you remember that language, comes directly from Ford at Ford's request and demand and is itself a per se violation of Accord. So Ford wants to...

BAKER: Did you object?

LAWYER: I believe we did your honor. I'm not sure of that. I will check it and give you a citation. But I believe we did.

CORNYN: One of Ford's complaints and you may need to come back to the jury issue, but let me ask you about one of the evidentiary, a couple of the evidentiary rulings. It was Ford's theory of the case was it not that your client's head snapped forward because of the force of the collision and did not actually come in contact with the dashboard; is that correct?

LAWYER: I'm trying to be extremely technical here your honor to be sure that I answer you correctly and you can rely on what I say. Ford's actual contention was that Willie's injury resulted because of some unique susceptibility that Willie had because his neck was immature and not sufficiently developed that the ligaments in his neck were somehow defective and allowed his skull to separate from his spinal column.

CORNYN: Their theory was it did not come in contact with the dashboard; correct?

LAWYER: Their theory was at one point, they had different theories depending on who's ox was in the ditch, but at one point in the trial they said that he did not strike the dashboard, at another point their expert said that there was an injury to the right side of his head over his eye that came from Ford contact with Ford structures up around the Apillar. That's the pillar that's up at the front of the truck.

CORNYN: Yet the TC excluded an evidence of a sled test with slack in the seatbelt caused by the tension eliminator showing that dummy's head hit the dash, which tended to I guess be offered and negate your theory of the case, and the TC excluded that. At the same time the TC allowed you to admit evidence of sled tests involving a different vehicle, a passenger vehicle as opposed to a pickup truck, with 6 year old child dummies with no tension eliminators and no slack in the belt. Can you tell us why that's not harmful error?

LAWYER: Those are two different points. First let's talk about Ford's sled test. What happened was that this is standard operating procedure Ford in product's cases. In major cases they go out to an outfit called Failure Analysis in Phoenix, AZ, out in the desert, and they conducted a crash test there using exemplary vehicles of the same type that were actually involved in this collision. In the

course of that crash test they generate what they call a crash pulse, which is recorded information from instruments within the vehicles that measure forces and energy and acceleration and things like that. And then they take that information from the crash test back to Deerborn Michigan and there they conduct their sled tests.

Now I'm trying to answer your question in a direct way and I hope I don't stray too much. There was a lengthy hearing. The trial judge heard evidence for about 12 hours on this question. And he heard from us and he heard from them and took into account all the experts; and this is what the record show in regard to that test. First of all, with regard to that test Ford used what they call ballast material, and it's proper to use ballast material, that is if there's a spare tire or something of that sort in the vehicle you need to replicate that weight in your test, that's fine. But what Ford did for ballast was they took instead of putting ballast all over the vehicle where it actually was they took all the ballast material in this context - 70 lbs. of lead weights and sand - and put it on the floorboard right in front of the accelerometer where Willie Searcy's feet would have been.

OWEN: Didn't your expert say that was alright?

LAWYER: No, he did not. That's what they say in their brief. If you read the record, don't rely on me Justice Owen, read the record, what Mr. Siason said was that was not alright. He said ballast is fine. It was not alright to put the material where they put it there. It was put there for 1 purpose, that was to enhance the forces that would be shown on the accelerometer when there was absolutely no evidence at all, none, that Willie Searcy had 70 lbs. of weight by his feet. None at all. They did that. If you will forgive me for saying so. I will say it publicly. They rigged the test. But they didn't rig it well enough because the second thing they did, this is all in the record, was they said this is a great crash test that we have in Arizona. It shows exactly what happened. Our expert said he thought it was a good crash test. But it's not quite good enough. So what we will do is we're going to arbitrarily increase the forces before we do our sled test, and I will tell you what else we are going to do just to be sure it comes out right, what we are going to do is we are going to take an event that occurred in 150 milliseconds, and we're going to compress it into 100 milliseconds. Again, Justice Owen, you remember Mr. Siason's testimony on this - you've obviously read the briefs on this - they say Mr. Siason said well there was no problem with that. What Mr. Siason said was, that was a big problem because you take an event that happened in 150 milliseconds and you compress it into 100, that in an engineering standpoint would be the difference between dropping an egg on foam rubber and dropping an egg on concrete.

There were many other things. A leading expert your honor in this state, probably one of the best in the world, is Dr. Joel Kirkpatrick who teach neuropathology at the Baylor Medical School in Houston. He said unambiguously that the _____ dummies that Ford used in this test were not biophadelic(?) and did not demonstrate in any way the actual responses of Willie Searcy's body in this collision. They could not be relied upon. Both he and Siason testified repeatedly that what Ford had done was junk science and what they had tried to do was stage a test in such a manner as to get

to a predetermined result.

PHILLIPS: The other half of Justice Cornyn's question is didn't the test that you offered have equal dissimilarities?

LAWYER: Absolutely not. I will come to that. There are many other dissimilarities in this record. And what Judge Ross said was he admitted the crash test in Arizona, and refused to admit the sled test. That's exactly what this court has counseled trial judges to do in Broders(?), not to accept junk science testimony from nonqualified witnesses. Dr. Benedict, their witness who sponsored this test, didn't even complete his internship. He's a Ph.D. who went to medical school and now testifies exclusively for manufacturers. And unless those protections apply only to defendants, which I don't think the court certainly intended, then they apply here. It was properly excluded.

Let me answer your question Chief Justice Phillips. And that's about this test that we had. You will have to get a little background here because I want you to understand what actually happened in this trial. Ford in this trial specifically and repeatedly said: We never did any testing on our seatbelt systems with slack in the system. If you look at the opening statement of Mr. Finnell he says unambiguously: All our testing was done with the belts tied against the chest. It wasn't any reason for us to do it any other way. We got, and this is in the record, we got Ford's testimony in 5-6 maybe more than that other tension eliminator cases from their experts in which they swore under oath that they had never done any testing of their vehicles with slack in the seat belt system. We then went through Justice Cornyn about 1,000 or so sled tests and tests that Ford had in-house. We had to go through them manually one by one finding the needle in the haystack. The first one we found was a 1967 test of a Thunderbird done in 1966 in which Ford's engineers put 4-5 inches of slack into the shoulder belt, exactly what we said happened to Willie, for the purpose of seeing what effect a 3 point restraint would have with slack in the belt. And they got their wish - the dummy's head was torn off in that test. At a 30 mph barrier test the dummy's head was torn off.

We also found a test involving children in a passive restrain system, which our expert went through in technical detail explaining how that system was almost exactly like a tension eliminator in terms of inducing slack into the system. In that situation Ford tested it again with slack in the system, again the child was decapitated. The child dummy was decapitated. And Ford says incredibly that that evidence was inadmissible in this case. Ford's own testing which show that Ford knew exactly how dangerous this thing was and nonetheless _____ on the public was inadmissible.

CORNYN: Was it offered to impeach their prior representation or was it offered to show it was substantially similar to what happened here?

LAWYER: We specifically said it was not substantially similar. We qualified our offer to say

we are not saying that these crash tests in any way show what happened in this accident. Rather they show that Ford knew contrary to its sworn position to repeated courts and to the jury in this case, that if you put slack in this system you would likely kill the occupants of the vehicle. And they knew it. And the other aspect of it your honor, you can call it impeachment I suppose, remembers it's not impeachment of a witness, it's impeachment of a party, that was to show that Ford in fact misrepresented its position to the trial judge and to the jury in this case. And we think were entitled to make that proof.

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REBUTTAL

LAWYER: May it please the court. In the few minutes I have I want to go back to the crashworthiness questions that were asked and the issue about the difference between crashworthiness and design defect and whether the particular jury instructions here in any way did not adequately apprize this jury of a difference between damages proximately were the producing cause of an injury and damages that were caused by a collision or occurrence.

In the record, in the jury instructions, the court instructs the jury as follows, and this is an instruction to which no objection was made:

> A defective product negligence or breach of warranty may be a proximate or producing cause of an injury whether or not such defective product, negligence or breach of warranty actually caused the particular collision in question.

There is no doubt that this jury was properly instructed on crashworthiness that they were to consider damages proximately caused by or producing cause of an injury. A specific crashworthiness instruction could not be better crafted for this case.

ABBOTT: What's your response to Mr. _____ comment about the proposed new restatement?

LAWYER: I have not read it. So I'm sure it says what he says it says. However, the fact that the restatement has a correct statement of the law and assuming even for purposes of argument that what they put in their instructions which we don't agree with, but if you assumed even that they were correct under some new draft, this court has steadfastly tried to avoid surplus language in all of its jury charges in product cases. In fact in Accord this court said: We explicitly approve the pattern jury charge issue and instruction for design defect cases and disapprove the addition of any other instructions in such cases however correctly they may state the law under §402a of the restatement second of torts.

GONZALEZ: How about Mr. Ayers comment or argument with regards to surplus instructions that

you were doing the same thing. You were asking the TC and did in fact ask the TC to do something in violation of a court in the very argument you're making today by insisting that the jury be told that they are not _____?

LAWYER: There is a couple of ways I can respond to that. First is that it doesn't make any difference.

GONZALEZ: You can do it, but they can't?

LAWYER: No, not at all. Two wrongs do not make a right. This court has said you do not put additional instructions in the case, and you don't.

PHILLIPS: So if you had won you would be standing ready to have a new trial?

LAWYER: If you take this to its logical extension you cannot possibly harmonize what Mr. Ayres is saying should matter in this case with what this court has tried to do and what Accord teaches. There is one set of jury instructions and one set of issues that the court should give. Now his argument is well if I the plaintiff convince the TC to give an incorrect instruction of the law, and then you defendant to try and to protect yourself from that incorrect instruction offer another one, well that's okay.

CORNYN: So both sides basically infected the charge with reversible errors?

LAWYER: Two wrongs don't make a right here and it's impractical, impossibility for a defendant to really have to sit idly by and not try and do something to protect themselves at the outset to try and get a good jury verdict so that we don't have to be. But in any case the issue is what should go in the jury charge and whether it was enough for the crashworthiness concern. And the answer is neither. The plaintiff's instruction on the law was wrong, it was harmful error, and it shouldn't have been there.

OWEN: Will you talk about Ford's internal tests that were admitted into evidence, the videos?

LAWYER: The sled tests your honor?

OWEN: Not your sled tests, the tests that Ford did internally that plaintiff offered and it was admitted that decapitation...

LAWYER: Yes your honor there was one decapitation tape that Ford did of a 1967 Thunderbird. Certainly that was not substantially similar to anything that occurred in this case.

GONZALEZ: They admit that up front?

LAWYER: The second tape and it was not admitted.

GONZALEZ: It was to rebut the position that Ford was taking that there was no such tests.

LAWYER: Right. And there was no such admission. There was not impeachment. We never denied that. We never denied that we tested for slack.

GONZALEZ: The record will speak for itself.

LAWYER: In our briefings we have submitted evidence to that effect. There was no impeachment to be had here. So it had no purpose other than to prejudice the jury. I would like to briefly close on the point of harmful error with respect to the exclusion of the sled tests. You know it's rare in a case that you do get to have any idea what a jury is interested in. But in our case we have a unique opportunity to know. The jury sent out one note...

PHILLIPS: Is this in response to...

OWEN: I would like to get back to the sled tests briefly.

LAWYER: The jury sent out a note and asked to see defendant's Exs. 152 and 226. Defendants Ex. 152 is our video tape of the two moving crash tests that simulated the accident, the one upon which the sled test was based the excluded sled test was based. The second video that the jury asked to see was Ford's demonstration of the tension eliminator. The one thing that Ford wanted to show them was how this accident couldn't have happened the way the plaintiff claimed and how their causation theory couldn't have happened in this particular crash, in this particular case. And that was omitted, and it was harmful error.