IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO: 5D07-2303

LT NO: 99-CA-3878

FORD MOTOR COMPANY and
MAZDA MOTOR CORPORATION,

Appellants,

v.

FRANCIS B. FORCE, ET AL.

Appellees.
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BRIEF OF APPELLEE

On Appeal from the Ninth Judicial Circuit Court

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I.
INTRODUCTION AND SUMMARY OF ARGUMENT

Over 11 years ago, in July of 1996, Mark Force suffered irreparable brain damage when the seatbelt on his 1993 Ford Mustang failed to protect him in a car accident. Over 11 years later, Defendants Ford Motor Company and Mazda Motor Corporation (Mazda did most of the designing and testing of the seatbelt system) have finally conceded by omission that the Plaintiff's evidence supports a jury's verdict that the seatbelt was defective, and that the jury's quantification of Mark Force's overwhelming losses, a significant portion of which are economic, is supported by the evidence.[1] Indeed, Ford/Mazda's post-trial challenge to the damages consisted of exactly one sentence, cited no authority, and did not even mention any of the evidence of Mark Force's devastating injuries (R-38-7225). After three trials--the first reversed because of Ford/Mazda's erroneous opposition to a Standard Jury Instruction, the second a mistrial--it is now conceded that the evidence supports both Ford/Mazda's liability and the significant damages awarded.

What remains is Ford/Mazda's evolving attempt to find a persuasive appellate argument.[2] Ford/Mazda have finally focused on four evidentiary rulings, which they

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[1]Any argument not raised on Appeal is waived. *Wingate v. United Services Automobile Ass'n*, 480 So. 2d 665 (Fla. 5th DCA 1985).

[2]The first three arguments raised by Ford/Mazda on Appeal were numbers 11, 12 and 13 of their shotgun post-trial Motion (*id*. at 7218). These arguments merited

earlier had apparently thought were unimportant, made in the course of a 9-day trial producing a 15-Volume, 2003-page Transcript and 119 Exhibits.

The first argument constructs a strawman and then knocks it down. It depends entirely upon the erroneous assumption that Plaintiff's expert Steven Meyer's acceleration tests were "intended to show what allegedly occurred in this accident" (Brief at 3), when in fact he said many times that they were offered only to illustrate the general principles underlying his testimony--not the specifics of the accident. And in a fatal error, Ford/Mazda have *not* addressed the reason that they *were* admitted. They have *not* challenged the admissibility of tests to illustrate general principles underlying expert testimony. Nor could they, given that Ford/Mazda's third Argument on Appeal is based upon exactly that principle.[3]

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exactly one sentence each. The fourth, the Golden Rule argument, by our count was argument number 57, consisting of one sentence and no authority (*id*. at 7223).

[3]Without a hint of irony, Ford/Mazda contend in its third Argument that the trial court abused its discretion in declining to allow evidence of government crash tests on different cars with different retractor systems. Incredibly, Ford/Mazda protest there that although a "test to replicate what happened in a particular accident . . . must be substantially similar to the accident circumstances," "[w]here the test is being used for some other purpose . . . the court must evaluate the admissibility of that evidence under the general rules of relevancy" (Brief at 29). Therefore, they continue, "[t]he substantial similarity doctrine *did not apply* to the government tests offered by Defendants because they were *not offered to replicate this accident*" (*id*. at 29-30) (emphasis added). This statement alone requires rejection of Ford/Mazda's *first* argument, which is based solely on their contention that Mr. Meyer's tests were inadmissible because their *only* permissible basis was to replicate the accident, and

Moreover, Ford/Mazda have not argued that Mr. Meyer's tests failed to accurately illustrate the general principles for which they were offered, thereby waiving any such contention. In sum, Ford/Mazda's first argument addresses testimony that was *not* given, and fails to address the testimony that *was* given.[4]

Second (Brief of Appellant at 24-29), Ford/Mazda contend that Mr. Meyer's testimony as to what "occurred in this accident . . . was not supported by the facts and evidence" (Brief at 4), but instead was "based on factual assumptions for which there is no basis in the record," and are "contradict[ed by] the available evidence" (Brief at 24). Given that Ford/Mazda have not summarized a single syllable of the Plaintiff's evidence, it is difficult to take this argument seriously. How can they possibly assert that Meyer's testimony was "not supported by the facts and evidence," when they have not described any of "the facts and evidence"?

Here too, Ford/Mazda are fixated upon Mr. Meyer's testimony, ignoring the overwhelming evidence of the defect and causation wholly apart from that testimony.

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they did not do so. Only a few pages later, Ford/Mazda say exactly the opposite.

[4]On top of this, Ford/Mazda's first argument is harmless. As we will establish, the jury's verdict is supported by overwhelming evidence wholly apart from Mr. Meyer's testimony and tests. This is readily apparent under both the consumer-expectation test, about which the jury was instructed, and the alternative risk/benefit test. It was Ford/Mazda's obligation to inform the Court of this evidence. Because it independently supports the verdict, any error in admitting Mr. Meyer's tests and testimony was harmless.

Their argument is based entirely upon *Ford/Mazda's* view of the evidence, which the jury rejected, and which is irrelevant for purposes of this Appeal. It completely ignores the Plaintiff's evidence, which proved overwhelmingly, wholly apart from Mr. Meyer's opinions, that this tragedy was caused by a defect in Ford/Mazda's restraint system in Mark Force's car. That is the evidence that *does* support Mr. Meyer's expert opinion, and upon which it was based.[5]

Third, Ford/Mazda contend that the trial court abused its discretion in excluding videos of government crash tests that they say at one place in their Brief were "not offered to replicate this accident" (Brief at 30), but then says elsewhere were offered "to establish [that] the retractor was not defective" (Brief at 11). *See supra* note 3. Although Ford/Mazda may have wanted this evidence to rebut the testimony of Escort owners that their seatbelts had locked up in comparable crashes (testimony that was admitted solely on the issue of notice--not to prove a defect), by their own admission Ford/Mazda unquestionably offered this evidence to prove that its seatbelt in Mark Force's Escort "was not defective." There is no other purpose for which it could have been offered.

However, as Ford/Mazda admit, these were tests involving *other cars*--not

[5]Moreover, any error here was also harmless in light of the overwhelming evidence independently supporting the verdict.

Escorts. Ford/Mazda could not even identify their model years. They had *other* types of restraint systems--*not* the system used in the Escort. They were tests at far lower speeds than the speed of this accident. And Ford/Mazda did not even attempt to proffer numerous attributes of these tests that were necessary to show comparability. We will review several characteristics of the seatbelt systems in these unidentified model vehicles, that Ford/Mazda did not assimilate to the Escort in this case. There is no conceivable argument that the trial court abused its discretion in excluding these tests.

Fourth, Ford/Mazda contend that the trial court abused its discretion in failing to declare a mistrial after *sustaining* Ford/Mazda's objection when the Plaintiff asked the jurors to imagine what it would be like to spend the next 39 years with Mark Force's mental disability (Tr. 14 at 1861). Ford/Mazda repeatedly declined a curative instruction (*see* Tr. 14 at 1861, 1864, 1872, 1878, 1880). We respectfully disagree with the trial court's ruling that this was a Golden Rule argument, which is limited to the issue of damages, forbidding arguments that ask the jurors to award an amount of damages that they would want to receive if they were in the plaintiff's place. The Plaintiff's argument did not do so. It asked the jurors to empathize with Mark Force's mental condition, by imagining what it would be like to go through the rest of their lives with that condition. Numerous cases say that this was not a Golden Rule

argument. This is a legal question that arises here *de novo*.

Moreover, Ford/Mazda's objection was sustained. It has been held numerous times in Florida that a Golden Rule argument is not fundamental error, and it was certainly not fundamental error in this case. Ford/Mazda have not challenged the sufficiency of the evidence supporting the damages in this case, a third of which represent past and future medical expenses and lost income. This one comment in the course of a 2000-page Transcript did not so undermine the fundamental fairness of the trial as to cause a miscarriage of justice. At the least, the trial court had ample discretion to come to that conclusion.

II.
STATEMENT OF THE CASE AND FACTS

A. Steven Meyer's Tests. Mr. Meyer performed a series of tests that were designed to break down and illustrate separately some of the forces that operate in an automobile accident, in order that the jury would better understand the evidence--from both sides--of what happened in this accident. These tests, using a procedure peer reviewed and published by the Society of Automotive Engineers (Tr. 5 at 547), made no attempt to show how these different forces interacted with each other in this particular accident, which was the subject of other testimony. Their sole purpose was to illustrate the underlying science.

Meyer used the same retractor system found in Mark Force's 1993 Ford Escort (Tr. 5 at 545), which he mounted in the test device in the vehicle's pre-crash positioning (Tr. 1 at 551). As Ford/Mazda note (Brief at 4), we are concerned with the "ball and cup" retractor system for the shoulder belt in the Escort. Ford/Mazda have provided two sketches to show how it worked (*see* Brief at 4-5). When the driver brakes or hits something in an accident, the force of doing so (among other things) causes the steel ball in the retractor to roll out of its seat beneath the revolving gears that play out the shoulder belt, and to push a bar, called a "pawl," up into the teeth of the gear, causing it to stop playing out the belt (*see* Tr. 4 at 480-87; Tr. 16 at 1637-39).

As Ford/Mazda point out, the Plaintiff's evidence, which we will summarize below--the sufficiency of which Ford/Mazda have not challenged--was that a fatal design defect manifested itself in accidents in which the impact initially caused the retractor to lock, but then dominant vertical forces exceeding the horizontal forces caused the steel ball to be forced downward into the cup, thus releasing the pawl and allowing the retractor to unlock and the seatbelt to spool out (*see* Tr. 5 at 510, 548, 554-55, 580; Tr. 7 at 799-800; Tr. 12 at 1638, 1661-65). Meyer's job was to explain how these forces work, before stating his own opinion, which was *not* based upon his illustrative tests, but upon the huge body of evidence of the defect and causation--

evidence that Ford/Mazda have ignored.

Mr. Meyer explained that both vertical forces and horizontal forces can and will operate in a car accident (Tr. 5 at 548). These forces were present in the Force accident (Tr. V at 508). He told the jury that in order to explain the scientific principles applicable to these forces, he needed to break each of them down separately, always acknowledging that in real life they come together and interact with each other in the accident. Meyer did that so that the jury could appreciate the science of these forces in evaluating the *other* testimony--from both sides--about what actually happened. Meyer also acknowledged that there were forces in this accident in addition to those he illustrated in his tests. *See, e.g.,* Tr. 5 at 559 ("All the types of forces that I put in were present in the accident as well as many others").[6]

Mr. Meyer said repeatedly and explicitly that his tests did not attempt to estimate the force of either the vertical impact or the horizontal impact of the accident, or the way they interacted in this accident, or which was stronger in this accident. That was all to be the subject of other evidence. As even Ford/Mazda admit in a candid moment (Brief at 9), Meyer repeatedly told the jury that his tests

[6]Because Ford/Mazda have not challenged the validity or methodology of Meyer's tests for purposes of illustrating these general principles, we will merely refer the Court to the testimony establishing the extensive peer review, publications, and government utilization that validated them (*see, e.g.*, Tr. 5 at 508, 546-50, 559).

illustrated only general principles, and that he was *not* attempting to replicate this accident in any of the tests (*see, e.g.,* Tr. 5 at 553-54, 558-59, 596; Tr. 13 at 1761-63, 1774-76).

Thus, when asked whether his tests could identify "what happens in the real world," Meyer answered: "Well, that's certainly not what I'm suggesting happened here. What I'm suggesting and what I'm trying to explain here is that there are conditions in the real world where there are accelerations in different directions. That's all we're talking about" (Tr. 8 at 1762). He said (Tr. 13 at 1761-62): "Can it happen in the real world? Yes. Is this what I'm suggesting happened here? No." Meyer's objective was to find out what happens "if the vertical acceleration is stronger . . ." (Tr. 5 at 553). When asked whether, in any of his tests, he attempted to "expose the retractor to the horizontal forces that Mark Force's Escort was exposed to in this real world crash," Meyer answered: "Has absolutely nothing to do with anything" (*id*. at 558). He said: "[I]n this particular accident, we know that there were both [vertical and horizontal accelerations]. In other words, there were accelerations in the plane of the roadway and there were also vertical accelerations . . . based upon the deformation we see in the vehicle, as well as the crash test that had been performed by Ford/Mazda, so that's clear" (Tr. 5 at 509). Meyer said that these tests "were done to evaluate how the vertical accelerations, if there are vertical forces,

would influence those horizontal plane accelerations" (Tr. 5 at 509). He said that "what makes sense physically"--"what the physics would tell us"--is that with little or no pressure on the belt (*see id.* at 554), when the vertical forces are stronger in this system, the ball can be forced downward, releasing the pawl, and allow spoolout. His test was designed to effect the scenario in which the vertical forces are stronger, and then "what we're evaluating is, will it, in fact, happen; will it, in fact, unlock the retractor and will the retractor then be unlocked such that the belt gets spooled out" (*id*. at 553-54). He said: "So the tests were done to evaluate how the ball and cup will respond to forces in both those directions" (Tr. 5 at 510). And that of course required that this particular test be created to make the vertical forces stronger, just as other tests look at stronger horizontal forces, to see what would happen under such circumstances.

It was for that reason that Meyer conducted the tests without effecting the kind of tension on the belt that is sometimes created by the force of the driver's body into the belt, because that would destroy the entire premise of the test (*see id.* at 554-55). As Meyer put it, if there is tension on the seatbelt, "it's a very boring test" (*id*. at 554): "I can't see what the ball did because it doesn't move because it just stays locked. And what I really want to know [is] what's the ball doing when there is no tension on the shoulder belt and the ball is allowed to move" (*id*.).

In the other tests that Meyer conducted he did the same thing. He artificially removed forces other than the one he was studying, to see how it operated if the force being studied was dominant. For example, in some cases he disabled the vehicle sensitive crash sensor in order to test the backup belt webbing sensor that kicks in if the primary retractor locking system fails. He had to do this because, "remember, the vehicle sensor is the primary one and it's set [at] a lower threshold" (*see id.* at 556-67). He "evaluate[d] those two crash sensors independently [to] determine how it was that they would respond to the forces similar to the ones that were present in this accident as well as what their threshold was; in other words, when are they designed to lock" (Tr. 4 at 465).

Meyer said that this is exactly the way that TRW, the retractor's manufacturer, conducted its tests: "[W]hen TRW says 'I tested it to make sure that at 2.5 Gs it did not lock,' well, they can't do that with the vehicle sensor set at .7 Gs because they wouldn't be able to get to 2.5" (Tr. 5 at 557). He was asked: "Because it will always lock?" The answer: "Exactly. So in order to test and to prove and establish that it complied [with the applicable requirement], they would necessarily [have] had to do the same thing, which is to disable [the vehicle sensitive crash sensor]" (*id*. at 557). In light of the foregoing, the jury could not have failed to understand that Meyer's tests isolated the separate forces in the accident for illustration--forces that everyone

knew had operated concurrently in this crash. Ford/Mazda have not challenged their validity for that purpose.

B. The Real Evidence of the Defect and Causation. Meyer's tests illustrated what happens when the vertical forces in the accident are stronger than the horizontal forces. The Plaintiff then offered *other* evidence of what in fact happened, which we will discuss in detail below. Ford/Mazda's most serious transgression is their own failure to do so. The physical evidence that strong vertical forces were in fact present included the vertical deformation during the crash of the tunnel where the retractor was mounted (Tr. 5 at 529-30, 581); the movement of the retractor during the crash; and the post-accident resting position of the Force vehicle, with its back end on top of the Mustang (Tr. 5 at 559, 567, 590). As we note below, the Plaintiff then offered overwhelming evidence that the retractor disengaged as a result of those forces, allowing the belt to spool out, and causing Mark to be propelled into the A-pillar of the car (the roof support pillar next to the windshield).

Ford/Mazda have completely ignored this body of evidence, wholly apart from Meyer's tests--and indeed, apart from Meyer's expression of his ultimate opinion (which was based on the totality of the evidence--not the tests)--proving the design defect that caused this tragedy. This is a serious dereliction of their duty as

Appellants.[7] Meyer's tests, and his opinions, can only be evaluated in the light of the totality of evidence. In this sense, Ford/Mazda's Brief fails at the outset.

The Plaintiff's most direct evidence satisfied Florida's consumer-expectation test, by proving that the vehicle restraint system in the Escort simply did not work. It allowed Mark Force to hit his head on the A-pillar, which caused his devastating brain injury.[8] And as Ford/Mazda acknowledged (Brief at 2), and the Plaintiff proved (*see infra*), if Mark did strike the A-pillar, that *alone* established that the shoulder belt restraint system necessarily failed.[9]

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[7]*See B.M.S. Broadcasting, Inc. v. Simplex, Inc.*, 504 So. 2d 513, 514 (Fla. 5th DCA 1987); *Hutchins v. Hutchins*, 501 So. 2d 722, 723 (Fla. 5th DCA 1987). *See also Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F. 3d 1219 (7th Cir. 1995).

[8]As we note below, the evidence also supported the jury's verdict under the other test about which the court instructed the jury, asking whether the product was unreasonably dangerous to the consumer, and whether the foreseeable risks could have been reduced or avoided by the adoption of a reasonable alternative design (*see* Tr. 14 at 1950-51). We begin with the consumer-expectation test because it supports the verdict wholly independent of Mr. Meyer's testimony and tests. Some of the following citations are to Meyer's testimony, but only to his discussion of the factual bases for his opinion--for example, tests conducted by Ford/Mazda or the government.

[9]Ford/Mazda's defense was that *something else* happened--that the severity of the crash pushed the front of the Escort in, striking Mark's head on its collapsing hood or perhaps the corner of the Mustang (Tr. 12 at 1605). The Defendants acknowledged that if Mark did strike the A-pillar, the restraint system necessarily failed. (And the Plaintiff proved that anyway, *see infra*). Thus, each side offered a different scenario. Ford/Mazda have conceded that the jury was entitled to believe the Plaintiff's witnesses

Dr. William Anderson, a pathologist, alone established that Mark's head struck the A-pillar. He examined the A-pillar trim under a microscope, and found evidence of both blood and subcutaneous skin cells--conclusive evidence that was unrebutted (Tr. 6 at 746-47). This testimony was alone sufficient to sustain the jury's finding that Mark hit the A-pillar, which by definition, by expert testimony, and by admission, means that the shoulder belt restraint system failed.

Dr. Jonathan Greenberg, Mark's treating neurologist (*see* Tr. 5 at 632-33), also independently established this point. He said that Mark's catastrophic injuries, which he equated to being hit by a crowbar (*id*. at 644),[10] could *only* have been caused by Mark's head hitting the A-pillar of the car (*id*. at 671-72, 677-78). There was nothing else proximate that could have caused it. Given the circumstances of the crash, including the fact that Mark did not suffer injury to any other part of his body (*id*. at 663-66), Dr. Greenberg eliminated every other possible cause of his brain injury, including the windshield (*id*. at 637, 672, 678, 680), the steering wheel (*id*. at 664, 666-67, 672, 678), the dashboard (*id.* at 668-69, 672), any non-solid object (*id.* at 669-70), and Ford/Mazda's theory that the hood had been smashed in by the other car (*id.* at 682-83).

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[10]Mark lost 20-25% of both cerebral hemispheres, constituting 1/4 of the top part of his brain, or 20% of its entire volume (*id*. at 646).

Of course, as the Defendants admitted, there had to be spoolout for Mark to strike his head forcibly on the A-pillar. But the Plaintiff did not leave this conclusion to inference. Dr. Carley Ward, a biomedical engineer who was qualified not only to analyze the mechanics of the accident but also the resulting brain injury (*see* Tr. 6 at 760-67), testified that in order for Mark's head to hit the A-pillar, which did not move rearward in the crash (Tr. 6 at 775), the shoulder belt had to spool out a grossly unacceptable 7-10 inches (Tr. 7 at 785).[11] Ward said that without the spoolout of the shoulder belt retractor, allowing Mark's head to strike the A pillar, Mark would not have had a significant brain injury (Tr. 7 at 785).[12]

These three witnesses--two testifying conclusively that Mark's head hit the A-pillar, one that grossly-unacceptable spoolout had to be the cause--overwhelmingly supported the jury's verdict, without any consideration of Meyer's testimony and tests.

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[11]Federal Motor Vehicle Safety Standard 209 requires retractor lockup with no more than one inch of spoolout. Tr. 4 at 472.

[12]Ford/Mazda's own second-trial crash test, in which there was no spoolout of a new seatbelt installed in the 1993 Escort in a simulated crash with a 1993 Mustang, showed no impact of the driver dummy's head with the A-pillar (*see* Ex. 48; Tr. 9 at 1233, 1258, 1271-75; Tr. 11 at 1531; Tr. 12 at 1943). (There was also no intrusion by the Mustang into the windshield of the Escort or any part of its hood (*see* Tr. 11 at 1533. This not only debunked Ford/Mazda's theory of causation, but proved that absent the spoolout of Mark Force's seatbelt, his head would not have struck the A-pillar or anything else).

And there was more--much more. The separate lap belt retractor in Mark's car locked; the lap belt had a visible lock mark on it; but the shoulder belt had none (Tr. 5 at 524-25, 527). Mark had no broken bones except the skull fracture--no significant injuries except the loss of brain tissue (*see* Tr. 7 at 790, 801). Testing of the U.S. retractor, the same type as in Mark's car, showed 15-17 inches of spool out in 200-300 milliseconds (*see* Tr. 5 at 572-73; Tr. 8 at 1055). Ford/Mazda's test engineer filmed sled tests on the U.S. model producing spoolout of as much as six inches (*see* Tr. 5 at 519; Tr. 7 at 861-68). Two Ford/Mazda vehicle crash tests run to simulate the Force accident, and admitted without objection (Ex. 47, 48), created deformation in the vehicle (Tr. 5 at 509). Interior views in the first test showed buckling of the center console where the Escort's shoulder belt retractor was mounted, which causes vertical accelerations (*see* Tr. 5 at 529-36).

Before the third trial, Ford/Mazda ran a second crash test to simulate the wreck, creating an offset frontal impact between a 1993 Mustang and a 1993 Escort, and using a dummy for which a new seatbelt had been furnished. With no spoolout of the new seatbelt, the dummy did not strike its head on the A-pillar or anything else, and there was no intrusion into the Escort by any part of the Mustang or any part of the hood of the Escort (the theory that Ford/Mazda had advanced). This too proved that if there had been no failure of the retractor and no spool-out in Mark's accident, there

would have been no injury (*see* Tr. 12 at 1943; Tr. 19 at 1233, 1258, 1271-75). All of this evidence proved that the restraint system stipulated to have been worn by Mark Force did not perform as a reasonable consumer would expect it to perform.

And still more. The Plaintiff also proved the defect by evidence that on the Escort model that Ford/Mazda used in Canada at the same time, which added webgrabbers to its seatbelt retractor at a cost of $4 (*see* Ex. 28; Tr. 5 at 573-75; Tr. 7 at 879-80; Tr. 8 at 1048, 1055),[13] there were no reported customer complaints of spoolout in accidents in Canadian Escorts equipped with webgrabbers (*see* Tr. 8 at 1079-81).[14] Testing of a Canadian retractor showed that spoolout was limited to one inch after lockup (Tr. 5 at 567-68, 572-74, 578). The Canadian Escort web sensing retractor always locked within 3 Gs, whereas the U.S. Escort retractor did not lock until 13 Gs (Tr. 5 at 576-77). This showed that the Escort retractor's web-sensing lockup was properly timed to work in Canada, but not in the U.S. version. And this

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[13]A webgrabber is an extra safety device in the restraint system--a clamp that grabs the belt and clamps it down in the accident, preventing the belt spoolout that occurred in Ford/Mazda's own filmed sled tests on the same U.S. model retractor used by Mark Force, by "limit[ing] the spooling to approximately one inch" (Tr. 5 at 573; *see id.* at 572-74). The Canadian retractor also had a better web-sensing capability than the U.S. version on Mark's Escort (*see* Tr. 5 at 577).

[14]The 1993 Mustang that hit Mark's car had a webgrabber in its retractor (*see* Tr. 8 at 1061-61). The driver, Ms. Hamilton, suffered only minor injuries (*see* Tr. 7 at 784).

conclusion was substantiated by testimony of TRW's (the retractor manufacturer's) representative that TRW was actually told by Mazda not to test the web-sensing device on the U.S. Escort retractor (*see* Tr. 7 at 888). Based on the Canadian retractor tests alone, the jury could find the defect and causation. Ford/Mazda make no mention of these findings in their Brief.[15]

This evidence, introduced wholly apart from Steven Meyer's testimony and

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[15]In support of the Plaintiff's failure-to-warn claim, the Plaintiff proved Ford/Mazda's knowledge of this problem by evidence that the same thing that happened to Mark Force had happened to other owners of the same car. The trial court instructed that this evidence was relevant only to the issue of notice--not to prove the defect (Tr. 14 at 1954). The Plaintiff proved 45 other similar incidents on this vehicle in which the shoulder belt retractor did not lock (*see* Tr. 5 at 582; Tr. 8 at 1081-1103). Forty-five Ford/Mazda customers gave notice to Ford/Mazda before the Force accident that the shoulder belt was spooling out in accidents, allowing injuries (Tr. 8 at 1081-1102; *see* Ex. Binder AZ). Several testified live or by deposition, including Mr. Fisher, who struck his head on his Escort's A-pillar (Tr. 7 at 916-39, 960, 981-86, 988-1004). Seven Ford Escort owners testified about these incidents, and about their complaints to Ford/Mazda (*see* Tr. 7 at 900-60; Tr. 8 at 975). Ford/Mazda's corporate representative also acknowledged these complaints (Tr. 8 at 1081-98).

Ford/Mazda repeatedly waived any objection to this evidence. It not only failed to object or to cross-appeal its admission at the first trial, thereby creating the law of the case; it also did not object to this evidence at the third trial; and it has not made the point an issue in this Appeal, thereby waiving it again. (The testimony that Ford/Mazda refer to at page 11 of their Brief was different testimony, concerning ten consumer complaints concerning the earlier model 1987-90 model Ford Escorts or Mercury Tracers--not the incidents and complaints about the 1993 Escort (*see* Tr. 8 at 1024-33, 1046-47, 1051-55, 1078). In any event, Ford/Mazda have not challenged that evidence on Appeal either).

tests, is simply overwhelming, which is why Ford/Mazda had no choice but to concede the sufficiency of the evidence. But Ford/Mazda also had the obligation, as Appellants, to advise the Court of this evidence, which is highly relevant to its challenge to Mr. Meyer's tests and testimony. It failed to do so. Its Appeal should be rejected for that reason alone.

C. Meyer's Expert Testimony as to Defect and Causation. Finally, based on all of this evidence (*see* Tr. 5 at 566)--*not* on the tests that he conducted to illustrate the dynamics of the crash--Steven Meyer expressed his own expert opinion. After reviewing all of the evidence summarized above, he said that buckling of the console tunnel where the shoulder belt retractor was mounted caused vertical forces that allowed spoolout of the belt. The result was that the shoulder belt retractor predictably failed to restrain Mark Force as he was propelled forward into the A-pillar (Tr. 5 at 530-31, 559, 567, 580-82, 590-91; Tr. 9 at 1252). The shoulder belt retractor would have locked if equipped with a webgrabber (Tr. 5 at 584). Meyer's testimony too provided independent support for the jury's verdict.

D. The Government Crash Test Videos. As the predicate for its argument (Brief at 11), Ford/Mazda point out that the Plaintiff introduced the testimony of witnesses who complained to Ford/Mazda that the seatbelts in their identical Escorts did not lock in accidents, causing them to hit the interior of the vehicle; plus

additional evidence of such incidents; and evidence of consumer complaints about an earlier model Escort in which the same thing happened. As we noted, *supra* note 16, the trial court instructed the jury that this evidence was not admissible to prove a defect, but only to show inquiry notice to Ford/Mazda that should have led them to investigate the complaints, and then to warn Escort owners of the danger (*see* Tr. 14 at 1954). Ford/Mazda say that "[t]o rebut this evidence *and to establish the retractor was not defective*" (Brief at 11) (emphasis added)--in other words, to directly address the merits--Ford/Mazda offered government crash tests at 35 miles per hour on what it says were "comparable vehicles," some with "alternative design[s] proposed by the Plaintiff in which belted dummies were not impacted" (*see* Brief at 11-12). Ford/Mazda have perfunctorily noted that the Plaintiff objected, and that the trial court sustained the objection, but they have provided no description of the numerous bases for that objection.

They included the following: Ford/Mazda never made a proffer to show that the retractors were comparable; that the interior dimensions of the other vehicles were comparable; that the forces in the tests were comparable; that the steering wheel was comparable; the angle of the A-pillar; the location of the dashboard; the room height dimensions; or the seat track and seat back performances in the crashes--all factors that can affect the ultimate outcome of the crash. The tests involved an unidentified

model year for the Hyundai Scoupe, an unidentified model year for the Nissan Sentra, an unidentified model year for the Plymouth Colt, and an unidentified model year for the Kia Sofia (Tr. 12 at 1671). None of these vehicles contained a seatbelt proven to be substantially similar to the model in question. The court asked: "How do we know their seatbelts weren't poorly designed?" Ford/Mazda's answer: "Maybe they were. I don't know" (Tr. 12 at 1671). None of these vehicles was proven to have an occupant space that measured substantially similar to Mark's car. The court said: "But the interior is different in each of these cars?" (Tr. 12 at 1672). Ford/Mazda could not deny that. The court asked: "Why don't you show it on the Ford/Mazda products where's it's the web--I mean you have Ford/Mazda products with webgrabbers I assume" (Tr. 12 at 1672-73). Ford/Mazda answered: "There may be one on there [on the test models] too, but that's not--I mean, there's not a Canadian Escort [webgrabber] on there" (*id*.). The Plaintiff said "We would not object to the Canadian Escort. . . . [I]t's substantially similar. If they tested that with a webgrabber it comes in no matter what it shows. These other vehicles [are] not substantially similar" (Tr. 12 at 1673). When shown in voir dire, the tests were not only of different vehicles with different seatbelt systems; they also used a fixed barrier, as opposed to the colliding forces in this crash (Tr. 12 at 1674). Ford/Mazda concede that these tests were offered "to establish the retractor was not defective" (Brief at

11). To do that, as Ford/Mazda tell us in Argument A, it had to show substantial similarity. It failed woefully.

E. Closing Argument. Ford/Mazda have accurately reported the facts (Brief at 13-14). However, they have not reported the broader context in which the challenged remark was made. The Plaintiff discussed Mark's damages in closing for a significant period of time (*see* Tr. 14 at 1848-49, 1856-81, 1894-1902). He talked about the force of the crash, which was "sufficient to fracture not only his skull but through the skill and turn his brain into jelly, into like a pulpous mass" (*id*. at 1859); how the brain of a 27-year-old man was "permanently and irrevocably destroyed" (*id*.); and about his painful redevelopment, as if he were a helpless child--unable to walk, talk, or swallow, breathing through a tube (*id*. at 1860). The evidence, and the closing argument, were overpowering. Their impact is reflected in the jury's verdict, unchallenged by Ford/Mazda. And in this mass of devastating evidence, they say that three sentences were fundamental error, infecting the entire integrity of the trial.

Without any reference to the amount of damages requested, but solely for the purpose of illustrating Mark's grievous injury, the Plaintiff asked the jury to "[i]magine spending the rest of your life, the majority of each day for the rest of your life, in this case, the last ten and a half years of Mark's life and the next 39 and a half years of his life, in that state. Being able to see the dots but not connect the dots.

And you heard about some of his outbursts and some of these things. Imagine, imagine" (Tr. 14 at 1861). There was no entreaty that the jurors determine what damages they would want if they were in his position.

The trial court's first reaction to the objection was that the comment was not a Golden Rule argument, because "he doesn't talk about dollars" (Tr. 14 at 1861). Ford/Mazda disagreed, and said (for the first of countless times) that "[n]o curative instruction would cure that" (*id*. at 1864). The court asked if there was any case holding that a curative instruction was not sufficient in the face of a Golden Rule argument (*id*. at 1865). Ford/Mazda had none. The court asked for further research (*id*. at 1866). After reviewing the cases, the trial court said that "it's not a matter of putting yourself in the place of the plaintiff just for money damages. . . . "I just don't think its limited to money damages" (Tr. 14 at 1869). Ford/Mazda again said: "I don't think there's a curative instruction you can give" (Tr. at 1872). After further argument, the court said: "The only thing I'm concerned about is some form of curative instruction done at the time the statement was made in closing argument" (Tr. 1875). The Plaintiff proposed such a curative instruction, and provided it in writing to the court (*id*.). The court said that it would "not give a curative instruction unless the defense is willing to stipulate to some kind of instruction, and I don't think they are" (*id*. at 1878). Ford/Mazda said: "We are not" (*id*.). Just to be certain, the

Plaintiff asked again: "I would like to know if the objecting party is requesting a curative instruction or wants one" (*id.*). The court: "They do not. They've moved for a mistrial period" (*id.*). It said later: "You're objecting to a curative instruction?" (Tr. 1880). Ford/Mazda answered: "Right, Judge" (*id.*). The court deferred on the motion for mistrial (*id*. at 1879).

III.
ISSUES ON APPEAL

A WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING EVIDENCE OF THE TESTS CONDUCTED BY STEVEN MEYER.

B. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING MEYER'S TESTIMONY THAT THE SHOULDER BELT RETRACTOR SYSTEM WAS DEFECTIVE AND CAUSED MARK'S INJURY.

C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING VIDEOS OF GOVERNMENT CRASH TESTS ON OTHER VEHICLES.

D. WHETHER A COMMENT MADE BY THE PLAINTIFF'S COUNSEL IN CLOSING ARGUMENT WAS A GOLDEN RULE ARGUMENT; AND IF SO, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO DECLARE A MISTRIAL, AFTER FORD/MAZDA REJECTED A CURATIVE INSTRUCTION.

IV.
STANDARD OF REVIEW

The trial court's rulings on the admission of evidence were committed to its discretion. *See Town of Palm Beach v. Palm Beach County,* 460 So. 2d 879, 882 (Fla. 1984); *General Motors Corp. v. Porritt*, 891 So. 2d 1056, 1058-59 (Fla. 2d DCA 2004); *LaMarr v. Lang*, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001). The trial court's ruling on a motion for mistrial is committed to its discretion. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006), *cert. denied sub nom. R. J. Reynolds Co. v. Engle*, 128 S. Ct. 96 (2007). The trial court's ruling on an issue of law--for example, whether proposed evidence falls within the statutory definition of hearsay, *see Burkey v. State*, 922 So. 2d 1033 (Fla. 4th DCA), *review denied*, 940 So. 2d 427 (2006)-- presents a *de novo* issue on Appeal.

V.
SUMMARY OF ARGUMENT

We have summarized the Argument in the Introduction. Ford/Mazda's belatedly-chosen arguments are extremely weak--even contradictory. They are also based in part upon a recitation of the evidence which is alarmingly incomplete, failing to acknowledge overwhelming evidence for the Plaintiff. The Judgment should be affirmed.

VI.
ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE EVIDENCE OF TESTS CONDUCTED BY STEVEN MEYER.

Ford/Mazda's argument is based on a legal premise that it calls "well settled"--that "evidence concerning a test or experiment is not admissible unless the proponent demonstrates substantial similarity between the test conditions and the facts of the case" (Brief at 17). This is a blanket statement that as a matter of law, test evidence can *only* be admissible if it purports to replicate the plaintiff's experience. Thus, Ford/Mazda's only argument is that Meyer's tests could be admitted for that reason alone, and that Meyer's tests did not satisfy that criterion. Argument A is an assertion of law--that the *only* valid basis for the admission of a test is to replicate the Plaintiff's experience.

But then in Argument C, Ford/Mazda say the exact opposite. They say that "[t]he substantial similarity doctrine did not apply to the government tests offered by Defendants because they were not offered to replicate this accident" (Brief at 29-30). They say that "where a party uses a test to replicate what occurred in a particular accident, the test must be substantially similar to the accident circumstances," but "[w]here the test is being used for some other purpose . . . the court must evaluate the

admissibility of that evidence under the general rules of relevancy" (Brief at 29).

Thus, after contending in Argument A that Meyer's tests could *only* be admissible if he showed "substantial similarity between the test conditions and the facts of this case," and basing their entire argument on that single contention, Ford/Mazda acknowledge a few pages later that tests might also be admissible "for some other purpose," in which case they are evaluated "under the general rules of relevancy."

This admission destroys the sole basis of Ford/Mazda's first argument, which does *not* address (below or on Appeal) the purpose for which Mr. Meyer's tests were actually introduced. It does *not* address (below or on Appeal) the "general rules of relevancy." It does *not* argue (below or on Appeal) that the tests did not provide competent evidence of what they purported to prove--that is, the physics of how various forces operate during an auto accident. It does *not* deny (below or on Appeal) that Meyer's tests were conducted according to acceptable methodology (nor could it, *see supra* note 6). It does *not* argue (below or on Appeal) that the tests were conducted improperly. All of this has been forfeited, at trial and on Appeal, and is deemed to be admitted. *See supra* note 1.[16] Because Meyer did not attempt to

[16]It would be impermissible to advance any of these arguments for the first time in a Reply Brief. *See General Mortgage Associates, Inc. v. Campolo Realty & Mortgage Corp.*, 678 So. 2d 345 (Fla. 3d DCA 1996); *Mestre Rental Co. v. Resources*

replicate the accident, it is unnecessary to engage Ford/Mazda's extensive demonstration (Brief at 6-10, 19-22) that Meyer did not attempt to replicate the accident.

Given its thesis, all of the authorities cited by Ford/Mazda are cases in which the tests in question were expressly offered to replicate the accident, but failed to do so. *See, e.g., General Motors Corp. v. Porritt*, 891 So. 2d 1056, 1058 (Fla. 2d DCA 2004) (seatbelt "tests were not merely shown to jury as a demonstration; they were admitted over objection as substantive evidence," but were "done under dissimilar conditions"). But the relevant cases are those that Ford/Mazda cite under Argument C. For example, in *Tran v. Toyota Motor Corp.*, 420 F. 3d 1310, 1316 (11th Cir. 2005), the court held that evidence concerning a study done by Toyota, showing that its seatbelt restraint system performed well in a variety of dissimilar accident conditions, nevertheless was admissible because it was not offered to re-enact the accident, but rather to show the overall effectiveness of the system. It would be difficult to find a more direct condemnation of Ford/Mazda's first argument. The court in *Tran* quoted *Heath v. Suzuki Motor Corp.*, 126 F. 3d 1391, 1396-97 (11th Cir. 1997), holding that even when the evidence proposed is "pointedly dissimilar," the doctrine of substantial similarity does not apply if it was "not offered to reenact

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Recovery (Dade County), Inc., 568 So. 2d 1344 (Fla. 3d DCA 1990).

the accident."[17] And we agree with Ford/Mazda that the same rule adheres under Florida law.[18]

As we said, Ford/Mazda have not challenged the admissibility of Meyer's tests for this purpose, either in their methodology or their accuracy for the purposes offered. Both issues therefore have been waived. We have established, and Ford/Mazda agree, that tests are admissible not only to replicate an accident, but also to illustrate general underlying principles. Meyer's tests were admissible for that purpose. At the least, the trial court did not abuse its discretion in admitting them.

In this context, there is no merit to Ford/Mazda's contention (Brief at 22-24)

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[17] *Accord, Gladhill v. General Motors Corp.*, 743 F. 2d 1049, 1051 (4th Cir. 1984) ("Defendants are correct that demonstrations of experiments used to illustrate the principles used in forming an expert opinion are not always required to adhere strictly to the circumstances of the events at issue in trial"); *Hinkle v. City of Clarksburg*, *West Virginia* 81 F. 3d 416 (4th Cir. 1996); *Young v. Illinois Central Gulf R. Co.*, 618 F. 2d 332, 338 (5th Cir. 1980) (reversing exclusion of "motion picture experiment [that] was not offered to reenact the accident but was presented only to show that under the circumstances of this case it was physically possible for Mr. Young's car to have been diverted onto the railroad track"), *citing Zurzolo v. General Motors Corp.*, 69 F.R.D. 469, 473 (E.D. Pa. 1975) ("The film in question was offered to demonstrate certain principles of physics. It functioned as a graphic portrayal of the expert's oral testimony about Newton's laws of motion").

[18] *See generally Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 860 (Fla. 3d DCA 2007) (evidence of other accidents with limiting instructions); *Scarlett v. Ouelette*, 948 So. 2d 859, 863-64 (Fla. 3d DCA 2007) (photographs introduced for demonstrative purposes only, with limiting instructing); *Metropolitan Dade County v. Zapata*, 601 So. 2d 239, 245 (Fla. 3d DCA 1992) (same).

that admission of Meyer's tests was prejudicial. The cited authorities speak only to tests promising the "artificial recreation of an event," *Grant v. State*, 171 So. 2d 361, 363 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966). The tests here did not purport to do that, and the jury was told that repeatedly. If Ford/Mazda had wanted a limiting jury instruction to that effect, they could have asked for one. *Compare* cases cited *supra* note 18. They had the opportunity to cure any possibility of the prejudice they allege, and waived their objection by failing to do so.[19] This point alone forestalls the argument.

Moreover, as we noted, Meyer's tests--for whatever purpose--had nothing to do with Florida' consumer expectation test--a separate theory of liability about which the court instructed the jury (*see* Tr. 14 at 1950). *See Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 473-75 (Fla. 4th DCA 2007), *certified on other grounds*, 973 So. 2d 684 (Fla. 4th DCA), *review granted*, 978 So. 2d 160 (Fla. 2008). And the jury's verdict also could have been based on the failure-to-warn claim--also a separate theory of liability. Therefore, under the two-issue rule, the verdict is supportable

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[19]*See Brown v. State*, 818 So. 2d 652, 654 (Fla. 3d DCA) (failure to request limiting instruction), *cert. denied*, 835 So. 2d (Fla. 2002); *Lightfoot v. State*, 591 So. 2d 305, 306 (Fla. 1st DCA 1991) (same). *See also Rodriguez v. State,* 919 So. 2d 1252, 1285 (Fla. 2005) (opportunity to cure error); *Sullivan v. State*, 303 So. 2d 632 (Fla. 1974) (same), *cert. denied*, 428 U.S. 911 (Fla. 1976); *City of Coral Gables v. Levison*, 220 So. 2d 430 (Fla. 3d DCA 1969) (same).

independent of any error in admitting Meyer's tests.[20] That too requires affirmance.

Moreover, even if the tests had been offered to prove the defect in Ford/Mazda's shoulder restraint system, they still would have constituted only a small wave in a flood of evidence--and therefore were cumulative--and therefore were harmless.[21] For this reason too, the trial court could not have abused its discretion in finding that the admission of these tests did not require reversal. For numerous reasons, the trial court did not abuse its discretion in allowing evidence of the tests conducted by Mr. Meyer to illustrate the scientific principles underlying the forces in this accident.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING MEYER'S TESTIMONY THAT THE SHOULDER BELT RETRACTOR SYSTEM WAS DEFECTIVE AND CAUSED MARK'S INJURY.

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[20] *See Liggett Group*, 973 So. 2d at 473; *Food Lion, L.L.C. v. Henderson*, 895 So. 2d 1207, 1208-09 (Fla. 5th DCA 2005); *Marriott International, Inc. v. Perez-Melendez*, 855 So. 2d 624, 627-28 (Fla. 5th DCA 2003); *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1292-93 (Fla. 4th DCA 2002); *Zimmer, Inc. v. Birnbaum*, 758 So. 2d 714, 715 (Fla. 4th DCA), *review denied*, 786 So. 2d 1193 (Fla. 2000).

[21] *See Williams v. State*, 947 So. 2d 517, 521 (Fla. 3d DCA 2006), *review dismissed*, 954 So. 2d 1157 (Fla. 2007); *Harrell v. Aztec Environmental, Inc.*, 921 So. 2d 805, 806 (Fla. 1st DCA 2006); *Target Stores v. Detje*, 833 So. 2d 844, 845 (Fla. 4th DCA 2002); *Dos Santos v. Carlson*, 806 So. 2d 539, 542 (Fla. 3d DCA 2002); *Barrio v. Wilson*, 779 So. 2d 413, 414 (Fla. 2d DCA 2000); *Loehrke v. State*, 722 So. 2d 867, 870 (Fla. 5th DCA 1998).

To begin with, Ford/Mazda have not preserved this point for appellate review. Although Ford/Mazda objected strenuously to Meyer's testimony about the tests that he conducted (Argument A), Ford/Mazda made no objection to Meyer's overall testimony as an expert, or to the expression of his expert opinion, based on all of the relevant facts of Record. The failure to object to expert testimony "precludes appellate review of the propriety of its admission." *Marks v. DelCastillo*, 386 so. 2d 1259, 1267 (Fla. 3d DCA 1980), *review denied*, 397 So. 2d 778 (Fla. 1981).[22] As the Supreme Court has held, absent an objection, it is up to the jury to evaluate the worth of expert's testimony:

> In the instant case, the District Court below determined that it could render an independent judgment on the facts even though the evidence adduced below was not challenged. It also determined that certain unchallenged expert testimony was "so unpracticable that the trial court should have rejected such testimony." The inherent danger of this approach, of course, is that it weakens the appellate process by suggesting that deviation from neutral standards of appellate review is permissible if the appellate court is offended by evidence and testimony unchallenged by the

[22] *Accord, KMart Corp. v. Hayes*, 707 So. 2d 957 (Fla. 3d DCA), *review denied*, 718 So. 2d 168 (Fla. 1998); *Madsen, Sapp*, *Mena, Rodriguez & Co., P.A. v. Leaman*, 686 So. 2d 780 (Fla. 4th DCA 1997); *Wildwood Properties, Inc. v. Archer of Vero Beach, Inc.*, 621 So. 2d 691 (Fla. 4th DCA 1993); *Stockman v. Duke*, 578 So. 2d 831 (Fla. 2d DCA 1991); *Swan v. Florida Farm Bureau Ins. Co.*, 404 So. 2d 802 (Fla. 5th DCA 1981); *Tabasky v. Dreyfuss*, 350 So. 2d 520 (Fla. 3d DCA 1977). *See also Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F. 2d 814, 819-20 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983).

> litigants within the adversary process, and accepted by the trial judge.

Golden Hills Turf & Country Club, Inc. v. Buchanan, 273 So. 2d 375, 376 (Fla. 1973). *Accord, City of Hialeah v. Weatherford*, 466 So. 2d 1127 (Fla. 3d DCA 1985); *Nat Harrison and Associates, Inc. v. Byrd*, 256 So. 2d 50 (Fla. 4th DCA 1971).[23] Therefore, Ford/Mazda's failure to object invited the jury to accept Meyer's testimony or reject it, waiving any question of its competency. For this reason alone, Ford/Mazda's belated objection is not preserved for appellate review.

On the merits, we have exhausted this Argument. Ford/Mazda contend (Brief at 25-29) that Mr. Meyer's testimony about the defect in their shoulder restraint system was inadmissible because it assertedly was based solely on the inapposite tests that he conducted, and that there was no other Record evidence to support it. They say that Meyer "[r]el[ied] on his vertical acceleration tests" (Brief at 24), and "there was no other evidence to support Meyer's critical factual assumptions and, in fact, all available evidence was to the contrary" (Brief at 27). That statement is simply incorrect, as Meyer told the jury repeatedly. And there was a mountain of other evidence to support the verdict.

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[23] The same rule adheres in the federal system. *See G.M. Broad & Co. v. U.S. Home Corp.*, 759 F. 2d 1526, 1538 (11th Cir. 1985); *Nanda v. Ford Motor Co.*, 509 F. 2d 213, 222 (7th Cir. 1974).

We agree with Ford/Mazda that "[t]o be admissible, an expert's opinion must be based on valid underlying data which has a proper factual basis." *Carnival Corp. v. Stowers*, 834 So. 2d 386, 387 (Fla. 3d DCA 2003). Although an expert is not required to recount the bases for his opinions--a matter left for cross-examination--and although the facts on which he relies "need not be admissible in evidence" if they "are of a type reasonably relied upon by experts in the subject to support the opinion expressed," §90.704, Fla. Stat.; *see Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006), we acknowledge the general principle that the expert's opinion (if properly objected to) is incompetent if not based upon or consistent with the evidence presented at trial. By the same token, however, the expert's testimony presents a jury question when it *is* consistent with the evidence presented.[24]

As we have demonstrated, Meyer's opinion is supported by overwhelming evidence, whether contradicted or not. Meyer said plainly that he relied upon the entire body of evidence proving liability and damages, and not upon the tests that he conducted to illustrate the underlying science. As we demonstrated, and as Ford/Mazda should have acknowledged, there is more than substantial evidence to support Meyer's testimony.

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[24]*See Wright v. Coral Farms*, 200 So. 2d 537, 539-40 (Fla. 1967); *Caraway v. Armour & Co.*, 156 So. 2d 494, 496 (Fla. 1963); *Landmark Towers, LLC v. Ibarguen*, 954 So. 2d 43, 44 (Fla. 1st DCA 2007).

Finally, as we said earlier, even if Meyer's tests had been inadmissible, given the overwhelming evidence of Ford/Mazda's liability, any reliance upon them by Meyer was harmless. Even if it could be argued that Meyer's testimony was tainted by any reliance upon these tests, there was overwhelming evidence of liability wholly apart from Meyer's testimony. *See supra* pp. 12-19. And on top of that, as we said, the tests had no relevance to the independent consumer-expectation theory of liability, or the separate failure-to-warn verdict, and therefore were doubly harmless. It cannot be said that the trial court abused its broad discretion in denying a new trial on the basis of Meyer's testimony.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING VIDEOS OF GOVERNMENT CRASH TESTS ON OTHER VEHICLES.

The authorities cited by Ford/Mazda in support of their first Argument (Brief at 17-18), "requiring substantial similarity between the test conditions and the facts of the case" (Brief at 17), are fatal to their position in Argument C . The tests offered by Ford/Mazda--on other model cars of unidentified years, with other types of seatbelts, for which Ford/Mazda made no proffer on any of the factors that prove or disprove similarity--were obviously inadmissible, or at least the trial court had discretion to reach that conclusion.

Ford/Mazda's primary authority on the specific issue of seatbelt tests is *General Motors Corp. v. Porritt*, 891 So. 2d 1056, 1058-59 (Fla. 2d DCA 2004). As they point out (Brief at 18), the expert in *Porritt* was attempting to replicate the accident--not to illustrate any general principles. In fact, the appellate court rejected the plaintiff's contention that the tests were "merely a demonstrative aid"; they "were not merely shown to the jury as a demonstration; they were admitted over objection as substantive evidence" (*id.* at 1059). *Porritt's* primary holding is that under the standard established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the plaintiff "failed to show that a 'clear majority' of the members of the relevant scientific community ascribed validity to the tests as a methodology of proving that inertial unlatching occurs." *Porritt*, 891 So. 2d at 1058, *quoting People v. Guerra*, 37 Cal. 3d 385, 208 Cal. Rptr. 162, 690 P.2d 635, 656 (1984), *and quoted in Brim v. State*, 779 So. 2d 427, 433 (Fla. 2d DCA 2000). But the court in *Porritt* also held that "because the conditions of the tests were not shown to be substantially similar to those during the rollover, the videotape evidence was inadmissible." Given that the test results were offered to prove what happened in the accident--not any general principles--their lack of similarity required exclusion. *See also Detroit Marine Engineering, Inc. v. Maloy*, 419 So. 2d 687, 692 (Fla. 1st DCA 1982) (tests properly excluded in part because defendant could not identify year of product tested, and

because of dissimilarities); *American Motors Corp. v. Ellis*, 403 So. 2d 459, 468 (Fla. 5th DCA 1981) (no abuse of discretion in excluding crash tests intended "to simulate the collision in this particular case," in light of "significant changes"), *review denied*, 415 So. 2d 1359 (Fla. 1982).

In the instant case, as Ford/Mazda have acknowledged at least in one place in their Brief (p. 11), they offered these tests "to establish the retractor was not defective." And as we said, there is no other conceivable reason for which they could have been offered. Ford/Mazda did not offer these tests as merely demonstrative, and they did not ask for a limiting instruction to that effect--itself a waiver. *See* Tr. 12 at 1671-74. *See supra* note 19. On the merits, the admissibility of these tests had to stand or fall with their similarities to the actual crash conditions at the time.

Obviously, they failed. *See supra* pp. 19-21. We will not repeat the numerous ways they failed. On the facts of this case, the test results offered by Ford/Mazda--on other cars of unknown years with other restraint systems--were inadmissible, and the trial court did not abuse its discretion in excluding them.

D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT THE PLAINTIFF'S COMMENT IN CLOSING ARGUMENT WAS A GOLDEN RULE ARGUMENT; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FORD/MAZDA'S MOTION FOR MISTRIAL BASED UPON THAT ARGUMENT.

1. The Plaintiff's Remark Was Not a Golden Rule Argument. Ford/Mazda's fifty-seventh post-trial argument was that in describing Mark's injuries, with no reference to any money damages requested or suggested, the Plaintiff asked the jury to "[i]magine spending the rest of your life, the majority of each day for the rest of your life, in this case, the last ten and a half years of Mark's life and the next 39 and a half years of his life, in that state. Being able to see the dots but not connect the dots. And you heard about some of his outbursts and some of these things. Imagine, imagine" (Tr. 14 at 1861).

This was not a Golden Rule argument. A Golden Rule argument asks the jurors "to place themselves in the plaintiffs' position and urge[s] them to award an amount of money they would desire if they had been the victims." *Coral Gables, Inc. v. Zabala*, 520 So. 2d 653, 654 (Fla. 3d DCA 1988). As the court put it in *Simmonds v. Lowery*, 563 So. 2d 183, 184 (Fla. 4th DCA 1990), "[t]o be impermissible, the argument must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation." *Accord, Metropolitan Dade County v. Zapata*, 601 So. 2d 239, 241 (Fla. 3d DCA 1992) (identical language). Numerous cases have held that various comments asking jurors, implicitly or explicitly, to imagine the plaintiff's situation, without specifically asking how much money the jurors would want if they were in

the plaintiff's position, are not Golden Rule arguments.[25]

The comment made by the Plaintiff in closing asked the jury to empathize with the Plaintiff's injury--imagine what it would be like to suffer such a debilitation for almost 40 years. On the issue of damages, that is the entire purpose of a closing argument--to communicate to the jury the nature of the plaintiff's injury--what it would be like to suffer that injury. It does not ask the jury to award the plaintiff what the jurors would want to be awarded in similar circumstances. It asks the jury to appreciate the extent of the Plaintiff's injury, and then to fashion an amount of damages which appropriately compensates the Plaintiff for that injury, as the trial court instructs. It is not a Golden Rule argument.

2. A Golden Rule Argument Does Not Constitute Fundamental Error, and it Was Not Fundamental Error in this Case. Even if the Plaintiff's remark had been

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[25] *See Goutis v. Express Transport, Inc.*, *Division of F.V. Miranda, Inc.* 699 So. 2d 757, 760-61 (Fla. 4th DCA 1997), *review dismissed*, 705 So. 2d 901 (Fla. 1998); *Porta v. Arango*, 588 So. 2d 50 (Fla. 3d DCA 1991); *Simmonds v. Lowery*, 563 So. 2d 183, 184 (Fla. 4th DCA 1990); *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258 (Fla. 1st DCA), *review denied*, 553 So. 2d 1164 (Fla. 1989); *Shaffer v. Ward*, 510 So. 2d 602, 603 (Fla. 5th DCA 1987); *Seaboard Coastline Railroad Co. v. Addison*, 481 So. 2d 3 (Fla. 1st DCA 1985), *disapproved on another ground*, 502 So. 2d 1241 (Fla. 1987); *Bew v. Williams*, 373 So. 2d 446 (Fla. 2d DCA 1979); *City of Belle Glade v. Means*, 374 So. 2d 1110 (Fla. 4th DCA 1979); *Americana of Bal Harbour, Inc. v. Kiester*, 245 So. 2d 121 (Fla. 3d DCA), *cert. denied*, 247 So. 2d 439 (Fla. 1971); *Stewart v. Cook*, 218 So. 2d 491 (Fla. 4th DCA 1969); *Ward v. Orange Memorial Hospital Ass'n, Inc.*, 193 So. 2d 492 (Fla. 4th DCA 1966); *Bullock v. Branch*, 130 So. 2d 74 (Fla. 1st DCA 1961); *Magid v. Mozo*, 135 So. 2d 772 (Fla. 1st DCA 1961).

a Golden Rule argument, it did not constitute fundamental error sufficient to warrant reversal. When an objection is sustained and a motion for mistrial denied, the standard for determining fundamental error is whether the remark was "highly prejudicial and inflammatory." *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1012 n. 2 (Fla. 2000), *citing Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 580, 585 (Fla. 2d DCA 1996), *and cited in Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271 & n. 14 (Fla. 2006), *cert. denied sub nom. R. J. Reynolds Co. v. Engle*, 128 S. Ct. 96 (2007), *and Mercury Ins. Co. of Florida v. Moreta*, 957 So. 2d 1242, 1250 (Fla. 2d DCA 2007). *See Tanner v. Beck ex rel. Hagerty*, 907 So. 2d 1190, 1196 (Fla. 3d DCA 2005). Under this standard, a mistrial is appropriate only as an "absolute legal necessity." *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999), *quoted in Gatten v. Zachar*, 932 So. 2d 543, 544 (Fla. 5th DCA 2006).

This is not the exact same standard as that prescribed in *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, 1029-30 (Fla. 2000), for appraising the effect of unobjected-to events. *See Murphy* at 1012 n. 2; citations *supra*. However, the courts have found that standard instructive, *see Engle*, 945 So. 2d at 1271, and we will review it as well. The Supreme Court said in *Murphy*:

> Harmfulness in this context . . . carries a requirement that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration

> and determination of the case by the jury. . . . The extensiveness of the objectionable material is a factor to be considered in the harmlessness analysis. In sum, improper closing argument comments must be of such a nature that [they threaten] the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments.
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> . . . [T]he party must then establish that the argument is incurable. Specifically, a complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict. This concept of "incurability" can be traced back to the *Baggett* standard [*Baggett v. Davis*, 124 Fla. 701, 169 So. 372 (1936)] that . . . "the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence." 124 Fla. at 717, 169 So. at 379.
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> . . . [T]he party finally must also establish that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial.

The comments in question "must be placed and evaluated in context," and "the length of the trial is relevant." *Id.* at 1013. This formula is analogous to the standard applicable here, as the court said in *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 580, 587 (Fla. 2d DCA 1996) ("so pervasively prejudicial and fundamental as to

. . . result[] in a miscarriage of justice").

Numerous courts have held that a Golden Rule argument does not satisfy these onerous standards. As the court put it in *Hagan*, 666 So. 2d at 588--the case endorsed by the Supreme Court in *Murphy*: "[P]laintiff's counsel made an argument that could be characterized as a Golden Rule argument. But even a Golden Rule argument is not sufficiently 'sinister' to fall automatically to the level of fundamental error," *quoting Budget Rent-A-Car Systems, Inc. v. Jana*, 600 So. 2d 466 (Fla. 4th DCA), *review denied*, 606 So. 2d 1165 (Fla. 1992). The court said in *Grushoff v. Denny's, Inc.*, 693 So. 2d 1068, 1069 (Fla. 4th DCA), *review dismissed*, 698 So. 2d 839 (Fla. 1997), *disapproved on other grounds in Murphy*, 766 So. 2d at 1031 & n. 24 (on the applicable standard of review), in which the argument was far more direct[26]: "The question for the trial court to consider on golden rule arguments is the same as it is for any other allegedly improper argument: whether the comment was highly prejudicial and inflammatory. Under no construction of the closing argument could [the plaintiff's] incomplete argument be considered highly prejudicial and inflammatory." The court said in *Grant v. State*, 677 So. 2d 45, 45-46 (Fla. 3d DCA 1996): "Although defendant is correct [that the statement was a Golden Rule

[26]"'[T]hey sawed off a piece of her bone, what's that worth? How much is it worth to you when you go to the dentist and he's going to do some work . . .?'"

argument], the impermissible argument . . . was an isolated comment, and in no way rose to the level necessary to establish fundamental error." *See also Cherry v. Moore*, 829 So. 2d 873, 888 n. 6 (Fla. 2002), *citing Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985); *Jones v. Wainright*, 473 So. 2d 1244, 1245 (Fla. 1985).

In short, a Golden Rule argument is subject to a harmless-error analysis: "Even if this were a Golden Rule argument, in *Cleveland Clinic Florida v. Wilson*, 685 So. 2d 15 (Fla. 4th DCA 1996), we receded from previous case law which applied a *per se* reversal rule to such comments. Instead, we held that the harmless error test would apply." *Goutis v. Express Transport, Inc., Division of F.V. Miranda, Inc.*, 699 So. 2d 757, 761 (Fla. 4th DCA 1997), *review dismissed*, 705 So. 2d 901 (Fla. 1998). *Accord, Dillard v. Choronzy*, 584 So. 2d 240 (Fla. 5th DCA), *review dismissed sub nom. Humana of Florida, Inc. v. Choronzy*, 587 So. 2d 1328 (Fla. 1991); *Tri-County Truss Co. v. Leonard*, 467 So. 2d 370 (Fla. 4th DCA), *review denied*, 476 So. 2d 676 (Fla. 1985); *Bew v. Williams*, 373 So. 2d 446 (Fla. 2d DCA 1979).

We respectfully submit, as several courts above have held, that a Golden Rule argument cannot satisfy the applicable standard of harmful error when a mistrial motion is denied. In any event, it did not do so in this case. This was a 10-day trial resulting in a transcript of 2,000 pages, 119 Exhibits, and overwhelming evidence in the Plaintiff's favor. Ford/Mazda have not challenged the sufficiency of that

evidence, including the evidence of damages which was the subject of the Plaintiff's remark. Ford/Mazda have not argued that the damages were excessive or the jury inflamed. Nor could they, in light of the harm they caused to Mr. Force. In that light, it is difficult to argue that the Plaintiff's remark struck at the heart of the case, inflamed the jury, and constituted fundamental error.

We would ask the Court to consider the kinds of remarks that Florida courts, under a variety of standards, have held to be so egregious as to warrant a new trial.[27]

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[27] *See, e.g., Superior Industries Internat'l, Inc. v. Faulk*, 695 So. 2d 376 (Fla. 5th DCA) (comment that jurors had to make manufacturers take responsibility and stop exploiting their knowledge that as long as there are 16-year old boys, and trucks, they would try to make their front ends sharper; and that the decedent had been "snuffed out at . . . tender age"), *review denied sub nom. Hopper v. Superior Industries Internat'l, Inc.*, 700 So. 2d 685 (Fla. 1997); *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552 (Fla. 3d DCA 1996) (personal attack on integrity and credibility of opposing counsel); *Baptist Hospital, Inc. v. Rawson*, 674 So. 2d 777 (Fla. 1st DCA), *review denied*, 682 So. 2d 1100 (Fla. 1996); *Muhammad v. Toys R Us, Inc.*, 668 So. 2d 254 (Fla. 1st DCA 1996); *Martino v. Metropolitan Dade County*, 655 So. 2d 151 (Fla. 3d DCA 1995) (suggestion of adverse effect on future case in the event of verdict for plaintiff); *Sacred Heart Hospital of Pensacola v. Stone*, 650 So. 2d 676 (Fla. 1st DCA), *review denied*, 659 So. 2d 1089 (Fla. 1995); *Al-Site Corp. v. Della Croce*, 647 So. 2d 296 (Fla. 3d DCA 1994) (character attacks and name calling); *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA), *review dismissed*, 649 So. 2d 232 (Fla. 1994); *Pippin v. Latosynski*, 622 So. 2d 566 (Fla. 1st DCA 1993); *George v. Mann*, 622 So. 2d 151 (Fla. 3d DCA) (saying that plaintiff was a liar, was perpetuating a fraud on the court, and had concealed evidence), *review denied*, 629 So. 2d 134 (Fla. 1993); *Silva v. Nightingale*, 619 So. 2d 4 (Fla. 5th DCA1993); *Schubert v. Allstate Ins. Co., Inc.*, 603 So. 2d 554 (Fla. 5th DCA), *review dismissed*, 606 So. 2d 1164 (Fla. 1992); *Bloch v. Addis*, 493 So. 2d 539 (Fla. 3d DCA 1986)(revelation of conversation with the plaintiff's expert about an injury, not in evidence); *Borden, Inc. v. Young*, 479 So. 2d 850 (Fla. 3d DCA 1985) (counsel's

In contrast, we ask the Court to consider those comments that were not sufficiently fundamental to warrant a new trial.[28]

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assertion of his own "personal knowledge of nefarious activities supposedly engaged in" by corporate defendant, not in evidence and not true), *review denied*, 488 So. 2d 832 (Fla. 1986).

[28]*See, e.g., Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271-74 (Fla. 2006), *cert. denied sub nom. R.J. Reynolds Tobacco Co. v. Engle*, 128 S. Ct. 96 (2007) (noting that given the length of the trial, which "is relevant to the analysis," *id.* at 1272, it was not fundamental error to make one mention of the word "race" in the context of discussing consumer studies that divide American consumers into groups; in rebutting an argument that there are two sides to every story by asking whether that was true of the Holocaust or slavery (comment found improper but not fundamental); in attempts to incite racial passions by expanding upon the "two sides" rebuttal with a lengthy discussion of Rosa Parks and the Civil Rights Movement; and by a closing argument "replete with impermissible references to jury nullification," *id*. at 1273); *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552 (Fla. 3d DCA 1996) (personal attack on integrity and credibility of opposing counsel); *Baptist Hospital, Inc. v. Rawson*, 674 So. 2d 777 (Fla. 1st DCA), *review denied*, 682 So. 2d 1100 (Fla. 1996); *Murphy v. Internat'l Robotics Systems, Inc.*, 766 So. 2d 1010, 1031-32 (Fla. 2000)(defense closing telling the jurors that they would be accessories after the fact to tax fraud; that they would be awarding damages based on a phony consulting agreement; and that the plaintiffs would be cashing out a lottery ticket); *White Construction Co., Inc. v. Dupont*, 455 So. 2d 1026 (Fla. 1984) (comments about the racial and economic differences between the parties); *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) (alleged unconstitutionality of attorneys'-fee statute not raised below not fundamental error); *Tyus v. Apalachicola Northern R. Co.*, 130 So. 2d 580 (Fla. 1961)(argument that railroad buys its way out of trouble; facts not in evidence re: subsequent repair); *Mercury Ins. Co. of Florida v. Moreta*, 957 So. 2d 1242 (Fla. 2d DCA 2007) (criticizing insurer's litigation tactics and failure to pay; remarks about what counsel's son would think of such tactics); *USAA Casualty Ins. Co. v. Howell,* 901 So. 2d 876, 879-80 (Fla. 4th DCA 2005) (associating insurance company with Iraqi Minister of Information and attributing standard practice of denying coverage not fundamental); *King v. Byrd*, 716 So. 2d 831, 834 (Fla. 4th DCA 1998) (attacks on defense counsel's ethics; calling him a hired gun), *review denied*, 779 So. 2d 271 (Fla. 2000); *Lucas v. Mast*, 758 So. 2d 1194 (Fla. 3d DCA 2000) (juror's

Finally, we respectfully remind the Court that a trial court's order on a new-trial motion is committed to its broad discretion. *See supra* p. 25. And "the trial judge is in the best position to determine the propriety and potential impact of

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non-disclosure of involvement in pending litigation); *Grau v. Branham*, 761 So. 2d 375 (Fla. 4th DCA 2000) (repeated references to defendant and Nazi Germany), *review denied*, 789 So. 2d 345 (Fla. 2001); *Allstate Ins. Co. v. Inman*, 753 So. 2d 117 (Fla. 5th DCA 1999) (condemning closing arguments "in the strongest possible terms"); *James v. State*, 741 So. 2d 546 (Fla. 4th DCA 1999) (opinion testimony of defendant's guilt); *Mayo v. Gazarosian*, 727 So. 2d 1140 (Fla. 5th DCA 1999) (numerous improper comments concerning personal opinions, credibility, and personal knowledge of facts); *Fravel v. Haughey*, 727 So. 2d 1033, 1035 (Fla. 5th DCA 1999) (en banc) (accusations of perjury; conscience-of community argument); *Copertino v. State*, 726 So. 2d 330, 334 (Fla. 4th DCA), *review denied*, 735 So. 2d 1284 (Fla. 1999) (calling the defendant "young Mr. Hitler"); *Keene v. Chicago Bridge and Iron Co.*, 596 So. 2d 700, 710 (Fla. 1st DCA 1992); *Dillard v. Choronzy*, 584 So. 2d 240, 241 (Fla. 5th DCA), *review dismissed sub nom. Humana of Florida, Inc. v. Choronzy*, 587 So. 2d 1328 (Fla. 1991); *Cummins Alabama, Inc. v. Albritten*, 548 So. 2d 258, 263 (Fla. 1st DCA), *review denied*, 553 So. 2d 1164 (Fla. 1989); *Florida Crushed Stone Co. v. Johnson*, 546 So. 2d 1102 (Fla. 5th DCA 1989) ("send a message" argument not fundamental, where not followed by request that defendant "pay a penalty"); *DeAlmeida v. Graham*, 524 So. 2d 666, 669 (Fla. 4th DCA), *review denied*, 519 So. 2d 988 (Fla. 1987) (request for "retribution" "did not constitute fundamental error"); *Brumage v. Plummer*, 502 So. 2d 966 (Fla. 3d DCA) (emotional entreaty that the defendant not be permitted to get away with its negligent conduct), *review denied*, 513 So. 2d 1062 (Fla. 1987); *Gregory v. Seaboard System R.R., Inc*., 484 So. 2d 35 (Fla. 2nd DCA), *review denied*, 492 So. 2d 1334 (Fla. 1986); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985) (entreating jury to send a message to the defendant in Cincinnati that people in Miami do not condone his conduct), *review denied*, 492 So. 2d 1331 (Fla. 1986); *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1173 (Fla. 3d DCA 1985); *International Ins. Co. v. Ballon*, 403 So. 2d 1071,1076 (Fla. 4th DCA 1981), *review denied*, 412 So. 2d 463 (Fla. 1982). *Cf. Mordenti v. State*, 630 So. 2d 1080 (Fla.) (in a criminal case, the test of fundamental error is the equivalence of a denial of due process), *cert. denied*, 512 U.S. 1227 (1994); *State v. Johnson*, 616 So. 2d 1 (Fla. 1993) (same).

allegedly improper closing argument." *Murphy*, 766 So. 2d at 1031). *See Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 580, 587 (Fla. 2d DCA 1996) (when the trial court denies the new-trial motion, its ruling "should not be disturbed in the absence of a clear showing that its broad discretion has been abused"). At the end of this trial, the trial judge complimented counsel for both sides for the "excellent job" by "talented attorneys who are courteous to each other . . ." (Tr. XIV at 1973). It is respectfully submitted that the isolated comment of Plaintiff's counsel in closing argument was not a Golden Rule argument, and in any event, cannot rise to the level of fundamental error. The trial court did not abuse its broad discretion in reaching that conclusion.

VII.
CONCLUSION

It is respectfully submitted that the Judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail upon all counsel on the attached Service List on this ___ day of May, 2008.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

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