IN THE CIRCUIT COURT OF THE 5TH JUDICIAL CIRCUIT IN AND FOR SUMTER COUNTY, FLORIDA

PEGGY T. STIMPSON and her husband, RALPH M. STIMSON,

Plaintiffs,

vs.

FORD MOTOR COMPANY, et al.,

Defendants.

_____/

Case No. 2004-CA-13

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM DECISION

Introduction

This case commenced with the filing of a complaint by Ralph and Peggy Stimpson alleging that on October 28, 2003, their 1991 Ford Aerostar van suddenly accelerated from their carport during gear engagement, traveled in excess of one hundred (100) feet during which time the brakes were unable to stop the van and thereafter struck a utility pole, causing disabling injuries to Peggy Stimpson. Ralph Stimpson, the driver, is a middle-aged man and at the time of the occurrence there was no evidence of any physical, mental, drug or alcohol related impairment. The Stimpsons' suit was based on strict liability, negligence, and punitive damages for fraudulent concealment of a defect that they claim made defendant's cruise control electronics susceptible to an uncontrolled acceleration at gear engagement caused by electromagnetic interference. Defendant denies these allegations, and claims there is no credible evidence that electromagnetic interference causes sudden accelerations in its automobiles.

Plaintiffs, to prevail, needed to show that Florida's statute of repose was tolled by fraudulent concealment of the design defect that caused their Aerostar to accelerate out of control, they alleged that Ford for many years has defended sudden accelerations with three fraudulent and intentionally misleading claims: First, that electromagnetic interference can't possibly cause an uncontrollable acceleration as occurred in Plaintiffs' 1991 Aerostar; second, that only the simultaneous occurrence of multiple failures detectable by inspection can theoretically cause a sudden acceleration from a standstill; and, finally, that without such detectable evidence, the only possible explanation is driver error. Plaintiffs say Ford has reinforced these claims by citing government reports it knows are erroneous and without scientific foundation, and by misleading trial tactics for which it has often been sanctioned or reprimanded.

Following a verdict in favor of Ford after a four week trial, Plaintiffs claimed that Ford had used the very tactics about which they had warned in their pretrial motions, and asked the Court to strike its' defenses, impose sanctions, and order a new trial on damages only. Underlying Plaintiffs' motion is the question whether, as they contend, Ford has repeatedly used fraudulent tactics to cover up the truth about an automotive phenomenon that since the 1980s has resulted in many injuries and fatalities. Given the serious nature and the implications of Plaintiffs' allegations, it is incumbent on the Court to carefully review the evidence they say supports them. In reaching these Findings of Fact and Conclusions of Law, therefore, the Court has considered the copious pretrial and post-trial motions of the parties, their briefs, the documentary evidence, the trial transcript, and the transcript of the post-trial evidentiary hearings conducted by the Court on the issues raised by Plaintiffs' allegations. This Court has given the

Plaintiffs and Ford generous time to present all of their issues and the law. The Court has also granted all reasonable requests to accommodate the parties and their witnesses and counsel so that each has had sufficient time to furnish the Court with the facts and their positions. As a result, the Court finds as follows:

1. While Ford's electronic cruise control was under development in 1973, William Follmer, a Ford engineer, warned about the risk posed by electromagnetic interference, and cautioned that "to avoid disaster" it was imperative to incorporate failsafe protection against EMI in the system's design.[1]

2. In 1976, two Ford engineers obtained a patent assigned to Ford that described a design for the cruise control system's printed circuit board to reduce the risk of a sudden acceleration posed by EMI.[2]

. According to a document prepared by the company's Electrical and Electronics Division, Ford determined in 1976 that electromagnetic interference did not pose a significant risk and, therefore, "No special consideration was given to designing in electromagnetic compatibility.[3]

. When the cruise control system in the Stimpsons' Aerostar is working to design intent, it employs a vacuum operated servo to hold the throttle open while the system is engaged. An "on/off" button on the steering column alerts the controls the system is about to be engaged, and a "set" button signals the controls to activate switches on the servo to simultaneously create vacuum and shut off atmospheric pressure, allowing a cable connected to the throttle plate to hold the throttle open at the desired speed. Tapping the "on/off" button or the brake pedal disengages the system.[4]

5. It is undisputed that in this design the switches controlling the servo receive voltage potential, or in laymen's terms, "power," at ignition, a feature Plaintiffs claim, and Ford denies, makes the system particularly vulnerable at gear engagement to a current spike, i.e., to electromagnetic interference, that can bypass the control logic and induce the servo to pull the throttle wide open.

6. In 1979, Ford's senior management established and continued to maintain a $75 million reserve which could be utilized to cover the possibility of a recall due to sudden accelerations.[5]

7. It is not disputed that Plaintiffs' 1991 Aerostar van is equipped with the same electronic cruise control system Ford first introduced in certain 1980 models.

8. The record shows that prior to 1984 reports of sudden accelerations in Ford models were relatively few. After Ford introduced an advanced version of its engine electronics, the so-called "EEC-IV" in 1984 models, reports of sudden acceleration at gear engagement began to increase rapidly, a pattern that continued throughout the 1980s.[6]

9. During the early 1980s, sudden accelerations were often investigated by field engineers and technicians employed in one of Ford's 33 district offices throughout the country, who recorded the results in Service Investigation Reports, or SIRs, that were forwarded to Customer Service Division headquarters in Dearborn.[7]

10. After SIRs increased substantially following the introduction of the EEC-IV, a Safety Office manager named Edward L. Richardson, anticipating an eventual government inquiry, began informally reviewing these field reports until September 30, 1985, when NHTSA opened the first of several investigations involving Ford.[8]

1. With NHTSA's investigation pending, Richardson directed three subordinates to review SIRs for fact patterns indicating what was causing sudden accelerations. The review showed that:

a) sudden accelerations from a standstill invariably began at gear engagement;

b) drivers frequently reported that braking during the event was ineffective;

c) field engineers often identified the cruise control electronics as the cause;

d) field engineers frequently recommended replacing the cruise control servo; and

e) there were no field reports identifying driver error as the cause of a sudden acceleration.[9]

2. According to a notation on a chronology of events prepared by Richardson, NHTSA was told on May 21, 1986 that Ford had concluded that its "vehicle systems are not defective," a claim clearly contradicted by the findings of the company's field engineers recorded in their SIRs.[10]

13. On August 5, 1986, NHTSA closed its initial Ford investigation on the basis that no "common component" had been identified as a cause, a finding consistent with Ford's representation on May 21, 1986 that its "vehicle systems were not defective."[1]

14. In September, 1986, Alan Updegrove, a manager in Ford's Customer Service Division headquarters, familiar with the findings of the company's field engineers, met with a lawyer in Ford's legal department and the manager of the office that employs in-house experts Ford uses in litigation. Updegrove expressed concern over the "inflammatory" opinions

recorded in SIRs, and recommended a new format for investigating sudden accelerations. As a result, he was directed to assemble a team to develop a new investigative approach.[12]

15. Following the EEC-IV in 1984 models, malfunctioning cruise control servos under warranty for which no cause could be identified rose rapidly; [1] and at the same time, according to Richardson, when cruise control servos removed by field engineers investigating sudden accelerations were sent to Ford's laboratories for testing, no cause for the reported event could be identified.[1]

16. On October 21, 1986, Ford's Electrical and Electronics Division, or EED, submitted a report to senior management analyzing the reasons behind the rapid rise in undiagnosed failures in electronic components. The report identified six components, including the cruise control servo, whose undiagnosed failure rate had experienced the greatest increases. According to the report, prior to 1984, the cause of servo malfunctions had been identified 80% of the time, while after 1984 the rate plummeted to 20%.[1]

17. The EED report specifically identified "electromagnetic influences in the vehicle environment" due to "the increasing complexity of electrical systems" as the root cause of this quantum increase in undiagnosed servo malfunctions; and since servos removed by field engineers investigating sudden accelerations were testing normal in Ford's laboratories, it was clear that "electromagnetic influences" were also the cause of the findings contained in SIRs the Safety Office was reviewing at the time.[1]

18. On December 31, 1986, NHTSA notified Ford that the agency had identified 439 reports of "unexpected vehicle acceleration" that had resulted in "193 accidents, 106 injuries, and 5 fatalities . . . in 1983-1986 Ford vehicles" that could result in a safety recall. The agency

asked Ford to "identify and describe all significant modifications or changes that could relate to the alleged defect in the manufacture, design, or operating strategy of the ignition, fuel, or throttle control system used in the subject vehicles." It also asked for "copies of all owner complaints, field reports, service and technical bulletins, studies, surveys, or investigations . . . pertaining to the alleged defect."[1]

19. On January 12, 1987, in response to a recommendation in the EED report on October 21, 1986, Ford created a multi-disciplinary task force for the specific purpose of studying how interactions between the engine and cruise control electronics were contributing to sudden accelerations.[1] The EED's recommendation explicitly recognized that malfunctions involving the cruise control servo were caused by system level interactions, and not by detectable failures in individual components of the interacting systems.

20. On January 29, 1987, Edward L. Richardson and the Director of the ASO, Robert Munson, met with Ford's Board Chairman to discuss the recently opened government investigation.[1]

21. On March 3, 1987, about 200 field engineers assembled in Dearborn were instructed to discontinue using the SIR format, and to henceforth investigate sudden accelerations in accordance with the recently completed format developed by Updegrove's team. According to Updegrove, a directive was issued at this point requiring that sudden acceleration-related SIRs be purged in the year they were generated.[2]

22. On March 13, 1987, Ford told NHTSA that the "Engine Engineering, Electrical and Electronics Divisions have informed us that no significant modifications have been made to the ignition, fuel, or throttle control systems . . . that have a causal or corrective connection to the

alleged defect." That claim, however, was contrary to the fact that, after Ford significantly expanded its engine electronics in the EEC-IV, both the rate of undiagnosed servo malfunctions and the number of sudden acceleration reports increased substantially.[2]

23. Plaintiffs cited an interrogatory answer by Ford showing that SIRs related to sudden acceleration as of 1987 had a one year retention period. Since federal law requires that safety-related records have a five year retention period, they claim inculpatory SIRs were given a one year retention period as part of a strategy to conceal them from NHTSA. A former Safety Office employee, William Koeppel, testified during post-trial hearings that because sudden acceleration is a safety issue, SIRs covering them required a five year retention period. Koeppel, however, claimed to have no direct involvement with sudden acceleration prior to 1988, and was unsure why sudden acceleration-related SIRs had been assigned a one year retention period. Since Plaintiffs asserted in their pretrial motion to strike Ford's defenses that many SIRs had been given a one year retention period as part of a plan to conceal them from the government, Ford certainly had every opportunity during these proceedings to produce a witness to rebut this serious accusation by plaintiffs. [2]

24. It is significant that a combined total of only 38 SIRs were disclosed by Ford in its responses. Of these, only seven submitted in November of 1985, and 16 in March of 1987 pertained to a sudden acceleration from a standstill. This paucity of reports is patently at odds with the fact that ten days before Ford's responses on March 13, 1987, about 200 field engineers assembled in Dearborn were instructed to discontinue using the SIR format when investigating sudden accelerations. It is implausible on its face that 200 field engineers working out of 33 district offices would have submitted ten fewer sudden acceleration-related SIRs, in toto, than

there were district offices employing engineers who were investigating these occurrences. Furthermore, if Richardson's three subordinates, who by March 13, 1987 had been reviewing SIRs for 18 months, had seen just one SIR a week during this period, there should have been at least 225 reports with Ford's responses on March 13, 1987.

25. Plaintiffs allege that most SIRs were retroactively assigned a one year retention period and purged unlawfully and were unlawfully withheld from the federal government. There is clear and convincing evidence in this record that many SIRs were therefore withheld.

26. In its March 13, 1987 responses, Ford told NHTSA that electronic malfunctions of the type that could cause sudden acceleration "would be expected to reveal physical evidence of causal origin." Since this was flatly contradicted by the findings contained in SIRs under review by the ASO, and by the EED report of October 21, 1986, the fact that neither study was disclosed to the government shows that Ford intended to conceal that EMI was the possible root cause of the problem.[23]

27. On October 16, 1987, NHTSA announced that it had commissioned the Transportation System Center of Cambridge, Massachusetts to conduct an industry-wide study of the sudden acceleration phenomenon.[2]

28. On October 28, 1987, a report prepared by an "Electronics Reliability Study Team" analyzed for senior management the reasons behind Ford's continuing electronics problems. The report specifically identified "electrical transients," i.e., electromagnetic interference, and a lack of uniform procedures for circuit analysis as contributory causes, making the "Reliability Study" relevant to sudden accelerations.[2]

29. On February 24, 1988, Stephen Hahn, a senior electrical engineer and team leader of the Sudden Acceleration Task Force Ford created on January 12, 1987, stated in a memorandum that "only when the vehicle speed control function is integrated into the EEC-IV system does the EEC system have the potential to produce a wide open throttle acceleration."[2] This was a reference to the undisputed fact that Ford in certain of its models had integrated the engine and cruise control electronics in a single microprocessor for the EEC-IV system. Hahn's comment, therefore, recognized that, while the engine electronics alone can not produce a wide open throttle sudden acceleration, interactions between the engine and cruise control electronics can, which is consistent with the results of the ASO's study, the conclusions of the EED, and the findings of Ford's "Electronics Reliability Study Team."

30. In the fall of 1988, 25-30 Ford engineers completed a detailed analysis of factors that could cause or contribute to a sudden acceleration. The study, known as an Ishikawa diagram, specifically identified electromagnetic interference on the output side of the cruise control electronics as a potential cause. Notwithstanding a pending NHTSA request for all reports, studies, or investigations that might assist the TSC study, the Ishikawa analysis was not disclosed to the federal government in the fall of 1988.[2]

31. In early January, 1989, NHTSA published the TSC study finding, inter alia, that EMI was not a contributing factor to sudden accelerations; that at least two simultaneous and detectable faults would have to occur for the cruise control electronics to cause a sudden acceleration; and that, in the absence of such detectable faults, the most "plausible explanation was driver pedal error." These findings showed that NHTSA had accepted the representations regarding its electronics Ford made to the agency prior to the publication of the TSC study.[2]

32. On October 12, 1989, NHTSA asked Ford for studies or investigations that could explain a "failure of the throttle control system to properly control vehicle speed in 1988-1989 model year Thunderbird/Cougar models."[2] On December 18, 1989, Ford responded, in pertinent part, as follows:

> Ford has received and investigated reports alleging sudden acceleration incidents, both with and without explicit allegations of brake failure, on virtually all vehicles it produces including the vehicles which are the subject of this inquiry. Ford's investigations, like those of NHTSA and others encompassed numerous components, systems, complex interrelationships, and human factors. The typical scope of such analysis is manifested by the diverse studies documented within the Transportation System Center (TSC) report; similar efforts continue at Ford, as exemplified by a schematic diagram, provided as Attachment I, which was formulated by Ford engineering personnel to structure sudden acceleration-type incident analysis.[3]

33. The "schematic diagram" mentioned by Ford was a copy of the Ishikawa diagram identifying electromagnetic interference on the output side of the cruise control electronics as a risk factor for sudden acceleration. Plaintiffs alleged, however, that Ford gave NHTSA a copy of the Ishikawa diagram on which the section identifying electromagnetic interference as a risk factor for sudden acceleration was illegible, and that they had obtained a legible copy of the diagram only after a Florida court ordered Ford to produce one. Defendant correctly pointed out, however, that Plaintiffs do not have a copy of the diagram given NHTSA with its responses on December 18, 1989. Nevertheless, it seems self-evident that had Ford given NHTSA a legible copy, the agency would have seen that material aspects of Ford's earlier representations regarding its cruise control electronics were untrue; and since it is clear that Ford withheld from NHTSA internal reports and studies showing that EMI is the root cause of sudden accelerations, it is reasonable to infer that Ford did not give a legible copy of the diagram to the federal

government. Finally, because William Koeppel was identified pursuant to Fla. R. Civ. P. 1.310(b)(6) as a person knowledgeable about Ford's responses to the government, Defendant had every opportunity to present him with an accurate copy of what was presented to NHTSA.

34. Plaintiffs also allege that Ford falsely represented to NHTSA on December 18, 1989, referring to the Updegrove investigation, that those results supported the conclusion that "pedal misapplication is the most plausible cause."[3] Since Plaintiffs contend that the Updegrove study virtually eliminated "pedal misapplication," the Court will examine the evidence bearing on that contention.

35. According to Updegrove's final report, the investigative format was developed by a team that included a representative from the Powertrain Electronics Unit, the ASO, and the Customer Service Division, and was designed "to guide the investigation into key areas that included the engine control electronics, underhood linkages, wiring and speed control, . . . and an extensive interview with the operator of the vehicle and any available witnesses to the event."[3] To obtain this information, Updegrove's team developed a lengthy questionnaire that field investigators used to record facts and information indicating the likely cause of the occurrence.[3]

36. The data and information sought by the questionnaire included: (1) the driver's usual startup procedure; (2) whether the driver customarily kept his/her foot on the brake pedal while shifting from "park" into a driver gear; (3) the sound of the engine during the event; (4) whether the brakes were applied and, if so, how; (5) the braking effectiveness; (6) whether a passenger in the car observed braking; (7) whether the driver or passenger observed the accelerator pedal move to the floor by itself; (8) whether there were tire marks on the pavement consistent with the driver's description of the occurrence; (9) whether one or more witnesses

outside of the automobile observed brake lights; (10) how the event terminated; (11) if it was terminated by the driver, whether it was accomplished by braking, shifting into neutral, or turning off the ignition; (12) whether the event ended with the automobile crashing into something; (13) how far the automobile travelled from start to termination; (14) the duration of the event; (15) whether there had been a prior similar event in the same automobile; and (16) whether the automobile had been serviced following a prior similar event.[3]

37. Based on the recorded information and data, each case was placed in one of three groupings that were defined in Updegrove's final report as follows:

- Group I -- Increase in engine RPMs or vehicle speed upon engagement from park to drive or reverse. Group I(a) cases involved an identifiable delay or pause before the engagement step.
- Group II -- No deceleration or slowing of the vehicle when the accelerator's released or the speed control is cancelled through brake pedal actuation or pressing the "off" switch.
- Group III -- Slow increase in engine or vehicle speed. Maximum speed attained is controlled by the engine control system/strategy.

About 1900 cases were classified as Group I events that began "upon gear engagement."[3]

38. Cases were also assigned to one of six possible causal categories defined as follows:

> 1. Complete: Allegation, interview results and vehicle investigation results are logical but no explanation for the event can be determined. Note: Assignment of this causal factor used in early investigations only.
>
> 2. Inconsistent: Allegation, interview and vehicle investigation

results are not consistent and/or not supported by tests on customer vehicle or like vehicles.

3. Misapplication: Driver had admitted misapplying/application of accelerator when intended to apply brake. Admission was made during interview attendant to investigation or admission was made by operator to an interviewed observer.

4. Normal: Customer allegations described a situation closely resembling an engine control strategy event (idle increase for codes start of idle increase to offset parasitic load on engine). An investigation determined all vehicle functions were normal.

5. Hardware: Investigation identified a component fault. Included in his category are floor mat related incidents, fouled linkage situations, and engine control or speed control hardware faults.

6. Incomplete: Select facts of case are known, interview of operator and/or technical investigation of vehicle is not complete.[3]

39. Ford's electronic summaries show that only a miniscule number of cases were classified as "normal" or "incomplete," and that "hardware" was used when a vehicle inspection found something mechanical that might have prevented the throttle from closing when pressure was released on the accelerator pedal. Because it is undisputed that nothing mechanical can cause a car to rapidly accelerate from a standstill at startup, the category "hardware" does not apply to Group I events. Therefore, only the categories "complete," "inconsistent," and "misapplication" are relevant to occurrences that began at gear engagement.

40. The electronic summaries show that Ford classified less than one percent of the Group I events as a "misapplication," while 99% were classified as either "complete" or "inconsistent." According to Updegrove, these two classifications meant essentially the same thing, namely, that the evidence collected logically supported the driver' claim of an uncontrolled acceleration, but no physical explanation for the event was found during the vehicle

inspection.[3] Since that is entirely consistent with the findings of the ASO, the Electrical and Electronics Division, and the "Electronics Reliability Study Team," it was materially false for Ford to tell NHTSA on December 18, 1989, that the Updegrove results supported the agency's conclusion that driver error was the "most plausible cause" of sudden accelerations.

41. Plaintiffs claim that Ford since 1994 has systematically used its designated electronics expert in *Stimpson,* Victor Declercq, to perpetrate the false and misleading claim that there is no evidence that Ford's electronics are susceptible to an EMI-induced sudden acceleration. They cite Declercq's testimony that he was told by a lawyer in Ford's Office of General Counsel that no summary of the Updegrove results existed.[3] Declercq acknowledges having asked a lawyer in the Office of General Counsel whether there was an engineering summary of the Updegrove results, and being told that none existed. At best, what Updegrove was told was intentionally misleading because Updegrove's final report shows that engineers helped to develop the investigative methodology. Moreover, one of those engineers, James Auiler, has testified that the "Updegrove database was a special study to get premium factual information so that we could do engineering analysis and due diligence and understand what was really going on."[39] The important point, however, is that the results recorded in the electronic summaries would have revealed to Declercq that, by eliminating a pedal misapplication in 99% of the cases, the only remaining possibility was electronic malfunctions affecting the cruise control servo. Hence, shielding Declercq from the results of this massive study shows that Ford has manipulated Declercq as part of an "unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier-of-

fact or unfairly hampering the presentation of the opposing party's claim. *Balogna v. Schlanger*, 995 So. 2d 576, 528 (Fla. 5th DCA 2008).

42. The Stimpsons contend that in its opening statement, cross-examination of Plaintiffs' experts, with the testimony of its reconstruction experts, and in final argument, Ford engaged in the same fraudulent tactics they warned about in their pretrial motion to strike Ford's defenses. Therefore, the Court will examine the testimony and evidence Plaintiffs claim support this contention.

43. As for Defendant's opening statement, Plaintiffs cite the following representation to the jury:

> [T]he evidence will be that Ford's engineers went out and they looked at their own testing procedures. And Ford, and Mr. Declercq, who you've heard about from Mr. Murray already. Mr. Declercq was the manager of a thing called the Ford Electromagnetic Compatibility Laboratory. Ford spent $35 million and built a laboratory to test not just the circuit board. They took apart an entire car in this laboratory and tested for electromagnetic interference and radio frequency interference, and they would bombard these cars with thousands of times of radiation that can be produced by any component inside the car itself.
>
> They could -- *in fact, Mr. Declercq will tell you,* that sometimes an engineer when they were running a test would put a bag of popcorn on the hood of the car, and when they'd run the test, they could pop the popcorn in that laboratory.[4]

44. Mr. Declercq was not called by Ford to support the implication that the company's testing had eliminated electromagnetic interference as a risk factor for sudden acceleration; and while a party as a matter of trial strategy may choose not to call a witness identified in its opening statement, it is not allowed to make false and misleading statements that cannot be supported by testimony or evidence. Notwithstanding that the several internal reports,

studies, and investigations discussed in these findings showed that electromagnetic interference is a risk factor for sudden acceleration, Ford clearly implied to the jury that testing in its $35 million laboratory had eliminated that risk. It is also significant that Declercq acknowledged in post-trial testimony that no Ford model with the cruise control electronics at issue here had been tested following a sudden acceleration; and that no testing replicating EMI on the output side of the cruise control had been performed.[4]

Ford's Cross-Examination of Plaintiffs' Experts

45. The record contains clear and convincing evidence that Ford withheld the results of internal reports, studies, and investigations from NHTSA that contradicted the principal findings and conclusions in the NHTSA-funded study by the Cambridge-based Transportation System Center. The question, therefore, is whether Ford used the TSC study, as Plaintiffs contend, to intentionally mislead the jury.

46. Plaintiffs say the cross-examinations of their two expert electrical engineers, Samuel Sero and Keith Armstrong, were intentionally misleading because Ford quoted statements from the TSC study it knew were grossly misleading. While Plaintiffs cite multiple instances where Ford's counsel quoted from the TSC study, it is sufficient to examine two representative occurrences, the first during the cross-examination of Mr. Sero:

> Q: Now, the 1989 report did look at cruise control malfunctions, didn't it? If you would bring up page 8. Down at the bottom there's a section entitled "cruise control malfunctions," right?
>
> A: OK.
>
> Q: And they devote several pages to this, do they not?
> A: Yes, they did.

Q: And if you go all the way to just about the end of that discussion on page 13, the last page of text about it, and the next-to-last paragraph there reads that "if the accelerator pedal moves down seemingly of its own accord in a sudden acceleration incident, a cruise control problem is a likely explanation. However, *for a wide open throttle condition to continue beyond the moment the driver's foot presses the brake pedal, at least one and usually two or three independent and easily recognized faults must also occur simultaneously.* No evidence of such failures has been found." Did I read that correctly?

A: You read it correctly.[4]

47. The record is clear that Ford has long known from the sources discussed herein that multiple, independent, and easily recognized faults are not prerequisites for a sudden acceleration. Therefore, it was intentionally misleading to quote these unfounded conclusions in the TSC study to refute the testimony of Mr. Sero.

48. The same can be said for the following cross-examination of Mr. Keith Armstrong, a recognized expert in the field of functional safety in preventing potentially injurious malfunctions caused by electromagnetic interference.

Q: Mr. Armstrong, when we broke I was asking you about the 1989 National Highway Traffic Safety Administration examination of sudden acceleration. Do you recall that?

A: Yes.

Q: Can you [Elmo operator] put the front page up there again. Then I had asked you that in the 1989 report examining sudden acceleration in the technical summary, one of the conclusions they reached was for SAI, or sudden acceleration incidents, in which there is no evidence of throttle sticking or cruise control malfunction, the inescapable conclusion is that these definitely involve the driver inadvertently pressing the accelerator instead of or in addition to the brake pedal. Is that contained in that report?

A: That's what it says.[4]

49. The Court fails to see the difference, on the one hand, between quoting statements in a government report known to be untrue, and on the other hand having a witness cite them as authoritative support for a defense that is intentionally misleading. If there is a difference, it is that in the latter case the witness can be cross-examined, while in the former Plaintiffs' counsel are barred by law from even questioning persons who authored a government report like the TSC study. It would be one thing if this were an isolated case of a cross-examination overstepping its bounds; here, however, Victor Declercq acknowledged in post-trial testimony that he has frequently cited the TSC study to juries as support for his opinion that multiple, simultaneous, and detectable failures are prerequisites for a sudden acceleration.

Ford's In Limine Motion Regarding Plaintiffs' Accident Reconstruction

50. Prior to trial, Ford filed a motion in limine to bar Plaintiffs' reconstructionist, William Berg, from testifying about demonstrations he had observed in an Aerostar showing that a cruise control malfunction could have produced the tire marks observed in Plaintiffs' carport. Because the demonstrations were not videotaped or photographed, Ford argued that Berg should be barred from mentioning them in his testimony. While Plaintiffs agreed in their written response not to mention the tests Berg had observed, they expressed their concern on the record that the intent of Ford's in limine motion was fraudulent, and reserved the right, if necessary, to recall Dr. Berg on rebuttal. Plaintiffs also arranged for Berg to observe videotaped repetitions of the tests he had seen earlier.

51. Notwithstanding Plaintiffs' agreement not to mention the tests Dr. Berg had observed, Ford brought the subject up in its cross-examination in a manner suggesting that Plaintiffs' counsel was concealing something from the jury:

> Q: When you went down there, I think you went down on September 9, 2009, right? You went down there on September 9, which was a week before I concluded your deposition on September 14, right?
>
> A: Just a moment. Correct.
>
> Q: Now when you went down there, Mr. Murray was down there, wasn't he?
>
> A: He was.
>
> Q: And you ran some experiments at a warehouse owned by Ed Bell, right?
>
> A: I observed some tests with an exemplar vehicle, correct.
>
> Q: This is what you prepared while you were down there on September 9, correct?
>
> A: Yes.
>
> Q: You didn't take any photographs of the experiments that you observed, right?
>
> A: I did not.
>
> Q: Nobody took any pictures, did they?
>
> A: Not to my knowledge.
>
> Q: Nobody took a videotape of the tests?
>
> A: Correct.
>
> Q: Nobody made any measurements of the tests?
>
> A: Not that I'm aware of.[4]

While this line of questioning insinuated concealment by Plaintiffs, it is significant that, for reasons to be discussed, Ford did not perform its own tests until after it learned from deposing Berg that the tests he observed had not been videotaped.

Ford's Accident Reconstruction Testimony

52. Ford's reconstructionist, Joe Kent, opined that Ralph Stimson caused his Aerostar to suddenly accelerate from his carport and crash by mistakenly flooring the gas pedal before he shifted into "drive." According to Kent, "that's the only way those tire marks, in my view, could be made."[4]

53. Karl Stopschinski, an electrical engineer, described videotaped tests he performed in an exemplar Aerostar, two of which, in particular, he claimed, supported the conclusion that Mr. Stimpson had floored the gas pedal and, with the engine racing, shifted into drive. Stopschinski described a test sequence meant to support Kent's claim this was "the only way those tire marks could be made."

> Before I shifted into drive, the engine speed was going up to 5,000 rpms. I have the accelerator fully open before I am shifting out of park with the engine speed racing at a high level.[4]

The videotape of this demonstration showed that it produced tire marks similar to those in the Plaintiffs' carport.

54. Stopschinski also used an electrical device to simulate a cruise control malfunction with this test sequence:

> Now, the shift into drive was before that [the activation of the cruise control servo] so the sequence would go shift into drive, activate the bypass switch . . . [4]

The videotape of this test showed there were no tire marks on the surface. Based on these tests, Stopschinski opined on the ultimate issue before the jury:

> I believe . . . that Mr. Stimpson mistakenly applied the accelerator pedal instead of the brake while shifting from park into drive causing the engine speed to increase suddenly and causing the vehicle to accelerate rapidly and causing the tires to spin and create the tire marks that we saw in the carport.

55. When Ford rested following Stopschinksi's testimony, Plaintiffs claimed that Ford's reconstruction was fraudulent and asked leave to recall Dr. Berg for rebuttal, which was granted. Although the videotaped repetition of the earlier tests Berg observed showed that a cruise control malfunction could have caused the tire marks in the Stimpsons' carport, Ford took advantage of Plaintiffs' agreement not to mention the first tests Berg had observed by insinuating that the earlier tests were unfavorable to the Stimpsons:

> But, you know, Mr. Murray's talked a lot about concealment, but the biggest concealment, the one concealment we all know about now is this one right here. And that's what Dr. Berg did with those tests, and I was really upset about that.
>
> September 9th, Dr. Berg observes the test. He tells me that Mr. Murray said not to document the results. Now I submit to you that a fair inference that you can make, if any of those tests didn't come out right, if they weren't going to make a picture of them or make any documentation of them in September.[4]

56. Ford had every right to impeach Dr. Berg. Ford, however, did not have the right to impugn the integrity of plaintiffs' counsel by suggesting he had manufactured "secret" testing and had improperly hidden that evidence from Ford, the Court, and the jury:

> Q: Now, you talked to Mr. Murray before you came here to testify, and he told you, shush, don't mention the tests, right? He said don't mention the tests, right? [4]

> Q: You concealed the fact that you'd done these tests from me and from the judge and from the jury when you were here on the 8th of February, right? [5]

This theme was repeated in Ford's closing argument:

> So Dr. Berg comes in here on February 8th and doesn't tell anybody about his testing. He told me that he had been told by counsel for the Stimpsons to keep the testing quiet, not to mention it....Mr. Stopschinski comes in here, poor nice Mr. Stopschinski, a big tall guy, who ran all the tests, and Mr. Murray invites Mr. Stopschinski to go watch Dr. Berg run his tests. Well, that's impossible. That's untrue, because the test had been run two weeks before. That's concealment.[5]
>
> . . . .
>
> *The truth is that the plaintiffs' lawyers concealed the testing from everybody* that Dr. Berg ran and made a misleading statement to poor Mr. Stopschinski about inviting him to see the testing and had their witness conceal it from everybody that he's done this testing, so I had no opportunity to have one of our witnesses look at this testing. *Those are the facts about fraud and concealment in this case.* [5]

57. While Florida law looks with disfavor on comments that impugn the character or integrity of an opposing lawyer, the maneuvering by opposing lawyers in this instance might be seen as gamesmanship, generally permitted in our adversarial system, were it not that Stopschinski acknowledged in post-trial testimony that he had known at the time of trial that a malfunction in the cruise control electronics *before shifting was completed* would have produced the tire marks in the carport; and since Stopschinski never tested for that possibility, it is clear from his post-trial testimony that this omission was intentional. Therefore, it was at least improper for Ford to suggest that Plaintiffs' counsel had concealed the earlier tests observed by Berg because they were unfavorable to the Stimpsons. As for Kent's claim that first flooring the

accelerator pedal and then shifting was "the only way those tire marks could be made," whether or not he knew this was untrue, Ford certainly did.

58. Ford cites *Murphy v Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (2000), for the law which governs the issue of whether an unobjected statement in closing argument can be the basis for a new trial, and claims that those criteria have not been met. However, some statements are *per se* objectionable and constitute fundamental error – whether or not the *Murphy* case criteria are met.

Florida law is clear that an attack on the integrity of opposing counsel will not be tolerated and in itself will justify a new trial. *See e.g., Rosario-Paredes v. J.C. Wrecker Service,* 975 So.2d 1205, 1208 (5th DCA 2008); *Johnnides v. Amoco Oil Co., Inc.*, 778 So.2d 443 (3d DCA 2001); *D'Ambrosio v. State,* 736 So.2d 44, 46 (5th DCA 1999); *Owens-Corning Fiberglass Corp. v. Crane,* 683 So.2d 552, 553 (3d DCA 1996); *Hammond v. Mulligan,* 667 So.2d 854, 855 (5th DCA 1996); *Emerson Electric Co. v. Garcia,* 623 So.2d 523 (3d DCA 1993); *Venning v. Roe,* 616 So.2d 604 (2d DCA 1993); *Shubert v. Allstate Inc. Co.*, 603 So.2d 554, 555 (5th *DCA 1992); Owens Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (3rd DCA 1995), Sun Supermarkets, Inc. v. Fields,* 568 So.2d 480 (3d DCA 1990); *State v. Comesana*, 904 So.2d 462, 265 (3d DCA 2005); *Bloch v. Addis,* 493 So.2d 539, 541 (3d DCA 1986).

Murphy did not change that rule. The Court in *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So.2d 997 (3d DCA 2008), which was decided after *Murphy* reversed a judgment and ordered a new trial where counsel in closing argument accused opposing counsel of hiding evidence, noting that "[a contemporaneous objection] is not necessary if the comment constitutes

fundamental error or extinguished Dadeland's right to a fair trial. *Id.* at 1002. Second, the egregiousness of Ford's comments in closing argument, in any event, meet the *Murphy* criteria.

Ford states that it "simply brought to light the facts". However, Ford went beyond the "facts" when it told the jury that Mr. Murray had committed fraud and concealment; complained that Ford's counsel was personally upset with Mr. Murray's actions, implied that Dr. Berg's original testing was not videotaped because plaintiff's were concerned the results wouldn't turn out in their favor; and contended plaintiff's had sandbagged Ford by keeping the testing "secret" until rebuttal. Trial transcript at 3680-81, 3686. Ford also fails to acknowledge its' attacks on the integrity of Mr. Murray and Dr. Berg occurred not only in closing argument but during the trial. *See, e.g.,* Trial transcript of February 18, 2010, at 3221-22, 3225-26.

The Ford Communications Network Video

59. Plaintiffs showed the jury a 1999 videotaped program produced by Ford's Communications Network that featured Victor Declercq demonstrating on a table top model of Ford's cruise control system five failures that would have to occur simultaneously before a sudden acceleration was possible. Plaintiffs contended that since Declercq had testified to the same effect since the video was produced, it showed that Declercq had been deliberately shielded from internal reports and studies contradicting his testimony. Although Declercq was never called, the following segment of Ford's final argument suggested to the jury that Declercq's statements for FCN were consistent with Ford's claim that there is no evidence that electromagnetic interference could have caused the Stimpsons' Aerostar to suddenly accelerate:

> Now, let's talk for a moment about the facts about how the cruise control system operates. And frankly, I was surprised in this case that Mr. Murray introduced the videotape of Mr. Declercq describing the system. Can we see Mr. Declercq's videotape:

Mr. Bibb: We're going to talk about Mr. Sero's theory now.

From the FCN video:

> Declercq: Sam Sero's theory does not happen in the real world. For Sero's theory to happen in the real world, there would have to be five simultaneous failures.
>
> First of all, this wire has to be broken. One of these two hot wires has to be frayed and then that fray has to be shorted to ground. That's three failures.
>
> Then the dump valve has to be inoperative. That's four failures. Then the brake which will overcome the engine has to also fail. That's five simultaneous failures. If all of these failures actually had occurred in the real world, they would leave evidence and we would be able to find that evidence. We have never found that.

(Video concluded).

Although Ford's counsel acknowledged that the 1999 FCN production was not directed at Sero's opinion that EMI is the root cause of most sudden accelerations, what followed the video replay clearly suggested that Declercq's unsworn statements applied to Sero's testimony in *Stimpson*:

> Mr. Bibb: Now let's talk about the facts of Plaintiffs' theory. Mr. Declercq's videotape there was made in 1999. Mr. Sero came in here and testified that over time his theory has evolved. Mr. Declercq was talking about Mr. Sero's theory then.
>
> Today, Mr. Sero came in here -- and if we can show that -- his theory is that there's an unknown and undetectable electrical transient, an EMI, that lasts a millionths of a second, comes from an unknown source within the vehicle. It travels an unknown course through the vehicle. It enters the cruise

> control in an unknown way and it causes the cruise control to turn itself on and accelerate the Aerostar from a standstill to wide open throttle. .[5]

Since Declercq acknowledged in post-trial testimony that, if called, he would have testified the multiple, simultaneous, and detectable failures would have been required to cause the sudden acceleration in Plaintiffs' Aerostar, it is clear that Ford's purpose in playing the video during its final argument was to make these claims to the jury without exposing Declercq to cross-examination; and since there is overwhelming evidence in this record that multiple, simultaneous and detectable failures are not prerequisites for a sudden acceleration, replaying the video to discredit the testimony of Mr. Sero was at least intentionally misleading.

60. Because Ford's opening statement suggested that Mr. Declercq would be called to show that Defendant's testing had eliminated EMI as a risk factor for sudden acceleration, the following segment of Ford's argument exacerbated the misleading nature of its opening statement regarding the company's testing:

> You know, the other thing that did come out through Mr. Sero's testimony and Mr. Armstrong's testimony is they were aware that Ford Motor Company does electromagnetic compatibility tests. Ford tests its vehicles to make sure that electromagnetic interference won't affect the radio and windshield wipers and every electrical component on the vehicle. They know their customer wouldn't like that. They wouldn't want the windows to roll up and down surprisingly. They wouldn't want static on the radio, and they wouldn't want their cruise control to malfunction.
>
> So Ford -- and Mr. Sero agreed -- had a $35 million facility that they could test the entire vehicle, they could test individual components and they tested all of these to the standards in existence, which are the Society of Automotive Engineering, electromagnetic compatibility standards.[5]

The McMath Denial and the Schmidt Paper

61. During the post-trial evidentiary hearings, Ford elicited from William Koeppel that a paper authored by Dr. Richard Schmidt was cited by NHTSA as a basis for rejecting a petition by Arkansas lawyer, Sandy McMath, asking the agency to reopen its earlier investigation into the cause of sudden acceleration. Koeppel testified under questioning by Ford regarding the McMath denial as follows:

> Q: I want to focus our attention for a moment on pedal misapplication. Is it your understanding, sir, that we are having a hearing today to try to determine whether or not Ford Motor Company's defense of pedal misapplication was fraudulent?
>
> A: That's essentially my understanding of one of their claims.
>
> Q: I'm going to go to page 18 of that study [the McMath denial]. Can you read that first paragraph of Defendant's Exhibit H, which is admitted in the record?
>
> A: In a 1989 study, Richard A. Schmidt reviewed evidence of a human factors explanation of the phenomenon of unintended acceleration, whereby at the start of a driving cycle, an operator experiences full, unexpected acceleration for as long as twelve seconds with an apparently completed failure of the brake system, often leading to an accident.
>
> Q: Richard Schmidt was one of the studies that NHTSA reviewed back then when it drafted this report [the McMath denial] back in 2000, correct?
>
> A: I reviewed several of the peer reviewed papers Schmidt has published as well.
>
> Q: I want you to read also on page 18 of Defendant's Exhibit H the paragraph that starts with "once."
>
> A: Once unintended acceleration is initiated, a serious contributing factor is the failure to detect and correct a foot placement error, mainly because of lack of effective

> feedback from the well learned, essentially automatic foot movements. The onset of the unintended acceleration may produce a startle reaction compounded by severe time stress, placing the individual in a state of hypervigilance (panic) in which information processing activities necessary to take effective action are seriously disrupted.
>
> Q: Sir, your understanding of that paragraph is that pedal misapplication occurs?
>
> A: Yes.
>
> Q: Is it also your understanding from reading that paragraph, sir, that not only does pedal misapplication occur, but that it occurs for an extended period of time?
>
> A: Yes. And the paragraph explains why people will not detect it and think they're pressing the brake pedal instead of the accelerator.
>
> Q: Again, just so the record is clear, Mr. Koeppel, this report was authored and became part of the Federal Register in 2000, correct?
>
> A: Yes.[5]

While Plaintiffs do not deny that people occasionally make pedal errors, they did say that there is no empirical or scientific proof that people mistakenly floor the accelerator pedal and keep it there for sufficient time for their vehicle to travel long distances until it crashes (this is unlike the typical case that we occasionally read about in the newspapers where an elderly person crashes his vehicle into a storefront window in a strip mall parking lot when the driver mistakenly pushes on the accelerator rather than the brake); and while it is not necessary to the Stimpsons' case to prove that contention, one of their trial counsel, who recently deposed Schmidt in an unrelated case, argued that Schmidt's work shows there is no empirical or scientific basis for the conclusion in NHTSA's 1989 report that the most likely cause of most

sudden accelerations is driver pedal error. If that contention is true, the implications of that contention are far reaching. Therefore, the Court will carefully examine Dr. Schmidt's testimony.

62. A logical starting point in evaluating Dr. Schmidt's published opinions is how he defines the term sudden acceleration:

> Q: Now, Dr. Schmidt, I'm aware that you've published various papers, and I read some of that background information. And in those papers, you have proposed a hypotheses regarding the cause of some or most so-called sudden accelerations, am I correct?
>
> A: Yes.
>
> Q: Does the term sudden acceleration have a distinct meaning to you?
>
> A: I use the NHTSA definition. . . which says it's a full, uncommanded full throttle situation from a stop or near stop after shifting from park or a drive gear with a perceived brake failure.[5]

Schmidt explained his hypothesis that drivers cause sudden accelerations this way:

> Q: Now, I read your papers, and I think it's your position or hypothesis that these occurrences, many of them, or maybe most of them, . . the driver mispositioned his or her foot over the accelerator pedal; is that correct?
>
> A: Yes.
>
> Q: In this hypothesis, does the driver misposition his or her foot . . . over the accelerator pedal before he begins the shifting movement?
>
> A: I would say simultaneously with.
>
> Q: Simultaneously. You're going to have to explain that. In your hypothesis, I'm using it in a distinct sense, Doctor, you understand?

A: Sure.

Q: Scientists hypothesize something.

A: Sure.

Q: In your hypothesis, does the driver misposition his foot before or after . . . the shifting process begins?

A: . . . Well, that's why I say contemporaneously, both of those things are operating together. I don't know exactly what the timing is, but they both generally operate together.

Q: But explain to me how, in your hypothesis, the shifting and mispositioning happens.

A: Well, the driver gets into the car, and presumably or perhaps is mispositioned in the car because he just sat down anew in the vehicle. And then in an attempt to get the car going, he has to do two things. One is put his foot lightly on the brake, and two, shift out of park into drive or reverse . . .

Q: So is it your hypothesis then that it is in the process of moving the foot to the brake pedal that the foot gets mispositioned?

A: Yes.

Q: Now, I'm sure as part of your research, you've looked into whether drivers typically put their foot on the brake pedal during the start up or during the shifting maneuver, whether or not the car has a shiftlock, we'll get to that later, have you researched whether drivers typically place their foot on the brake pedal during start up procedures?

A: I really haven't done any research to answer that question directly, but certainly from complaints about unintended acceleration, that's what the driver says he does.

Q: I think we can agree that typically, in these sudden acceleration cases, the driver says he got in the car, put his foot on the brake at start up, that's a rather standard version of the allegations made by drivers in these cases, isn't it?

A: Yes it is.[5]

63. While NHTSA defined sudden acceleration as a full throttle acceleration at gear engagement, Schmidt's hypothesis assumes something quite different:

> Q: So in the classic sudden acceleration, the driver makes a series of mistakes, he mispositions his or her foot, he then pushes on the gas pedal enough to cause a wide open throttle acceleration, he persists in that mistake for some period of time, depending on the circumstances, and then, in many cases, at least, a crash occurs; is that a good profile of what happens?
>
> A: Most. I think I heard you say, though, the driver puts his foot on the accelerator pedal and immediately generates full throttle.
>
> Q: OK.
>
> A: That's not what I think.
>
> Q: What do you think?
>
> A: Well, what I think is the driver intends to put his foot lightly on the brake, but his foot goes to the accelerator instead. So that pedal application is a light one.
>
> Q: OK.
>
> A: Not full throttle at all.
>
> Q: OK.
>
> A: And then subsequent to shifting into drive or reverse, the car starts to move, the driver stops the car or attempts to stop the car by pushing on the brake, but is on the accelerator instead, so the car goes a little faster.
>
> Q: OK.
>
> A: And so he pushes again, and so on and so on until you have a full throttle event. It's not my view that the driver

initially puts his foot on the accelerator in a full throttle way, not at all.

Q: In other words, you're saying he doesn't go pedal to the metal immediately?

A: No.

Q: It's a progressive series of actions on the part of the driver?

A: I think in the classic one, yes, that's right.[5]

64. Since it is undisputed that in a classic sudden acceleration the throttle rapidly goes to wide open at gear engagement, Schmidt's hypothesis is obviously inconsistent with this generally accepted description of a sudden acceleration. The core question, however, is whether there is a scientific or empirical basis for Schmidt's hypothesis that pedal errors cause most sudden accelerations. On that fundamental point, his testimony is important:

Q: I'm trying to find out how you began. What information did you use, Dr. Schmidt, in formulating this hypotheses?

A: Well, one would be sort of doing a "thought experiment," assuming the hypothesis that the car did it and that the car malfunctioned in some way, that predicts the unintended acceleration thing.

But that also has the drawback that it requires two, at least two malfunctions of the car to occur at the same time and to fix themselves afterwards. So that data tends to refute hypotheses that talk about the car being at fault.[6]

This shows that Schmidt's "thought experiment" made the same assumption the TSC study did, namely, that a sudden acceleration "requires at least two malfunctions that fix themselves afterwards." That raises the question whether there is any credible scientific or empirical basis for that assumption, which makes the following testimony particularly relevant to this inquiry.

Q: You say for a sudden acceleration to have been caused by some kind of malfunction, there has to be two malfunctions in the car at the same time? Is that right?

A: At least two, yes.

Q: At least two. What are those minimal two?

A: One of the two has to be something wrong with the fuel delivery system, the acceleration system. Number two, is the brakes have to fail.

Q: What has to go wrong, in your thought process, with the fuel delivery system?

A: Well, I have no idea about that . . I'm not an engineer. Secondly, I don't really know what aspect of the fuel delivery system has failed or claimed to have failed. All the driver knows is that something failed and the car went into wide open throttle . . .

* * *

Q: You take at face value what the driver said, and then, as I understand it, try to determine scientifically whether those reports are valid or not?

A: Right. In the sense that the thought experiment here that we referred to a minute ago is the idea that we all know that vehicles don't fix themselves.

Furthermore, it's unlikely that you have two independent malfunctions occur at the same time. So I think that observation, which is called data, I suppose, if you were to look at the data, I suppose you would find something like that, that observation then argues against a vehicle defect theory.

Q: So let's for a moment say that we reached the point in the thought experiment where we conclude that these two kinds of failures occurring simultaneously is unlikely or extremely remote?

A: Right.

Q: That's basically where you began?

A: I guess so.[6]

65. It is apparent that Schmidt assumed that if no tangible or detectable evidence of a malfunction is found in the vehicle, the cause must be the driver. However, when Schmidt was pressed to explain the basis for this assumption, he conceded that: (1) he was unaware of any research showing that drivers occasionally misposition their foot on the accelerator pedal at start up;[6] (2) he never consulted with an electrical engineer regarding his assumption that two detectable faults at least that "fix themselves" were necessary for a sudden acceleration; [6](3) that he had heard about Ford's Updegrove investigation, but knew nothing about the results;[6] (4) he has done no research regarding brake pedal force needed to stop an open throttle acceleration;[6] and (5) when confronted with the fact that many sudden accelerations had been terminated by the driver disengaging the engine before a crash occurred, he said he would be "surprised" if that were the case.[6]

66. Dr. Schmidt's deposition shows that he recently co-authored a paper entitled "Cars Gone Wild" that analyzed North Carolina accident data over a six year period showing that approximately 2,000 drivers involved in an accident had admitted making a pedal error. According to Schmidt, his research had uncovered "39 classic unintended acceleration events in the North Carolina study," a disclosure that produced the following testimony:

Q: Please tell us how many of the 39 drivers in the sudden acceleration occurrences you identified in the North Carolina study did the driver admit to making some kind of pedal error?

A: The driver never admitted making a pedal error.

Q: Why would all of the 39 drivers deny a pedal error, when so many of the other drivers in the North Carolina study admitted a pedal error?

A: I'm not positive about the answer to that. In one sentence, that's sort of typical of the phenomenon, unintended acceleration, classic unintended acceleration where the driver makes a pedal misapplication and continues to believe that his foot was on brake, and that the brake failed, when, in fact, his foot was on accelerator . . .

Q: I know your hypothesis; now I'm interested in ... having you tell us about any empirical or scientific research evidence you can point to that would indicate, or explain, why drivers who are involved in a classic sudden acceleration would virtually universally deny that they had made a pedal error ...

You have hypothesized that drivers never admit this or virtually never admit this, true?

A: That's almost true. Almost in the sense, I guess you could say hypothesized, this is what we find in the data.

Q: We can agree that the data shows that there's nothing unusual in the fact that none of the 39 drivers in the Carolina study admitted a pedal error?

A: That's right.

* * *

Q: . . . Now your hypothesis is they don't know they made a pedal error?

A: Yes.

Q: So they don't admit it.

A: Well, yes, I really believe they don't know they made a pedal error . . .

Q: OK.

A: And they continued not to know that after the episode is over when they described it.[6]

Although Schmidt has a Ph.D. in human performance, he was unable to cite scientific or empirical evidence for the reason drivers universally deny having caused a sudden acceleration-related accident, while literally thousands of drivers involved in a moving accident readily admitted making a pedal error.

67. It appears that Ford's purpose in citing Dr. Schmidt's work was to counter Plaintiffs' contention that there is no credible scientific or empirical evidence to support the claim that Ralph Stimpson suddenly floored the accelerator pedal before shifting into drive, thereby sending his Aerostar, with the wheels spinning, out of control until it crashed. There is no similarity, however, between Schmidt's hypothesis and the sudden, rapid acceleration of Plaintiffs' Aerostar. Moreover, because the TSC study and the McMath Denial both made the same assumptions Dr. Schmidt did in his "thought experiment," this record contains no scientific or empirical support for the possibility that Ralph Stimpson caused this serious accident by flooring the accelerator pedal before beginning to shift into drive. If there were credible proof that people, even occasionally, do what Ford claims Ralph Stimpson did, there would have been no reason to intentionally omit testing whether the cruise control malfunction could have caused the tire marks in Plaintiffs' carport. The Court finds by clear and convincing evidence, therefore, that there is no evidence in this record to support Ford's claim that Ralph Stimpson caused the accident that has left his wife permanently paralyzed.

CONCLUSIONS OF LAW

I. Relief From Judgment

1. Fla. R. Civ. P. §1.540 authorizes a trial court to relieve a party from final judgment where clear and convincing evidence shows that the opposing party has committed fraud, misrepresentation, or other misconduct. A trial court also possesses the inherent authority to grant that relief. *Cox v. Burke*, 706 So. 2d 43 (5th DCA 1998).

2. The party seeking such relief must demonstrate "clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate the matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. *Id.* at 46. If this standard is met, the court in its discretion may strike the opposing party's pleadings. *Sun v. Aviles*, 5th DCA, Case No. 5009-3 420 (December 17, 2010). That sanction not only ensures that the proceedings *sub judice* will be protected, but that other litigants will be deterred from engaging in similar conduct. *Tramel v. Bass*, 672 So. 2d 78 (1st DCA 1996).

3. The United States Supreme Court has recognized the historical equitable duty and power of the courts to relieve a party like the Stimpsons from the hardship of a fraudulently obtained judgment. *Hazel-Altlas Glass Co. v. Hartford_Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250 (1944)(cited with approval, *Harrono v. Murphy*, 723 So. 2d 892 (Fla. 3d DCA 1998)(perjury). Particularly apropos to this case is Justice Black's potent observation, at U.S. p. 246, L.Ed.p. 1256:

> [Tampering with the administration of justice in the manner indisputably shown here involves more than an injury to a single litigant. It is wrong against the institutions set up to protect and safeguard the public, institutions in which fraud

> cannot complacently be tolerated consistently with the good order of society.
>
> ***
>
> The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

4. Applying these principles, the Court finds by clear and convincing evidence that defendant Ford Motor Company engaged in misconduct justifying the striking of its answer and the entry of a judgment in plaintiffs' favor on liability.

5. The conduct justifying this relief is set forth at length in the foregoing Findings of Fact and is summarized as follows:

(a) Ford deemed its Service Investigation Reports relating to sudden acceleration to be unrelated to safety, and thus destroyed them within one year after they were created. However, those reports were patently relevant to safety and thus required by federal law to be kept for five years. Because Ford unlawfully disposed of those documents, numerous engineering reports identifying the cruise control electronics as the cause of sudden acceleration were concealed from NHTSA. Had Ford disclosed them, the government would have discovered years ago that electronic failures in the cruise control system is a cause of sudden acceleration.

(b) Ford represented to NHTSA that it had identified no components that could cause sudden acceleration; that there were no design changes in its throttle control system that were correlated with sudden acceleration; and that if sudden

acceleration were caused by a design failure, it would leave physical evidence of multiple component failures. These claims were false and are contradicted by the SIRs, the Updegrove study, and the engineering reports commissioned by Ford's Technical Affairs Committee. Accordingly, Ford knew that NHTSA's 1989 "Examination of Sudden Acceleration" was predicated upon false information. Ford's copious use of that report throughout the trial was likewise misleading and fraudulent.

(c) Notwithstanding that Ford had moved *in limine* to prevent plaintiffs' expert Dr. Berg from discussing his exemplar testing, it proceeded to inquire about those tests on cross-examination and implied to the jury that Dr. Berg's findings were unreliable because the tests had not been videotaped. On numerous occasions throughout the trial, the plaintiffs advised that the purpose of Dr. Berg's testing was to expose the falsity of any suggestion by Ford that the tire marks in the Stimpson carport could have been caused only by driver error.

(d) Through its reconstruction experts Joe Kent and Karl Stopschinski, Ford presented false and misleading testimony by telling the jury that the only way the tire marks could be made would be if Mr. Stimpson had mistakenly applied the accelerator full throttle before gear engagement. After plaintiffs recalled Dr. Berg to rebut that false claim, Ford responded by telling the jury that it was the plaintiffs who purposefully and fraudulently concealed evidence, in effect exhorting the jury to punish the plaintiffs for actions that took place off the record.

6. These acts of misconduct, individually and collectively, constitute a calculated plan to interfere with the judicial system's ability to adjudicate a matter by improperly influencing the jury.

7. Accordingly, Ford's answer, including its affirmative defenses, is hereby stricken and judgment on liability entered in favor of plaintiffs. A second trial will take place to assess the amount of compensatory damages; whether punitive damages are appropriate; and if so, the amount of such punitive damages. The Court will also entertain a motion for the assessment of costs at the appropriate time.

II. New Trial

8. Plaintiffs also filed a motion for a mistrial and a new trial. Since a motion for mistrial made after the discharge of the jury will be treated as a motion for a new trial, *Keene Brothers Trucking, Inc. v. Pennell*, 614 So. 2d 1083, 1085 (1993), the motions will treated identically.

9. The grounds for a new trial are virtually limitless, but the moving party must convince the trial court that it is "reasonably clear that substantial rights have been violated to the extent that a fair trial was not had." *Hagen v. Sunbank of Mid-Florida, N.A.*, 666 So. 2d 580, 584 (2nd DCA 1996). In this case, there are two independent and sufficient grounds for ordering a new trial.

a. Fundamental Error

10. A court may grant a new trial even where the alleged error was not preserved, so long as the error is "fundamental," that is, goes to the "foundation of a case" or to the "merits of the cause of action," or "extinguishes a party's right to a fair trial." *Id.* at 584. This doctrine

preserves the public's confidence in our system of justice. *Id.* Here, there are several instances of fundamental error, each of which justifies the granting of a new trial.

1. *Estoppel*

11. It is axiomatic that a party is estopped from taking one position in litigation and thereafter changing its position to the detriment of the opposing party. *Hernandez v. Home Depot U.S.A, Inc.*, 695 So. 2d 484 (3rd DCA 1997); *Salcedo v. Asociacon Cubana, Inc.*, 368 So. 2d 1337 (3rd DCA 1979). As the *Hernandez* court explained, this is "the ultimate gotchaism -- whipsaw the plaintiff for not producing the very testimony" that defendant had successfully excluded.

12. After filing a motion *in limine* to preclude Dr. Berg's exemplar testing, plaintiff agreed not to elicit that testimony and adhered to that agreement. Nonetheless, Ford, reversing its position, drew out the testing on cross-examination and impeached Dr. Berg by implying that the reason his testing was not videotaped was that plaintiffs wanted to protect themselves if the results didn't turn out the way they wanted and, further, that they had acted improperly by not inviting Ford to observe the tests. But there was no discovery rule that was violated; in fact, Ford did not invite plaintiffs to witness the testing of Mr. Stopschinski. Even if plaintiffs had committed a procedural impropriety, and they did not, it is for the court to impose sanctions for such conduct; it is fundamental error to invite the jury to do so. *Bloch v. Addis*, 493 So. 2d 539, 541 (3rd DCA 1986).

13. This theme was carried over into closing argument, where Ford's counsel suggested that it was plaintiffs' counsel who had committed fraud and concealment and that Ford's counsel was "really upset about that," injecting his personal beliefs for the assessment of

the jury. It is reasonable to conclude that the jury went along with Ford's counsel's exhortation to be angry with plaintiffs' counsel and Dr. Berg for committing these allegedly fraudulent acts. This misconduct sullied the entire proceedings and deprived plaintiffs of a fair trial and constitutes fundamental error.

2. *Impugning Integrity of Opposing Counsel*

14. It is never acceptable to impugn the integrity of opposing counsel. *Rosario-Paredes v. J. C. Wrecker Service*, 975 So. 2d 1205, 1208 (5th DCA 2008). Even if no contemporaneous objection is made to such comments, such arguments fall squarely within the category of fundamental error because it jeopardizes the basic right to a fair and legitimate trial. *SDG Dadeland Associates, Inc. v. Anthony*, 979 So. 2d 997, 1002 (3rd DCA 2008).

15. Ford's cross-examination of Dr. Berg and its closing argument were tantamount to accusing plaintiffs' counsel of orchestrating a conspiracy between plaintiffs and their expert in an attempt to trick the jury, hide evidence, and perpetrate a fraud on the court. This devastated any chance plaintiffs might have had to secure a fair trial in front of a jury who had been told not to trust plaintiffs' counsel. *Sun Supermarkets, Inc. v Fields*, 568 So. 2d 480, 484 (3rd DCA 1990). *See also Emerson Electric Company v. Garcia*, 623 So. 2d 523 (3rd DCA 1993).

16. Ford's attack on the integrity of plaintiffs' counsel and plaintiffs' expert witness justifies a new trial even though Ford's closing argument was not objected to. *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (2000). Each of *Murphy's* four criteria have been met. First, Ford's argument was clearly improper since it is well-established that attacks on the integrity of opposing counsel is *per se* objectionable. *Rosario-Paredes v. J. C. Wrecker Service*, 975 So. 2d 1205, 1208 (5th DCA 2008). Ford's counsel also interjected his

personal assessment of the credibility of Dr. Berg and plaintiffs' counsel. ("And that's what Dr. Berg did with those tests, and I was really upset about that.") It is also *per se* improper for counsel to voice his or her own assessments of the evidence.

17. Second, the deleterious influence of Ford's closing argument could not be corrected by rebuke or retraction. Because Ford in effect had called plaintiffs' counsel a liar ("The truth is that the plaintiffs' lawyers concealed the testing from everybody....Those are the facts about fraud and concealment." (3686)), no curative admonitions from the court could have removed the taint. As a practical matter, the only corrective instruction would be for the jury to be told either to ignore the claim that plaintiffs' counsel is a liar (implying that he might be), or to be told as a matter of fact that plaintiffs' counsel is not a liar. Both options are untenable.

18. Third, this type of conduct would jeopardize the public's interest in our system of justice if permitted to go unchallenged. A party may not attempt to win a case by accusing opposing counsel of fraud and concealment; by telling the jury that plaintiffs wrongfully kept their testing secret from the court, the jury, and the opposing party; or that plaintiffs' counsel and expert witness had in effect colluded to pull the wool over everyone's eyes. A jury must assess the facts based upon properly admitted evidence.

3. *Fraudulent Reconstruction Testimony*

19. Ford' reconstruction expert Joe Kent told the jury that the only way the tire marks in the Stimpsons' carport could have been made was by Mr. Stimpson depressing the accelerator pedal to the floor, full throttle, before the car was placed into drive gear. (2522, 2549) Ford's other expert Karl Stopschinski likewise told the jury that the only way he was able to create tire marks during his exemplar testing was through the same type of pedal error. (2763) However,

Mr. Stopschinski admitted during the post-trial hearing that he was aware all along that tire marks could also be made by a cruise control malfunction, as posited by the plaintiffs. Tr. of January 19, 2011 at 540.

20. Ford knew Mr. Kent's testimony was untrue and it was therefore fraudulent and misleading for Ford to have represented to the jury that a pedal error by Mr. Stimpson was the only way the tire marks could have been created. The prejudicial impact of that testimony was compounded by Ford's claim that plaintiffs' efforts to expose its falsity was tainted by a conspiracy to conceal relevant evidence from Ford, the court, and the jury. This misconduct tainted the very foundation of this case and deprived plaintiffs of a fair trial.

b. The Verdict was Against the Manifest Weight of the Evidence

21. A new trial may also be granted, in the court's discretion, where the verdict is contrary to the manifest weight of the evidence. *Baptist Memorial Hospital, Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980). It is the duty of the trial judge to grant a new trial where the jury has been deceived as to the force and credibility of the evidence, or has been influenced by considerations outside the record. *Hernandez, id.* at 403.

22. The verdict finding no causal defect in the Aerostar's cruise control system and no causal negligence on the part of Ford was against the manifest weight of the evidence. The proofs introduced at trial include various patents owned by Ford showing that electronic malfunctions in the cruise control system can cause sudden, unintended acceleration, in addition to reports from Ford's engineers, including SIRs and CQIS reports, diagnosing sudden acceleration as a problem with the cruise control system. Ford's Ishikawa engineering diagram likewise shows that EMI is a cause of sudden unintended acceleration.

23. Ford offered no evidence to contradict those admissions. The only evidence it offered was the testimony of its two reconstruction experts, who opined that the Stimpson accident could have been caused only by pedal error. However, as noted above, that testimony was misleading in that Ford was well aware at the time it elicited that testimony that a cruise control malfunction could also cause the tire marks.

24. The Stimpsons proved, by substantial factual and legal support, that Ford concealed the defect of sudden unexpected full throttle acceleration caused by electronic interference in the 1991 Aerostar van. This threshold finding underpins the unique foundation of this case and the conclusions of law.

25. Accordingly, the only reasonable inference from the evidence is that Ford's electronic cruise control system was negligently designed in that Ford knew or should have known that the system was susceptible to sudden unintended throttle opening, and likewise that there was a design defect in the 1991 Aerostar that was a cause of the Stimpsons' accident. The jury was also deceived as to the credibility of the evidence and influenced by considerations outside the record.

26. For the foregoing reasons, the Court grants plaintiffs' motion for a new trial. This order becomes effective only if the order granting relief from judgment is reversed on appeal. *Frazier v. Seaboard System Railroad, Inc.*, 508 So. 2d 345, 346 (1987).

DONE and ORDERED in Chambers of the Senior Judges' Office for the Fifth Judicial Circuit, at Ocala, Marion County, Florida, on this 20 day of July, 2011.

William T. Swigert, Senior Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Findings of Fact, Conclusion of Law and Memorandum Decision has been furnished by US Mail on this 30 day of July, 2011, to the following:

Thomas J. Murray, Esq.
Mary S. O'Neill, Esq.
111 East Shoreline Drive
Sandusky, OH 44870-2517

Roy L. Glass, Esq.
Law Offices of Roy L. Glass, P.A.
5501 Central Avenue
St. Petersburg, FL 33710

Roy D. Wasson, Esq.
Wasson & Associates Chartered
28 W. Flagler Street, Suite 600
Miami, FL 33130

Leon M. Boyajan, II, Esq.
2303 West Highway 44
Inverness, FL 34452-3809

Counsel for Plaintiffs

Francis M. McDonald, Jr., Esq.
Scott A. Richmond, Esq.
McDonald Toole Wiggins PA
485 N. Keller Road, Suite 401
Maitland, FL 32751

J. Randolph Bibb, Jr., Esq.
Robert F. Chapski, Esq.
Lewis, King, Krieg & Waldrop, P.C.
Post Office Box 198615
Nashville, TN 32719-8615

Alina Alonso, Esq.
Carlton Fields, P.A.
4200 Miami Tower
100 Southeast Second Street
Miami, FL 33131

Counsel for Defendants

Rosemary Spivey
Judicial Assistant

See Plaintiffs' Trial Exhibit No. 42. In his peer-reviewed, copyrighted paper for the Society of Automotive Engineers, the following observations by Follmer would prove prescient when sudden accelerations suddenly became a national problem.

1. Of primary importance is protection from negative transients which result from the decay of inductive currents through the various electromagnetic actuators in the automobile;
2. Although we have broken down the design factors into two classes, it must be understood that these are very interactive; and
3. To avoid disaster . . . performance factors for the electronic speed control should include . . . safety -- fail-safe design.

It is noteworthy that the report of the Electrical and Electronics Division on October 21, 1986 recognizes that each of these factors was contributing to undiagnosed failures in electronic components, including the cruise control servo.

While Victor Declercq in his post-trial testimony suggested that the cruise control system described in Follmer's paper was different from that in the Stimpsons' Aerostar in some respects, the paper clearly shows that the basic features were the same. *See* Plaintiffs' Trial Exhibit 42.

[2] One of the inventors was James T. Walker, who is described in Follmer's paper as being "totally responsible for the design and development of the speed control system electronics . . ." The invention itself was a "printed wiring circuit guard ring" described by the patent as "a safety feature against electromagnetic interference causing a speed control circuit malfunction resulting in excessive accelerations of the vehicle." *See* Plaintiffs' Trial Exhibit No. 25.

[3] On March 3, 1987 unidentified engineers employed by the Electrical and Electronics Division circulated a memorandum recommending that the guard ring patented in 1976 be added to the printed circuit board for the cruise control. The memorandum noted that "electromagnetic compatibility was not noted as being a problem when the present speed control system was designed. Therefore, no special consideration was given to designing in EMC immunity." Plaintiffs' Trial Exhibit No. 19. Although a memorandum issued by the Electrical and Electronics Division's business planning office on July 30, 1987 noted that this modification to the circuit board was "required by Ford specifications," the memo states that "program managers elected not to add." It is noteworthy that this decision was made less than three months before NHTSA announced that it had contracted with the Cambridge-based Transportation Systems Center for a study of the sudden acceleration phenomenon.

[4] Trial transcript of February 9, 2010, pp. 1549-1550.

[5] Plaintiffs' Trial Exhibit No. 48

[6] See graphs prepared by William Koeppel, Exhibit 14 to Plaintiffs' Memorandum Supplementing Evidence of September 17, 2010, which were received in evidence during post-trial hearings on

[7] Trial transcript of Richardson of February 3, 2010, pp. 727, 732

[8] Trial transcript of Richardson testimony on February 3, 2010, p. 741-742

[9] Trial transcript of February 3, 2010 of Richardson, pp. 741, 745-748, 759-761, 776-777; See also Exhibit No. 18 to Plaintiffs' Memorandum Pursuant to Fla. R. Civ. P. filed on October 22, 2010.

[10] Plaintiffs' Trial Exhibit No. 47, Richardson's chronology at pg. 4

[11] See Exhibit No. 8 to Plaintiffs' Motion to Compel Ford to Show Cause filed January 14, 2010

[12] Post-trial hearing, March 21, 2011 at pp. 878-888

[13] Plaintiffs' Trial Exhibit No. 23

[14] See Exhibit 1 to Plaintiffs' Supplemental Memorandum filed September 17, 2010; E.L. Richardson testimony, p. 24

[15] Plaintiffs' Trial Exhibit No. 23

[16] Plaintiffs' Trial Exhibit No. 23

[17] Plaintiffs' Trial Exhibit No. 36

[18] Plaintiffs' Trial Exhibit No. 41

[19] Plaintiffs' Trial Exhibit No. 47 at p. 7

[20] Post-trial testimony of Updegrove on March 21, 2011, pp. 895-897, 912-913 and Post-trial testimony of Koeppel on March 21, 2011, p. 897, 902, 912-913

[21] Plaintiffs' Trial Exhibit No. 38

[22] Post-trial testimony of Koeppel on March 21, 2011, p. 897, 902, 912-913 and Post-trial testimony of Updegrove on March 21, 2011, pp. 895-897, 912-913

[23] Plaintiffs' Trial Exhibit No. 38 at p. 5

[24] Exhibit No. 20 to Plaintiffs' Responses to Ford's Motion to Vacate filed January 5, 2011; see also Plaintiffs' Trial Exhibit No. 47, Richardson's chronology at p. 9

[25] See Plaintiffs' Trial Exhibit No. 23

[26] Exhibit No. 14 to Plaintiffs' Memorandum Pursuant to Fla. R. Civ. P. 1.540(b)(13) filed October 22, 2010

[27] Exhibit No. 3 to Plaintiffs' Memorandum Supplementing Evidence and Argument Presented During Proceedings on September 17, 2010

[28] Exhibit B to Ford's Motion to Vacate filed on December 8, 2010

[29] Exhibit No. 2 to Plaintiffs' Memorandum Supplementing Evidence and Argument Presented During Proceedings on September 17, 2010

[30] Plaintiffs' Trial Exhibit No. 37

[31] Plaintiffs' Trial Exhibit No. 37

[32] Plaintiffs' Trial Exhibit No. 1

[33] Plaintiffs' Trial Exhibit No. 2

[34] Plaintiffs' Trial Exhibit No. 2

[35] See electronic summaries to Updegrove's final report, Plaintiffs' Trial Exhibit No. 1

[36] Plaintiffs' Trial Exhibit No. 1

[37] Trial testimony of February 8 ,2010, p. 1323-1325; see also Trial Exhibit No. 1

[38] Exhibit No. 3 to Plaintiffs' Response to Ford's Motion to Vacate filed on January 5, 2011

[39] Exhibit No. 18 to Plaintiffs' Response to Ford's Motion to Vacate, filed January 5, 2011.

[40] Trial transcript of February 2, 2010 at p. 477-478.

[41] Post-trial testimony of Declercq on January 19, 2011 at p. 308

[42] Trial testimony of Sero on February 9, 2010, p. 1750

[43] Trial testimony of Armstrong on February 5, 2010, p. 1213

[44] Trial transcript of Berg on February 8, 2010 at pp. 1402-1403

[45] Trial testimony of Joe Kent on February 15, 2010, p. 2549

[46] Trial testimony of Stopschinski of February 15, 2010, pp. 2636-2637

[47] Trial testimony of Stopschinski of February 16, 2010, p. 2690

[48] Trial testimony of Bibb of February 22, 2010, pp. 3680-3681

[49] Trial transcript of Berg on February 18, 2010 at p 3221

[50] Trial transcript of Berg on February 18, 2010 at p. 3222

[51] Closing of Bibb on February 22, 2010 at p. 3682-3683

[52] Closing of Bibb on February 22, 2010 at p. 3686

[53] Exhibit No. 15 to Plaintiffs' Cross-Motion to Compel Ford to Show Cause filed on January 14, 2010

[54] Trial testimony on February 22, 2010, pp. 3656-3657

[55] Trial testimony of February 22, 2010, p. 3661

[56] Post-trial hearing, March 22, 2011, pp. 1061-1063 (William Koeppel)

[57] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 5-6

[58] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 13-17

[59] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 41-43

[60] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, p. 47

[61] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 48-54

[62] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 21-23

[63] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 49-50

[64] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, p. 70

[65] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, p. 101

[66] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 91-93[67] Schmidt deposition, Exhibit 43 to Post-Trial Hearing held on March 21, 2011, pp. 37-41.