224 Va 421
CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JAN 14 1981
RICHMOND, VIRGINIA

9

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 801026

FORD MOTOR COMPANY, et al,

Appellant,

v.

CONSTANCE K. BARTHOLOMEW,

Appellee.

JOINT APPENDIX

Volume I

Richard H. Lewis, Esquire
Steven W. Bancroft, Esquire
4103 Chain Bridge Road, Suite 111
Post Office Box 22
Fairfax, Virginia 22030

Counsel for Appellant

Robert C. Dunn, Esquire
Bernard S. Cohen, Esquire
COHEN AND ANNAND, P.C.
320 King Street
Post Office Box 117
Alexandria, Virginia 22313

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

Volume I

	Appendix Page
Motion for Judgment filed August 3, 1978	1
Answer and Grounds of Defense of Ford Motor Company filed October 4, 1978	6
Motion of Defendant, Ford Motor Company to set aside verdict and enter judgment non obstante verdicto or in the alternative to grant a new trial on the issues of liability and compensatory damages filed December 20, 1979	9
Letter, Opinion of the Court dated March 4, 1980	50
Judgment Order entered on April 4, 1980	56
Assignment of Error of Appellant, Ford Motor Co.	61
Assignment of Cross Error of Appellee, Constance K. Bartholomew	63
Excerpts of Transcript of November 13, 1979	
Testimony of Constance K. Bartholomew	64
Testimony of Dr. David A. Zohn	87
Testimony of Constance K. Bartholomew	96
Testimony of Lincoln Vance	107
Testimony of William H. Divine	113
Excerpts of Transcript of November 14, 1979	
Testimony of William H. Divine	139
Testimony of Orlando Dan Ross	207
Testimony of William H. Divine	214

TABLE OF CONTENTS

Volume II

Appendix Page

Excerpts of Transcript of November 14, 1979 (cont'd.)

Testimony of Michael C. Southerly 219

Testimony of James L. Martin 228

Excerpts of Transcript of November 15, 1979

Testimony of Douglas Dixon 243

Defendant, Ford Motor Co.'s motion to strike the Plaintiff's evidence at the conclusion of Plaintiff's case-in-chief 258

Plaintiff's Oral Reply to Defendant's motion to strike transcript 261

Testimony of Alfred T. Bryant 264

Testimony of F. W. King, III 283

Testimony of Robert Everson 296

Testimony of William A. Barr 310

Excerpts of Transcript of November 16, 1979

Rebuttal Testimony of William H. Divine, at conclusion of Defendant's case-in-chief 323

Defendant's motion to strike the Plaintiff's evidence at the conclusion of Plaintiff's case-in-rebuttal 373

Plaintiff's oral reply to Defendant's motion to strike at the conclusion of Plaintiff's case-in-rebuttal 376

Defendant's motion to strike the Plaintiff's evidence at the conclusion of Plaintiff's case-in-rebuttal 380

Objection to granting Instruction No. 3 (Instruction No. 3) 383

TABLE OF CONTENTS

Volume II - cont'd.

	Appendix Page
Withdrawal of Instruction No. 15	384
Objection for the refusal to grant Instruction No. 20 (Instruction No. 20)	386
Objection for the refusal to grant Instruction Nos. 21-25	387
Objection for the refusal to grant Instruction Nos. 26 and 27	388
Objection for the refusal to grant Instruction No. D (Instruction No. D) and responses on Instruction No. D	389
Plaintiff's Exhibits:	
No. 19; Letter dated January 19, 1972	392
No. 22; Memo dated May 3, 1971	394
No. 23; Memo dated June 30, 1971	396
No. 24; Memo dated December 8, 1971	397
No. 25; Memo dated January 13, 1972	400
No. 26; Certificate - U.S. Department of Transportation	402
Defendant's Exhibits:	
No. 1; Diagram	405
No. 2; Change Request	406

FILED
IN CIRCUIT COURT
CLERK'S OFFICE

AUG 23 1978
FAIRFAX
JAMES E. [illegible]
CLERK FAIRFAX COUNTY, VA.
WRIT TAX PAID
DEPOSIT. . . .

MOTION FOR JUDGMENT

COMES NOW the plaintiff, Constance K. Bartholomew, by counsel, and in and for her Motion for Judgment states as follows:

FACTS

1. The plaintiff, Constance K. Bartholomew (hereinafter called "Bartholomew"), is the registered owner of a 1973 Lincoln Continental, vehicle number 3Y82A812586, which was purchased from Dave Pyles Lincoln Mercury (hereinafter called "Dave Pyles").

2. The defendant Ford Motor Company (hereinafter called "Ford") manufactured and placed into the stream of commerce said vehicle which was purchased by Bartholomew.

3. In May 1975 Bartholomew got into the car in an indoor parking garage at 2700 Calvert Street, N. W., Washington, D. C. Immediately upon starting the engine, the car jumped from "Park" to "Reverse" and backed into a wall in the parking lot. Upon hitting the wall, Bartholomew tried to take the car out of reverse. The shift lever moved up and down through the entire range of gears with no effect and she was unable to move the car.

4. Following the incident, the car was towed by Dave Pyles to its service department in Annandale, Virginia. The transmission linkage was replaced at Bartholomew's expense.

5. On several occasions after the transmission linkage was replaced, Bartholomew contacted Dave Pyles regarding looseness in the shift lever. The car was checked several times thereafter by Dave Pyles, at Bartholomew's expense.

6. In October 1976, the car was parked in the parcel pick up lane of a supermarket in Falls Church, Virginia. The engine was idling with the emergency brake on; the gear was in "park" position. Bartholomew was beside the car, loading groceries, when the car began to move in a reverse direction. Her two month old infant was on the front seat of the car and therefore, Bartholomew tried to stop the car but was thrown to the ground. The left front wheel of the vehicle ran over her left leg.

7. Bartholomew suffered the following:

A. Serious, permanent injury to her left leg,

B. Lost wages,

c. Past, present and future medical and hospital expenses; and,

D. Acute pain and suffering.

FIRST CLAIM FOR RELIEF--NEGLIGENCE

8. Bartholomew hereby incorporates by reference all of the allegations of paragraphs number one through number seven supra, as if separately set forth herein.

9. At all times herein mentioned, Ford owed certain duties to Bartholomew with respect to the design, manufacture, distribution, advertising, labeling, and offering for sale of the subject vehicle which proved to be unsafe, unfit, and hazardous for use.

10. At all times herein mentioned, Dave Pyles owed certain duties to Bartholomew with respect to ascertaining and correcting the defect in the car when it was presented.

11. The injuries to Bartholomew were proximately caused by the negligence of Ford which negligence consisted, among other things, of the breaches of the following duties:

A. Failure to design and manufacture a vehicle which would not safely remain in "Park" gear.

B. Failure to warn of the hazard of the gear.

C. All other such failures of Ford revealed by the discovery procedures of this litigation.

12. The injuries to Bartholomew were proximately caused by the negligence of Dave Pyles which negligence consisted, among other things, of the breaches of the following duties:

A. Failure to ascertain the defect in the car when presented to its service department.

B. Failure to correct the defect in the car when presented to its service department.

C. All other such failures of Dave Pyles revealed by the discovery procedures of this litigation.

13. Bartholomew asserts that all of the negligence and breaches of Ford and Dave Pyles were a direct and proximate cause of Bartholomew's injuries.

SECOND CLAIM FOR RELIEF--STRICT LIABILITY

14. Bartholomew reasserts the allegations of paragraphs number one through seven supra, as if separately set forth herein.

15. The subject vehicle was designed and manufactured by Ford which had exclusive control of the manufacture, design and construction of the vehicle.

16. The design of the vehicle was defective which rendered it unreasonably dangerous.

17. The subject vehicle was offered for sale by Dave Pyles.

18. Ford and Dave Pyles are strictly liable to Bartholomew for the injuries proximately caused by the failure of the vehicle described above.

THIRD CLAIM FOR RELIEF--BREACH OF WARRANTY

19. Bartholomew reasserts the allegations of paragraphs number one through number seven supra, as if separately set forth herein.

20. Ford and Dave Pyles caused to be placed upon the market a vehicle which they expressly and impliedly warranted to be of merchantable quality, fit for the purposes for which it was intended. It was not fit for the ordinary purpose for which it was intended nor was it of merchantable quality.

21. As a direct and proximate result of the breach of this implied warranty of merchantability, Bartholomew was seriously injured.

FOURTH CLAIM FOR RELIEF--PUNITIVE DAMAGES

22. Bartholomew reasserts the allegations of paragraphs number one through seven supra, as if separately set forth herein.

23. Ford, having notice of similar incidents prior to Bartholomew's, made a conscious corporate decision not to retrofit, recall, or warn of the hazard created when a vehicle engaged in the "park" position and with emergency brake engaged slips

into gear and moves without notice and without provocation by the driver or passengers. Such conduct was willful, wanton and reckless disregard of the rights of Bartholomew.

PRAYER FOR RELIEF

WHEREFORE the plaintiff hereby requests that this Court award the plaintiff, Constance K. Bartholomew, One Hundred Thousand Dollars ($100,000.00) to compensate her for past, present, and future physical and mental pain and suffering, medical expenses, and past and future lost income.

For the willful, wanton and reckless disregard of the rights of the plaintiff, she requests punitive damages in the amount of Five Hundred Thousand Dollars ($500,000.00).

CONSTANCE K. BARTHOLOMEW
By Counsel

COHEN, VITT & ANNAND, P.C.
P. O. Box 117
Alexandria, Virginia 22313

By: Robert C. Dunn
BERNARD S. COHEN
ROBERT C. DUNN
Counsel for Plaintiff

and

HENRY S. FIEDLER
107 Pleasant Street, N. W.
Vienna, Virginia 22180

By: Robert C. Dunn for
HENRY S. FIEDLER

FILED
OCT 4 1978
JAMES F. HOOFNAGLE
CLERK

ANSWER AND GROUNDS OF DEFENSE

COMES NOW THE DEFENDANT, FORD MOTOR COMPANY, BY COUNSEL, AND FOR ANSWER AND GROUNDS OF DEFENSE TO THE MOTION FOR JUDGMENT FILED HEREIN STATES AS FOLLOWS:

1. THIS DEFENDANT NEITHER ADMITS NOR DENIES THE ALLEGATIONS CONTAINED IN PARAGRAPHS ONE (1), TWO (2), THREE (3), FOUR (4), FIVE (5), SIX (6) AND SEVEN (7) OF THE SECTION STYLED "FACTS"; AND PARAGRAPHS FIFTEEN (15) AND SIXTEEN (16) OF THE "SECOND CLAIM FOR RELIEF", HAVING INSUFFICIENT INFORMATION TO KNOW WHETHER OR NOT SUCH FACTS AND ALLEGATIONS EXIST OR ARE TRUE, BUT WHERE RELEVANT AND MATERIAL, DEMANDS STRICT PROOF.

2. THIS DEFENDANT DENIES THE ALLEGATIONS CONTAINED IN PARAGRAPHS NINE (9), TEN (10), ELEVEN (11), TWELVE (12) AND THIRTEEN (13) OF "FIRST CLAIM FOR RELIEF"; PARAGRAPHS SIXTEEN (16) AND EIGHTEEN (18) OF "SECOND CLAIM FOR RELIEF"; PARAGRAPHS TWENTY (20) AND TWENTY-ONE (21) OF "THIRD CLAIM FOR RELIEF"; AND PARAGRAPH TWENTY-THREE (23) OF "FOURTH CLAIM FOR RELIEF".

3. IN RESPONSE TO PARAGRAPHS EIGHT (8), FOURTEEN (14), NINETEEN (19) AND TWENTY-TWO (22), THIS DEFENDANT REASSERTS, REAFFIRMS AND REPLEADS IT ANSWERS TO PARAGRAPHS ONE (1) THROUGH SEVEN (7).

4. THIS DEFENDANT ADMITS THAT IT MANUFACTURED AND [illegible]NED IN THE MODEL YEAR 1973, LINCOLN CONTINENTAL AUTOMOBILES.

5. FOR FURTHER ANSWER AND BY WAY OF GROUNDS OF DEFENSE, THIS DEFENDANT STATES:

(A) IT DENIES THAT IT DIRECTLY, JOINTLY, SEVERALLY OR VICARIOUSLY DID ANY ACT OR MADE ANY OMISSION CONSTITUTING

NEGLIGENCE IN THIS MATTER.

(B) THIS DEFENDANT DENIES THAT IT IS STRICTLY LIABLE TO THE PLAINTIFF, AND DENIES THAT SUCH A THEORY OF LAW IS RECOGNIZED IN THE COMMONWEALTH OF VIRGINIA, AND ACCORDINGLY, MOVES THAT THE "SECOND CLAIM FOR RELIEF" BE STRICKEN.

(C) THIS DEFENDANT DENIES THAT IT BREACHED ANY EXPRESS OR IMPLIED WARRANTY RUNNING TO THE PLAINTIFF IN THIS MATTER.

(D) THIS DEFENDANT DENIES THAT PUNITIVE DAMAGES ARE APPLICABLE IN THIS CASE, AND DENIES THAT IT IS LIABLE TO THE PLAINTIFF FOR PUNITIVE DAMAGES.

(E) THIS DEFENDANT RELIES ON THE DEFENSE OF THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF.

(F) THIS DEFENDANT RELIES ON THE DEFENSE OF ASSUMPTION OF THE RISK BY THE PLAINTIFF.

(G) THIS DEFENDANT DENIES THAT THE PLAINTIFF WAS INJURED IN THE MANNER OR TO THE EXTENT ALLEGED AND DEMANDS STRICT PROOF OF ALL ELEMENTS OF LIABILITY, INJURY AND DAMAGES.

WHEREFORE HAVING FULLY ANSWERED, THIS DEFENDANT MOVES TO BE DISMISSED WITH ITS COSTS.

FORD MOTOR COMPANY

BY: _____
ITS COUNSEL

RICHARD H. LEWIS
BRAULT, LEWIS, GESCHICKTER & PALMER
10533 MAIN STREET
P. O. BOX 248
FAIRFAX, VIRGINIA 22030
COUNSEL FOR DEFENDANT FORD MOTOR COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING ANSWER AND GROUNDS OF DEFENSE WAS MAILED ON THIS 3RD DAY OF OCTOBER, 1978, TO BERNARD S. COHEN, ESQUIRE AND ROBERT C. DUNN, ESQUIRE, COHEN, VITT & ANNAND, P. C., P. O. BOX 117, ALEXANDRIA, VIRGINIA, 22313, COUNSEL FOR PLAINTIFF; TO HENRY S. FIEDLER, ESQUIRE, 107 PLEASANT STREET, N. W., VIENNA, VIRGINIA, 22180, COUNSEL FOR PLAINTIFF; AND TO WILLIAM O.SNEAD, III, ESQUIRE, CARR, JORDAN, COYNE & SAVITS, 4084 UNIVERSITY DRIVE, FAIRFAX, VIRGINIA, 22030, COUNSEL FOR DEFENDANT, DAVE PYLES LINCOLN MERCURY.

FILED
DEC 20 1979
JAMES E. HOUFNAGLE
Clerk of the Circuit Court
at Fairfax Courts, Va.

MOTION TO SET ASIDE VERDICT AND ENTER JUDGMENT NON OBSTANTE VERDICTO OR, IN THE ALTERNATIVE, TO GRANT A NEW TRIAL ON THE ISSUES OF LIABILITY AND COMPENSATORY DAMAGES

COMES NOW the defendant, Ford Motor Company, by counsel, and moves this Honorable Court to set aside the verdict in this case and enter a Final Judgment Non Obstante Verdicto for the defendant, Ford Motor Company, or, in the alternative, to grant a new trial on the issues of liability and compensatory damages, and in support thereof, states as follow:

I. The plaintiff's clear and unequivocal testimony regarding facts solely within her knowledge failed to establish a prima facie case of negligence against Ford Motor Company as a matter of law.

II. Assuming arguendo that plaintiff is not held bound by her own testimony, the contradictory testimony of her expert clearly establishes plaintiff's contributory negligence as a matter of law.

III. The verdict bears no reasonable relation to the damages sustained, and was so excessive as to be shocking and compel the conclusion that the jury misconceived or misunderstood the facts, the law, or the Instructions of the Court.

BRAULT, LEWIS, GESCHICKTER & PALMER
10533 Main Street, P. O. Box 248
Fairfax, Virginia 22030
Counsel for Defendant
Ford Motor Company

By: Richard H. Lewis by SWB
Richard H. Lewis

By: Steven W. Bancroft
Steven W. Bancroft

ARGUMENT I

THE PLAINTIFF'S CLEAR AND UNEQUIVOCAL TESTIMONY REGARDING FACTS SOLELY WITHIN HER KNOWLEDGE FAILED TO ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE AGAINST FORD MOTOR COMPANY AS A MATTER OF LAW.

The Motion for Judgment of the plaintiff alleges that she was the owner of a certain 1973 Lincoln Continental, purchased from the co-defendant, Dave Pyles Lincoln Mercury. Further, that in May of 1975, at an indoor parking lot in Washington, D.C., "...the car jumped from 'park' to 'reverse' and backed into a wall..." (Plaintiff's Motion for Judgment, at paragraph 3). After repairs by Dave Pyles, which she alleges were improperly made, she drove the car until October of 1976, when "...the car was placed in the parcel pick-up lane of a supermarket in Falls Church, Virginia. The engine was idling with the emergency brake on, the gear was in 'park' position. Mrs. Bartholomew was beside the car, loading groceries, when the car began to move in a reverse direction." (Id., at paragraph 6). This latter alleged incident gave rise to the litigation.

The Motion for Judgment alleged in part that Ford was negligent in its "[f]ailure to design and manufacture a vehicle which would not safely remain in park gear." (Id., at paragraph 11A).

The plaintiff testified many times and unequivocally throughout the trial that she placed the vehicle in the park position at the supermarket immediately prior to the alleged accident, was a quite experienced driver, and knew how to place the car in the park position. She testified that the vehicle jumped from the park position into the reverse position, causing the vehicle to move in a rearward direction.

The expert selected by the plaintiff testified that the vehicle would not jump from the park position into a reverse gear, but that the plaintiff, in his opinion, merely thought that she had put it in park position, but actually had not. The latter testimony was over the objection of the defendant Ford as to the expert's opinion as to what the plaintiff thought she had done as opposed to her clear, unequivocal, certain and unambiguous testimony.

The testimony of the expert witnesses of the defendant, Ford Motor Company, agreed that if the plaintiff had placed her vehicle in "park", it would not and could not have jumped from park to reverse, but would have required some subsequent action of the operator to cause the shift lever to be lifted up and then out of its "park" lock position.

A now well-settled doctrine of Virginia law with precise application to this case was first enunciated by the Supreme Court of Appeals in Massie v. Firmstone, 134 Va. 450 (1922). It was there established that where, as here, a party litigant testifies to facts within her own knowledge, her statements of facts and the necessary inferences therefrom are binding upon her and she cannot rely on other evidence in conflict with her own testimony to strengthen her case.

Massie was an action by a real estate agent for a commission allegedly owed to him for procuring a purchaser for a large tract of land owned by the defendant. Upon a review of the evidence, the Court found that plaintiff's testimony in fact supported the defendant's position, and thus barred plaintiff's recovery, even though other more favorable evidence was introduced by the plaintiff. The Court stated:

> "As a general rule, when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has a right to ask the Court or jury to accept as true the statements most favorable to him. In such a situation, he would be entitled to have the jury instructed upon his contention, or if there were a Demurrer to the evidence, the facts would have to be regarded as established in accordance with the testimony most favorable to him. This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask the Court or jury to believe that he was not told the truth. His statements of facts and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it where, as here, it depends upon facts within his own knowledge and as to which he has testified." 134 Va. at 462.

Since 1922, the Massie v. Firmstone rule has been repeatedly reaffirmed in a variety of contexts. Two cases which merit particular mention for the manner in which they exemplify the proper application of the Massie v. Firmstone doctrine to the instant case are Holland v. Holland, 217 Va. 874 (1977) and Turner v. Manning, 216 Va. 245 (1975).

Turner was a products liability action against the maker of an industrial hoist for injuries sustained by the plaintiff when the hoist fell from its suspension boom. The plaintiff's theories of recovery included negligent design, breach of warranties and negligent failure to warn of known dangerous characteristics of the hoist. Plaintiff's challenge to the design of the hoist focused on its lack of a safety hook at the point where the hoist joined the boom.

At trial, plaintiff elicited testimony from an adverse expert witness that it was "possible" for the hoist to disengage from its boom if a load in excess of its capacity was released suddenly, causing a backlash.

In affirming the trial court's decision to strike plaintiff's evidence, the Turner Court held that the plaintiff could not be permitted to strengthen his case with expert testimony which provided a possible explanation for the collapse of the hoist, but only upon a factual hypothesis inconsistent with plaintiff's own testimony.

In Holland v. Holland, supra, the plaintiff, Sharon A. Holland, was a passenger in the right front seat of an automobile being operated by her husband, Daniel Holland, when it was in collision with a vehicle operated by Croson. The plaintiff sued both her husband and Croson, and the jury found in favor of the plaintiff against the husband but in favor of Croson. The husband moved to set the verdict aside on the ground that the plaintiff's own testimony absolved him of negligence. The Trial Court overruled the Motion and Judgment was entered in favor of the plaintiff and against the defendant husband on the verdict.

On appeal, the Supreme Court reviewed the evidence, which showed that the plaintiff and her husband offered testimony that the defendant, Croson, suddenly and without warning, drove his automobile from the right eastbond lane into the left lane in front of the car operated by the defendant husband, causing the right front fender and right side of the Holland vehicle to collide with the left rear side and bumper of the defendant Croson's vehicle. The plaintiff further testified that the Croson vehicle swerved in front of the vehicle in which she was a passenger and that she was in a position to observe what had occurred. The defendant, Croson's evidence, on the other hand, showed that immediately before the accident, he was travelling in the left eastbound lane, preparing to make a left turn, actuated

his left turn signal and that while stopped in the left lane, his vehicle was struck on the left rear side by the vehicle operated by the defendant, Holland. The Court determined the issue to be whether the plaintiff could rely on the defendant Croson's evidence to sustain her case, and thus create a jury issue as to her husband's negligence or whether her own testimony, which exonerated the husband of negligence, was binding upon her and barred her recovery. The Court held that:

> "We think she is precluded by her own testimony, under the Massie-Firmstone rule.
>
> "Here, there is clear and unequivocal testimony from the plaintiff that, through no fault of her husband's, the vehicle in which she was riding was struck by a car which suddenly cut in front of it from the right lane. Fair-minded men could not reasonably infer from this positive testimony that plaintiff's husband was negligent. To the contrary, plaintiff's factual account of the events, acquired from her front-seat vantage point, absolves the husband of any wrongdoing.
>
> "Plaintiff contends her statements are non-binding opinions. But we have more than mere opinion that the husband 'wasn't driving poorly' and 'didn't do anything wrong' which would be insufficient, standing alone, to block plaintiff's claim. [Citations omitted.] Rather, plaintiff's testimony that Croson 'just cut right in front of' and 'swerved in front of' Holland are recitals of facts within her knowledge which are certain and unambiguous. Thus, she will not be heard to contend those statement are untrue by attempting to rely on Croson's evidence which is in irreconcilable conflict with hers. See Harris v. Harris, 211 Va. 459, 462, 177 S.E. 2d 534, 536 (1970). Accordingly, the plaintiff is bound by her testimony and the trial court erred on ruling to the contrary". 217 Va. at 876 (Emphasis added).

The Court reversed and entered Final Judgment in favor of the defendant husband.

A review of the evidence in this case clearly establishes the plaintiff's familiarity with the use of the subject vehicle, and, in particular, the park system function of the subject vehicle; her

certain and unambiguous statements that on the day of the alleged incident which gives rise to this suit that she knows that she placed the vehicle in park; and that the statements of her own expert are in irreconcilable conflict with plaintiff's statements.

In this case, there is clear and unequivocal testimony from the plaintiff testified that on October 22, 1976, she went to the Giant Food Store to do some grocery shopping and that she had her two month old infant with her. After she finished shopping, she went to the car, got in, and drove up to the pick up lane, sat there for a while waiting for the delivery boy to come out and put groceries in her car. When he did not come out, she decided to get out and put the groceries in herself. Concerning her actions before exiting the car, she testified:

> "I put the car -- it was a chilly day and I had the heat going. <u>I put the car in park</u>. I put the brake on and I got out of the car --"

Volume I-A, page 82. (Emphasis added)

She testified again in response to questions posed by her own attorney that:

> "I didn't shut the motor off, the heat was going, as I said, it was chilly, it was cold, and I had this new baby in the front seat, <u>but I know I had that car in park</u> and I put that brake on."

Volume IA, page 87. (Emphasis added)

Upon cross examination, she stated she had purchased the car in 1972 or 1973, and had driven it some 20,000 miles without incident until March 20, 1975, when she had an incident in a parking garage in Washington, D.C. when the engine did not catch or start. (TR-I-B, page 60 and 69). Further, she testified that she had no problems with the car, that she loved the car, and knew how to

operate the column shift before she had obtained the car and knew how to put it in park, had no trouble with putting the car in park and could check the car to see if it was in the park position. She stated:

> "Q. And, in fact, you can, once you put it in park, you can check to see if it is in park by wiggling it a bit?
>
> A. Yes.
>
> Q. So you were thoroughly familiar with how to put a car in park by the time you got the Lincoln?
>
> A. Yes.
>
> Q. And then, as you had it and used it for the two or three years, likewise,
>
> you also had no problem putting it in park, you knew how to put in park.
>
> A. Yes."
>
> TR VOL. I-B, pages 61, 62 and 63

Further, she testified that after the alleged garage incident, she drove the car eighteen months until the October 22, 1976, alleged incident giving rise to this litigation.

With regard as to her actions on the day of the incident on October 22, 1976, she stated:

> "Q. Now then, there came a time you decided to get out of the car?
>
> A. Yes.
>
> Q. Had you already placed the car in park before that time?
>
> A. No.
>
> Q. <u>But at that time, you did place it in park?</u>
>
> A. <u>Put it in park and put the brake on.</u>
>
> Q. <u>Any doubt in your mind that you placed it in ...</u>
>
> A. <u>No.</u>

Q. Ma'am?

A. No, especially because I had that baby in the car.

Q. You placed it in park. You'll have to say yes or no.

A. Yes.

Q. Did you check it to be sure?

A. I pushed it in park.

Q. O'kay. But in any event, you did, you definitely, there is no question in your mind you placed that car in park?

A. No.

Q. And you were particularly concerned about that because your child was in the car?

A. Yes."

(TR Vol. I-B, pages 67 and 68) (Emphasis added)

At no time in her direct testimony, nor in the cross examination did the plaintiff ever indicate that she might have been mistaken, she might have thought that the car was in park but actually it was not, or anything other than the fact that she knew she had placed the car in park gear.

The nature of the plaintiff's clear and unequivocal testimony as to the fact that she knew when she placed the car in park becomes even more apparent when one considers her testimony when challenged under cross-examination as to her actions surrounding the March, 1975, alleged incident.

Q. Then you indicated when you were in the parking garage, when you quit work, you came down, got in the car, you had you believe left it in -- do you believe you had left it in park?

A. I don't believe. I get in a car, I lock my doors or I'm getting out, I'll put it to you that way. I follow a pattern. That car was in park, the brake was on.

(TR Vol. I-B, page 64) (Emphasis added)

Further, plaintiff's own expert, who was in the court room during her testimony, acknowledged that she had testified that she definitely put the vehicle in park.

"Q. But that's not what Mrs. Bartholomew said happened to her. She said she had it definitely in park. Is that correct?

A. I was here in the Courtroom when she was giving her testimony, and I believe that's what she said."

TR Vol. II-A, page 72.

It should be apparent that the plaintiff's testimony as to her actions on the day of the October 22, 1976, alleged incident is clear, unequivocal, certain and unambiguous as to whether she had placed the vehicle in park or not.

Plaintiff's own expert, William Divine, in his testimony supports the position of the defendant, Ford Motor Company, that if the vehicle had been placed in park, it would not have jumped out.

He testified that if the system was in adjustment, and that if the park tang was placed in the park slot, it would not jump out; that the shift lever won't come out of the slot unless the driver lifts it up and moves it to another gear, and further,

"Q. So, if Mrs. Bartholomew, had put the car in park, it would not have moved?

A. I believe not."

The expert reiterated that if an operator puts the tang in park, puts the brake on, that the car is not going to move, provided the linkage is in good repair and further, that if the linkage is out of alignment or if there is a linkage problem, that it is not a design defect. (TR Vol. II-A, page 81).

But what is apparently relied upon by the plaintiff to extricate her from her certain and unambiguous statement about facts solely within her knowledge that she had placed the vehicle in park, is the subsequent opinion of her expert who testified, over the objection of the defendant, Ford Motor Company, that it was his opinion that the plaintiff thought she had placed the vehicle in park, but actually did not. Not only is Mr. Divine's testimony on this issue in irreconcilable conflict with the plaintiff's, but further he readily admitted that his opinion was not at all based upon the plaintiff's version of what happened.

> Q. Are you telling us now that your testimony in this case was not at all based on what Mrs. Bartholomew testified to?
>
> A. Well, Mrs. Bartholomew testified that she put the lever into park and --
>
> Q. Well, I'm aware of what Mrs. Bartholomew testified. That wasn't the question. The question was, did you base any of your opinion on Mrs. Bartholomew's testimony or version of what happened?
>
> A. No, sir.
>
> Q. You did not. Is that correct?
>
> A. Yes, that's correct.
>
> Q. It doesn't matter what Mrs. Bartholomew's version is?
>
> A. No, sir, not as far as the engineering study of the transmission is concerned.

Q. Your conclusion is that Mrs. Bartholomew never put the car in park?

A. Yes.

Q. It doesn't matter what she said about that?

A. That's exactly right. She thought she did, I'm, sure.

Q. Why are you sure she thought she did?

A. Because she said so.

Q. Then it does matter what Mrs. Bartholomew says?

A. From the standpoint of the function of the transmission and the design of the transmission, no, it does not make any difference what Mrs. Bartholomew said.

Q. You mean any time a car goes backwards it's going to be a transmission problem?

A. No, sir.

Q. It could be other problems, couldn't it?

A. Well, it could be deliberate too.

Q. It could be an accident, couldn't it, failure to put it in park?

A. Yes.

Q. It could be failure to put on the emergency brake?

A. Yes, of course.

(TR Vol IIA, pages 86 - 88.)

The plaintiff's expert further testified:

"Q. Alright, now let me ask you this, in your opinion as to the cause of this accident, was the emergency brake on or not?

A. When the car slipped into reverse, as it apparently did --

Q. Why do you say apparently did?

A. Well, because I didn't see it, I wasn't there.

Q. You are relying on Mrs. Bartholomew. How do you know that the car slipped into reverse?

A. I don't."

TR Vol. II-A, page 88

The experts introduced by Ford consisted of a Ford employed engineer and an independent engineer, a college professor at the United States Naval Academy, Annapolis, Maryland. Both agreed that if, in fact, the vehicle was placed in the park gear, it could not jump from park into reverse.

The Court recognized the testimony in its final form and stated:

> "Initially, there was also the impression that -- perhaps this was the Court's fault -- that there was the initial impression that we were dealing with some transmission where it jumped out of park when it was idling and went into reverse and rolled away, which was of great concern to the Court. It turns out it doesn't jump out of park at all; in fact, it won't come out of park but that if you make an error in driving and don't put it all the way up into park, there is a danger that it will go down into reverse, and that can happen, as you can even demonstrate it once in a million or two million times."

(TR Vol. IV-A, page 121)

The Court's reference to the probability of such an occurrence happening in one million or two million times came from the testimony of the plaintiff's expert, who stated that in using a model to demonstrate the slipping of the parking tang off of the land either into park or reverse:

> "The thing is we are looking at an instance that happens once out of a million times or a couple of million times. To try to set this thing up to duplicate that is a trial and error process, sir."
>
> (TR Vol. IV-A, page 76).

Plaintiff's Motion for Judgment alleges that on the date of the alleged incident which gives rise to the instant matter that her vehicle was in park gear (position) and then went into reverse; that her subsequent testimony at trial establishes her knowledge of the Park system and her long time use of the subject vehicle. In particular, there is clear and unequivocal testimony from the plaintiff that on the day of the alleged incident she knows she put the vehicle in park. There is additional testimony supported by both litigants' experts, and already acknowledged by this Court, that once a vehicle is placed in park it cannot go into reverse.

The Massie v. Firmstone maxim, supra, has clearly established that if a litigant, a person of average intelligence and in possession of her faculties, testifies clearly and unequivocally to facts within her knowledge which show as a matter of law she has no case, she is bound thereby and may not recover. Plaintiff's testimony that she knew she had that car in park and that there was no doubt or question in her mind that she had the vehicle in park are statements of fact within her knowledge which are certain and unambiguous. Thus, she should not be heard to contend that those statements are untrue by attempting to rely on Divine's testimony, which he readily admits is not based on the plaintiff's statements, and which is in irreconcilable conflict with the plaintiff's.

It is respectfully submitted that under the Massie v. Firmstone maxim, the plaintiff is bound by her statements of fact and

the necessary inferences therefrom are binding upon her. Therefore, Judgment Non Obstante Verdicto should properly be entered in favor of the defendant, Ford Motor Company.

ARGUMENT II

ASSUMING ARGUENDO THAT PLAINTIFF IS NOT HELD BOUND BY HER OWN TESTIMONY, THE CONTRADICTORY TESTIMONY OF HER EXPERT CLEARLY ESTABLISHES PLAINTIFF'S CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

It is well-settled in Virginia that in order for a person's conduct to constitute contributory negligence, an objective test of carelessness must be satisfied by the particular facts of the case. Amusement Slides v. Lehmann, 217 Va. 815 (1977). The specific type of conduct that falls within the parameters of contributory negligence is set forth in 57 Am Jur 2d Negligence, Section 317 Page 719, which states:

> "Contributory negligence therefore consists of the doing of something that a person of ordinary prudence would not do, or failure to do something that a person of ordinary prudence would do, under the circumstances, to protect themselves from harm. However, before one can be found to have been guilty of contributory negligence, it must appear to the satisfaction of the Court that some specific act or omission on his part did not meet the standards exacted by law, including the standard of care that a reasonable, prudent person would exercise in discovering and avoiding the danger."

Case law in Virginia is consistent with the above citation as evidenced by the recent decisions in Budzinski v. Harris, 213 Va. 107 (1972) and Reed v. Carlyle and Martin, Inc., 214 Va. 592 (1974).

In Budzinski, an administrator filed a wrongful death action against the driver of a vehicle, alleging negligence on the

part of the defendant resulting in a fatal accident. Evidence at trial showed that the defendant purchased and consumed numerous beers in the presence of the deceased before the accident took place. In point of fact, the deceased had actual knowledge of the defendant consuming seven or eight beers and driving at a high rate of speed prior to the occurrence giving rise to the litigation.

Nevertheless, the jury returned a verdict in Budzinski, supra, in favor of the plaintiff administrator. However, the Trial Court set the verdict aside on the basis that the deceased had assumed the risk and was contributorily negligent in her actions. The Administrator appealed the Trial Court's action and was granted a Writ of Error.

The Supreme Court of Virginia reversed the lower court's decision to set the verdict aside, holding that the required elements of contributory negligence were not satisfied by stating:

> "...one who knows or in the exercise of ordinary care should know that the driver had been drinking intoxicating beverages to such an extent that his ability to drive has been or is likely to have been impaired and voluntarily entered the automobile or continues as a passenger after reasonable opportunity to leave is contributorily negligent in the absence of exigent circumstances which makes such conduct reasonable. Citing Wright v. Tate, 208 Va. 291 (1967). Thus, a knowledge of the risk is not necessary, if, in the exercise of ordinary care, one should have known of its existence." 213 Va. at .

It is important to note that the Supreme Court's reversal in Budzinski, was premised on the finding that the deceased had no alternatives or opportunities to exit the defendant's automobile before the fatal crash occurred. Therefore, in Budzinski the exigent

circumstances confronting deceased excused her negligence in remaining in the vehicle after she should have realized the danger of doing so.

In applying Budzinski to the facts presented in the case at bar, one finds that Mrs. Bartholomew's negligent conduct cannot be excused on the grounds of exigent circumstances because no such circumstances existed. There is no evidence indicating an emergency or lack of alternatives available to Mrs. Bartholomew when she left her vehicle unattended with the motor running on October 22, 1976. Therefore, if Mrs. Bartholomew's conduct is found to be contributorily negligent on the day in question, it cannot be excused or overlooked on the grounds that she was faced with exigent circumstances.

The Court's attention is first drawn to the plaintiff's testimony in which she clearly indicates that she was an experienced driver generally and, more specifically, thoroughly familiar with the use of her 1973 Lincoln Continental and its associated shift control mechanism.

> Q. But in any event you or -- Strike that question please. At the time, that is back in the area when you bought the car, 1973, had you been a licensed driver for some years?
>
> A. Yes.
>
> Q. You were familiar with the way to operate automobiles?
>
> A. Yes.
>
> Q. And had you used a shift column lever before?
>
> A. Is that what I had on the Lincoln?
>
> Q. Yes. You know, the --
>
> A. Yes.

Q. --little knob that you --

A. Yes.

Q. --put the car in gear with?

A. Yes.

Q. You knew how to do that before you got the Lincoln?

A. Yes.

Q. And than you drove the Lincoln for two or three years from the time you bought it up until this parking garage incident?

A. Yes.

Q. Do you -- did you know how to put it in park?

A. I hope I did.

Q. I mean that sounded like a simple question but you know what -- you didn't have any trouble putting the car in park, did you?

A. No, I didn't.

Q. And in fact, you can, once you put it in park you can check it to see if it is in park by wiggling it a bit?

A. Yes.

Q. So you were thoroughly familiar with how to put a car in park by the time you got the Lincoln?

A. Yes.

Q. And then as you had it and you'd used it for the two or three years you likewise you also had no problem putting it in park, you knew how to put it in park?

A. Yes.

Q. I assume in the two or three years you did have maintenance on the vehicle?

A. Yes.

Q. But nothing of any, no problems at all with the vehicle?

A. No, sir.

Q. And do you know how many thousands of miles you put on the car up until this incident at the parking garage?

A. I would have to say in the 20s.

Q. Then you indicated when you were in the parking garage, when you quit work, you came down, got in the car, you had you believe left it in -- do you believe you had left it in park?

A. I don't believe. I get in a car, I lock my doors or I'm getting out, I'll put it to you that pay. I follow a pattern. That car was in park, the brake was on.

(TR Vol. I-B, pages 62 - 64).

Juxtaposed to the plaintiff's testimony is the testimony of Mrs. Bartholomew's expert witness, William H. Divine, who stated that the plaintiff never placed her column shift lever in park on the day of the alleged occurrence, but rather misplaced the column shift lever somewhere between park to reverse on the gate insert plate. Mr. Divine clearly stated that if the column shift lever was properly placed in park, it would be impossible for the vehicle to jump to reverse without some operator assistance. Reference is made to pages 65 and 66 of Mr. Divine's trial testimony found in Volume II-A, which states:

MR. LEWIS: Cross examination of Mr. Divine:

Q. And, in fact, its true, is it not, that if that park tang -- excuse me. Park tang is put in the park slot, if its actually in that slot, its not going to jump out, is it?

A. I don't believe it will.

Q. So what we're talking about is, what you're saying is an operator is careful and put it in the park slot, it just won't come out?

A. The shift lever won't come out of the slot, no."

Consequently, the plaintiff's own expert, Mr. Divine, contradicts her testimony and theory of the case by stating that the shift lever will not jump from park to reverse once the vehicle is properly placed in park. Interestingly, the plaintiff continually stated throughout her deposition and trial testimony that she put the vehicle in park and knew it was in park before the alleged incident occurred.

Mr. Divine's testimony alone proves as a matter of law, that the plaintiff, Mrs. Bartholomew, was contributorily negligent by failing to properly engage the column shift lever in park on October 22, 1976. In further support of the same proposition, the Court's attention is drawn to Mr. Divine's rebuttal testimony at Vol IV-A, page 104, which states:

> "MR. LEWIS: cross-examination of Mr. Divine
>
> Q. If you take the care--if the operator takes the care to put the selector column in the proper gear, it's not going to jump out, is it?
>
> A. If it's put in park, it would not jump out, if put in properly.
>
> Q. No question in your mind about this?
>
> A. No, sir, none."

Therefore, Mr. Divine's testimony in and of itself proves that the plaintiff, Mrs. Bartholomew, carelessly misplaced her column shift lever on her 1973 Lincoln Continental on the day of the alleged occurrence.

Further, if Mrs. Bartholomew had followed the specific instructions set forth in her Owner's Manual to be sure the selector lever is in park, this alleged accident would not have occurred. The

Court's attention is drawn to plaintiff's exhibit dated April 19, 1971, which specifically sets forth the precise language found in Mrs. Bartholomew's Owner's Manual:

> "Whenever the car is parked, be sure the selector lever is in the P position. Set your parking brake everytime you leave the car."

An analysis of the Supreme Court's decision in Reed, also shows that Mrs. Bartholomew's conduct was negligent on October 22, [illegible] by failing to conduct herself as a reasonable and prudent person. The facts involved in Reed concerned an experienced farmer unloading an insilage wagon that had broken down while exposed beaters on the wagon remained in full operation. As the plaintiff farmer was unloading the wagon, he slipped and fell into the beaters and was severely injured. He filed suit for damages against the defendant manufacturer and seller of the wagon alleging negligence. The lower Court ruled that the deposition, as a matter of law, proved the plaintiff's contributory negligence and granted defendant's Motion for entering final judgment in their favor and plaintiff appealed.

The appellate Court in Reed emphasized plaintiff's own testimony that stated, "I didn't feel any danger about working near beaters in operation", and affirmed the action taken by the lower Court. The Supreme Court firmly held that the test to determine contributory negligence as a matter of law requires the following type of conduct:

> ". . . It is not whether the plaintiff actually knew of the danger confronting him, but whether, in the exercise of reasonable care, he should have known he was in a situation of peril. Budzinski, supra. We think reasonable men should not differ upon the proposition that the plaintiff should have known of his peril." 214 Va.

In applying the Reed holding to the facts now in question, one finds that Mrs. Bartholomew's conduct, as an experienced driver generally and, specifically, in the use of her 1973 Lincoln Continental and its associated shift control mechanism, must be deemed contributorily negligent because she knew or should have known that if she ignored the instructions in the Owner's Manual, her car would not be safely locked in park. Nevertheless, she ignored these instructions and, as her expert testified, she misplaced her column shift lever while the motor was running and exited the vehicle.

In addition to Mrs. Bartholomew's failure to follow the Owner's Manual instructions, she further admits in her deposition and trial testimony that she considered her car unsafe for some time before the alleged accident because of the looseness she was experiencing in her column shift lever after her alleged March, 1975, [illegible] and the subsequent alleged negligent repair work by the co-defendant, Dave-Pyles.

As Mrs. Bartholomew stated on direct examination by Mr. Cohen.

> Q. Will you tell the Court and the jury, please, what your 1973 Lincoln Continental was like after Dave Pyles repaired it in March of 1975?
>
> A. The difference that I noticed after they had repaired it and I'd taken it in was that it never -- the needle never quite went completely into "P" -- into Park -- when you pushed the lever up, and it just -- it just felt a little loose. It just never had that tightness, you'd push it in and it was secure. It just had a little bit of play in it.
>
> Q. Did you complaint about that or inquire about it?
>
> A. Yes.

Q. Who did you make your complaints or inquiries to?

A. I took it back to Dave Pyles several times.

Q. What were you told?

A. They did road test it and they check it out, and they said, "The car is working. It's running fine. It's working fine; it catches. You put your brake on and everything is fine", you know. "Don't worry about it. Nothing's wrong with it."

Q. Did you do anything other than complaint orally to them?

A. As the -- as it would not stay into Park, it was going more between Park and Reverse, and I kept driving it back and forth, I could see they were a little aggravated with me. I did write a letter to the people on Gatehouse Road complaint about the --

. . .

Q. Did you continue to use the car?

A. Yes, I did.

Q. Why did you use the car if you had some concern about it?

A. Well, I kept taking it in and telling them what I thought was wrong, but, as I said, We've always used Dave Pyles and to an extent, like my husband said, they said the car was all right. You know, "Just leave it alone; it's running fine. You're not having any problems and leave well enough alone", and I needed it for transportation.

Q. Well, did you rely upon what Dave Pyles was telling you?

A. Yes.

(TR Vol. 1A, pages 79 - 81).

And in cross-examination by Mr. Snead, Mrs. Bartholomew testified:

A. I trusted them.

Q. Now didn't you tell me that that's exactly what it was, that they were right, that in fact it was in park?

A. They said it was.

Q. But you knew it was, didn't you? You checked yourself, didn't you?

A. What do you mean, I checked myself?

Q. When they showed you [personnel at Davepyles Lincoln-Mercury] that it was in park you were satisfied in your own mind, you checked that it was in park, didn't you?

A. Yes.

Q. And in fact it was in park, wasn't it?

A. It was in park but the needle wasn't completely over the P the way it used to be.

Q. But once it's in park you cannot move that lever without --

MR. COHEN: I object. That's argumentative.

MR. SNEAD: -- adjusting it, can you?

MR. COHEN: That's not --

THE COURT: Sustained.

THE WITNESS: I'm sorry.

BY MR. SNEAD:

Q. Those times that it was in park when you brought it over and talked to Dave Pyles about it how would you get it out of park?

A. I didn't bring it over to them just because it was not in park. I was putting the two things together. Whenever I put that car in park before it slammed into the wall, I mean I could fell the tightness. I just put it in park and as you said, I had the confidence, it's in park.

But after that when I drove the car out there was play in that handle plus the fact that it wasn't going all the way over to the P where it had gone before.

Q. Did you thereafter start to jiggle the little lever when you put the car in park to insure it was in?

A. I think I took -- Yes, I think I was a little extra careful.

Q. You think so?

A. Well, I was aware of the problem. I kept going back in."

(TR. Vol. 1B, pages 74 - 75).

Yet, even though the plaintiff believed her vehicle was unsafe she made the decision to leave her vehicle with the engine running and unattended on the day of her alleged incident. Surely, if she had not misplaced the column shift lever and not left the vehicle's engine running while it was unattended, her alleged accident would not have taken place. For these reasons Mrs. Bartholomew not only contributed to her alleged accident but must be deemed to have been the sole and proximate cause thereof.

The plaintiff's theory of defendant Ford's liability, as that theory developed during the presentation of her case, involves a curious contradiction.

On one hand she insists that she knows when the shift lever is securely in its park position and that it was so placed at the time of the incident complained of. At the same time she would have this Court ignore the clear effect of her own testimony and accept the purely speculative hypothesis of her expert that she really didn't place her car in park after all.

It is probably true that no one will ever know to a certainty what Mrs. Bartholomew actually did on the day in question. But that uncertainty cannot properly be resolved against Ford Motor Company.

Ford did not contend at trial, and does not now contend, that it is impossible to misposition the gear selector between park and reverse. With no little difficulty, plaintiff's expert demonstrated that "possibility" using a mock-up of the automatic transmission system brought to the courtroom by Ford. But that

intermediate position is not the park position that Mrs. Bartholomew insisted she was familiar with; that is not the park position in which she claims to have placed her gear selector before exiting her vehicle.

It is respectfully suggested that this Court cannot allow the plaintiff to have it both ways. Either she "parked" her car as she insists she did, in which event the theory expressed in her Motion for Judgment is barred by the testimony of her own expert, or, she did not properly "park" her car as she insists she always did, in which case her claim is barred by her own contributory negligence, as a matter of law. See, in addition to all of the authorities cited above, Reliable Stores v. March, 218 Va. 1005 (1978); Washington v. Schuyler, 433 F. 2d 362 (4th Cir. 1970).

For the foregoing reasons, the defendant, Ford Motor Company, requests that its Motion for Judgment Notwithstanding the Verdict be granted on the basis of plaintiff's own evidence

ARGUMENT III

THE VERDICT BEARS NO REASONABLE RELATION TO THE DAMAGES SUSTAINED, AND WAS SO EXCESSIVE AS TO BE SHOCKING AND COMPEL THE CONCLUSION THAT THE JURY MISCONCEIVED OR MISUNDERSTOOD THE FACTS, THE LAW, OR THE INSTRUCTIONS OF THE COURT.

It is well-established in Virginia that a trial judge may order a new trial if he considers a jury award of damages to be excessive in relationship to the actual injury sustained. Section 8.01-383 of the Code of Virginia (1950) specifically conveys this power to a trial judge:

> "In any Civil Case or proceeding the Court, before which a Trial by jury is had, may grant a new Trial, unless it be otherwise specifically provided. A new Trial may be granted as well when the damages awarded are not too

> small as when they are excessive. Not more than two new Trials shall be granted to the same party in the same cause on the ground that the verdict is contrary to the evidence, either by the Trial Court or by the Appellate Court, or both. (Code 1950, Section 8-224; 1977, C.617).

In addition, case law in Virginia has long held that a trial judge not only has the authority to grant a new trial when a damage award is excessive and unreasonable, but an actual duty to do so, to ensure that justice is obtained.

In the recent case of Clatterbuck v. Miller, 215 Va. 359 (1974), the Supreme Court of Virginia held that:

> "The law has wisely placed in the hands of the Trial Judge the power to exercise his sound discretion in supervising the verdicts of juries to prevent miscarriages of justice. The law intends that this power should be exercised and that the Judge should be more than a mere referee between the litigating parties."
>
> 215 Va. at 363.

In keeping with this authority, trial courts have often set jury verdicts aside when an excessive damage award has been granted. A case in point is Smithey v. Sinclair Refining Company, 203 Va. 142 (1961), a personal injury action arising out of an automobile accident. During trial, the defendant admitted liability for plaintiff's injuries, and the case was submitted to the jury on the issue of damages alone. The jury returned a verdict for FIFTEEN THOUSAND DOLLARS ($15,000.00), for plaintiff and the defendant moved to set it aside as excessive.

The trial court granted defendant's Motion and put the plaintiff on terms to either accept FIVE THOUSAND DOLLARS ($5,000.00) or have a new trial. The plaintiff agreed to the trial judge's

remittitur of TEN THOUSAND DOLLARS ($10,000.00) under protest and filed a Writ of Error.

The Supreme Court affirmed the remittitur noting that the plaintiff's medical bills totaled only $59.00, and his lost wages amounte to only $45.00. Based on the lack of medical testimony concerning permanency of injury and the plaintiff's small medical bills, the Supreme Court applied the general rule that:

> "...if it appears that the verdict is so excessive as to shock the conscience of the Court and to create the impression that the injury has been influenced by passion, corruption or prejudice, or has misconceived or misunderstood the facts or the law, or if the award is so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision, then it becomes the plain duty of the Judge, acting within his legal authority to correct the injustice. Citing Chesapeake and Ohio Railroad Company v. Arrington, 126 Va. 194, cert. denied 255 U.S. 573, 41 S. Ct. 376, 65 L. Ed. 792 (1932)." 203 Va. at 146.

Applying the above noted rule the Smithey Court held that:

> "Under these circumstances, although the evidence is devoid of even a suggestion that the jury was actuated by passion, prejudice or corruption, an award of $15,000.00, could only have resulted from a misconception or misunderstanding of the seriousness of the plaintiff's injuries. The size of the verdict, so out of proportion as is to the plaintiff's injuries and his medical expenses and loss of wages, is sufficient, standing alone, to shock the conscience of the Court and to cast upon it the stamp of unfairness." Id. at 148.

The application of these principles to the jury verdict of FIFTY THOUSAND DOLLARS ($50,000.00) in Mrs. Bartholomew's favor, places on this Honorable Court a duty to order a new trial on the issues of liability and damages because of the obvious misconception and misinterpretation of the facts or law by the jury in awarding such a shocking and excessive verdict. The $50,000.00 verdict in this case cannot be justified under any reasonable characterization

of the plaintiff's minimal injuries and forces the conclusion that the jury verdict was not a product of impartiality, but rather stemmed from some passion, prejudice or bias on their part. This Court properly must take cognizance of the fact that Mrs. Bartholomew's total medical expenditures resulting from her October 22, 1976, mishap totals only $291.10. Further, the trial record is devoid of any evidence of lost wages or permanent injury to plaintiff as a result of the October 22, 1976 incident. Surely, Mrs. Bartholomew's medical bills of $291.10, standing alone, cannot justify the excessive verdict of $50,000.00 granted her by the jury.

Plaintiff's own medical expert, Dr. Zohn, testified that the last time he found any objective signs of injury relating to her accident as on May 2, 1978. (TR Vol. I-B, pages 53 and 54). Further, Dr. Zohn also admitted that plaintiff's soft tissue injury did not develop any calcification problems and she made a rapid and good recovery. The Court's attention is drawn to pages 52, 53 and 54 of the trial transcript found in Volume I-B:

> BY MR. SNEAD: Cross examination of Dr. Zohn:
>
> Q. Doctor, as I understand it, you discussed the potential problems with a soft tissue injury. One of the potential problems was the possibility of calcification. Is that correct, Sir?
>
> A. That is correct.
>
> Q. But you are not talking about that in this case, are you?
>
> A. It did not happen.
>
> Q. And, in fact, what you had in this case was a good recovery, didn't you?
>
> A. The patient continued to complain of symptoms relating to this over a period of about a year to two years, but ultimately, the symptoms seemed to have resolved.

Q. In fact, you had good range of motion and everything that you are looking for a good recovery?

A. There was only minimal limitation of range of motion and minimal swelling and basically, she had recovered most of her function.

Q. And, in fact, Doctor, you stopped finding any objective signs, long before she quit complaining, didn't you?

A. I am trying to find the last time I found something objective. On May 2, 1978, there was still noted some slight swelling of the left leg as compared to the right. There was a slight limitation of flexion,

a two finger breadth's difference in flexion of the left leg versus the right, and I believe that that was the last time I could find anything of significance related, that I thought was related to her accident.

Q. And, in fact, you, of course, were aware of the rheumatoid arthritic condition?

A. Yes, I was.

Q. And she would, from time to time, complain about the right leg or the left leg; it would vary, wouldn't it?

A. Yes.

Q. And at some point and time, you can't say that the complaints that she continued to have were related to the accident rather than the rheumatoid arthritic condition, can you?

A. That's correct.

Q. And on several occasions you made note that you weren't going to treat this knee when she complained of it, and that you found nothing.

A. That I was or was not?

Q. You were not going to treat it further based on those complaints.

A. That's correct.

Likewise, on cross examination on behalf of the defendant, Ford Motor Company, Dr. Zohn further corroborated the fact that plaintiff recovered from her soft tissue injury very quickly and suffered no permanent injury. The following is an excerpt from Dr. Zohn's testimony, highlighting the minimal injuries suffered by the plaintiff alleged to have occurred on October 22, 1976.:

(TR Vol. I-B, Pages 55 and 56)

BY MR. LEWIS: Cross examination of Dr. Zohn:

Q. Your diagnosis initially was a soft tissue injury?

A. Correct.

Q. And you used the word ecchymosis, I believe, that is in layman's language, that's a bad bruise, isn't it?

A. It's bleeding and discoloration that is visible to the naked eye.

Q. Right. Which is -- but the dark discoloration as a bruise looks like?

A. Well, it's a question of degree.

Q. Then you treated her, and I don't want to go over this again, but isn't it true that in your nurses notes, or your physical therapist's notes, that this ecchymotic area or this bruised area, by November 16, 1976, was almost completely cleared?

A. What was the date, Sir?

Q. November 16, 1976.

A. That's correct.

Q Then there's no question a back injury came from this automobile accident before the October 22 visit that you saw her?

A. That's correct.

Q. And the right shoulder pains, we don't know where they came from?

A. That's correct, too.

Q. And the rheumatoid arthritic condition of the left knee and the other parts pre-existed both of the accidents?

A. That's correct.

Apparently, the excessive jury award in this case stems from some prejudice or bias by the jury and/or their misconception or misunderstanding of the facts or law because the award bears no relationship to the damages sustained and therefore is not supported by, and is contrary to, the evidence. See National Cab v. Thompson, 208 Va. 731 (1968).

Surely, an impartial jury could not have arrived at the $50,000.00 verdict based on Dr. Zohn's testimony, which revealed the minimal injuries sustained by the plaintiff. It is this very conduct by the jury in the Bartholomew case that forms the basis of the defendant, Ford Motor Company's Motion for Judgment Notwithstanding the Verdict, or, in the alternative, a new trial encompassing the issues of liability and damages.

Another witness called by plaintiff to show the effect of the alleged October 22, 1976, occurrence, was Lincoln Vance. Upon being called to the stand, Mr. Vance attempted to explain plaintiff's personality before the alleged occurrence on October 22, 1976, and what her personality was like subsequent thereto. However, Mr. Vance's testimony about plaintiff's tenuous personality changes, in no way justifies the $50,000.00 verdict. For example, the Court's attention is drawn to Mr. Vance's testimony, which states as follows:

(TR Vol I-B, Pages 97 and 98

MR. COHEN: Direct examination of Lincoln Vance

Q. What can you say about your observation of her personality and outlook since the accident?

A. She is not quite as self-confident as she was. She -- she's not as happy at home because she is unable to keep the house as she would normally like to keep it. She is unable to do many of the things that she used to do as a matter of course.

Q. Have you been able to observe her level of patience, or any change in that?

A. I <u>think</u> she has much less patience. You'll have to forgive me, but she has considerably less patience than she used to have.

Mr. Vance ignored the fact that at the time of the alleged October 22, 1976 occurrence, Mrs. Bartholomew was suffering from

rheumatoid arthritis in her joints, a back injury from an automobile accident in August of 1976, and recovering from a childbirth of caesarean section. It is important to note that Mr. Vance overlooked all of these factors and vaguely related all of Mrs. Bartholomew's personality changes to her alleged October 22, 1976 occurrence. Mr. Vance's testimony at Page 101, Volume 1-B, of the trial transcript evidences these vague observations on his part:

> BY MR. LEWIS: Cross examination of Lincoln Vance
>
> Q. Alright - so anything -- from your observation of after October 22, you wouldn't know whether it was related to the October 22 incident or the accident before, would you, Sir?
>
> A. Other than her leg, no.
>
> Q. And you said something about Thanksgiving. Thanksgiving would have been in latter November of -- I don't know the date -- correct?
>
> A. Probably, yes.
>
> Q. Well, had the bruises and everything cleared up by then?
>
> A. Actually, I don't know whether they had cleared up or not. I do know that her leg was considerably larger.
>
> Q. Alright.
>
> A. Now whether the bruises had cleared up, I can't answer that.

Clearly, the above-noted medical testimony of Dr. Zohn and the lay testimony of Mr. Vance about possible changes in plaintiff's personality cannot support the $50,000 jury award, even when all inferences and doubts are resolved in Mrs. Bartholomew's favor. The excessiveness of the jury verdict must have been motivated by prejudice, bias or simply misconceived the evidence and law of the case.

In support of Ford Motor Company's request for Judgment Notwithstanding the Verdict and Motion for a new trial, the Court's attention is drawn to the case of Rawle v. McIlhenny, 163 Va. 735 (1934). The facts in Rawle involved an automobile accident where personal injuries and property damage were allegedly sustained by the plaintiff, Mrs. McIlhenny. Plaintiff filed suit against Mr. Rawle alleging negligence in the operation of his automobile while in the scope of his employment. The case was submitted to the jury and a verdict was returned in plaintiff's favor for $1,500.00. Based on the inadequacy of the $1,500.00 damage award, the plaintiff moved the Court to set the verdict aside and grant a new trial to try the single question of damages. The Court sustained the Motion and the second jury returned a verdict in plaintiff's favor in the amount of $5,000.00. To the second verdict, Mr. Rawle was granted a Writ of Error.

On Appeal, the Supreme Court affirmed the second verdict on the grounds that the initial damage award was inadequate because the jury misconceived the merits of the case insofar as it related to the single question of damages. For this reason, a new trial on damages could not be assigned as error on the part of the lower Court.

Despite the Appellate ruling, Rawle is extremely important to the facts confronted in Bartholomew, because the guidelines for granting a new trial on liability and damages are clearly set forth. The Court's attention is drawn to the five classes of cases the Rawle Court outlined as crucial in determining what issues are to be tried when a new trial is granted. An analysis of these sample cases show

the direct applicability of case four and case 5 (c) to the issues now placed in question by the defendant, Ford Motor Company. The Supreme Court of Virginia stated as follows, in the Rawle case:

> CASE FOUR
>
> Cases in which clearly the decided preponderance of the evidence is in favor of the Right of Recovery, so there is sufficient evidence to support a verdict finding the defendant not liable.
> In such cases, it is generally held that the Court will set aside the verdict for inadequacy and grant a new trial; and usually, where the practice of granting improper cases, new trials limited to the question of damages prevails, the Court will restrict a new trial to the question of damages. But, in this class of cases, where the amount of damages recoverable is not distinctly separable from the matters involved in the issues as to liability, the new trial should be granted on all issues.
>
> CASE FIVE (c)
>
> Cases of conflicting evidence, in which there is sufficient evidence to support a verdict in favor of either the plaintiff or the defendant, but in which there is no clear preponderance of the evidence in favor of either.
>
> (c) In the fifth class of cases when the merit of the case is to liability appear not to have been reasonably well developed upon the trial, or the question as to the amount of damages dis not distinctly separable from the matters involved in the issue as to liability, or the evidence with reference to liability has probably exerted a material influence upon the jury in determining the amount of the verdict, ...or for some other reason, the ends of justice would not seem to be better promoted by granting a new trial on all the issues, where the Court sets aside a verdict of this class, it should grant a new trial on all issues.

Moreover, Rawle, holds that when a verdict is found to be [illegible]ve, the trial court must carefully consider whether the jury's misconduct affected its finding of liability as well as damages:

> ...Before a new trial should be limited to the amount of damages, it should be reasonably clear that the misconduct or misconception of the jury from which the inadequacy (excessiveness)

> of the verdict has resulted, has not extended to a determination of the question of liability as well as its detemrination on the amount of damages.

Similarly, it is important to note the case of Chappel v. White, 184 Va. 810 (1946), which reiterates the same view set forth in Rawle. In Chappel, an action was filed alleging gross negligence on the part of the defendant while operating a motor vehicle, which in turn, caused injury to plaintiff. At the close of the trial, the jury returned a verdict in plaintiff's favor for $7,500.00. The verdict was reversed and remanded for error in the admission of certain evidence and error in the instructions.

The second jury trial retried all the issues and concluded in a plaintiff's verdict in the amount of $4,231.18. Plaintiff moved the Court to vacate the second verdict for inadequacy and the Motion was granted by the Court.

The third trial retried only the issue of damages and resulted in a $9,000.00 verdict in plaintiff's favor, and defendant assigned error. On the Appellate level, the Supreme Court of Virginia reinstated the second verdict for $4,231.18, citing Rawle as authority by utilizing Case Four and Case Five referenced above. The Court reasoned that the jury in the first case had been influenced by partiality, prejudice or a mistake in view of merits of the case by rendering a verdict in the excessive amount of $7,500.00. In doing so, the trial Court found that a new trial was required on all of the issues, including liability, as well as damages, in order to ensure that justice was obtained.

Next, the Court's attention is drawn to the case of Wright v. Estep, 194 Va. 332 (1952), where the defendant, Ford Motor Company's position requesting a new trial of liability and damages is

strongly supported. In Wright, supra, the suit again surrounded an automobile mishap where plaintiff sustained severe personal injury. The jury returned a verdict of $5,000.00 in favor of the plaintiff, and all post trial Motions by both the defendant and plaintiff were overruled by the Court. Plaintiff was granted a Writ of Error to review the judgment on the quantum of damages.

The Supreme Court in Wright, supra, reversed and remanded the entire jury verdict and ordered a new trial on all the issues presented. The highest Court in this State found that the entire verdict was unjust because the jury had ignored the Instructions that were given by the Lower Court. Further, the Supreme Court held that the new trial on damages alone would be in error, because the issue of liability was questionable, and in direct conflict by the evidence presented, holding that:

> "We are of the opinion that the case falls within the fifth classification of cases outlined in Rawle v. McIlhenny, supra, in which there is sufficient evidence to support a verdict in favor of either the plaintiff or the defendant, but in which there is no clear preponderance in favor of either. In such cases, we set, where the 'question as to the amount of damages is not distinctly separable from matters involved in the issue as to liability, or the evidence with reference to liability has probably exerted a material influence upon the jury in determining the amount of the verdict, where the evidence warrants the inference set, instead of deciding the question of liability, the jury has arbitrarily determined to make both parties bear a part of the burden of the injury.' The verdict should be set aside and a new trial granted on all the issues. Citing Rawle, supra, and Chappel, supra."

The most recent case on this question is Rome v. Kelly Springfield, 217 Va. 943 (1977), where the Supreme Court promulgated

the guidelines to be used when determining what issues are to be retried when a new trial is granted. In Rome, the Court held as follows:

> "Where the question of the amount of damages is not distinctly separable from the matters involved in the issue of liability, or the evidence with reference to liability has probably exerted a material influence upon the jury in determining the amount of the verdict . . . the verdict should be set aside and a new trial granted on all issues. Wright v. Estep, infra." 217 Va. at 948.

In applying the above-noted authorities to the question now before this Court, it becomes readily apparent that the jury verdict of $50,000.00 in this case fails to find the required support in the evidence offered at trial and is so excessive that the jury must have been influenced by some partiality, prejudice, bias or misconception of the evidence or law in this case. It is important to note what this Court stated at the close of the evidence when it struck plaintiff's punitive damage claim:

> THE COURT (TR 122 & 123)
>
> "From a philosophical standpoint, I carefully considered the arguments submitted by Mr. Cohen and I think it makes a persuasive case, but in corporate irresponsibility or corporate avarice there is no reason there shouldn't be punitive damages in products liability cases.
>
> But the evidence in this case, I don't think comes anywhere near that. I don't think it even approaches it. I think its a serious question whether there is even any liability but I am not the jury. It is a jury question. I think particularly in view of the experts' testimony, both your expert and the expert of the defendants, even the negligence question is a close one."
>
> (TR Vol. IV A, pages 122, 123)

The size of the verdict strongly implies that the jury incorporated an element of punishment to the defendant, Ford Motor Comapny. Such unauthorized and unwarranted conduct by the jury in this case when punitive damages were not in issue requires this Honorable Court to grant the defendant's request for Judgment Notwithstanding the Verdict, or a new trial on the issues of both liability and damages.

Despite the fact that the Court struck the punitive damage claim, plaintiff's counsel discussed Ford Motor Company's, "Corporate I don't careism", at length in his closing argument to the jury when there was absolutely no evidence to support that contention. Plaintiff's counsel argued that Ford Motor Company knew of the danger in its vehicles and chose not to rectify them; that "some people are going to die, [but Ford] will just pay for the ones that die." These shocking comments implied that Ford acted wantonly and willfully and should be punished for its "I don't careism". See, e.g. TR. Volume IV B, page 64.

Such misstatements were clearly contrary to the evidence presented at trial by Ford engineers who explained what they did to determine the accuracy of the small number of confirmed reports coming from the field during the early 1970's. Obviously, plaintiff's counsel wanted the jury panel to overlook Ford's efforts in this area and went far beyond the evidence offered at trial to accomplish his purpose. These gross misstatements by plaintiff's counsel either created or fueled the jury's bias which is so apparent from the verdict it rendered.

CONCLUSION

For all of the reasons stated herein, defendant Ford Motor Company, hereby requests that Judgment be entered in its favor, or, in the alternative, that a new trial be ordered in this cause on the issues of liability and damages.

BRAULT, LEWIS, GESCHICKTER & PALMER
10533 Main Street, P.O. Box 248
Fairfax, Virginia 22030
Counsel for Defendant
Ford Motor Company

By: Richard H. Lewis by SWB
Richard H. Lewis

By: Steven W. Bancroft
Steven W. Bancroft

CERTIFICATE

I hereby certify that a true copy of the foregoing brief was hand delivered this 20th day of December, 1979, to Bernard S. Cohen, Esquire, 320 King Street, Alexandria, Virginia 22313, Counsel for Plaintiff, and mailed this same day to William O. Snead, Esquire, 4084 University Drive, Fairfax, Virginia 22030, Counsel for the Defendant, Dave Pyles Lincoln Mercury.

Richard H. Lewis by SWB
Richard H. Lewis

Steven W. Bancroft
Steven W. Bancroft

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
COUNTY OF FAIRFAX CITY OF FAIRFAX
CITY OF FALLS CHURCH

File

BARNARD F. JENNINGS
WILLIAM G. PLUMMER
LEWIS D. MORRIS
BURCH MILLSAP
JAMES C. CACHERIS
THOMAS J. MIDDLETON
RICHARD J. JAMBORSKY
LEWIS HALL GRIFFITH
F. BRUCE BACH
JUDGES

JAMES KEITH
RETIRED JUDGE

FAIRFAX COUNTY COURTHOUSE
4000 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

March 4, 1980

Richard H. Lewis, Esq.
P. O. Box 22
Fairfax, Virginia 22030

Bernard S. Cohen, Esq.
P. O. Box 117
Alexandria, Virginia 22313

Henry S. Fiedler, Esq.
107 Pleasant Street, N. W.
Vienna, Virginia 22180

Re: Bartholomew v. Ford Motor Company;
At Law No. 43347

Gentlemen:

You will recall that this case was tried by a jury on November 13, 14, 15 and 16, 1979. The jury began deliberating on November 16, and being unable to reach a verdict, resumed deliberation on November 19, 1980. The jury returned a verdict in the amount of $50,000.00, which was the amount mentioned by plaintiff's counsel in his closing argument.

The defendant asks the court to set aside the verdict and enter judgment non obstante verdicto, or, in the alternative, to grant a new trial on the issue of liability and compensatory damages. These motions were argued on January 4, 1980.

Defendant argues that the application of the doctrine of Massie v. Firmstone, 134 Va. 450, (1922) bars plaintiff's recovery. The Court dealt with this point extensively at trial and again concludes that the Massie v. Firmstone doctrine is inapplicable to the facts of the instant case. The Court accepts and adopts the argument contained in part I of plaintiff's memorandum of January 2, 1980, in opposition, pages 1 - 4.

Defendant next argues that plaintiff was contributorily negligent as a matter of law. The Court again concludes, as it did at trial, that the question of contributory negligence was properly a jury question. The Court accepts and adopts the argument contained in part II of plaintiff's memorandum in opposition, pages 5 - 7.

The real issue in this case is whether the $50,000.00 award is excessive, and if it is, what the Court should do about it.

In confronting this issue some background material is necessary, clarifying first of all what this case is not about. Notwithstanding the misrepresentations of press and television, this case is not about a vehicle that "jumps" out of park into reverse. Every expert witness including plaintiff's expert agree that when the transmission is in park it will not come out. The plaintiff's attorneys concede this. Nor is it a case about a conscious corporate decision by the defendant to concern itself with profits over concern for safety and life.

Plaintiff alleges that defendant negligently designed a transmission thereby creating an "illusory park position," causing the driver to think the car is in park when it isn't. Plaintiff further alleges that defendant negligently failed to warn about or correct the defective design.

The evidence, based on plaintiff's testimony and her witnesses, established that in 1976 she had gone to a super market in a shopping center. As she went to pick up her purchases, she put her Lincoln automobile in what she thought was the park position and left the engine running. Her two month old infant was in the front seat. She went around to the back to put in her purchases. At or about the time she opened the back door, the car began moving backwards. She was knocked down and the car ran over her leg causing a soft tissue injury, but no fracture. As the car rolled over her she suffered great pain and fear, the fear being more for the safety of her infant. She believed that the car would roll into traffic on a busy street, but it did not.

The plaintiff was not hospitalized and her doctor testified that over all her response to treatment was fairly good. The swelling eventually decreased. Her doctor did not say there was any permanent injury. The total medical expenses for X-rays and therapy were $292.10. There was no evidence of loss of income or other special damages. The plaintiff did, however, still complain

of some discomfort with her leg right up to the time of trial. A close friend testified that plaintiff is less patient and not as happy today as she was before the accident.

The plaintiff sought punitive damages, and counsel, in opening statement, referred to a conscious corporate decision to place profits over safety. At the conclusion of plaintiff's evidence, the Court struck the claim for punitive damages. The Court concluded that while punitive damages could be awarded in cases of corporate irresponsibility or corporate avarice in products liability cases, the evidence in the instant case did not justify submitting the issue of punitive damages to the jury. Looking at the evidence in the light most favorable to the plaintiff, the Court could not find "a wrongful act done with a bad motive or with such gross negligence as to amount to positive misconduct, or in a manner so wanton, or reckless as to manifest a wilful disregard of the rights of others..." Wright v. Everett, 197 Va. 608 (1956); Baker v. Carrington, 138 Va. 22 (1924). At best, plaintiff established that defendant's corporate officers and employees erred in judgment resulting in simple negligence in design and negligent failure to correct or to warn.

In Murphy v. Va. Car. Freight Lines, 215 Va. 770, 773 (1975) The Court upheld the jury verdict and referred to Edmiston v. Kupsenel, 205 Va. 198 (1964):

> In Virginia, the courts are clothed with the authority, and charged with the duty, to correct what plainly appears to be an unfair verdict in a personal injury case. The use of this authority is but the exercise of the inherent discretion of the trial courts, limited by the admonitory principle that it is the jury's function, ordinarily, to assess damages.
>
> Where the attack upon such a verdict is based upon its alleged excessiveness, if the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision, the court is empowered, and in fact obligated, to step in and correct the injustice.
>
> If the verdict is determined to be excessive, the court may put the successful party on terms to accept

> a reduced amount, deemed reasonable compensation for his injuries, as an alternative to awarding a new trial, or it may order a new trial as to the whole amount of damages.
>
> But neither course of action is warranted if the verdict merely appears to be large and more than the trial judge would have awarded had he been a member of the jury. If the verdict is supported by sufficient evidence and is reached in a fair and impartial trial, it cannot be disturbed.

In applying these "familiar principles" to the instant case the Court concludes that a $50,000.00 award in a case where the damages are $292.10 shocks the conscience of the Court. The award is so out of proportion to the injuries suffered as to suggest that the award is not the product of a fair and impartial decision. The Court is compelled to step in and correct the injustice.

The Court is unwilling to apply Rawle v. McIlhenny, 163 Va. 735 (1934) to the instant case. The rules of that case are appropriate in considering a plaintiff's motion to set aside jury verdicts on the grounds of inadequacy. In the instant case, while it was a close question and one which the Court may have decided differently, a jury found liability on the defendant's part and no contributory negligence by the plaintiff. There is sufficient evidence and reasonable inference to support these findings. In view of such evidence, there is no reason to conclude that an excessive damage award tainted the legitimacy of the jury's finding on liability. There can be no suggestion that this was a compromise verdict reached because the jury had doubts about liability.

This trial lasted five days, at great expense to taxpayers and parties. Sec. 8.01-383.1, 1950 Code of Virginia, as amended, recognizes the right of the Court to enter an order of remittitur. The power exists even when there is no standard by which damages for pain and suffering and mental anguish may be measured. See Smithey v. Sinclair Refining Co., 203 Va. 142 (1961), Bassett Furniture v. McReynolds, 216 Va. 897 (1976) and Campbell v. Hawkins, 217 Va. 800 (1977).

In the instant case, plaintiff incurred medical expenses of $292.10; she suffered the pain and emotional trauma of the car rolling over her leg, her anguish over the safety of her infant, an ugly and severe bruise, and several years of occasional discomfort. In

addition she was inconvenienced in caring for her children and home. Plaintiff was not hospitalized, suffered no permanent injury and had no out of pocket expense other than the $292.10.

These damages may be compared and contrasted with some of the reported cases in attempting to arrive at a fair and rational award.

In Lynchburg Coca Cola v. Reynolds, 215 Va. 1 (1974) the Court held that an award of $3,000.00 was excessive. The plaintiff vomited and developed an aversion to dark drinks after sensing mold and mildew in a partially consumed bottle of Coca-Cola. Plaintiff incurred 59¢ out of pocket expenses for medicine and received no medical treatment.

In National Cab Company, Incorporated v. Lillie S. Thompson, 208 Va. 731 (1968) plaintiff incurred medical expenses of $62.00 and sustained disability in use of her thumb estimated to be 15%. A $10,000.00 verdict was considered excessive.

In Wagnstrom v. Pope, 207 Va. 761 (1967), plaintiff incurred $500.00 medical expenses, and suffered bruises requiring eight days in the hospital and three months of recovery. A reduction of damages from $7,000.00 to $4,000.00 was reversed.

Hughes v. Moore, 214 Va. 27 (1973) is of special interest. An award of $12,000.00 was not considered excessive even though the plaintiff had medical expenses of only $112.00. She suffered an inability to nurse her child, a resumption of her menstrual periods, and a continuing nervous condition.

This Court having concluded that a $50,000.00 award in the instant case is excessive and unfair, and not believing that a new trial is justified, will exercise its best sense of fairness and justice and order a remittitur of $33,500.00 and enter judgment in plaintiff's favor in the amount of $16,500.00. If plaintiff chooses not to accept the remittitur, then the Court will grant a new trial on the issue of compensatory damages only.

Mr. Lewis will please prepare an appropriate order and submit it to Mr. Cohen for approval as to form.

The Court is most appreciative to each one of you for the thought, skill and assistance which you brought to this case.

With warm regards for each of you, I am,

Sincerely,

Richard J. Jamborsky

RJJ:elc

O R D E R

Heretofore on the 13th, 14th, 15th, 16th and 19th days of November, 1979, came the plaintiff, in person and by counsel, and the defendants, by their duly authorized representatives and by counsel, and this case came on for trial upon the plaintiff's Motion for Judgment, the Answers and Grounds of Defense of the defendants and the other pleadings filed herein.

Thereupon came a jury of thirteen (13) veniremen, who were sworn and examined on their voir dire and found to be competent and qualified jurors. From the panel of veniremen, seven (7) persons were duly selected, with counsel for the plaintiff and counsel for the defendants, each having exercised three (3) peremptory strikes.

Thereupon the jury heard the opening statements of counsel and heard all of the plaintiff's evidence in the case.

At the conclusion of the plaintiff's evidence, the defendant, Dave Pyles Lincoln Mercury, by counsel, moved the Court to strike the plaintiff's evidence and dismiss the case with prejudice, on the grounds that plaintiff's action was barred by the statute of limitations, and the Court, after hearing argument and receiving authorities being of the opinion that the Motion should be granted, it is

ORDERED that the plaintiff, Constance K. Bartholomew, recover nothing of and from the defendant, Dave Pyles Lincoln Mercury, to which ruling of the Court, the plaintiff, by counsel, notes her exception.

Also at the conclusion of the plaintiff's evidence, the defendant, Ford Motor Company, by counsel, moved the Court to strike the plaintiff's evidence on grounds set forth in the record, and the Court, after receiving authorities and considering the matter, overruled the Motion to strike the plaintiff's evidence on behalf of the Ford Motor Company, to which ruling of the Court, the defendant, Ford Motor Company, notes its exception.

Thereupon the jury heard all of the defendant's evidence and the rebuttal evidence of the plaintiff, and at the conclusion of all of the evidence, the defendant, Ford Motor Company, by counsel, moved the Court to strike the plaintiff's evidence on the grounds set forth in the record, and after receiving authorities, hearing argument and considering the matter, the Motion of the Ford Motor Company to strike the plaintiff's evidence was overruled, to which ruling of the Court, Ford Motor Company, by counsel, notes its exception.

Also at the conclusion of all the evidence the defendant, Ford Motor Company, by counsel, moved the Court to strike the plaintiff's evidence of punitive damages on grounds set forth in the record, and the Court, after receiving authorities and considering the matter, granted the Motion to strike the plaintiff's evidence of punitive damages, to which ruling of the Court, the plaintiff notes her exception.

Thereupon the Court considered instructions to be granted, and on November 16, 1979, the jury received their instructions from the Court, heard argument of counsel thereon and retired

to their room to consider their verdict, and not being able to reach a verdict, the case was continued until November 19, 1979.

On November 19, 1979, the jury resumed its deliberation in their room, and thereafter returned into open Court and rendered their verdict in favor of the plaintiff against Ford Motor Company in the amount of FIFTY THOUSAND and no/100 DOLLARS ($50,000.00).

After rendering the aforesaid verdict, at the request of counsel for Ford Motor Company, the jury was polled, and each and every juror affirmed that that was his or her verdict.

After rendering the aforesaid verdict and being polled, the jury was discharged.

Thereupon the Ford Motor Company, by counsel, moved the Court for leave to file a written Motion to Set Aside the Verdict and Enter Judgment Non Obstante Veredicto or in the Alternative to Grant a New Trial on the Issues of Liability and Compensatory Damages, which Motion was granted, and the matter continued for the filing of briefs by both parties and to be heard on January 4, 1980.

Thereupon on January 4, 1980, the parties, after having filed briefs appeared and the Motion of the Ford Motor Company to Set Aside the Verdict and Enter Judgment Non Obstante Veredicto or in the Alternative to Grant a New Trial on the Issues of Liability and Compensatory Damages was heard and taken under advisement by the Court. Thereupon, on March 4, 1980, the Court filed a written opinion overruling the Motion of the Ford Motor Company to Set Aside the Verdict and Enter Judgment Non Obstante Veredicto or in the Alternative to Grant a New Trial on the Issues

of Liability and Compensatory Damages, to which ruling of the Court, the Ford Motor Company, by counsel, notes its objection and exception.

Further, the Court concluding that the FIFTY THOUSAND and no/100 DOLLARS ($50,000.00) award in this case is excessive and unfair and being of the opinion that an Order of remittitur in the amount of THIRTY-THREE THOUSAND FIVE HUNDRED and no/100 DOLLARS ($33,500.00) should be granted, and a judgment entered in the plaintiff's favor in the amount of SIXTEEN THOUSAND FIVE HUNDRED and no/100 DOLLARS ($16,500.00) with the further proviso that if the plaintiff chooses not to accept the remittitur, then the Court will enter an Order granting a new trial on the issue of compensatory damages solely.

The Court being advised that the plaintiff, after consideration of the matter elects to accept judgment in plaintiff's favor in the amount of SIXTEEN THOUSAND FIVE HUNDRED and no/100 DOLLARS ($16,500.00), under protest.

Pursuant to Rule 5:9(a), the transcript in this case is hereby made part of the record.

NOW, THEREFORE, it is

ORDERED that judgment be entered in favor of the plaintiff, Constance K. Bartholomew, and against the defendant, Ford Motor Company, in the amount of SIXTEEN THOUSAND FIVE HUNDRED and no/100 DOLLARS ($16,500.00) plus costs in the amount of 61.00.

ENTERED this 4th day of April, 1980.

RICHARD J. JAMBORSKY, JUDGE

SEEN, OBJECTION AND EXCEPTION:

Bernard S. Cohen
COHEN AND ANNAND, P.C.
Counsel for Plaintiff

SEEN, OBJECTION AND EXCEPTION:

Richard H. Lewis
Counsel for Ford Motor Company

SEEN:

William O. Snead, III
CARR, JORDAN, COYNE & SAVITS
Counsel for Dave Pyles Lincoln Mercury

ASSIGNMENT OF ERROR OF APPELLANT,
FORD MOTOR COMPANY

1. The trial Court erred in denying Ford's Motion to Strike the Plaintiff's evidence and the post trial Motions to set aside the verdict, inasmuch as Plaintiff's evidence failed to establish a prima facie case on liability in that:

(a) The Plaintiff's expert admitted that he had not performed the investigation and calculations necessary to give his opinion probative value.

(b) The testimony of the Plaintiff's expert witness contradicted the Plaintiff's own unequivocal testimony of facts within her knowledge and was speculative and not based on facts in evidence.

(c) The Plaintiff failed to offer any evidence from which the jury could reasonably infer that Ford was negligent in the design of the vehicle; that the vehicle was defective when it left Ford's control; or that Ford breached any implied warranties to Plaintiff.

(d) At most, the Plaintiff's evidence showed that the product in question differed from that of one competitor, and was subject to dangers which are inherent in any automobile with an automatic transmission, i.e., the risk that the driver might carelessly misplace the shift lever.

2. The Trial Court erred in denying Ford's Motion to Strike the Plaintiff's evidence on the grounds that the Plaintiff had misused her vehicle and was contributorily negligent as a matter of law.

3. The Trial Court erred in allowing the Plaintiff's expert, an engineer, to testify the Plaintiff-Appellee thought she had placed the gear shift in park gear, but really had not, when the Plaintiff testified unequivocally that she had definitely placed the gear shift lever in park gear and further, failed to strike the evidence on said grounds and in refusing to grant Instruction Number D.

4. The Trial Court committed reversible error in denying Ford's post trial Motions for a new trial on the issues of liability and compensatory damages on the grounds that the jury verdict was so excessive and shocking that it compelled the conclusion that the jury misconceived or misunderstood the facts, the law or the Instructions of the Court.

ASSIGNMENT OF CROSS ERROR OF
APPELLEE, CONSTANCE K. BARTHOLOMEW

1. The trial court erred in striking Bartholomew's request for punitive damages.

2. The trial court erred in granting defendant Ford's request for a remittitur.

3. The trial court erred in not permitting Bartholomew's expert witness to testify about data examined at or issued by the National Highway Traffic Safety Administration (NHTSA) which supported and corroborated his opinion as to the unsafe design of the Ford transmission system.

4. The trial court erred when it struck Bartholomew's claim under a strict liability theory of recovery.

5. The trial court erred in refusing Bartholomew's proposed instruction no. 20.

Tuesday, November 13, 1979

11 Q State your name, please.

12 A Constance Kessler Bartholomew.

16 Q Where do you reside?

17 A 3117 Sleepy Hollow Road, in Falls Church.

18 Q About how long have you lived there?

19 A Ten years.

20 Q Were you the owner of a 1973 Lincoln Continental

21 manufactured by the Ford Motor Company?

22 A Yes.

23 Q Were you using that car pretty much

1 continuously from the time you purchased it in approxi-

2 mately 1973?

3 A Yes.

4 Q Did your husband, on occasion, drive it, too?

5 A On occasion.

17 Q Mrs. Bartholomew, tell the Court what happened
18 in 1975, when you were working for Dr. Chucker, with
19 respect to an incident that happened with the use of
20 the 1973 Lincoln Continental.
21 A I went downstairs at the end of the day and
22 it was an underground parking garage. I proceeded to get
23 into the car, and I went to turn the key in the ignition,
1 and it's like I -- I just turned it. It didn't quite
2 even catch, I don't believe, and the car slammed into
3 the back wall.
4 And I sat there for a minute, playing with
5 the lever, and it was just like, you know, playing with
6 a toy. It wasn't catching in Park, Neutral, Reverse,
7 Drive -- nothing.
8 Q Now, Mrs. Bartholomew, when you park the
9 car or when you stop the car, what is your practice
10 with respect to the emergency brake?
11 A I put the car in Park and I press the
12 emergency brake, because --
13 Q How is the emergency brake put on? Is it a
14 foot brake?
15 A Yes, it is a foot brake.

16 Q Would you explain to the Court and the jury
17 how the foot brake, the foot emergency brake, functioned
18 on the 1973 Lincoln Continental that you owned?
19 A Yes. When you put your car in Park and put
20 your brake on, the minute that car comes out of Park,
21 it throws the brake, and the brake will not stay on in
22 anything else but Park.
23 Q And the car is manufactured that way? That
1 was a feature that Ford Motor Company --
2 A Yes.
3 Q -- offered with the car?
4 A Yes.
5 Q What happened after this incident where it
6 backed into the wall? What did you do with the car then?
7 A I went upstairs and we called -- I called Dave
8 Pyles, and they sent a tow truck. We had to have it
9 towed in because I couldn't get it to go into Drive,
10 and they towed it into Dave Pyles and they repaired it
11 for me.
12 Q Now, why did you use Dave Pyles Lincoln-
13 Mercury dealer?

14 A My family has always dealt with them, and
15 I've always been very happy with their service.
16 Q Had you been letting them service the car even
17 before this incident in 1975?
18 A Yes.

23 Q Mrs. Bartholomew, I show you this photocopy of
1 this bill from Dave Pyles Lincoln-Mercury and ask if
2 you can identify that.
3 A Yes.
4 Q What is it?
5 A It's a bill for repairing the car that day.
6 Q Now, I notice that the date on that bill is
7 March 20th, 1975.
8 Can you see that? I think it's hard to read,
9 but that is my best estimate of what it looks like.
10 Does it look like that to you?
11 A I see it; yes.
12 Q Now, to the best of your recollection, does
13 that square with your recollection as to when you thought
14 this incident happened when you had it fixed?
15 A Yes.

10 Q Will you tell the Court and the jury, please,
11 what your 1973 Lincoln Continental was like after Dave
12 Pyles repaired it in March of 1975?
13 A The difference that I noticed after they had
14 repaired it and I'd taken it in was that it never -- the
15 needle never quite went completely into "P" -- into Park
16 -- when you pushed the lever up, and it just -- it just
17 felt a little loose. It just never had that tightness,
18 you'd push it in and it was secure. It just had a little
19 bit of play in it.
20 Q Did you complain about that or inquire about
21 it?
22 A Yes.
23 Q Who did you make your complaints or inquiries
1 to?
2 A I took it back to Dave Pyles several times.
3 Q What were you told?
4 A They did road test it and they checked it
5 out, and they said, "The car is working. It's running
6 fine. It's working fine; it catches. You put your
7 brake on and everything is fine", you know. "Don't
8 worry about it. Nothing's wrong with it."

1 Q Did you continue to use the car?

2 A Yes, I did.

3 Q Why did you use the car if you had some

4 concern about it?

5 A Well, I kept taking it in and telling them

6 what I thought was wrong, but, as I said, we've always

7 used Dave Pyles and to an extent, like my husband said,

8 they said the car was all right. You know, "Just leave

9 it alone; it's running fine. You're not having any

10 problems and leave well enough alone", and I needed it

11 for transportation.

12 Q Well, did you rely upon what Dave Pyles was

13 telling you?

14 A Yes.

15 Q Did there come a time when you, again, had a

16 serious incident with the same car?

17 A Yes.

18 Q Would you tell that to the Court and the jury,

19 please, when that was?

20 A It was Friday, October 22nd, 1976, and I had

21 gone to the Giant Food Store to do some grocery shopping,

22 and I had my two-month-old infant with me, and I finished

23 shopping and I went -- I picked up the baby from the cart.

1 I went to get the car, and I got in it, drove it up to
2 the pick-up lane, and I sat there for awhile, waiting
3 for the boy to come out and put the groceries in, and
4 when he didn't come out, I figured I would just get out
5 and put them in myself.
6 I put the car -- it was a chilly day and I
7 had the heat going. I put the car in Park, I put the
8 brake on, and I got out of the car, leaving the door
9 open on the driver's side. I just left that door open.
10 Q Was it a four-door car, Mrs. Bartholomew?
11 A Yes; yes.
12 Q Which door did you leave open, when you say
13 'on the driver's side'?
14 A The left door on the driver's side.
15 Q The front door?
16 A My door, in the front, yes.
17 And I got out. I opened the door in the back
18 and proceeded to load my groceries. I had put in about
19 three or four bags, and all of a sudden I felt something
20 just kind of tap me, and instantly I realized that car
21 was moving, and I started running with it, trying to get
22 around the doors to get back into the driver's seat, to
23 bring the car under control.

1 But, the car started moving faster, and I'd
2 had a Cesarean. I really couldn't -- I wasn't running
3 -- I felt like I was running in a Marathon race.
4 But the door knocked me down and the car ran
5 over me. I just felt this great, crushing weight. I
6 couldn't even tell at that moment where it had hit me,
7 but I knew it had run over my leg, and, you know, I
8 didn't have any breath. I was just lying there on the
9 ground, watching the car moving out towards the highway,
10 and the only thing I could think of was, "There it goes."
11 I mean, it was so agonizing and frustrating.
12 I couldn't get up, you know, to get it. I thought,
13 "There goes that baby. It's going out on the highway."
14 It was going this way (indicating), with oncoming cars
15 coming down, and I figured, "That's the end of him", not
16 to mention the people that would be killed when they
17 crashed into my car, and I just buried my head in the
18 ground.
19 And then, after several moments, I could hear
20 people's voices, and I looked up again. I could see that
21 my car had crashed into several other cars.
22 Q Where had it crashed into these cars?
23 A On the Giant lot. On the Giant lot, and I

1 couldn't -- I just couldn't get up on this leg, and,
2 as I said, I couldn't catch my breath and I started
3 dragging myself across the lot, because I was alone
4 and that baby was in the car.
5 And I just dragged myself until I got to
6 the floor of the car, and he had fallen to the floor,
7 and I just reached my hand in, you know, to touch him,
8 to make sure he was all right. He was crying.
9 And, the manager of the Giant Food, whom I
10 recognized, came over and said, "Let me take the baby",
11 and then I just collapsed on the ground.

1 Well, I just signed the papers refusing
2 admission and was taken home.
3 BY MR. COHEN:
4 Q You signed the papers -- what?
5 A Refusing admission, and was taken home.
6 Q Why did you refuse admission?
7 A Because I have four young children and that
8 new baby, and I was nursing him. I'd never even tried
9 a bottle yet, and I had no one to leave him with at that
10 time.

18 Q Mrs. Bartholomew, when the car was out in
19 front of the Giant, did it have the emergency brake on?
20 A Yes.
21 Q How do you know you had the emergency brake on?
22 A I just know I had that brake on. By leaving --
23 I can't explain it. It's just a feeling, but I left that

1 front door open. I didn't shut it off. I didn't shut
2 the motor off. The heat was going. As I said, it was
3 chilly; it was cold, and I had this new baby in the
4 front seat, but I know I had that car in Park and I
5 put that brake on.
6 Q Mrs. Bartholomew, do you recall the automobile
7 accident that you had approximately two months before this
8 October '76 incident when the '73 Lincoln ran over your
9 leg?
10 A It was -- it was the end of July or the
11 beginning of August. I was coming down Williamsburg
12 Boulevard and someone was making -- it was two lanes,
13 and someone was making a left-hand turn, and the person
14 in back of him didn't expect it, and in order to avoid

15 hitting them swerved into us, and she hit the whole
16 side of the car, and that was that accident.
17 Q And you received some injury in that?
18 A Yes.
19 Q And you were still seeing Dr. Zohn for that
20 at the time you were injured on October 22, 1976?

18 Q Mrs. Bartholomew, do you know what part of
19 the car went over you when you were lying there in
20 front of the supermarket?
21 A Left front wheel.
22 Q Do you know what part of your body it went
23 over? Explain to the jury how you felt when that car
1 was going over.
2 A Well, when it goes -- when a car goes
3 over you -- the first thing you've got to remember,
4 the impact -- the door throws you down, you lose your
5 breath. The car is going over you. Everything is
6 happening, you know, so quickly.
7 Not to center on myself, but I think I
8 thought, "I'm going to die." I mean, "A car has run
9 over me." But watching it moving away with the baby

10 in it, that's all I could think about.

11 Q You had been satisfied with Dave Pyles Lincoln

12 Mercury up to that time, you've testified.

13 Now, did you take the car back to them to

14 have it repaired --

15 A No.

16 Q -- this time?

17 A No.

18 Q Why not?

19 A Well, first of all, I'd been in and out, in

20 and out, and in and out, and I forgot to tell you that

21 I had made several phone calls asking them, since I

22 couldn't get anywhere with Dave Pyles, did they have

23 a representative, a go-between, and these are the people

1 on Gatehouse Road, and they said, "Well, you have to

2 arrange that -- "

3 MR. LEWIS: I think I'm going to have to

4 object to some unknown -- I assume it's some unknown

5 person at Gatehouse Road.

6 THE COURT: Would you be more specific, so

7 far as identifying what organization, person, or groups

8 you were talking about?

9 THE WITNESS: Yes. It is the Ford Motor

10 Company. I'm quite sure the address is Gatehouse Road

11 at Route 50.

12 THE COURT: Did anyone there identify him-
13 self to you?
14 THE WITNESS: No.
15 THE COURT: Was it a male or a female?
16 THE WITNESS: Male, and he said --
17 MR. LEWIS: Well, Your Honor, I would object.
18 I just don't think -- I think it takes a lot more than that
19 to make any kind of admission or whatever it might be
20 proffered, for what purpose, I don't know, but I just
21 don't think calling a number and saying I talked to
22 somebody there and they said all of this could be
23 admissible against the Defendant Ford.
1 THE COURT: I overrule the objection.
2 MR. LEWIS: Thank you. Note my exception.
3 THE WITNESS: Does that mean I go ahead or I
4 stop?
5 THE COURT: Go ahead.
6 THE WITNESS: All right.
7 I called him trying to get someone to go
8 between Dave Pyles and myself before this accident of
9 October 22nd, because I was still leery of the lever
10 not going all the way in Park, and he said, "You have
11 to go through your Ford dealership, and they have a
12 representative", and I said, "Well, this is where the
13 problem lies."

14 So, needless to say, after that, I just --
15 I didn't want to go back there.
16 BY MR. COHEN:
17 Q So, you came to go to Brown Lincoln Mercury?
18 A Yes.
19 Q About the time you went there, they had just
20 changed their name from O'Brien and Rohall to Brown
21 Lincoln Mercury?
22 A Yes.
23 Q Is that true?
1 A (Nodding head)
2 Q Did you have the car repaired there?
3 A Yes, I did.
4 Q After showing these to counsel, Mrs.
5 Bartholomew, I'll show them to you.
6 (Mr. Cohen handed documents to Messrs. Lewis
7 and Snead for their perusal.)
8 BY MR. COHEN:
9 Q Now, Mrs. Bartholomew, I show you these
10 O'Brien and Rohall invoices that you have given me
11 previously, and ask if you can identify them.
12 A All right. Date, 10/26. Yes, that was the
13 first time I took it there for that. This is their
14 work order (indicating) and -- what is the date on this
15 one? -- yes.

16 Q Do all of those have to do with the repairs
17 that you ordered at O'Brien and Rohall as a result of
18 the damage to the car received in the October 22nd,
19 1976 incident?
20 A Yes. Yes, it does.

7 Q Now, Mrs. Bartholomew, referring back to the
8 times you said you took the car back to Dave Pyles to
9 complain, was that at the time that you were having other work
10 done or sometimes having the transmission serviced?
11 A I never took that car in that I didn't say
12 to them, "While you're doing whatever such-and-such
13 needs, will you please check the lever? It still doesn't
14 go all the way into Park." I would always mention it.
15 Q Did you, in fact, have transmission service
16 work done in between the time when they first fixed it
17 and the next incident?
18 A Yes.

13 Q. Mrs. Bartholomew, I want to ask you some
14 questions about your injuries and treatment now. Would you
15 tell the Court and the jury, please, what your leg looked
16 like in the hours following the time the car ran over it and
17 how your recuperative period went over the next several
18 months?
19 A. All right. As I said, the leg just started to
20 swell tremendously to the extent I couldn't fit in any
21 slacks and then it just started turning black and it went
22 all the way from my thigh down to the ankle.
23 And I went to the doctor as many times as I
1 could. It was very difficult walking on it or getting around
2 and I still had this baby and at this time the baby was crying
3 24 hours a day.
4 So wherever I went I had to take that baby with
5 me and he wasn't, he wouldn't, you know, he wasn't laying
6 quiet while I was getting this treatment at the hospital
7 that I was supposed to go to.
8 Q. What hospital were you taking these treatments
9 at?
10 A. Northern Virginia Doctors Hospital. And, as I
11 said, I went as often as I could. The doctor suggested that
12 it was imperative that I stay off it and we did get someone
13 in to help me with the other three children and the house
14 a little but the baby, as I just keep saying, did cry 24
15 hours a day.

16 It was a matter of walking him and trying to
17 pacify him and I went as many times as I could, you know, as
18 I could get there.
19 Q. Did you on occasion miss appointments or have
20 to cancel appointments with the physical therapist?
21 A. Yes, I did.
22 Q. Could you explain to the Court and the jury why
23 you did that?

1 A. Well, I'd say the first couple weeks it was a
2 matter of did I really want to push to go or would it have
3 just been better for me to stay home and not have to drag a
4 baby out, drive there and you had to park in a parking lot,
5 there was a good distance of walking.

22 THE WITNESS: Doctor -- When I finally decided
23 at the hospital what it was that was really hurting me which
1 was this leg and thigh they called in an orthopedic surgeon
2 and this was this Dr. Heilen.
3 Q. And was this bill for $40 incurred in the course
4 of treatment that he gave you at the emergency room --
5 A. Yes.

6 Q --as a result of the injury you received on
7 October 22, 1976?
8 A Yes.
9 Q Now I show you this bill from Northern Virginia
10 Doctor's Hospital that is headed up interim through 12/31/76
11 but has some balance for treatments received for your earlier
12 accident that have nothing to do with this case.
13 But are the ones for after October 22, 1976
14 related to this case?
15 A Yes.
16 Q That would be $135 worth?
17 A Yes.
18 Q I show you this bill from Drs. Prominski, Sheely,
19 Banning, Cornell and Garcia, X-ray department. Is a $46
20 portion of this bill related to X-rays taken of your left
21 femur and left knee for the injuries received on October 22,
22 1976?
23 A Yes.

1 EXAMINATION ON BEHALF OF THE DEFENDANT FORD:
2 BY MR. LEWIS:
3 Q Mrs. Bartholomew, this accident occurred on
4 October 22?
5 A Yes.

6 Q. 1976?

7 A. Yes.

8 Q. Now I believe you testified earlier that you had

9 been involved in an accident in July, late July or early

10 August of 1976?

11 A. Yes.

12 Q. And it was an automobile accident?

13 A. Yes.

14 Q. You had received some personal injuries in

15 that matter?

16 A. Yes.

17 Q. And actually engaged a lawyer and presented a

18 claim?

19 A. Yes.

20 Q. Did you come under the care of a physician for

21 the injuries you received in that accident?

22 A. Yes.

23 Q. Tell me, if you will, the name of the physician

1 or all physicians that rendered treatment to you from that

2 accident in July or August, 1976.

3 A. Dr. David Zohn.

20 Q. And in fact, do you recall, did you in fact seek
21 and obtain treatment from Dr. Zohn on the date preceding
22 the accident of October 22, 1976?
23 A. Yes.
1 Q. After the accident you told us that you went to
2 the hospital and that you were X-rayed there?
3 A. Yes.
4 Q. And Dr. Heilen, a specialist, came in to check
5 you out?
6 A. Yes.
7 Q. Did he see you more than that one time?
8 A. No.
9 Q. And I assume that the X-rays, or do you know,
10 X-rays indicated no broken bones or anything of that nature?
11 A. Yes.

2 Q. Then you had the accident on the next day and
3 you were seen by Dr. Heilen, you went home. After that did
4 you seek any medical attention for the October 22 accident?
5 A. Yes, I did.
6 Q. From who?
7 A. Dr. Zohn.

8 Q. And do you remember when that was?

9 A. The accident occurred on a Friday. It probably

10 was a Monday or a Tuesday. I really can't recall the date

11 but early, very early in the week.

22 Q. Would October 26 be approximately right?

23 A. 22nd, 23rd, 24th, right, Monday or Tuesday.

1 Q. And did you indicate -- Strike that. Was that

2 the same day you went to put the car in --

3 A. Say the date to me again.

4 Q. October 26, 1976.

5 A. I believe it was.

6 Q. The same day you took the car in to, let's see,

7 that's Brown?

8 A. I believe it was.

9 Q. And I believe you drove the car in to Brown?

10 A. Yes.

7 Q. Could you tell us about how many times you saw
8 Dr. Zohn from October until December?
9 A. Not as many times as I should have. I really
10 can't recall.
11 Q. Would four sound correct?
12 A. I really can't recall.
13 Q. You can't recall?
14 A. No.

7 Q. Is it true that you didn't seek any or obtain
8 any medical attention at all from December of 1976 until
9 December of 1977?
10 A. It could be.
11 Q. Do you --
12 A. I think I -- Excuse me. I think I saw Dr. Kroft
13 in the --
14 Q. For your rheumatoid arthritis?
15 A. Yes. Yes.
16 Q. But nothing for any injury in this August '76
17 accident or the October '76 accident?
18 A. No. I had pain pills that I took if something
19 really bothered me.
20 Q. Then in December, a year later, you started going
21 back and obtaining some treatment?
22 A. Yes.

7 BY MR. COHEN:

8 Q. Mrs. Bartholomew, would you explain why you went

9 to Brown Lincoln Mercury first before going on to the doctor?

10 A. Well, it just -- you know, when you have four

11 children and we had just opened up our own business. My

12 husband was gone 12 hours a day. I have no family in this

13 area or someone --

14 We live in an older neighborhood. There's no one

15 to call to say, could you stay with the children? I mean, my

16 main objective at that time was taking care of that house and

17 I needed a car.

18 Whether I was able or not there was certain

19 things I had to push myself to do and I knew in my mind

20 even with my husband saying, well, maybe you didn't and maybe

21 you did, I knew I had that car in park and that brake on

22 and I was scared to death.

23 So I just -- I figured, I'll get in it; I'm going

1 to drive it right to the dealer and let him take a look at

2 it. That would either assure me that there's something or

3 there isn't.

13 EXAMINATION ON BEHALF OF THE PLAINTIFF:

14 BY MR. COHEN:

15 Q. Would you state your name please?

16 A. David Arthur Zohn.

17 Q. Are you a medical doctor?

18 A. I am.

19 Q. What is your specialty?

20 A. My speciality is called physical medicine and

21 rehabilitation.

22 Q. Can you very briefly tell the Court and the

23 jury what physical medicine and rehabilitation is?

1 A. Yes. It's concerned with the diagnosis and

2 treatment primarily by physical therapeutic means of various

3 muscular, neurologic and rheumalogic conditions.

4 MR. COHEN: Can we have a stipulation that

5 Dr. Zohn is an expert physical medicine and rehabilitation

6 specialist or do you want me to --

7 MR. SNEAD: I would so proffer.

8 MR. LEWIS: No objection.

9 THE COURT: All right. We'll receive his

10 testimony as that of an expert in the field of physical

11 medicine and rehabilitation.

12 BY MR. COHEN:

13 Q. Dr. Zohn, in the course of your practice did

14 you have occasion to see Constance Bartholomew as a patient?

15 A. Yes, I did.

16 Q. And would you tell us please when you first

17 saw her?

18 A. May I refer to my notes?

19 Q. Certainly.

20 A. I first saw the patient on August 3rd, 1976.

21 Q. And what was the occasion for seeing her then?

22 A. On that occasion she was complaining of back

23 pain which occurred as a result of an automobile accident.

1 Q. On the previous day?

2 A. On 8/2/76.

3 Q. And did she enter into treatment with your

4 office as a patient?

5 A. Yes, she did. Treatment was limited because

6 at that time she was pregnant and I believe in her ninth

7 month of pregnancy so treatment was limited but we did

8 undertake what treatment we could.

9 Q. How frequently was she supposed to come to you

10 at that time?

11 A. Initially it was daily.

12 Q. And did she in fact make any visits at all?

13 A. Oh, yes, she came into the office for that

14 problem.

21 Q. Now, when you next saw her for an injury could
22 you tell the Court and jury when that was?
23 A. I saw her -- I had seen her intermittently
1 over the succeeding months because of the problems related
2 to her prior auto accident both before and after delivery
3 of her children but I next saw her on 10/26/76 because of
4 left leg pain.
5 Q. All right. And, would you tell us what history
6 you took at that time?
7 A. Yes. The patient told me she had been run over
8 by a tire of a car four days prior to my seeing her. She
9 was taken to an emergency room where X-rays of her pelvis
10 were taken and these were reported to be negative for
11 fracture.
12 There were no X-rays taken I noted at that time
13 of her leg, her knee or her calf.
14 Q. Did you examine her?
15 A. I did.
16 Q. And what were the findings of your examination?
17 A. Basically, there was a marked evidence of
18 ecchymosis or bleeding underneath the skin throughout the
19 entire leg and calf, left leg and calf.

20 Q. When you say the entire left leg and calf, can
21 you be more descriptive for us, please?
22 A. Well, actually the area was labeled the postero-
23 medial aspect of the calf which is the back and the inside
1 predominantly but it extended around the entire leg.
2 Q. And how serious an injury was this?
3 A. Well, there was marked swelling involved. There
4 was pain, limitation of motion, discoloration of the leg.
5 X-rays, additional X-ray studies were taken and there was
6 no evidence of any fracture so it was what we call a soft
7 tissue injury but there's no question that there was a great
8 deal of soft tissue damage associated with it.

10 Q. Describe the seriousness of Mrs. Bartholomew's
11 injury. I think before you described the extent and now I'm
12 asking you the seriousness.
13 A. Yes. It has potential serious implications,
14 the most common being -- the most --
15 MR. LEWIS: If the Court please, I think -- I
16 just have to object to potential or what might happen or
17 this and I think like Mr. Snead what is involved in this
18 case is what actually should be testified to; not what
19 possibly could happen.

20 THE COURT: I overrule the objection. You
21 may continue your answer.
22 MR. LEWIS: Exception, please.
23 THE WITNESS: The injury has the potential for
1 becoming calcified, that is, there's bleeding into the soft
2 tissues. There is the potential for the blood turning into
3 calcium and eventually into even bone so that there can be
4 limitation of motion of the adjacent joints as well as pain
5 due to the fact that bone is present where it's not supposed
6 to be.
7 BY MR. COHEN:
8 Q. And what sort of treatment or course do you put
9 the patient on to help prevent this complication from
10 occurring?
11 A. We put the patient on a course of treatment
12 designed to reduce the swelling and help to resorb the
13 bleeding which had taken place in the muscle and she was
14 treated with enzymatic treatment. That is, there are
15 enzymes which dissolve the blood clot and this was not given
16 to her orally but was given to her by an electrical current
17 through her leg.
18 She was also treated with deep heat in the form
19 of ultrasound to help resorb the debris and the destruction
20 that had taken place. And, she was also given range of

21 motion exercises for her hip and knee because these were
22 limited due to the soft tissue injuries and the fact that
23 the muscles could not contract and relax normally.

1 Q. Did you have to tell her anything about staying
2 off the leg or was she --
3 A. Yes. Obviously, the less weight bearing, the
4 less use of the part, the better, so that was --
5 Q. What response did she say to you or what
6 problem did she present to you with respect to having to
7 stay off of her leg?
8 A. Well, she pointed out some difficulties that
9 she had in terms of her having to carry on with some of her
10 business affairs and taking care of children, babies
11 actually.
12 Q. Did the course of -- Did you enter into the
13 course of treatment with her that you just described?
14 A. Yes.
15 Q. And how effective was it in her case?
16 A. Well, I think it was effective. I think that
17 over the ensuing months my notes indicate that the swelling
18 decreased, the discoloration disappeared. There was a very
19 large painful lump in her leg which I thought might
20 represent either a tear of the fibers or actually an area
21 of bleeding which we call a hematoma.

22 And this gradually disappeared and her range
23 of motion improved so I would say that overall her response
1 was fairly good.

20 BY MR. SNEAD:
21 Q. Doctor, as I understand it you've discussed the
22 potential problems with a soft tissue injury. One of those
23 potential problems was the possibility of calcification.
1 Is that correct, sir?
2 A. That's correct.
3 Q. But we're not talking about that in this case,
4 are we?
5 A. It did not happen.
6 Q. And in fact, what you had in this case was a
7 good recovery, didn't you?
8 A. The patient continued to complain of symptoms
9 relating to this over a period of about a year to two years
10 but ultimately the symptoms seemed to have resolved.
11 Q. In fact, you had good range of motion and
12 everything that you were looking for for a good recovery?
13 A. There was only minimal limitation of range
14 of motion and minimal swelling and basically she had
15 recovered most of her function.

1 right. And I believe that was the last time I could find
2 anything of significance related, that I thought was related
3 to her accident.

2 BY MR. LEWIS:
3 Q. Your diagnosis initially was a soft tissue
4 injury?
5 A. Correct.
6 Q. And you used the word ecchymosis I believe.
7 That is in layman's language, that's a bad bruise, isn't it?
8 A. It's a bleeding and discoloration that's
9 visible to the naked eye.
10 Q. Right. Which is -- But the dark discoloration
11 as a bruise looks like?
12 A. Well, it's a question of degree.
13 Q. Then you treated her, and I don't want to go
14 over this again but isn't it true that in your nurse's notes
15 or your physical therapist's notes that this ecchymotic
16 area or this bruised area by November 16, 1976 was almost
17 completely cleared?
18 A. What was the date, sir?

19 Q. November 16, 1976.

20 A. That's correct.

21 Q. Then there's no question the back injury came

22 from this automobile accident before the October 22 visit

23 that you saw her?

1 A. That's correct.

2 Q. And the right shoulder pains, we don't know

3 where that came from?

4 A. That's correct too.

5 Q. And the rheumatoid arthritic condition of the

6 left knee and the other parts preexisted both of the acci-

7 dents?

8 A. That's correct.

8 Q. Mrs. Bartholomew, I want to ask you a few
9 questions now about your other testimony. First, can you
10 tell us when your father purchased this automobile?

5 THE WITNESS: All right. '72. 1972.

9 Q. Then you, when he traded it in you made
10 arrangements to purchase it from Dave Pyles where he traded
11 it?
12 A. Yes.
13 Q. When did you purchase it?
14 A. '72; 1973.
15 Q. Do I understand that you drove it then con-
16 tinuously or basically it was your car?
17 A. Yes.
18 Q. And you told us there was an incident that took
19 place on March 20, 1975 roughly two or three years after you
20 got the car?
21 A. Yes.
22 Q. And had you had any trouble at all with that
23 vehicle up until this incident in the parking garage?

1 A. Nothing major. Nothing that I can recall that
2 was major.
3 Q. In fact I believe you indicated to us earlier
4 when we took your deposition that you liked the car, you --
5 A. I loved that car.

At the time, that is back in the area when you bought
5 the car, 1973, had you been a licensed driver for some years?
6 A. Yes.
7 Q. You were familiar with the way to operate
8 automobiles?
9 A. Yes.
10 Q. And had you used a shift column lever before?
11 A. Is that what I had on the Lincoln?
12 Q. Yes. You know, the --
13 A. Yes.
14 Q. --little knob that you --
15 A. Yes.
16 Q. --put the car in gear with?
17 A. Yes.
18 Q. You knew how to do that before you got the

19 Lincoln?

20 A. Yes.

21 Q. And then you drove the Lincoln for two or three

22 years from the time you bought it up until this parking

23 garage incident?

1 A. Yes.

2 Q. Do you -- did you know how to put it in park?

3 A. I hope I did.

4 Q. I mean that sounded like a simple question but

5 you know what -- you didn't have any trouble putting the

6 car in park, did you?

7 A. No, I didn't.

8 Q. And in fact, you can, once you put it in park

9 you can check it to see if it is in park by wiggling it a

10 bit?

11 A. Yes.

12 Q. So you were thoroughly familiar with how to put

13 a car in park by the time you got the Lincoln?

14 A. Yes.

15 Q. And then as you had it and you'd used it for the

16 two or three years you likewise you also had no problem

17 putting it in park, you knew how to put it in park?

18 A. Yes.

19 Q. I assume in the two or three years you did have
20 maintenance on the vehicle?
21 A. Yes.
22 Q. But nothing of any, no problems at all with the
23 vehicle?
1 A. No, sir.
2 Q. And do you know how many thousands of miles you
3 put on the car up until this incident at the parking garage?
4 A. I would have to say in the 20s.
5 Q. Then you indicated when you were in the parking
6 garage, when you quit work, you came down, got in the car,
7 you had you believe left it in -- do you believe you had
8 left it in park?
9 A. I don't believe. I get in a car, I lock my
10 doors or I'm getting out, I'll put it to you that way. I
11 follow a pattern. That car was in park, the brake was on.
12 Q. And you got in and turned the key and it
13 immediately moved?
14 A. It immediately moved.
15 Q. Instantaneously?
16 A. Instantaneously.
17 Q. You say it didn't even catch, you mean the motor
18 didn't even catch?
19 A. I really don't think it caught.

20 Q. All right. Then do you know how far was your
21 rear bumper from this concrete wall?
22 A. Well, I backed the car in so it -- just a couple
23 of feet.
1 Q. Do you actually know or are you just guessing?
2 A. I know it's a couple of feet, a regular parking
3 space.
4 Q. Then you told us that you took the car to get
5 repairs and things at Dave Pyles?
6 A. I had it towed in.
7 Q. Are you sure about that?
8 A. I should know if I had my car towed in. I
9 couldn't drive it, remember, because I was playing with the
10 lever and it was like playing with a little toy.
11 Q. All right. Then you told us, and I don't want
12 to go over it and rehash this, you had it for the time
13 this occurred was in March, I believe we have agreed upon in
14 March, 1975, that date?
15 A. Yes, sir.
16 Q. Then you operated the car after the repairs up
17 until the October 22, 1976 incident?
18 A. Yes, sir.
19 Q. Roughly 18 months?
20 A. Yes, sir.

21 Q. Then you indicated that you, you told us that
22 you had some problems or you felt it wasn't quite right or
23 wasn't just like it was before?
1 A. Well, checking today's bills I see that I had it
2 in there for transmission problems quite a few times.
3 Q. All right. And then on October 22 you went to
4 the Giant?
5 A. Yes.
6 Q. To do your shopping? That's the Giant on Route
7 50 up there by Seven Corners?
8 A. Yes.
9 Q. When you came into the -- Strike that. After you
10 left the store you went to your car?
11 A. Yes.
12 Q. It was an October day, October?
13 A. Yes.
14 Q. Do you know whether at that time of the year,
15 was it chilly or --
16 A. Yes.
17 Q. --was it warm?
18 A. No, it was chilly. I had the baby in one of
19 those suits that you zip up.
20 Q. And you got in the car, came around and when you
21 came in front of the Giant was your car facing toward Route
22 50 or toward I believe that other street might be Hillwood
23 Avenue?

1 A. Yes. The car, the front of the car was facing
2 Route 50.
3 Q. So the store then would be on your left?
4 A. Yes.
5 Q. You waited for the young man but no one came?
6 A. Yes.
7 Q. Now, then there came a time you decided to get
8 out of the car?
9 A. Yes.
10 Q. Had you already placed the car in park before
11 that time?
12 A. No.
13 Q. But at that time you did place it in park?
14 A. Put it in park and put the brake on.
15 Q. Any doubt in your mind that you placed it in --
16 A. No.
17 Q. Ma'am?
18 A. No. Especially because I had that baby in the
19 car.
20 Q. You placed it in park? You'll have to say, yes
21 or no.
22 A. Yes.
23 Q. Did you check it to be sure?

1 A. I pushed it in park.

2 Q. Then did -- You know, we talked a minute ago

3 you can check it by wiggling it to be sure it's in park.

4 A. Well, I never really -- As I told you before

5 when I was taking it in, I never, I would just put the car

6 in park and put the brake on.

7 Q. Okay. But in any event you did, you definitely,

8 there's no question in your mind you placed that car in

9 park?

10 A. No.

11 Q. And you were particularly concerned about that

12 because your child was in the car?

13 A. Yes.

14 Q. And then you also put your foot brake on?

15 A. Yes.

16 Q. And did it go on?

17 A. Yes.

18 Q. You indicated it can't go on unless the car is

19 in park?

20 A. Yes.

21 Q. All right. Now, you then got out the left -- Was

22 this a four-door or a two-door?

23 A. Four-door.

1 Q. You got out the driver's door then?
2 A. Yes.
3 Q. Did you, with your young child in the car did
4 you turn the engine off?
5 A. No.
6 Q. You did not. And then you got out the left
7 door, did you leave that open?
8 A. Yes, I left the door open.
9 Q. And then you opened the, that would be the left
10 rear door also?
11 A. Yes.
12 Q. And that was for the purpose of putting the
13 groceries in?
14 A. Yes.
15 Q. Now I believe you indicated that the -- Strike
16 that. In the area of the Giant store as you, there is an
17 incline there, is there not?
18 A. A slight one.
19 Q. And anyway, you were doing the chore of putting
20 the grocery bags in the car when you felt, as I believe I
21 jotted down, just kind of a tap on your shoulder?
22 A. Yes.
23 Q. And --

1 A. In my back; not on my shoulder.

2 Q. Oh, I'm sorry. On your back?

3 A. Yes.

4 Q. Then you realized the car was rolling?

5 A. Was moving, yes.

6 Q. At that time it was moving slowly?

7 A. Yes.

8 Q. Then as it continued to roll you tried to keep

9 up with it and it picked up speed as it rolled?

10 A. Yes.

11 Q. Down the hill, down the incline?

12 A. Yes.

13 THE WITNESS: No, I really -- I don't understand

14 that much about a car. When I bring it in I expect him to

5 BY MR. SNEAD:

11 Q. Now you indicated that on October 22nd, 1976 it

12 was chilly?

13 A. Yes.

14 Q. And that's why you left the car running?

15 A. Yes.

16 Q. Why did you leave the door open to the car?

17 A. I had the heater going and I just -- just

18 instinct, I just didn't want to shut the door with the baby

19 in the front seat.

20 Q. Now in fact you had two car doors open?

21 A. Yes.

22 Q. You could -- You were putting the groceries in

23 the back seat of the car?

1 A. Yes.

2 Q. Could you have punched a little button in that

3 car and the trunk would have opened up --

4 A. Yes.

5 Q. --and put your groceries in there?

6 A. Yes.

7 Q. Now because you had had previous problems with

8 this car and the transmission did you jiggle the transmission

9 lever?

10 A. I put the car in park and pressed the emergency

11 brake?

12 Q. Did you jiggle the lever to make sure it was in

13 park?

14 A. As far as I am concerned it was in park.

7 BY MR. COHEN:

8 Q State your name, please.

9 A Lincoln Vance.

4 Q All right. Did you then have occasion to

5 visit Connie and her family at home shortly after her

6 injury and during that period of time she was recuperating?

7 A Yes, sir. I was a fairly regular visitor

8 to the Bartholomew house.

9 Q And can you tell us what you saw about

10 Connie's injuries?

11 A The first time, her leg was, oh, I would say

12 at least double or more than double its normal size. It

13 wasn't a very pleasant sight. It was black and green,

14 actually, and blue.

15 Connie was crawling around on the floor. She

16 was unable to walk. And she had -- she had a new baby at

17 the time that was crying all the time, almost constantly.

18 It was just not too much I can tell you about it. She was

19 immobilized.

20 Q All right. Did you continue to visit the

21 Bartholomew household several times over the next couple of

22 months?

23 A Yes, sir. I used to go by there to see if

1 there was any assistance I could render in shopping and so
2 forth and, I guess to give her moral support.
3 Q. Do you recall being there around
4 Thanksgivingtime?
5 A. I think so.
6 Q. What did her left leg look like at that time?
7 A. It was still -- If I recall, it was still
8 considerably larger. Looked better than it had, obviously,
9 when I first saw it. But it was still quite swollen. And
10 she was still relatively immobile. She wasn't able to
11 stand on it comfortably.
12 Q. Can you tell the Court and Jury Connie's
13 level of activity before she was injured in this accident?
14 A. She was hyperactive mostly. She had a great
15 deal of self-confidence. She was the type of person that
16 really wasn't -- She thought that there wasn't anything that
17 she could not do or could not accomplish. She was a
18 biochemist. She used to work long hours for -- in her
19 profession. She ran the house with -- well, in those days,
20 three children. And she was a meticulous housekeeper.
21 Q. What do you mean by a "meticulous
22 housekeeper?"
23 A. You could literally eat off of the floors of

1 her house anywhere.

2 Q. Would you say she was above in cleanliness?

3 A. To a fault, almost.

4 Q. What else did she do around the house?

5 A. It would be easier almost to describe what

6 she didn't do. There was hardly anything around the house

7 that she didn't do, whether it was mowing lawns or putting

8 a swimming -- if I recall one time, putting a swimming pool

9 cover on.

10 I don't know what to tell you that she didn't

11 do.

12 Q. Did there come a time when she had to get

13 some help around the house?

14 A. Yes. Obviously she had to get help after

15 her injury. She -- As a matter of fact, I think she still

16 has it.

17 Q. Is that a maid?

18 A. I think at one time she had a nurse, and

19 then she has a maid.

20 Q. What can you say about your observation of

21 her personality and outlook since the accident?

22 A. She's not quite as self-confident as she

23 was. She -- She's not as happy at home because she's

1 unable to keep the house the way that she normally would
2 like to keep it. She's unable to do many of the things
3 that she used to do as a matter of course.
4 Q. Have you been able to observe her level of
5 patience or any change in that?
6 A. I think she has much less patience. You'll
7 have to forgive me but she has considerably less patience
8 than she used to have.

3 Q. Prior to dropping by the few days after this
4 October 22 incident, when was the last time you had been by
5 the house to visit she and the family? Prior to that.
6 A. Again, I couldn't give you dates. I was a
7 fairly constant visitor. She lives -- Her home is quite
8 close to mine.
9 Q. All right. What was her physical condition
10 immediately before this October 22 accident?
11 A. I presume you mean before the accident?
12 Q. Yes. Of October 22, 1976.
13 A. Well, she had just had a baby.
14 Q. Anything else?

15 A. Like what?

16 Q. Well, I don't know. I mean, I just want

17 your observations. What was her physical condition prior

18 to the October 22 accident we're talking about here where

19 you went down to Giant.

20 A. Well, I'm not a doctor but her physical

21 condition was what I would normally expect from a new

22 mother.

23 Q. But she had no injuries or anything else

1 that you were aware of other than childbirth?

2 A. Not that I was aware of?

3 Q. Well, you were aware that she had been

4 involved in an automobile accident in August of 1976?

5 A. Yes, I think so.

6 Q. And was injured?

7 A. Yes; I think, as a matter of fact, she

8 called me on that date, too.

9 Q. And weren't you aware that she was -- I beg

10 your pardon?

11 A. Sir? She called me on the day, also.

12 Q. But you say she was in good shape. She

13 didn't have any problems because of that accident?

14 A. As I told you, I am no doctor. I don't

15 know.

16 Q. All right. So anything -- From your
17 observation of after October 22, you wouldn't know whether
18 it was related to the October 22 incident or the accident
19 before, would you, sir?
20 A. Other than her leg, no.
21 Q. And you said something about Thanksgiving.
22 Thanksgiving would have been in the latter November of --
23 I don't know the date -- correct?
1 A. Probably, yes.
2 Q. Well, hadn't the bruises and everything
3 cleared up by then?
4 A. Actually, I don't know whether they had
5 cleared up or not. I do know that her leg was considerably
6 larger.
7 Q. All right.
8 A. Now, whether the bruises had cleared up, I
9 can't answer that.

11 Q. State your full name, please.

12 A. William Henry Divine.

13 Q. And Mr. Divine, where is your place of

14 business?

15 A. Annapolis, Maryland.

16 Q. And what is your profession?

17 A. I am president of Universal Associates,

18 which is a small engineering consulting company, and I

19 function as a Registered Professional Engineer.

20 Q. Would you tell the Court and the Jury,

21 please, what a Registered Professional Engineer does or

22 what you do with relation to your profession?

23 A. It might be a little easier. A Registered

1 Professional Engineer that is in practice would generally

2 undertake assignments from clients to do engineering work

3 of various and sundry kinds. In my particular case, I am

4 a mechanical-electrical engineer. The assignments that I

5 undertake are, in some instances, designing refrigeration

6 air conditioning systems for clients. Other work that I

7 do involves investigating accidents for insurance

8 companies.

18 Q. And do I understand from that time up until
19 now or -- I beg your pardon -- up until '74, you were
20 engaged primarily in air conditioning?
21 A. Yes, sir.
22 Q. Have you ever designed any part of an
23 automobile?
1 A. Other than the air conditioning equipment,
2 no, sir.
3 Q. You designed air conditioning equipment for
4 an automobile?
5 A. Application engineering. I am not a design
6 engineer, sir.
7 Q. You are not a design engineer?
8 A. No, sir.

7 Q. What?
8 A. Well, for instance, the fluid drives used
9 in fans are roughly comparable in that they've got a torque
10 converter in them and that they have gearing.
11 Q. You're talking about a small fan?
12 A. Five hundred horsepower, maybe; a thousand
13 horsepower; down to ten horsepower, too.

14 Q. And this work -- I noted down here that it
15 involved designing of cold storage areas.
16 A. Sir, you keep saying design.
17 Q. All right. You don't -- Okay. Let's get
18 that clear. You have no experience whatsoever in design?
19 A. In designing components. The difference
20 between an application engineer -- An application engineer
21 takes a component, a product that is already designed by a
22 design engineer, and applies it.

1 then. You have never been in the field of designing?
2 Designing?
3 A. Yes, sir. Insofar as automatic transmissions
4 are concerned.
5 Q. You've never done that?
6 A. I've got two patents, for example, to my
7 credit, which, they are not particularly significant except
8 in the refrigeration field. There I worked with design
9 engineers but I would never consider that I was a design
10 engineer; no, sir.

11 Q. All right. You are an application engineer?

12 A. Yes.

13 Q. And that takes things people have already

14 designed and puts them to their best use, I guess; would

15 that be a good way to say it?

16 A. Puts them together in systems, generally,

17 is the function of the application engineer. I mean, for

2 BY MR. SNEAD:

3 Q. Now, when you say that you're a systems

4 engineer and application engineer, is that like being a

5 jack-of-all-trades in terms of engineering; that, you look

6 at a broad view of engineering?

7 A. From the standpoint that you look at the

8 broad view of systems and so forth, yes. But not a -- I'm

9 sorry.

10 Q. Do you feel qualified as a mechanical

11 engineer to deal with any principle of mechanical

12 engineering dealing with any part of any type of -- that

13 involves mechanical engineering?

14 A. After sufficient study and investigation

15 and examination, yes.

16 Q. The study and examination. Is that the study
17 and examination of the particular part in question or are
18 you looking to literature and what other experts say?
19 A. The entire gamut. Looking at the piece of
20 equipment; looking at, as best I can, what went into the
21 original design of it, the function of it, the way it fits
22 into the system.
23 Q. Did you, in this case, go to other experts
1 for advice and help and opinions either through literature
2 or through conversations?
3 A. Yes.
4 Q. Did you feel that they were -- these other
5 experts were more qualified and competent in this area than
6 you?
7 A. Perhaps in the beginning, yes.
8 Q. And that is why you went to them?
9 A. Not just other experts but the instruction
10 manuals on the material itself; discussing it with
11 transmission shops; watching the material being
12 disassembled; actually disassembling at least one
13 transmission myself.
14 Q. Did you get into the mechanic -- automobile
15 mechanic aspect of this case?
16 A. Yes.

17 Q. Are you an expert in that?

18 A. From a mechanical engineering standpoint, I

19 am --

20 Q. From a mechanic standpoint.

21 A. I am not an automobile mechanic, from the

22 standpoint that it would take me four times as long to

23 disassemble a transmission as it would a mechanic.

1 Q. But you are not -- you don't feel competent

2 to testify to this Jury as to what a mechanic, an

3 automobile mechanic, ought to do or not do with one of

4 these transmissions?

5 A. From an engineering standpoint I do, yes.

6 Q. From an engineering standpoint. Now, how

7 is it -- Does a mechanic, in putting together a car,

8 taking it apart and making it well again, does a mechanic

9 approach it from an engineering standpoint?

10 A. Generally not.

11 Q. You wouldn't expect a mechanic to --

12 A. I would not expect him to; no, sir.

13 Q. And you're not going to get into the

14 mechanic's end of things, either; are you?

15 A. Well, unfortunately, when you work with

16 mechanical components and systems, you must know what the

17 mechanic is supposed to do. For instance --

18 Q You go and ask the mechanic what he's
19 supposed to do?
20 A No, sir. No, sir.
21 Q What do you do?
22 A You instruct the mechanic as to what he is
23 supposed to do.
1 Q All right. Have you ever instructed a
2 mechanic in --
3 A Disassembling of a transmission?
4 Q -- assembly or disassembly of a transmission
5 in an automobile?
6 A Yes, sir.
7 Q You have instructed a mechanic?
8 A Yes, sir.
9 Q When was that?
10 A When I investigated an accident down in
11 Alto Vista, Virginia. I think it was about a year and a
12 half ago.
13 Q Now, do you -- are you instructing the
14 mechanic how to take the full thing apart after the
15 accident or are you instructing the mechanic how to make
16 a car well when it comes into the shop?
17 A Well, in this particular case, we were
18 examining a transmission that had been installed by the

19 factory in a Ford pickup truck and the truck was still
20 relatively new. And in working with the mechanic, I
21 instructed him as to what to do and when to do it. He
22 actually did it as far as the dropping the transmission
23 out of the car. For instance, I didn't tell him to unscrew
1 that bolt and that bolt and that bolt.
2 Q You told him to --
3 A I told him to drop it down and then let's
4 look at it here and then take it to the bench and take the
5 pawls off and so forth.
6 Q In other words, what you did was you asked
7 the fellow to take the thing apart for you is what you're
8 saying?
9 A Yes.

19 BY MR. SNEAD:
20 Q Mr. Divine, you are not telling these folks
21 in the Jury that you're competent to tell an automobile
22 mechanic how to do his job? That's not what you're
23 saying, is it?

1 A. From the standpoint of what he is to do,
2 not precisely how he is to do it. In other words, you've
3 got to understand the piece of equipment that you're
4 looking at in order to tell the mechanic what you want done.
5 Q. You understand transmissions better than
6 mechanics who work on them?
7 A. From an engineering standpoint; yes, sir.
8 Q. What does an engineering standpoint have to
9 do with repairing a transmission?
10 A. Quite a bit. I've worked with mechanics --
11 and this doesn't confine itself to automobile mechanics,
12 necessarily, but mechanics, because, whether he's a
13 steamfitter, whether he's a plumber, whether he's an
14 automobile mechanic or whether he's an electrician, he's
15 a skilled worker and he functions to repair, construct,
16 install, service equipment. It's a manual task that he is
17 involved in. His ability to diagnose trouble, his ability
18 to examine a piece of equipment or, more particularly, a
19 system to find out what the trouble is, is limited.
20 An engineer is trained to look at the whole
21 system and follow it piece by piece as it goes along and
22 find out what the trouble is, and then you tell the
23 mechanic what to do to fix it.

1 Q. Mr. Divine, you were not trained in
2 transmissions; were you?
3 A. No, sir.

14 THE COURT: Mr. Divine, without giving us
15 the specific studies, reports or pieces of literature that
16 you have read, you can continue your answer. But we don't
17 want to hear specific titles or names of specific reports.
18 If you have anything else to add to your answer, you may
19 finish your answer.
20 THE WITNESS: In addition to the printed
21 material, I think I can call it, that I have studied in
22 relation to the automatic transmissions and their linkage --
23 and I'm not sure if I am repeating myself or not -- but I

1 did and have, over the past year and a half, two years,
2 in transmission shops, observe the disassembly and the
3 components of the transmissions and followed that up with
4 the printed material to improve my knowledge and find out
5 what makes a transmission linkage, specifically, function.

8 Q Mr. Divine, as I understand your testimony
9 as far as automobile transmission go, you first got into
10 the study of them arising out of this case.
11 A Actually, it was the second case that got me
12 into the study of them rather than this one.
13 Q Okay. But in any case, it was as a result
14 of a case, as we understand what all this is about --
15 A Yes; that's correct.
16 Q -- that got you into automobile
17 transmissions?
18 A Yes, sir.
19 Q Now, I believe you also said that there
20 wasn't anything in the field of mechanical engineering
21 which you could not become expert in.
22 A That's the way I feel about it, yes.

8 Q Have you ever taught engineering?
9 A No, sir.
10 Q Or written any articles in the field of
11 transmissions?
12 A No.

13 MR. LEWIS: Nothing further.

14 THE COURT: Is there anything else of this

15 witness?

16 MR. COHEN: No, sir.

17 THE COURT: I'm of the opinion that he may

18 testify as an expert in the field of mechanical engineering.

19 Go ahead.

2 Q Let me interrupt you. Isn't it true that

3 some cars, instead of using 2 and 1, use like D1 and D2 or

4 L, depending upon the makes?

5 A I believe so. The PRNDL or PRND12 was

6 standardized by the Society of Automotive Engineers and --

7 so that, all cars with automatic transmissions function in

8 essentially the same way as far as the operating lever is

9 concerned. That is so you can get into a Chevy or a Ford

10 or Plymouth or whatever and, without a great deal of

11 research and study and training, operate the car even

12 though it is not the one that you are normally used to.

20 Q. Mr. Divine, is that what a driver feels when
21 he's moving his shift column? He feels that little roller
22 rolling through the rooster comb?
23 A. In part. You also feel the notches, if you
1 will, or the various pieces in the insert as you move the
2 transmission lever. You feel the motion of the linkage to
3 a very small degree, and then you feel the action of the
4 rooster comb as the detent clicks over the -- roller clicks
5 over the notches in it. And of course, you also feel as
6 you push the lever up into Park -- you also feel a
7 resistance of that spring that we looked at on this cam
8 as the pawl comes up -- as the rod comes up and spring-loads
9 the pawl to the closed position so that it will engage as
10 soon as the car moves. And sometimes when you push the
11 thing up, you will find that the pawl drops into place and
12 the car doesn't have to move; obviously it just depends on
13 where it catches you in the particular place you're in.

23 Q All right. Did you have an occasion to
1 compare the Ford C-6 automatic transmission to other
2 automatic transmission systems? For example, one
3 manufactured by General Motors?
4 A Yes.
5 Q And do you have any exhibit that you can
6 use to demonstrate the difference between the two?
7 A Basically, the transmission linkages are --
8 the transmissions themselves are very much the same with
9 the major car lines. That is, the larger transmissions
10 for the major car lines all bear a fairly close resemblance
11 simply because there is only so many ways you can do
12 something.
13 The -- Again, the Park, Reverse, Neutral,
14 Drive sequence is the same for each of the major car lines.
15 Therefore, there are only so many ways you can build an
16 insert or a gate or whatever you want to call it. The
17 General Motors car -- This particular unit is from an
18 Oldsmobile or for an Oldsmobile. We got it at a parts
19 supply house. This corresponds to the insert plate that
20 we showed you for the -- that is, corresponds approximately
21 to the insert plate that we showed you for the steering
22 column that we have here. And this, of course, is the
23 general configuration of the Ford insert plate with the --

1 well, you can look at it this way. It may be easier to
2 see it.
3 This is the General Motors plate for the
4 Oldsmobile and it fits Oldsmobiles from 1971 until 1975 or
5 '-7. The changes made in these transmissions are made
6 fairly slowly.
7 And incidently, for your own information,
8 the transmission is a very reliable piece of equipment for
9 its complexity. It's quite a remarkable piece of
10 machinery.

19 You'll notice that the -- if you will
20 remember looking at this particular unit here, you will
21 notice that the land between Park and Reverse is
22 considerably larger, longer, than the one that we looked at
23 for the Ford. If you can't remember, I will be glad to get
1 the other unit so you can compare them.
2 Again, this is not the precise insert plate
3 that was used in the Bartholomew car but it is very closely
4 related in that the arrangement is the same. And you can
5 see there is a difference here in that Ford decided to go

6 this way with the insert plate and GM decided to go this
7 way. But it's the same thing from the standpoint of the
8 notches. And if you will look at the Ford and compare it
9 with the GM -- I don't know whether you can see it from
10 there or not but you see how narrow the land is between Park
11 and Reverse, and you see how relatively much wider it is
12 here than the GM. I'm trying to keep from bumping it. Let
13 me move down a little bit so that we can see it down here.
14 You can see that the notch here for Park
15 and the land between Park and Reverse in the Ford is so
16 wide and then the GM configuration, here is the Park and
17 here is the Reverse and here is the land.
18 Now, because of the difference in diameter
19 of the things, they are not directly related. But in
20 comparison, the comparison is best expressed by the angular
21 motion of the selector lever. In other words, there are
22 different lengths to selector levers by about an inch or
23 a half an inch, something like that, and there is different
1 diameters or the radius of these gadgets. So that, the
2 actual thing that tells us that true distance moved is the
3 angle that the selector lever moves through. And a
4 comparison between the Ford and the GM -- In other words,
5 to go from Reverse to Park, the lever for the Ford moves
6 fourteen degrees -- through an arc of fourteen degrees.

7 The lever on the GM moves through an arc of twenty-three
8 degrees. It's almost twice as much. And you can see, of
9 course, that the land here is considerably larger than the
10 land here. And as I say, those aren't really completely
11 related but that gives you an indication of the actual
12 differences, better reflected by the fourteen-degree
13 motion and the twenty-three-degree motion.
14 Q Now, are there differences between the GM
15 rooster comb and the Ford rooster comb?
16 A That, of course, reflects the same thing to
17 an even greater extent, I suppose you could say, in that
18 the rooster comb for the Ford -- And remember, we have got
19 the Park, Reverse, Neutral, Drive, 1, 2. In the GM, you
20 notice that there is quite a difference in the
21 configuration, particularly in the Reverse to Park, in the
22 thing. You see the Ford notches are all about the same.
23 And in the GM, the distance -- the notch for Reverse to the
1 notch for Park is quite a bit -- They are quite a bit
2 further apart and a different configuration, you see. In
3 other words, here we have a regular notch and here we have
4 a much wider peaked arrangement.
5 Now, in studying these various linkages and
6 methods of controlling the transmission through the manual
7 linkage, if you will, the -- in comparing the insert

8 plates and the rooster combs and looking at the things
9 that happen as you move the selector lever back and forth,
10 it is my opinion that the motion with the Ford system is
11 such that it encourages leaving the manual lever on the
12 land between Park and Reverse; encourages this.
13 The GM, for example, with the longer land,
14 you might think that it would be easier to leave the tang
15 or the selector lever on that longer land. But actually
16 what happens, in my opinion again, is that when you move
17 the lever to twenty-three degrees, then you've got a lot
18 more momentum. You expect to move the lever further. You
19 expect to move it substantially more than you do between
20 the other notches in the transmission. So that -- And in
21 addition to that, even if you did stop short of Park with
22 the GM type system, you probably would be over the mid-
23 point of the land which, of course, would get you up over
1 the mid-point of your -- depending on the linkage being
2 adjusted properly, would get you over the mid-point of the
3 prong here on the rooster comb.

8 What happens is if you get, for instance,
9 halfway on the land of the GM between Reverse and Park, if
10 you get more than halfway in Park, then the rooster comb
11 encourages the system to move toward Park; whereas, on the
12 Ford, it's a much narrower land that you are working with
13 and it does not have -- You would have to get, again, more
14 than halfway on the Ford to do the same thing but halfway
15 on the Ford is a very short distance versus the other.
16 THE COURT: Go ahead, Mr. Cohen.
17 BY MR. COHEN:
18 Q Now, do you have an opinion, Mr. Divine, as
19 to which of the two designs, the GM insert plate and
20 rooster comb and the Ford insert plate and rooster comb,
21 is going to function better in terms of the operator not
22 being misled into thinking they have the system into the
23 Park position?
1 MR. LEWIS: I'm going to object to that for
2 two reasons. This case isn't involving a -- This car was
3 in Park. This hasn't got anything -- The only testimony
4 from the Plaintiff was the car was in Park. This is not a
5 situation where that question would be applicable and I
6 would object to it for that reason.

3 THE COURT: As I understand your theory,
4 your theory of the case is that with the person driving
5 the Ford, they can think they're in Park and they're not in
6 Park; they think they're in Park and they may not be in
7 Park. So, so far as his presentation of the evidence is
8 concerned, your point, without the testimony that it is in
9 Park, it is irrelevant. I'm going to overrule that.
10 As to some standard of care or a standard of
11 performance or standard of design, I don't understand how
12 it makes any difference as to whether this is better than
13 GM; is it better than a Rolls Royce; is it better than a
14 Mercedes or is a Mercedes better? But surely there must be
15 some standard of care that needs to be used. And the mere
16 fact that General Motors makes a better car than Ford on a
17 transmission, I don't see how that makes any difference at
18 all.

18 MR. LEWIS: If the Court please, I think
19 I'm going to -- would like to respectfully object to that,
20 also. I believe that his testimony was all of these
21 transmissions, all of these systems were remarkable and
22 were excellent. And the intent before was he might think
23 one is a little bit better than the other but I don't see

1 how Mr. Cohen can ask him now to say this one is bad when
2 he's described them all as being of -- I didn't jot the
3 exact word down but -- I don't think it was amazing, but
4 they were marvels or something of that nature; they were
5 excellent pieces of machinery. And now to ask him if it's
6 bad, I just don't think -- I object to it.

15 Q. Do you have an opinion with a reasonable
16 degree of engineering probability -- I think probability is
17 the standard, Your Honor -- as to the safety aspects of
18 the Ford design of the insert plate, of the rooster?
19 A. In the course of studying the transmission
20 linkages and looking at the adequacy of the pieces in the
21 linkage, it is my opinion that the Ford arrangement shown
22 here and that we looked at in our examples is more likely
23 to cause an operator to fail to put the Ford transmission
1 into Park to a greater degree than the General Motors
2 design, for example, would do the same thing. In other
3 words, it's more likely that you would fail to put a Ford
4 C-6 transmission into Park than a GM transmission such as
5 we're looking at here simply because of the difference in
6 the linkages.

7 Q And when you say a system --

8 A System, linkage system. This is the shift

9 lever to the insert plate to the steering column, on down

10 to the rooster comb.

11 Q All right. Just tell us what you did, not

12 what they told you.

13 A I was asked to look at the car to see if I

14 could determine whether there was a defect in the car.

5 Q Now, Mr. Divine, do you have an opinion

6 after having heard Mrs. Bartholomew's testimony of what

7 happened in 1975 and then again what happened on October

8 22, 1976, as to the cause of the car being left with the

9 motor running, the emergency brake on, and Mrs. Bartholomew

10 stating that she pushed the shift lever up towards P and

11 that she felt she had engaged it in Park, then beginning
12 to move and knocking her over and causing her to be injured,
13 do you have an opinion with reasonable engineering
14 probability as to the cause of that action?
15 A. Yes.
16 MR. LEWIS: Well, I would object. For one
17 thing, I don't think there is any question that she said
18 definitely the vehicle was in the Park gear. I asked her
19 many times if she knew how to put it in Park; it was in
20 Park; she checked it; she checked it that day. Mr. Cohen
21 says that she put it up in that direction toward Park. I
22 think that the testimony here -- the only testimony and
23 the only person that was there who operated this was Mrs.
1 Bartholomew and she said she definitely put it in the Park
2 detent. And I don't think we can change the facts for a
3 hypothetical question.
4 MR. COHEN: I object to that representation,
5 Your Honor. She never heard of a detent back in October
6 of 1976 and she never said she put it in the Park position.
7 That is Mr. Lewis's characterization. He's trying to
8 confuse the issue here.
9 THE COURT: So far as this question is
10 concerned, assume that Mrs. Bartholomew has said that she
11 put it in Park. Go ahead.

12 BY MR. COHEN:

13 Q Can you give the Jury your opinion as to

14 what happened in the mechanism and how that -- and what

15 effect -- what relationship that had to her injuries, if

16 any?

17 A After studying the material that I had the

18 opportunity to look at and the various transmission pieces

19 and components and linkages and systems, I conclude and it

20 is my opinion that Mrs. Bartholomew did not truly put the

21 transmission into Park. She thought she did. She moved it

22 up toward the top end of the thing but she did not actually

23 get the tang engaged in the Park slot. She thought she

1 had. And it is possible with the transmission to have the

2 system -- have the appearance of it being in Park. It is

3 very close to the edge of the land that we looked at and

4 the insert plate. The arrow on the indicator looks like it

5 is in Park. The car can be held and still the system can

6 then slip into Reverse.

7 The split grommet in the system had the

8 effect, in my opinion, of making her think she had it in

9 Park because of the increased sloppiness, if you will, of

10 the linkage that we looked at so that, when she moved the

11 lever up, she thought it was in Park but it was not truly.

12 MR. LEWIS: If the Court please, I move to
13 strike that. I think the Court --
14 THE COURT: I will take that up in just a
15 moment.

1 THE COURT: Okay. The Jurors have been
2 excused and the expert witness who is testifying is no
3 longer in the courtroom.
4 There are two things that concern me, Mr.
5 Cohen, about where we stand now in the development of this
6 case. The first is that when you asked the expert witness
7 his opinion so far as a standard or so far as safety is
8 concerned, he really did not respond to your question. His
9 answer again was that it is more probable with the Ford
10 that you might have something happen than it is with the
11 General Motors car.
12 Well, unless there is some standard that
13 General Motors is the standard and, therefore, Ford doesn't
14 meet General Motors' standard, they are negligent, then
15 that answer is not responsive and is not helpful.

16 The second point is, I tried to give you as
17 much leeway as possible on the grommet so far as his stating
18 an opinion but there is no showing at this stage that that
19 grommet came from her car.
20 MR. COHEN: We expect Mr. Ross here, Your
21 Honor. It is always difficult in putting on witnesses to
22 know which order you go in. Perhaps we should have put
23 Mr. Ross on first but we hoped he would be here in the
1 morning.
2 THE COURT: That's all right if we have
3 your assurance that that is going to happen to establish
4 that the grommet came from the car.
5 Then, unless you can give me some other
6 reason to strike that answer, Mr. Lewis, I wouldn't strike
7 it, assuming that Mr. Ross establishes where the grommet
8 came from.
9 MR. LEWIS: All right, sir. Well, I would
10 like -- If we are -- I assume we're taking a break now.
11 Well, yes, sir; I understand the Court's
12 ruling.

10 MR. COHEN: There is a preliminary matter, Your
11 Honor. Sometime when you feel it's convenient, we would like
12 to make a proffer to the Court, and ask the Court to recon-
13 sider its ruling about putting in the fact that Mrs. Bartholo-
14 mew reported the matter to NHTSA, the National Highway Trans-
15 portation Safety Administration, and that --
16 THE COURT: Have I made such a ruling on that?
17 MR. COHEN: I thought you said we couldn't talk
18 about anything -- Well, that's what I'm not sure of. I'd
19 like clarification on that.
20 Let me give you some background. After this
21 happened, Mrs. Bartholomew became what is known as a
22 whistle blower. She called the National Highway Transporta-
23 tion Safety Administration, and she, in effect, initiated
1 this Federal Government investigation of Ford which resulted
2 in the National Highway Transportation Safety Administra-
3 tion asking Ford to issue an advisory, not to result in
4 a recall yet, but to cause them to issue an advisory,
5 and brought out of the woodwork hundreds, literally
6 hundreds, of cases, 49 known deaths, hundreds of injuries,
7 about this defect.

8 One of the things we are suing for is punitive
9 damages. It would be ironic if, because of the Court's
10 ruling, that we could not put in evidence about anything
11 that happened after her date of injury, that we could
12 not show the Court and the jury that she was responsible
13 for this movement forward in putting the finger on Ford.

17 THE COHEN: That she was responsible for, in
18 effect, pointing the figer at Ford and causing the National
19 Highway Transportation Safety Administration, known as
20 NHTSA, N-H-T-S-A, to start this investigation that resulted
21 in all these statistics coming into not only NHTSA, but
22 the Center for Auto Safety, which is a private public
23 interest group which coordinates all this information and
1 corroborates it by gathering it from the public and sending
2 it into NHTSA.
3 It would be ironic if one of the other hundreds
4 of people who brings a case a year or two down the road,
5 that even might have been injured about the same time or
6 before, but perhaps is out in California where litigation
7 takes four or five years to come up, gets punitive damages

8 in a case like this whereas the one who started the in-
9 vestigation really ought to be given that credit for
10 bringing all of this together is prevented from putting
11 on evidence to show that she started it and is responsible
12 for pointing the figure at Ford and starting this great
13 investigation.
14 That is an important gravamen of our case to tell
15 you the truth because, I think, you see, she hasn't been
16 killed and she hasn't been permanently and irreparably
17 crippled or anything like that.
18 The amount of specials for many cases that you
19 see in this Court are on the modest side compared to some
20 other cases.
21 That is the kind of proffer of evidence we would
22 like to make to this Court.
23 THE COURT: How does her participation under the
1 law, how does her participation or bringing this to the
2 attention of anybody else have anything to do with the
3 issue of punitive damages considering the definition and
4 purpose of punitive damages under Virginia law?
5 MR. COHEN: The definition -- Perhaps it's best
6 to look right out of Doubles, but if my recollection is
7 correct, as a deterrent to others and as punishment
8 for willful disregard of the rights of her and others,

9 and we can show that they engaged in a course of conduct from
10 1971 on right up until the time that she was hurt where
11 they did nothing.
12 We could show that even after she blew the whistle
13 on them, and other cases came out of the woodwork, they
14 continued to do nothing. And, they take a stonewalling
15 position in this case, and don't intend to do anything
16 about it.
17 And, I think that she ought to be rewarded as the
18 one who pointed the figure at them and show that they have
19 a cavalier, willful, wanton disregard that continues right
20 up to the present day of trial.
21 THE COURT: So far as the punishment aspects of
22 punitive damages, I certainly agree with your definition.
23 It's difficult for me to understand, I guess, what you're
1 talking about in terms of reward for her for blowing the
2 whistle, so to speak. That's what I don't see as an element
3 of the damage under Virginia --
4 MR. COHEN: If it tends to show that even after
5 she pointed the figure at them and was the one who put
6 the pressure on them, that they still take this cavalier
7 attitude that there's nothing wrong and this is operator
8 error and refuse to admit that it's a design error, an

9 applications error, then why shouldn't she be the one
10 who brings it to the attention of the Court, and shows
11 that the tort continues, the willful, wanton carelessness
12 that continues right up to the day of trial, why doesn't
13 that not become a part of her case for punitive damages?
14 THE COURT: All right. Is there anything else?
15 MR. COHEN: That's it.
16 THE COURT: Mr. Lewis.
17 MR. LEWIS: Your Honor, it's just -- It's hard,
18 unless there were some statute or some type of reward
19 for doing something -- First of all, I disagree with Mr.
20 Cohen's representations to the Court.
21 This investigation started back in 1977, July of
22 1977. They asked Ford for some material because of
23 complaints they had had including Mrs. Bartholomew's
1 complaint, and Ford has given that to them.
2 There's never, in all of the years since then,
3 there's never been a recall, never been anything derogatory
4 against Ford. They have presented evidence to these
5 people that their system is the same as General Motors,
6 the same as Chrysler.
7 What he says I don't believe is correct. The
8 representation that Ford back in '70 and '71 knew of
9 a situation, the Court has ruled that he can bring that

10 out, and he is bringing that out, and he's alleging to
11 the Court that Ford did nothing. We disagree one hundred
12 percent.
13 Ford did act responsively. We don't think there
14 is any punitive damage aspect in this case at all, but
15 I don't know what law or what theory that a person who
16 blows the whistle, so to speak, is entitled to some
17 reward because somebody else might have been injured before
18 in a different manner.
19 Punitive damages are not compensation. It's a
20 deterrent based on the facts of each case as the evidence
21 comes in in that case. What the wanton, willful, careless
22 disregard -- Virginia has a lot of cases on punitive
23 damages, the Pick case, the Lewis-Moore case, the Lewis
1 versus Moore case I believe it is. There is just no
2 evidence here at all.
3 And, I think punitive damages applies to the
4 case your trying.
5 Mr. Cohen is asking, he wants to put on evidence
6 that this lady made a complaint; and, therefore, she should
7 be rewarded in some way by punitive damages, not based
8 on any evidence in this case, but just because she caused
9 an investigation which has not issued anything that's
10 detrimental or accusatory of Ford.

11 They have asked Ford for material. Ford has
12 furnished it. But there's nothing, there's been no recall
13 after two years of investigation, over two years of
14 investigation.
15 That has no bearing, no materiality in this case,
16 what she did in regard to writing a letter or calling or
17 reporting something to this group in Washington. It has
18 no bearing in this case. It happened considerably after
19 this.
20 Their investigation started in '77. I respectfully
21 say to the Court it's just not an issue and should not
22 be considered.
23 THE COURT: Mr. Cohen, let me ask you this, this
1 is what bothers me about it: What does it prove for her
2 to testify that she made a complaint to this particular
3 body? What does it prove or establish?
4 Her doing it doesn't do anything. The only thing
5 that would constitute proof would evidently be the
6 results of it. If you are concerned about showing that
7 there were so many cars, or so many deaths, or that there
8 was this and this and this that all happened, that's the
9 gravamen of it, not the fact that she did it as opposed
10 to someone else, right?

10 MR. LEWIS: If the Court please, there's another
11 factor, too. Mr. Cohen neglects to say that also the
12 government is investigating and getting material from
13 General Motors and from Chrysler. They have not issued --
14 They have initiated an investigation, they have reached
15 no conclusion.
16 They have found no proof of any defect in any
17 of the transmissions. In fact, as the Plaintiff's
18 expert has already said, they're all the same, they are
19 all the same theory, the same thing.
20 It just is not fair. It's just not part of
21 punitive damages to allow evidence after the fact. I think
22 you have to, in a design defect, you have to show at the
23 time the car was manufactured, there was evidence of
1 something wrong, and then that it was grossly wrong, and
2 it's malicious. All of those things, and going ahead with
3 the design at that time, that it violated the principles
4 that we need in Virginia and in other states to establish
5 punitive damages.
6 These raw data collected by the government is
7 the rankest kind of hearsay. There is just no way that
8 anyone can rebut that. And, as I say, they are taken
9 years after this accident.

10 THE COURT: It's difficult to rule on these because
11 there are so many different issued involved. On the
12 issue as to whether or not Mrs. Bartholomew is entitled to
13 tell the jury that she is the one who blew the whistle
14 and that that is an element of punitive damages, I conclude
15 that that's not an element of punitive damages. That's
16 not the purpose of punitive damages, to reward Mrs.
17 Bartholomew, no matter how noble her purposes and motives
18 are, it's to punish Ford if Ford deserves punishment.
19 And the issue as to whether she is the one who
20 brought it to the attention of the government, or someone
21 else brought it to the attention of the government, is
22 irrelevant on the issue of punitive damages.
23 On the issue of the conduct that has gone on after
1 her injury, according to Whigmore and according to the
2 authorities on punitive damages, it is germane and it
3 is relevant.
4 If we take the most elemental kind of tort, what
5 happens after has a bearing on punitive damages; and on
6 the authorities I read and cited to you yesterday, I am
7 convinced that there is no problem in referring to what
8 went on after the particular incident involving Mrs.
9 Batholomew in establishing punitive damages. So, it
10 does have relevance, and it does have bearing.

17 There are obviously some hearsay problems
18 involved. There may be exceptions, but it's difficult for
19 me to rule in a vacuum. I don't know what piece of evidence
20 or item of evidence you have specifically that you want
21 the jury to consider.

23 MR. LEWIS: Just for the record, I don't want to
1 argue with the Court, but I think that all of what the
2 Court has said goes back to -- You have to, I believe,
3 establish at the time of manufacture there was knowledge
4 or reason to believe.
5 It's not what might have happened after.
6 I think that's the question: Whether or not Ford
7 acted as a reasonable and prudent manufacturer under
8 the circumstances with the information available to them
9 at that time.
10 Obviously, I just don't think -- I know an abstract
11 statement out of Wigmore might seem to apply, and I
12 don't believe -- I don't have a brief right here at the
13 moment, but I certainly will get one. -- But I don't think
14 it would be appropriate to hold Ford responsible for some-
15 thing that happened after this accident by way of any
16 notice to them of a defect in their equipment, and that's
17 our position, sir.

5 MR. LEWIS: Your Honor, I would also like to
6 call the Court's attention in ruling on this matter the
7 Plaintiff's Motion for Judgment, what we are as a Defendant
8 faced with.
9 The Plaintiff's Motion for Judgment states that
10 Ford having -- Under their fourth claim for relief of
11 punitive damages, states that Ford having notice of
12 similar instances prior to Bartholomew's -- made a con-
13 scious, corporate decision. And, I think that is the
14 law. I think they have set forth that as the law, and
15 I think that is what we're confronted with.
16 There has been no request for an amendment to the
17 pleadings.
18 THE COURT: I keep falling back on the statement
19 that I am trying to rule on the proffers that are made;
20 in generalities that are made; and I am doing the best job
21 I can on them without seeing the specific item of evidence.
22 What I am saying is there is some probative
23 value in incidences that would occur after the date in
1 question to show that they may have made the decision,
2 or that they did make the decision.
3 It seems to me that inferences to be drawn are
4 appropriate for the jury to consider in deciding what
5 course of action Ford chose to follow prior to the
6 time Mrs. Bartholomew was injured.

9 Q We left your testimony yesterday at a point where
10 we were trying to elicit your opinion on this design
11 application of the Ford transmission. I would like to
12 ask you whether you have an opinion based on reasonable
13 engineering probability as to whether Ford's transmission
14 system is within accepted engineering principles for a safe
15 transmission?
16 A Yes, I have an opinion.
17 Q Could you tell the Court and jury, please, what
18 that opinion is and what it is based upon.
19 A In my opinion, the transmission is designed in
20 a manner that a reasonable, prudent individual can be
21 led to place the shift lever on the land between park
22 and reverse, that the design of the transmission leads
23 a person to do this. It is also my opinion that that
1 condition is dangerous and unsafe as, of course, the
2 transmission in such a position can slip into reverse with
3 subsequent damage.
4 MR. LEWIS: Your Honor, I would, respectfully, for
5 the record, move to strike that because I don't believe
6 it's in compliance with the evidence in the case. His
7 opinion, as I understand it, was that the Ford design
8 would tend to have an operator fail to place the vehicle
9 in park.

10 That is not the evidence in their case. I think
11 that we should go with what we start out with, jumping
12 from park to reverse. That's the allegation, and the
13 testimony of the plaintiff is clear that it was in park;
14 not that it failed to get in park, but it was definitely and
15 clearly in park.
16 I would like to cite to the Court the case of
17 Massey versus Fernstone which holds that principle, and I
18 don't think in the abstract that it is the opinion the Ford
19 transmission system has any bearing when it does not comply
20 or is not in conformity with the facts in this case.
21 THE COURT: I deny your motion.
22 Go ahead.
23 MR. LEWIS: Please note my exception.

14 Q Do you have an opinion based on reasonable en-
15 gineering probability as to whether the Ford transmission
16 is fit for the purpose for which it was intended?
17 A Yes.
18 Q What is that opinion and the basis for it?
19 A Again, the design of the transmission is such,
20 as I said before, that it leads the reasonably prudent

21 operator to, from time-to-time, leave the lever on the
22 land between park and reverse.
23 And, in my opinion, that condition is a dangerous
1 and unsafe condition and does not conform with what
2 I consider to be engineering standards, safe engineering
3 standards.

12 Are you a member of the Society of Automobile
13 Engineers?
14 A. No, sir.
15 Q. Have you ever applied to try to be admitted?
16 A. No.
17 Q. You indicated, told the jury, that the Society of
18 Automobile Engineers is the group that sets the standard
19 for the wording on the column, P, R, N, that type of thing?
20 A. That was my belief, yes.
21 Q. That's your belief? Well, that's what you said
22 yesterday under oath, I believe, is it not?
23 A. Yes.

4 Q. This group, the Society of Automobile Engineers,
5 is a professional society, is it not?

6 A. I believe so.

7 Q. You are telling the jury that they set the standards

8 for the entire country, world?

9 A. Mr. Lewis, it is my understanding that there was

10 an agreement among the major manufacturers in the industry

11 to standardize on the arrangement of the shift levers

12 so that each of the cars, each of the styles, each of the

13 major makes, would be reasonably similar so that drivers

14 could operate them interchangeably without a problem;

15 and, it was also my understanding from material that I

16 read, that the impetus toward the standardization was

17 created in the area of the Society of Automobile Engineers.

18 Q. That's even a little different than yesterday.

19 Are you saying that that was an agreement of the automobile

20 manufacturers?

21 A. That was my understanding.

22 Q. Isn't it true, really, that you don't know who

23 set the standard?

1 A. It's true.

2 Q. If I told you that the Federal Government set the

3 standards, would you have any comment on that?

4 A. No.

10 Q. You've described the transmission in the car Mrs.
11 Bartholomew purchased as a C6?
12 A. Yes.
13 Q. Had you ever taken a C6 transmission apart prior
14 to being engaged in this case?
15 A. The reason I hesitate on that is because the
16 exact sequence of events runs over --
17 Q. I think the answer is simply yes or no. I would
18 appreciate just a yes or no answer.
19 A. I don't know.
20 Q. Well, tell me this: How many times have you taken
21 a C6 transmission apart?
22 A. Personally, once, in the company of a mechanic.
23 Q. Have you ever taken a General Motors, the equivalent
General Motors, transmission apart?
1 A. No, sir.
2 Q. So you can't compare from your own observation
3 of taking them apart?
4 A. Not from taking them apart, no.
5 Q. Now you have brought some exhibits with -- And I
6 don't recall the numbers which we have used, but I am
7 looking for the -- Here it is, the column here.
8 Just let me lay it right here for a moment, please.
9 That is a column that you've described and have
10 told the jury just what it was. You don't tell the ladies

11 and gentlemen of the jury that that is the identical
12 type of column that was on the Bartholomew car, do you?
13 A. I thought that I explained that yesterday: That
14 it is similar, except that it is my understanding that
15 the Bartholomew car did not have a tilt steering wheel.
16 This particular column was removed from a car that
17 did have a tilt steering wheel.
18 Q. The transmission case, where is that?
19 A. Down here in front of the Bench.
20 Q. You have talked a lot about transmissions. What
21 type of transmission is that?
22 A. It's similar to a C6. It's an earlier model. I
23 believe it to be a C6 transmission case, but of an earlier
1 model than the one that was involved in the Bartholomew
2 case.

14 Q. You have told the ladies and gentlemen of the jury
15 one of the major things involved in this matter in your
16 judgment is the rooster comb.
17 A. Yes.
18 Q. Does this transmission have a rooster comb?
19 A. No.

20 Q. Doesn't even have one, does it?

21 A. No, it doesn't.

22 Q. How does it shift the gears?

23 A. In a very similar manner, except that the manual

11 Q. Do you have an insert plate taken out of this

12 column for a Continental?

13 A. Only the insert plate that's there.

14 Q. Only that one?

15 A. Yes, sir.

16 Q. Is this the same thing that's on there? And, if

17 you need to come down and take a look at it, go right

18 ahead.

19 A. It appears to be essentially so, yes, sir.

20 Q. Do you have any other insert plates with you?

21 A. For a general motors car.

22 Q. May I see that?

23 What make car is that?

1 A. From an Oldsmobile.

2 Q. Oldsmobile?

3 A. Uh-huh.

4 Q. I assume you investigated and looked into the

5 insert plates that are used by all manufacturers?

6 A. No.

7 Q. What did you do?

8 A. Just General Motors, and Ford, of course.

9 Q. Let me show you something here. This is a tilt

10 column, is it not?

11 A. Yes, it is.

12 Q. On the floor?

13 A. Uh-huh.

14 Q. Let me show you this. Isn't this -- This is --

15 Do you want to compare what I just showed you? This is

16 on the tilt column in the '73?

17 A. It looks similar to it, yes, sir.

18 Q. I don't want "similar". I want to be sure.

19 A. It does look similar.

20 Q. You can't tell?

21 A. I haven't measured sizes of the pieces of equipment.

22 Q. Isn't this the insert for a Cadillac with a

23 tilt column?

1 A. I can't answer that.

2 Q. Didn't you compare the Lincoln with a Cadillac?

3 A. Not in this particular case. We have an Oldsmobile

4 detent plate.

5 Q. Oldsmobile? But Mrs. Bartholomew had a Lincoln,

6 did she not?

7 A. Yeah.

8 Q. Isn't the equivalent General Motor line the
9 Cadillac?
10 A. Yes.
11 Q. And the Oldsmobile is a lighter, smaller car, is
12 it not?
13 A. Except for the large Oldsmobile, yes.
14 Q. You don't know whether that came from a large or
15 small one, do you?
16 A. No.
17 Q. You just can't say what that is, is that correct?
18 A. It's obviously an insert plate, and having looked
19 at the Ford preparation that's similar to this that lists
20 the Ford, the GM and the Chrysler, and the different insert
21 plates for the different cars, this is for the tilt wheel,
22 according to what you've told me. The one that you had
23 in your hand there is for the fixed wheel.

1 Q. In the Oldsmobile?
2 A. In the Oldsmobile, similar Oldsmobile.
3 Q. How about the Chrysler?
4 A. I didn't investigate the Chrysler.
5 Q. You did not investigate that?
6 A. No.
7 Q. If you will assume that this is the insert plate
8 on the tilt column Cadillac, you will see, do you not,
9 that they all have a park position?

10 A. Yes.

11 Q. And that park position is the position farthest

12 to the left, is it not?

13 A. That's the one where the operator lifts the lever,

14 pushes it up to the top.

15 Q. What is the purpose of that slot, the park slot

16 we'll call it?

17 A. To lock the transmission selector lever in park.

18 Q. To lock the selector lever in park?

19 A. Yes, sir.

20 Q. That's the function of all three of them, isn't

21 it?

22 A. For Ford and GM, and I assume it is for Chrysler

23 although I haven't investigated that.

1 Q. You don't know if Chrysler uses the same basic

2 design?

3 A. There are variations. I assume that Chrysler --

4 I have seen photographs of the Chrysler insert plate, and

5 I have seen the comparable rooster comb, shall we call it,

6 and the variation is rather substantial. And, I don't

7 know why it's built like it is.

8 Q. It's correct, is it not, that the park slot in

9 the Continental is deeper than the park slot in the General

10 Motors, is it not?

11 A. It appears to be from the photograph.

12 Q. Which would make it more difficult to get it out

13 of park into reverse, would it not?

14 A. I wouldn't think particularly. You're going to

15 make a motion with your hand. The lever would have to

16 travel a little bit farther with the Ford than it would

17 with the GM.

18 Q. You would have to take a little more care because

19 you have to lift the lever higher to get it out, is that

20 correct?

21 A. I'm not sure.

22 Q. In the Ford --

23 A. Or I am sure that you would have to lift the lever

1 higher, but whether it requires more effort or not is a

2 good question.

3 Q. The Ford's park tang -- Or the tang that goes

4 down into the park slot --

5 A. Uh-huh.

6 Q. When it gets down here, it has a spring on top

7 [indicating] to keep it in there, doesn't it, sir?

8 A. Yes, sir, I believe.

9 Q. So does General Motors?

10 A. I believe so.

11 Q. Did you examine them?

12 A. No.

13 Q. You did not. Did you ever -- Let me ask you this --

14 A. I did examine one General Motors assembly, but

15 did not examine it closely enough to know certainly

16 whether it had a spring or not.

17 Q. Let me ask you this: Isn't it true that all of

18 the American manufacturers that have a column shift basically

19 have the very same design?

20 A. Similar, yes, sir.

21 Q. In fact you said yesterday they were very much

22 the same?

23 A. Very much.

1 Q. And have a close resemblance?

2 A. Yes.

3 Q. All are very reliable?

4 A. Yes.

5 Q. And all involve the same principle?

6 A. Yes, but --

7 Q. All right.

8 A. When I told the jury that the transmissions were

9 really remarkable pieces of engineering, I meant exactly

10 that, and that is particularly the hydraulic end of the

11 transmission. The --

12 Q. All right.

12 Q. Are you asking me now?

13 A. Well, it was my opinion, it was my impression,

14 that they used washers.

15 Q. Then these rooster combs are not anything unusual;

16 all of them have the rooster comb?

17 A. Yes.

18 Q. That's needed down there to put the transmission

19 in the proper gear as it is received from the little lever

20 on the column?

21 A. Yes, sir.

22 Q. All of them have this overtravel rod, do they

23 not?

1 A. What is an overtravel rod?

18 Q. I show you three documents here, and ask you if,

19 in fact, those aren't the pieces of machinery, whatever you

20 want to call it, that were used on the Ford, Chrysler and

21 GM?

22 A. Well, they are labeled such. The Ford does look

23 familiar in that the pieces appear to be what I've looked

1 at and studied.

2 The Chrysler, I have not seen before. The General

3 Motors, the rooster comb looks similar to some that I
4 have seen, but I have not seen the rest of the linkage.
5 Q. Are you saying, then, you don't know whether or
6 not these are photographs of the equivalent piece that's
7 in the C6?
8 A. They appear to be, but I am not positive.
9 Q. Let me ask you -- Let's move along, it would be
10 simplier. You don't find any problem with the design
11 of this part in the car, do you?
12 A. I don't find any problem with the design of the
13 parking pawl actuating rod and its associated pieces, the
14 cam, and the parking pawl and the gear. The rooster comb,
15 I do think there's a problem with.
16 Q. You think there's a problem with the rooster comb?
17 A. Yes, sir.
18 Q. That's the basis for your opinion? Yesterday,
19 you said you preferred the GM rooster comb, I believe?
20 A. What I intended to say -- You'd have to check
21 back to find out what I actually said, but what I believe
22 I said was that I felt the design of the General Motors
23 wound up being a safer design than the Ford.
1 Q. Why was that?
2 A. Because the design of the Ford, in my opinion,
3 leads an operator to place the selector lever on the land

4 between park and reverse. The design of the General
5 Motors --
6 Q. We're talking about rooster combs now?
7 A. The thing about it is is the rooster comb is so
8 closely associated with the detent plate in the steering
9 column -- After all, when the transmission lever, selector
10 lever, moves, it moves from one notch to another, from one
11 notch to the parking to the land between the park and
12 reverse, that motion,providing the system is in reasonably
13 good condition, it --
14 Q. Mr. --
15 A. Could I finish?
16 Q. Yes, sir.
17 A. That motion is transmitted to the rooster comb
18 through the manual transmission lever so that they are
19 part of the same system. And, whatever happens in the
20 insert plate also happens down at the rooster comb.
21 Q. Let me zero in, or I want to try to figure out
22 why you have an opinion. Is it because it is limited to
23 two areas: One, is there a difference between the rooster
1 comb in the GM, and there is a difference in the land
2 between park and reverse in the GM versus the Lincoln?
3 A. Yes, sir.
4 Q. That's what we're really talking about, isn't it?
5 A. Basically.

6 Q. Everything else in the system is equivalent, or
7 the same or just as good?
8 A. Approximately so, I believe.
9 Q. What you are telling the ladies and gentlemen of
10 this jury is your problem, or your complaints, in this
11 area zero in on two parts of the system: One, the width
12 of the land between park and reverse; and the different
13 configuration of the stamping of the rooster comb?
14 A. And the detent spring and so forth that is
15 associated with it, yes.
16 Q. Let's go first into the rooster comb. That's one
17 of the two areas that you believe is the basis of your
18 opinion that the Ford transmission is not as good as the
19 General Motors?
20 A. The phraseology I used is that I felt that the
21 Ford transmission was dangerous and unsafe because of its
22 design.
23 Q. Because of the rooster comb and the width of the
1 land between park and reverse?
2 A. Yes.
3 Q. Did you have a rooster comb that came out of the
4 Ford C6 transmission?
5 A. Yes, sir. This one [indicating].
6 Q. May I see that, sir?
7 A. [Witness complies.]

8 Q. Has this been marked?

9 MR. COHEN: Yes, it's number --

10 THE COURT: 15. Is that right? Do you agree with

11 that?

12 MR. COHEN: 15.

13 BY MR. LEWIS:

14 Q. I want to refer to Exhibit 15 for the record, and

15 if you can hold this up to the jury so that the overtravel

16 rod, or this long piece here [indicating] is to your left,

17 tell us -- I think we can see from here. Tell us where

18 the park detent is.

19 A. I have to refer to the drawing on the board.

20 Q. You can't tell from looking at this?

21 A. Because the geometry of the thing is such that

22 in normal operation it functions in this manner [indicating].

20 Q. And you have -- Did you bring some other rooster

21 comb in here?

22 A. This is a rooster comb from a General Motors car.

23 THE COURT: That's referred to as 16.

1 BY MR. LEWIS:

2 Q. 16. Now, Mr. Divine, what's the difference

3 between this and the other one that makes you believe this

4 is a better design?

5 A. The fact that there is a longer distance between

6 the reverse notch and the park notch which, of course,

7 corresponds again to the insert plate.

8 Q. That's because of what's up there? We're talking

9 about two different things now? You're talking about

10 the land between park and reverse up in the insert plate?

11 A. Yes, right.

12 Q. You told us yesterday, I believe, that the rooster

13 comb on the GM was better because of this peak?

14 A. What I said was -- What I believe I said was that

15 the distance between the notch for reverse and the notch

16 for park is greater than it is on the Ford; and that, in

17 addition, the peak which appears to be somewhat more toward

18 reverse than the park -- In other words, it doesn't appear

19 to me to be exactly in the center, would result in when

20 you put the shift lever toward park and landed on the land

21 between park and reverse, that if it was over center or

22 on-center with the GM, it appears as though any motion

23 would tend to push it toward the park position in the GM.

1 Q. Have you ever made any tests in that regard?

2 A. No.

3 Q. Never have?

4 A. Other than on the Ford cars.

5 Q. You never tested the GM car?

6 A. Only one.

7 Q. What kind of car was that?

8 A. Cadillac.

9 Q. What year?

10 A. '72.

11 Q. In regard to the rooster comb?

12 A. What I did on the '72 Cadillac was to duplicate

13 the test that I made on the Ford model cars and that was

14 to operate the transmission with the emergency brake on

15 to see if I could get it to slip from park, from park land

16 into reverse.

17 Q. This rooster comb exhibit you referred to yesterday

18 and we're looking at it today, that is not the rooster

19 comb that is on the 1973 Cadillac, is it?

20 A. I don't believe so.

21 Q. That's on the Oldsmobile that's the lower -- or the

22 smaller Oldsmobile, is it not?

23 A. I believe so.

1 Q. It's not on the Olds 98 or the Cadillacs, the

2 big cars?

3 A. No, I don't think so.

4 MR. COHEN: Are you referring to the insert

5 panel or the rooster comb?

6 THE WITNESS: Rooster comb.

7 BY MR. LEWIS:

8 Q. Let me show you this, if I might.

9 It's identified as the inner detent lever com-

10 parison.

11 A. 350.

12 Q. It shows the Ford, GM and Chrysler,doesn't it?

13 A. It says it does.

14 Q. These are the rooster combs, are they not?

15 A. They appear to be.

16 Q. The rooster comb for the THM400 used in the

17 Cadillac and Olds 98 is a different configuration than

18 this [indicating], isn't it?

19 A. Yes, it is.

20 Q. It doesn't have this peak up there, does it?

21 A. It doesn't have the exact same configuration, but

22 it has the same, or approximately the same, angular distance

23 between reverse and park. In fact, your figures say that

1 it is 23.3 degrees on the 400, and 23.3 degrees on the 350 which

2 is what that one resembles [indicating].

3 Q. You're talking about a different thing than I'm

4 asking you about.

5 I'm asking you: Isn't it true that the rooster

6 comb that you brought in for the small model Olds does

7 not have the same configuration as the rooster comb in the

8 '73 Cadillar? Does it?

9 A. Not the exact same configuration.

10 Q. In fact, isn't it true that there is no peak in

11 the Cadillac rooster comb? In fact, it's flat across the

12 top, isn't it?

13 A. It looks like it's tapered. It looks like it's

14 ramped from the photograph, the photostat.

15 Q. You were engaged in this case to compare different

16 makes, were you not?

17 A. No.

18 Q. You weren't, but you did? In other words, you

19 took it upon yourself to compare, didn't you?

20 A. Yes.

21 Q. Why didn't you use the rooster comb from the GM

22 that compares to the rooster comb in the Lincoln Continental

23 of the same year?

1 A. I couldn't find one at the time I was looking

2 for it.

3 Q. You have been working on this case since 1977 or

4 '76, isn't it?

5 A. No. The first contact I had with the case was

6 in 1976.

7 Q. You were asked to investigate it in 1976?

8 A. I was asked to investigate the accident that Mrs.
9 Bartholomew had.
10 Q. And from 1976 up until today you have not been
11 able to put your hands on a Cadillac rooster comb?
12 A. Sir, I was not engaged to study the transmissions
13 in 1976.
14 Q. When were you engaged to study the transmissions?
15 A. I don't remember. May I ask Mr. Cohen to refresh
16 my memory?
17 Q. Don't you have any notes or anything?
18 A. I can leaf through. I had hoped we could save
19 the Court time. I can leaf through my notes and try and
20 find it.
21 Q. It doesn't have to be the exact day. Has it been
22 over a year?
23 A. I would say about a year.
1 Q. In a year, since you have been looking into the
2 transmissions, have you been able to find a rooster
3 comb that goes on a 1973 Cadillac or a 1973 Olds 98?
4 A. I hadn't looked for them for the entire year.
5 I didn't realize that I was going to have to have one in
6 my possession.
7 Q. But you brought this here to tell the ladies
8 and gentlemen of the jury yesterday that the peak is

9 higher on this [indicating] rooster comb than it is on
10 the Lincoln Continental.
11 A. The thing that -- The principal factor that I
12 wanted to get across to the Court in this rooster comb
13 was the difference in the distance between the reverse
14 detent and the park detent.
15 Also, at the same time, I pointed out that in this
16 particular rooster comb there was a peak that did not
17 appear in the Ford unit.
18 Q. Didn't you know that the Cadillac for '73 rooster
19 comb was flat on top and didn't have a peak?
20 A. I didn't remember that, no, sir.
21 Q. Didn't remember that, and you've been studying
22 this for a year, studying these transmissions for a year,
23 and you didn't remember that?
1 A. That's correct.
2 Q. You took the time to get all of these parts, but
3 this is misleading, isn't it?
4 A. No, sir.
5 Q. Let's go one step farther. You say your complaint,
6 in addition to the rooster comb, involves the distance
7 of travel from park to reverse?
8 A. Yes.
9 Q. And it's best described in degrees, is it not?
10 A. I believe so, yes.

11 Q. So are you aware of the difference in degrees?

12 A. Between what?

13 Q. Between the Cadillac, 1973 Cadillac, and the 1973

14 Lincoln Continental?

15 A. Looking at your Inner Detent Lever Comparison,

16 it's spelled out quite clearly.

17 Q. Do you accept that?

18 A. Yes. The numbers I had used were 14 degrees and

19 23 degrees. You are a little more specific here.

20 Q. What you're saying is it takes a movement of

21 23 degrees in the Cadillac to go from reverse to park?

22 A. Yes.

23 Q. And it takes 14 degrees in the Lincoln Continental

1 to go from reverse to park?

2 A. Right.

3 Q. Or vice versa?

4 A. Uh-huh.

5 Q. So you've told the ladies and gentlemen of the

6 jury that it is a bad design for that reason?

7 A. I believe it to be.

8 Q. You didn't bother to tell the ladies and gentlemen

9 of the jury about the Chrysler products. How many degrees

10 does it take to go from reverse to park in a Chrysler

11 product?

12 A. 12 degrees.

13 Q. Less than the Ford?

14 A. Yes.

15 Q. Any reason you didn't tell the ladies and gentlemen

16 of the jury that yesterday?

17 A. I didn't think it was pertinent.

18 Q. But the reason you say there is something wrong

19 with the Ford is that it takes less movement to go from

20 reverse to park?

21 A. Yes.

22 Q. But it even takes less on the Chrysler than it

23 does on the Ford, doesn't it?

1 A. Maybe the Chrysler is unsafe too. I haven't

2 investigated it.

3 Q. If you accept these, if it takes less movement,

4 and that's the basis for your opinion, it's got to be

5 worse, hasn't it?

6 A. I haven't investigated the Chrysler.

2 Q. Just for that clarification again: The more,

3 the higher the number, of degrees, the farther the movement?

4 A. It depends. You know, if you had a very short

5 column lever, the actual hand motion would be less than

6 if you had a longer column lever if you traveled over the
7 same number of degrees.
8 Q. The degrees are the same no matter how --
9 A. Yes, but you asked me about the distance traveled.
10 Q. I am not talking about the distance of your
11 hand. I am talking about the distance of the movement of
12 the detent in the transmission.
13 A. The rooster comb itself?
14 Q. Yes.
15 A. Again, the geometry does have an affect on it,
16 but they are essentially comparable, yes.
17 Q. That's what we've been talking about here, the
18 23 you are saying is wrong -- The Ford product is wrong
19 because it's less degrees, or less distance; it has to
20 travel 14.5 degrees as opposed to 23.1 degrees?
21 A. What I said was that the design of the Ford
22 transmission, in my opinion, encourages the prudent operator
23 to have the selector lever tang wind up on the land between
1 reverse and park.
2 And, I think, in my opinion, one of the reasons
3 for this is the fact that the land is so short and the
4 travel is relatively short on the Ford transmission.

17 Q. Now let me ask you this, Mr. Divine: You went
18 out to examine this vehicle back -- The Plaintiff's vehicle
19 back in November, November 9, 1976, did you not?
20 A. November 1976. I think it was the 5th, but I'm
21 not sure.
22 Q. 5th of November. All right. And the purpose was
23 to actually examine the vehicle?
1 A. The assignment that I had was to examine the
2 vehicle to see if I could determine what caused the
3 accident.
4 Q. You were going out there to try to see if you
5 could make that vehicle go from park to reverse, didn't
6 you?
7 A. Well, that was part of the examination, yes.
8 Q. How long did you test and try to get the Bartholomew
9 vehicle to jump from park to reverse?
10 A. Oh, probably ten or fifteen minutes.
11 Q. Did you ever get it to do that?
12 A. No.
13 Q. It was working perfectly, properly, wasn't it?
14 A. It appeared to be.
15 Q. I believe you said yesterday if the system is
16 in adjustment, it will work perfectly, properly?

17 A. It should, yes.

18 Q. And, in fact it's true, is it not, that if that

19 park tang -- Excuse me. Park tang is in the park slot,

20 if it's actually in that slot, it's not going to jump out,

21 is it?

22 A. I don't believe it will.

23 Q. So what we're really talking about is, what you're

1 saying, is an operator is careful and puts it in the park

2 slot, it just won't come out?

3 A. The shift lever won't come out of the slot, no.

4 Q. Unless the driver lifts it up and moves it to

5 another gear?

6 A. Uh-huh. Can I add something about the --

7 Q. Mr. Cohen will ask you questions, I'm sure, if

8 he wants to.

9 Let me ask you this: How long -- I believe you

10 did say ten or fifteen minutes you tried to do that?

11 A. Yes.

12 Q. How many times did you put it -- How many times

13 did you actually try it, do you remember that?

14 A. Not exactly. It's been sometime back. Say four

15 or five times.

16 Q. So if Mrs. Bartholomew had put the car in park it

17 would not have moved?

18 A. I believe not.

19 Q. And if she had put the brake on, it would not have

20 moved either, would it? In the park detent with the brake

21 on, the car is not going to move, is it?

22 A. No, unless there is a maladjustment in the link-

23 age.

1 Q. That's not a design defect, a maladjustment,

2 if the linkage gets out of --

3 A. It's not a design defect, no, sir.

4 Q. Did you, while you were out there, were you

5 ever able to get the park tang to set up on this land,

6 as you call it?

7 A. No, sir.

3 Q. I believe, Mr. Divine, we left off when you

4 indicated you had tested Mrs. Bartholomew's car and that

5 you were unable to get the tang to stay up on the land when

6 you made your investigation?

7 A. Yes, I didn't try specifically to do that.

14 Q. I thought you just told us a few moments ago
15 that you were unable to get the car to jump from park to
16 reverse?
17 A. That's right, I didn't try to do it.
18 Q. Oh, you didn't try to do that?
19 A. No, sir.
20 Q. Didn't you just tell us a few moments ago that
21 that's, you went out there and spent ten or 15 minutes
22 trying to do it and couldn't duplicate it?
23 A. Operating the shift lever. At that point in
1 time I didn't know anywhere near the amount of information
2 that I have now in regard to the transmission and its
3 problems.
4 Q. But the complaint was that the car jumped from
5 park to reverse and that's why you went out to check it;
6 isn't that true?
7 A. I'm trying to think exactly what happened back
8 three years ago. The fact was reported to me at that
9 particular time that the car backed up. There was nothing
10 said at that time that it jumped from park to reverse.
11 Q. You made a written record of it. You say you
12 can't remember back that far; didn't you make a written
13 record and report of the matter?

14 A. Yes, sir, I did.

15 Q. And didn't you indicate that you examined and

16 tested the operation of the transmission?

17 A. Let me refresh my notes, memory. I guess you

18 have a copy of that report, do you not?

19 Q. Didn't you say that we examined and tested the

20 operation of the transmission on November 5 and found it

21 normal and that we were unable to duplicate the circumstances

22 reported. We could not get it to slip from park to reverse.

23 A. Yes, that's correct.

1 Q. Does that refresh your recollection?

2 A. Yes, it does.

3 Q. And I thought that's what you said a few

4 minutes ago before the jury retired, you had spent ten or

5 15 minutes trying to get it to do that?

6 A. I think I did, yes, sir. I'm sorry.

7 Q. And you indicated I believe before the jury

8 retired for the recess that you couldn't get the thing to

9 remain up on the land. Is that correct?

10 A. I believe so.

11 Q. The land we're talking about, just using this

12 as -- is this area between park and reverse, correct?

13 A. Yes, sir.

14 Q. And your other theory other than the rooster
15 comb which we've discussed is that this land on the Ford
16 is not as wide as the one on the GM?
17 A. Yes. That is correct. The two are linked
18 together, the rooster comb and the insert plate are linked
19 together.
20 Q. All right. Now, but the Chrysler is even more
21 narrow than the Ford is it not?
22 A. I did not examine the Chrysler. I do not know.
23 Q. You did not. Weren't you interested when you
1 were looking in the transmission to see what everybody was
2 doing in transmissions?
3 A. Time was limited and I studied the GM trans-
4 mission simply because it had more vehicles than Ford did.
5 Q. Now, we've already established that if a driver
6 does put the tang and the lever into park it won't jump out
7 on its own?
8 A. Providing the transmission, the linkage is in
9 good repair, yes.
10 Q. But if a person puts it up on the land it's
11 possible from some other source that the tang might slide
12 either into park or into reverse?
13 A. That's correct.
14 Q. But that's not what Mrs. Bartholomew said

15 happened to her. She said she had it definitely in park,
16 is that correct?
17 A. I was here in the courtroom when she was giving
18 her testimony and I believe that's what she said.
19 Q. All right, sir. Now, there are -- this distance,
20 this is a blow-up, of course, and you've seen these parts;
21 we're just talking about a very small little distance on
22 the width of that land, aren't we, in either case?
23 A. The distance we talked about and that's shown
1 here is the 14 degree motion versus the 23 degree motion.
2 Q. Right. And the Chrysler, the same thing applies
3 to the lands --
4 A. Well --
5 Q. --that the Chrysler is less --
6 A. The Chrysler?
7 Q. You're going back now to 14 versus 23 and
8 Chrysler is 13, less than Ford, is that correct?
9 A. Sir, I have not studied the Chrysler.
10 Q. Well, you accepted the figures here and we've
11 talked about that. I don't really want to go back into that
12 again.
13 A. Okay.

21 Q. Yes. There are other factors too involved,
22 aren't there as far as the inch pounds necessary to move
23 the tang one way or the other?

1 A. (No response.)
2 Q. If this tang is sitting on the land it's going
3 to take inch pounds to move it one way or the other?
4 A. At the end of the lever, you mean?
5 Q. Yes, to measure it.
6 A. Well, if you're going to measure the force it
7 takes to move it, yes, you would measure it in inch pounds.
8 Q. Did you ever make that test?
9 A. No.
10 Q. For instance, do you know whether or not it's
11 easier to move the tang, it takes less inch pounds to move
12 the tang on the wider land of the GM than it does on the
13 Ford? Do you know anything about that?
14 A. I didn't study that.
15 Q. Did you make any tests? Did you --
16 A. Other than the tests that I made of the
17 operation of the lever and the system.
18 Q. When you couldn't find anything wrong. We're
19 talking about November 5, '76.

20 A. Oh, you're talking about the Bartholomew car
21 itself?
22 Q. Yes.
23 A. Well, you didn't say that. I mean I'm sorry.
1 I wasn't aware that you were talking --
2 Q. All right, well, maybe I'm not clear and I
3 apologize if I'm not clear. Did you make any tests on the
4 Bartholomew car other than what you told us?
5 A. To review again if I remember correctly I went
6 to Brown --
7 Q. Well, you know -- Did you make any tests other
8 than what you told us about on November 5, 1976 on the
9 Bartholomew car? It seems like you could answer that yes
10 or no.
11 A. I don't believe so, no.
12 Q. Did you make any tests of any '73 Lincoln
13 Continental as to what amount, foot pounds, inch pounds --
14 A. No.
15 Q. --torque to move that tang?
16 A. No.
17 Q. You didn't compare that to the GM?
18 A. No.
19 Q. Did you make any other tests on a '73 Lincoln

20 Continental regarding the width of the land?

21 A. I did test a '72 Lincoln Continental which has

22 essentially the same type insert plate and did operate that

23 transmission selector lever.

1 Q. '72 doesn't have the rooster comb, does it?

2 A. I don't know, sir.

21 Q. And do you know, did you ever measure the

22 width of these lands? These are blown up, we realize that.

23 Did you ever measure? We're just talking about infinitesima

1 or a very short little distance, are we not?

2 A. Yes, it's shown right here on the actual piece --

3 Q. Well, that's the degrees but do you know in

4 measurement how wide that is?

5 A. No. I didn't measure it.

6 Q. On any of them?

7 A. No.

2 Q. Any improper design in using different

3 configurations?

4 A. The study that I made was confined to the

5 Ford and the GM and they do have different configurations
6 and I -- it is my opinion that the Ford design leads a driver
7 to put the selector lever on the land which I conclude is
8 a dangerous and unsafe design.
9 Q. That's the land we're talking about, right?
10 A. Well, that's the GM land, yes, sir.
11 Q. And this is the Chrylser land?
12 A. I presume it is.
13 Q. It's smaller than the Ford land, isn't it?
14 A. It appears to be although I'm not sure. I
15 didn't measure either one of them.
16 Q. So again, these lands, that makes the Chrysler
17 again worse than the Ford?
18 A. Well, sir, I haven't studied the Chrysler; I
19 can't answer that.
20 Q. Well, on your hypothesis --
21 A. There are other factors that are involved that
22 I could not be sure were sufficiently similar to the Ford
23 to be able to answer your question.
1 Q. And even beyond the American manufacturers the
2 foreign people have copied this basic design, haven't they?
3 A. I don't know.
4 Q. You don't know that?
5 A. No, sir.
6 Q. Wouldn't you -- to tell the ladies and gentle-

7 men of this jury, to give them a fair picture of the automobile
8 industry and the practice in the industry, wouldn't it be
9 necessary to also to be fair to consider the Chrysler?
10 A. What I was asked to do was to examine the Ford
11 transmission and try to determine whether I felt that it was
12 an adequate and safe and -- adequate and safe transmission.
13 Q. And in fact, when you made the examination
14 back in November you found that there was nothing wrong with
15 it, you couldn't find anything in the world wrong with it,
16 could you, and so reported?
17 A. In November, 1976 when I examined the
18 Bartholomew vehicle I had not been aware of some of the
19 deficiencies in the transmission at that time and could not
20 therefore check that vehicle for those deficiencies.
21 Q. Then let's go further then. Just one more
22 question in that area. If you came, if you did study the
23 Ford and GM and you came to -- you saw they were a little
1 different, instead of stopping there and saying just because
2 they're different and just because GM has a little wider
3 land that makes theirs better, wouldn't it be fair to have
4 a valid study of the transmissions of the '73s to go and
5 look at the Chrysler?
6 A. At the time we had sufficient time to only do
7 what we had to do.

8 Q. We're talking about one year, is that correct?

9 A. One year elapsed time, yes, sir.

10 Q. And you didn't have time to look at a Chrysler

11 and come in to tell the ladies and gentlemen of the jury how

12 the Chrysler compared to the Ford and the GM?

13 A. And the other thing, of course --

14 Q. Is that correct, you didn't have time in that

15 year to do that?

16 A. I determined that I would not do that simply

17 because the General Motors design was reflected by approxi-

18 mately twice the number of vehicles than Ford was and the

19 Chrysler, of course, would have been a far smaller sampling.

20 Q. In other words, what's good for GM is good

21 for you? Just because it's different from GM it's wrong?

22 Is that correct?

23 A. No, sir.

1 Q. But that's what you're saying. They make a

2 lot more cars than anybody else so if nobody meets up to

3 their standard it's not good?

4 A. It would give us a better sampling.

5 Q. And that's why you didn't look at Chrysler?

6 A. Yes.

7 Q. And let's go to one more thing. If an operator

8 puts the tang in park, puts the brake on, that car is not

9 going to move, is it?

10 A. Providing the linkage is in good repair it will
11 not.
12 Q. And you've told us already that linkage out of
13 alignment or a linkage problem is not a design problem?
14 A. I don't believe it is, no, sir.

15 Q. And in the beginning of the Bartholomew case
16 you were told by Mrs. Bartholomew that the car jumped out
17 of park and went into reverse and ran over her?
18 A. No, sir.
19 Q. Correct?
20 A. No, sir.
21 Q. You were not told that?
22 A. No, sir.
23 Q. What were you told?
1 A. The person that assigned me to the case asked
2 me to go out and try to determine why the car ran backwards.
3 Q. Why the car ran backwards; not why it jumped
4 out of park?
5 A. That's correct.
6 Q. When did you first find out that the car
7 allegedly jumped out of park?

8 A. After I investigated the case and got to the
9 Brown Lincoln Mercury showroom, service department.
10 Q. You contacted Mrs. Bartholomew?
11 A. No, sir.
12 Q. You did not?
13 A. No, sir.
14 Q. When did you first contact Mrs. Bartholomew?
15 A. I did not. Mrs. Bartholomew called me some
16 months after the investigation was made and the report
17 prepared for the investigation that I -- the initial investi-
18 gation that I made into the Bartholomew's car's accident.
19 Q. So it wasn't until several months after the
20 report that you issued in this case that you first talked
21 to Mrs. Bartholomew?
22 A. That's correct.
23 Q. And she contacted you?
1 A. Yes, that's correct.
2 Q. Now, as an expert given the task of attempting
3 to find out what happened did you not think it significant
4 if not important, if not critical, that you know what
5 allegedly took place?
6 A. Yes, sir.
7 Q. But yet you did not talk to Mrs. Bartholomew
8 until months after you issued your report as to what

9 happened and your conclusions?

10 A. That's correct.

21 Q. Didn't you at that time think it important

22 enough to you in looking into this case and publishing a

23 report on it with conclusions as to what happened, to talk

1 to Mrs. Bartholomew and find out from her?

2 A. No, sir.

1 Q. Now you were asked on the stand, Mr. Divine,

2 you heard what Mrs. Bartholomew, the plaintiff, relates?

3 A. Uh-huh.

4 Q. And you were asked based on your expertise in

5 the field and what Mrs. Bartholomew tells us, do you have

6 an opinion with a reasonable degree of medical probability

7 or engineering probability or whatever the standard was,

8 do you have an opinion. And you said, yes. Correct?

9 A. I don't think that Mrs. Bartholomew's testi-

10 mony was a part of the question that was asked of me.

11 Q. Are you telling us now that your testimony in
12 this case was not at all based on what Mrs. Bartholomew
13 testified to?
14 A. Well, Mrs. Bartholomew testified that she put
15 the lever into park and --
16 Q. Well, I'm aware of what Mrs. Bartholomew testified
17 That wasn't the question. The question was, did you base
18 any of your opinion on Mrs. Bartholomew's testimony or
19 version of what happened?
20 A. No, sir.
21 Q. You did not. Is that correct?
22 A. Yes, that's correct.
23 Q. It doesn't matter what Mrs. Bartholomew's
1 version is?
2 A. No, sir, not as far as the engineering study of
3 the transmission is concerned.
4 Q. Your conclusion is that Mrs. Bartholomew never
5 put the car in park?
6 A. Yes.
7 Q. It doesn't matter what she said about that?
8 A. That's exactly right. She thought she did,
9 I'm sure.
10 Q. Why are you sure she thought she did?
11 A. Because she said so.

12 Q Then it does matter what Mrs. Bartholomew says?

13 A From the standpoint of the function of the

14 transmission and the design of the transmission, no, it does

15 not make any difference what Mrs. Bartholomew said.

16 Q You mean any time a car goes backwards it's

17 going to be a transmission problem?

18 A No, sir.

19 Q It could be other problems, couldn't it?

20 A Well, it could be deliberate too.

21 Q It could be an accident, couldn't it, failure

22 to put it in park?

23 A Yes.

1 Q It could be failure to put on the emergency

2 brake?

3 A Yes, of course.

4 Q All right. Now let me ask you this, in your

5 opinion as to the cause of this accident was the emergency

6 brake on or not?

7 A When the car slipped into reverse as it

8 apparently did --

9 Q Why do you say, apparently did?

10 A Well, because I didn't see it. I wasn't there.

11 Q You're relying on Mrs. Bartholomew. How do

12 you know that car slipped into reverse?

13 A I don't.

6 Q. I was asking you about your opinions and
7 conclusions that were solicited from you by Mr. Cohen
8 concerning the cause of this accident.
9 A. And that is that the transmission leads
10 people, reasonably prudent people to -- the design of the
11 transmission leads them to put the selector lever in the
12 area between the park and reverse position where it can
13 slip out.
14 Q. Are you assuming in this case that it did slip
15 out?
16 A. The car apparently moved backwards according
17 to testimony that I heard and for it to do that it must
18 have slipped out.
19 Q. I thought you said that once it went into park --
20 A. I'm sorry. I --
21 Q. --it could not slip out?
22 A. It would have been left on the land between
23 park and reverse and then slipped from the land into the
1 reverse position; not slipped out of park; slipped out of
2 what Mrs. Bartholomew thought was park.

8 Q. Then what did Mrs. Bartholomew tell you?
9 A. That the car backed up over her.

10 Q. Then how do you conclude from that that it
11 slipped into reverse?
12 A. For it to back up over her under power it would
13 have had to be in reverse.
14 Q. Under power, what does that mean?
15 A. The engine driving the car.
16 Q. How do you know the engine was driving the car?
17 A. I can't be positive. The --
18 Q. In fact, you don't know, do you?
19 A. Well, other than the car's reported to have
20 run over her and if it was level ground the car wouldn't
21 have traveled by itself.
22 Q. Was it level ground?
23 A. I don't know.
1 Q. Have you seen the ground?
2 A. No.
3 Q. Did you ask?
4 A. No.
5 Q. Was that important to you if you're going to
6 testify that in order for it to have run over her while it's
7 under power whether the ground was level or sloped?
8 A. I should have asked, yes.
9 Q. You should have asked. Should you have gone
10 to the scene and looked?

11 A. Yes.

12 Q. But you didn't?

13 A. I didn't.

14 Q. And you didn't ask? And you don't know?

15 A. No.

16 Q. So you don't know whether it was under power

17 or not, do you?

18 A. No.

19 Q. You're indicating, no. And you don't know

20 whether it went in reverse or not, do you?

21 A. Not from my own personal knowledge, no.

8 Q. And then if it were to slip into reverse

9 somehow, albeit grocery bags in the back seat or for

10 some other way, there would be a tremendous lurch backwards,

11 wouldn't there?

12 A. There would be a motion backwards.

13 Q. A lurch backwards, wouldn't there?

14 A. Not necessarily, no.

15 Q. How do you know?

16 A. Because I've tried it.

17 Q. You've tried it?

18 A. Yes, I have.

19 Q. And there wasn't a lurch back?

20 A. It depends on how you do it. As the trans-

21 mission slips into the reverse gear it can accelerate very

22 smoothly and very slowly if it happens over a period of

23 time, a few seconds.

20 Q. Did you question Mrs. Bartholomew as to whether

21 she heard the thud that is made when the emergency brake is

22 released?

23 A. No.

1 Q. Were these important to you?

2 A. I should have asked them.

3 Q. But you didn't?

4 A. No.

5 Q. Now, you talk about a reasonably prudent person

6 and that's the trouble with Mr. Ford's product is because

7 reasonably prudent people can get hurt by it, is that what

8 you're saying?

9 A. Because of the design of the transmission, yes.

10 Q. Now would, does a reasonably prudent person

11 when they put it in park just pull it down a little bit to
12 insure that it's in park?
13 A. No.
14 Q. A reasonably prudent person doesn't do that?
15 A. I base that on the fact that I feel I'm a
16 reasonably prudent person and I don't and I'm aware of the
17 problem and I'm very careful about it.
18 Q. But you don't once you put it in park kind of
19 pull down a little bit?
20 A. No.

1 Q. When did you become an expert in C6 transmis-
2 sions and what happened in this case?
3 A. I suppose when I was qualified by the Court.
4 Q. No, but when in your mind, Mr. Divine, did you
5 become an expert in the C6 transmission and the cause of
6 this accident?
7 A. After study --
8 Q. Dates.
9 A. --and investigation -- I'm trying to think
10 about it when I would consider that I became sufficiently

11 expert to be able to testify. I would think about three
12 months ago.
13 Q. All right. But on November 16th, 1976 after
14 having played with the transmission for some ten to 15
15 minutes on November 5th, 1976 you were expert enough to
16 publish a report over your letterhead with conclusions as
17 to the cause of this accident, weren't you?
18 A. I was able to not publish a report but deliver
19 a report because that --
20 Q. Deliver a report.
21 A. --report was never published as such.
22 Q. With your signature on it and your reputation
23 behind it?
1 A. That's right.
2 Q. Even though you weren't an expert in it until
3 three months ago?
4 A. That's right.
5 Q. And your conclusions, sir --
6 A. You asked me, sir, when I considered myself an
7 expert.
8 Q. Yes, sir. Yes, sir. But you're willing to
9 publish a report a year and one-half before you consider
10 yourself an expert? Correct?
11 A. Yes.

12 Q. And your conclusions back in November of 1976
13 were, there were two conclusions, weren't there?
14 A. I'd have to look at the report again but I
15 believe so, yes. Yes.

4 Q. Mr. Divine, would you please explain to the
5 Court and jury why you issued a report in 1976 before you
6 considered yourself an expert on the C6 transmission?
7 A. Well, the insurance -- I'm sorry. The company
8 that asked me to study the accident knew that I was a
9 registered professional engineer and that I was generally
10 familiar with automobiles and that I'd done work with them
11 before in like situations and so I undertook the assignment
12 thinking I could be of service to them.
13 Q. And what were you focusing on when you under-
14 took the assignment?
15 A. Well, in the first place I objected to taking
16 the assignment because I felt from my knowledge, then
17 knowledge of transmissions and automatic transmissions that
18 the probable cause of the accident was a failure to put the
19 transmission in park.

20 And I asked them to not waste their money and
21 my time in looking into a thing that is as reasonably common
22 and simple as that type accident. They insisted that I go
23 and look at the car which I did and, of course, when I got
1 to the dealership the car had been repaired and seemed to
2 function in a completely normal manner.
3 Discussions with the service people revealed
4 that they had repaired the car --
5 MR. LEWIS: Wait a minute. I don't think it's
6 proper to say what somebody else told him, if the Court
7 please.
8 MR. COHEN: If Your Honor, please I think it
9 comes in under a clear exception to the hearsay rule.
10 We're asking him why he did what he did. We're not offering
11 any hearsay for the truth of the statement --
12 THE COURT: Very well. I --
13 MR. COHEN: --herein and I also proffer to the
14 Court that Mr. Ross is here and will testify right after
15 Mr. Divine.
16 THE COURT: I overrule the objection and I
17 instruct the jury that in this instance if he refers to
18 what someone else told him it's not for the truth of the
19 matter asserted in that statement but as a reason for why
20 he did something. Go ahead.

1 BY MR. COHEN:

2 Q. Go ahead. What were you told and what did you

3 do as a result of what you were told?

4 A. Mr. Ross told me that they had replaced a

5 broken grommet and I asked him if I might have the grommet

6 and he gave it to me.

7 Q. All right. And then you --

8 A. I purchased another grommet while I was there

9 at the Lincoln Mercury dealership and found on subsequent

10 investigation that the material that was used in the grommet

11 that had been in the car which apparently was an original

12 grommet, although I wouldn't be sure, varied from the

13 grommet that I purchased at the time in 1976.

14 Q. Is it fair to say then that your focus was on

15 the grommet and the linkage when you first investigated the

16 Bartholomew accident?

17 A. Yes.

18 Q. When was it that you began to focus on the C6

19 transmission design and application?

20 A. When an attorney asked me to come down into

21 Altavista, Virginia to look at a transmission in a Ford

22 pickup truck that had been involved in an accident.

23 Q. All right.

1 A. And that was probably -- Oh, I think probably
2 six months to a year after I looked at the Bartholomew car.
3 Q. So from the time you first looked at the
4 Bartholomew car to the time you went to examine the other
5 car in Altavista, Virginia, did you do any further work on
6 the Bartholomew case at all?
7 A. Not per se. Only in informational reading and
8 study about the transmission problem that existed with
9 Ford Motor Company.
10 Q. What began to evolve from the information you
11 received and in your thought processes about the C6 as time
12 went on and you began to receive more information?
13 A. Well, having owned Ford Motor cars for some
14 time, of course, I was concerned personally about the
15 safety of the car. And I did experiment with my own
16 vehicle and with other vehicles that I could find to test
17 and experiment with.

15 Q. What were the tests you made and on what kind
16 of cars?
17 A. Well, I had a 1974 Mercury Marquis which has
18 a C6 transmission and I was able to experiment with that,

19 of course, since it was my own. And I could duplicate the
20 reported hang-up or -- I'm sorry. I could duplicate the
21 reported slip from the illusory park, if you will, into
22 reverse in my own automobile.
23 Q How did you do that?
1 A By maneuvering the shift lever with the
2 emergency brake on. Of course, I had to hold my foot on it
3 because the 1974 Marquis was like Mrs. Bartholomew's
4 Continental in that the, when the transmission lever was
5 put into reverse it would release automatically the
6 emergency brake.
7 But, keeping my foot on the emergency brake I
8 could move the lever until I got it hung up. You could feel
9 it and you could sense it in your own car if you try, hung
10 up on the land between park and reverse and then slam the
11 door or shake the steering wheel or whatever and it would
12 slip into reverse.
13 Q You were able to duplicate that --
14 A Yes.
15 Q --with a slamming of the door?
16 A Yes. Incidentally, my '79 Mercury Marquis does
17 the same thing.
18 MR. LEWIS: If the Court please.

19 THE WITNESS: I'm sorry.

20 THE COURT: I instruct the jury to disregard

21 the last statement. There is no question.

1 Q. Now our earlier, it was today or yesterday, I

2 forget when, you said that the transmission is a fine piece

3 of engineering and Mr. Lewis has picked up on that and

4 inferred that you were saying that the Ford transmission,

5 C6 transmission with the detent, with the insert plate and

6 rooster comb is a fine transmission.

7 Is that what you were telling this Court?

8 A. No, sir. What I was trying to get across was

9 that the engineering refinement in the construction and the

10 design of the automatic transmissions used in our industry

11 is a really remarkable piece of work, a remarkable piece of

12 equipment.

13 The maintenance problems on them are minimal,

14 they're quite reliable and they work very well. This does

15 not mean to say that the Ford C6 transmission is a safe

16 piece of equipment. As I said before, in my opinion the

17 transmission is designed to permit the operator or to

18 encourage the operator, and a prudent operator, to have the
19 transmission lever hang up on the land between park and
20 reverse with the attendant possibility of the transmission
21 slipping into reverse and causing damage.

4 Q So when you -- based on what Mr. Snead asked
5 you, when you examined the car back in November of 1976 you
6 could find nothing wrong with the transmission?
7 A That's correct, sir.
8 Q And you at that time reported that or made some
9 comment about a grommet, you found a grommet was broken.
10 Did you ever make any tests on what affect a broken grommet
11 would have?
12 A I did not make any tests, no.
13 Q You could have if you'd wanted to, couldn't you?
14 A Well, I would have had to duplicate the
15 conditions and it would have been quite difficult.
16 Q So you don't know from any tests what affect
17 that would have on the operation of the transmission and the
18 linkage?
19 A Not from tests, no.

16 Q. I show you what's already been introduced into
17 evidence as Plaintiff's Exhibit number two and tell me
18 whether you can identify this.
19 A. This looks like one of our repair orders dated
20 10/26/76.
21 Q. Now, in your position with the Lincoln Mercury
22 dealer at that time would you've had supervision over the
23 person who repaired this work order?
1 A. Yes, sir.
2 Q. And to the best of your knowledge was this work
3 done by O'Brien and Rohall?
4 A. Yes, sir.
5 Q. I was wondering if you could read what work
6 was done by the company?
7 MR. LEWIS: If the Court, please, I think if
8 he wrote it on there, fine. But I don't believe if somebody
9 else wrote it on there I don't think he would -- Unless he
10 did the work or he saw the work done I don't think he would
11 be the proper person to read what's on the work order.
12 THE COURT: I overrule the objection.
13 MR. LEWIS: Exception please.
14 THE WITNESS: You want me to read the whole

15 work order?

16 THE COURT: Well, first of all, do you recall

17 what work was done on the car?

18 THE WITNESS: I can remember what work was done

19 on this particular car.

20 THE COURT: You can?

21 THE WITNESS: To some extent.

22 THE COURT: Okay. Would you tell as best you

23 can, as best you recollect what work was done and if you

1 can't recall you may use that to refresh your recollection.

2 MR. LEWIS: Your Honor, if I might ask, may we

3 clarify and ask him whether it's based on what somebody told

4 him or whether or not it's something that he knew?

5 THE COURT: How do you recall? What's that

6 based on?

7 THE WITNESS: Okay. I think the easiest way to

8 explain it would be to read the work done on the repair order

9 on the particular part of the vehicle that we're concerned

10 about which says here, repair shift linkage and adjust.

11 THE COURT: In doing this is this something that

12 you did personally or that you observed or someone told you

13 you or was done under your supervision?

14 THE WITNESS: Okay. It's nothing that I did

15 personally. The only thing I did was hand this work ticket

16 out to be done.

17 THE COURT: Then what did you do when the work

18 was over?

19 THE WITNESS: I completed this ticket to be

20 processed.

21 THE COURT: How do you know the work was done?

22 THE WITNESS: We'd never know for sure except

23 the man that did the work told me what he did.

1 THE COURT: All right. Go ahead.

2 THE WITNESS: The ticket says, check trans-

3 mission, comes out of gear at times and report. And --

4 MR. COHEN: Talk a little louder Mr. Ross. I

5 can't hear you.

6 THE WITNESS: It says, check transmission,

7 comes out of gear at times, report. And, we repaired shift

8 linkage and adjusted. It says here, save all parts.

9 BY MR. FIEDLER:

10 Q. To the best of your knowledge, Mr. Ross, were

11 the old parts saved?

12 A. Yes, we saved the old parts.

13 Q. And did there come a time when Mr. Divine came

14 to see you?

15 A. Yes.

16 Q. Would that have been in November of 1976?

17 A. (Nodding head.)

18 Q. And did Mr. Divine ask you for any kind of a
19 part from the Bartholomew vehicle?
20 A. He asked for the grommets that we replaced on
21 the shift linkage.
22 Q. And did you -- Were you able to produce for him
23 the grommet from the linkage of this C6 transmission?
1 A. I gave him the grommet that the technician
2 gave me.
3 Q. Let me show you these items here and tell me
4 whether you can identify them?
5 A. They look like grommets.
6 Q. Now is there anything peculiar about any of
7 these grommets?
8 A. Well, this one's -- this here the grommet's
9 all together and the other one's split in two different
10 pieces.

18 THE COURT: Do you recall the condition of the
19 grommet you gave Mr. Divine?
20 THE WITNESS: I gave Mr. Divine a grommet that
21 showed wear, it did not look new. I can't identify the

22 grommets there of being the same grommets. All old grommets
23 look like old grommets to me.

1 BY MR. FIEDLER:

2 Q. Did you have a discussion with Mr. Divine as
3 to where the grommet that had to be replaced on the
4 Bartholomew vehicle?

5 A. Yes, he asked where it was located, what
6 grommet we replaced.

7 Q. I was wondering if you could step over here,
8 Mr. Ross and look at Plaintiff's Exhibit No. 10 and tell me
9 whether or not you can identify now where you identified
10 the grommet to Mr. Divine?

11 A. He had a shop manual with this diagram and I
12 think we circled this grommet right there.

13 Q. So it would be the one right next to the column
14 shift shift lever?

15 A. Yes, sir.

16 Q. On your work order which has already been
17 admitted into evidence, Mr. Ross, there's a list of parts
18 on the upper left-hand corner and I was wondering whether or
19 not you could identify any of the parts there as being a
20 grommet which was replaced on the Bartholomew vehicle?

21 A. I don't remember Ford part numbers that well.

22 I think it's this one called insulator. That's --

23 Q. Could you read the number?

1 A. It's 1V -- I'm sorry, D5AZ4341 insulator.

2 Q. And the quantity?

3 A. It's one, one.

4 MR. FIEDLER: Your Honor, I'd like to move these

5 grommets into evidence as Plaintiff's Exhibit No. 18.

6 THE COURT: Is there any objection?

7 MR. LEWIS: I -- Go ahead.

8 MR. SNEAD: Your Honor --

9 THE COURT: Do you object or not?

10 MR. SNEAD: I have to object. I don't --

11 THE COURT: I sustain the objection.

15 Q. I believe you already told us that you did not

16 do any work on the car?

17 A. No, sir.

18 Q. And all of your information was told to you by

19 the mechanic?

20 A. Yes, sir.

21 Q. You don't know -- The grommet that you showed

22 us here, did that come out of a trash can or do you know?

23 Do you remember that?

1 A. Now I can't tell you where it came from.
2 Q. You don't know where it came from?
3 A. No.
4 Q. And you don't know what condition it was when
5 it was on the car?
6 A. Never seen it on the car, sir.
7 Q. You don't know whether it was cracked or broken
8 or anything on the car?
9 A. (Nodding head.)
10 Q. You'll have to say --
11 A. Yes; I'm sorry.
12 Q. Then these were just given to you by --
13 A. Yes, the ticket states to save old parts.
14 Q. Right.
15 A. The technician saved the old parts.
16 Q. You are familiar with the C6 transmission in
17 this car and have worked with them for years?
18 A. Well, not really because, let me clarify that.
19 When I was a technician we didn't have a C6. It came in
20 later and I can't really say I've done a whole lot of work
21 on the C6.
22 MR. LEWIS: All right. I don't have anything
23 further.

1 MR. COHEN: I'd like to move the admission of
2 these grommets, Your Honor.
3 THE COURT: Is there objection?
4 MR. LEWIS: Yes.
5 MR. SNEAD: Yes, Your Honor.

12 THE COURT: Okay. Mr. Snead, what's the basis
13 for your objection. Your Honor, it's twofold. First is the
14 question of the custody of, the chain of custody of the
15 particular item.
16 I don't think there's any question that Mr.
17 Divine sitting her got a grommet from Mr. Ross. He says that
18 the one that is sought to be introduced in evidence was the
19 one that he got from Mr. Ross.
20 Mr. Ross says, I don't know where I got this
21 grommet from. He said that, it is our custom to change parts
22 we save the parts but he said he didn't know where that
23 grommet came from and that's the chain of custody half of
1 the objection.
2 The second objection would be to the materialit
3 of it because we don't know what shape the grommet, whatever
4 grommet was on the car, was in while it was still in place on

5 the car.

6 And if that piece of the grommet is sought to

7 be introduced to show that it was in that condition when it

8 was on the car then I think clearly it's inadmissible for

9 that reason because the uncontroverted testimony by Mr. Ross

10 is they don't replace them.

11 They sometimes push them off with their thumb,

12 they sometimes knock it out with a screwdriver, they some-

13 times cut it with dikes and they sometimes take it off with

14 pliers.

15 And he testified that it's not always in the

16 same condition when it comes off as it was on the car. So

17 don't -- Wouldn't that be speculative on the part of the

18 jury as to whether the grommet in question looked like that

19 while it was on the car?

20 For that reason I would object as well as the

21 chain of custody.

22 MR. LEWIS: I'd just like to join him very

23 briefly on really the same last point. Mr. Ross did not

1 work on the car. He did not know the condition of the

2 grommet on the car. The only thing he knows is the condition

3 of the grommet when he got it and it's a big factor. Was

4 the grommet defective on the car? Was it split while it

5 was on the car or was it damaged while it was taken off?

6 He doesn't know. And I think to put something
7 like that in, allow it in to the jury it puts the court's
8 stamp of approval that this is admissible evidence and by
9 implication the plaintiff can argue, well, this is the
10 condition of the grommet on the car.
11 Nobody knows that and I would respectfully
12 join in with Mr. Snead. Unless there's testimony that the
13 grommet was in a defective condition on the car and it's in
14 the same condition as it was on the car I don't think it
15 should be admitted.
16 THE COURT: Mr. Cohen, would you like to answer
17 that?
18 MR. COHEN: Your Honor, please. I think that
19 the requirements that refer to chain of custody all come
20 from criminal cases and that the same standard does not
21 apply in the civil cases.
22 It is very difficult to find civil cases that
23 apply on the admission of objects not in chains of custody
1 but even if you look at some of the criminal cases they do
2 make some distinctions in The Law of Evidence, Professor
3 Friend's book.
4 They point out on page 305 where a tangible
5 solid object is being offered and no chemical analysis is
6 involved the Court should require no more than that a witness

7 testify that the item is what it purports to be and that its
8 condition has not changed materially since its initial
9 discovery.
10 If the offered item possesses characteristics
11 which are fairly unique and readily identifiable and if the
12 substance of which the item is composed is relatively
13 impervious to change the trial court is viewed as having
14 broad discretion to admit merely on the basis of testimony
15 that the item is the one in question and it is in a sub-
16 stantially unchanged condition.
17 I think what we want to do is have it admitted
18 to show that this was the grommet that was taken from the
19 car. There is no inference that it was split in two pieces
20 when it was on the car.
21 We would even be willing to stipulate that it
22 had to be split in two pieces when it was taken off the
23 car. That is not even the point. But there is a crack in
1 the rim on the bottom that the jury should see and there is
2 the work order ticket that says that the grommet or it's
3 called an insulator on there, had to be replaced and I think
4 that the reasonable inference that the jury can conclude
5 from seeing it is that, one, if they don't replace things
6 that don't have to be replaced, two, if a man says that
7 under his supervision it was removed and he gave it to Mr.

8 Divine and if Mr. Divine has testified that he's had it all
9 this time then it ought to be admissible.
10 THE COURT: Well, I asked that witness
11 specifically myself whether or not it was done under his
12 supervision and he said, no.
13 MR. COHEN: I thought he said, yes, Your Honor
14 THE COURT: No, he said it was not under his
15 supervision. His answer -- I asked him and he said, no.
16 At any rate I sustain the objection. I don't think it's
17 a question, the reference that you quote there I think makes
18 sense that we would not object to what Mr. Divine has done
19 with it to have to establish any more than it's been in his
20 custody but I don't think there's been a showing that that's
21 the grommet that came off the car in question.