DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
*January Term 2010*

**MITSUBISHI MOTORS CORPORATION,**
Appellant,

v.

**PETER LALIBERTE,** as Personal Representative of the Estate of SCOTT T. LALIBERTE, deceased,
Appellee.

No. 4D08-2211

[June 16, 2010]

DAMOORGIAN, J.

This is a products liability case that resulted in a multi-million dollar judgment against Mitsubishi Motors Corporation. Mitsubishi appeals on two grounds. First, it claims that the trial court made improper and unfairly prejudicial comments to the jury, thus denying it a fair trial. Second, it argues that the trial court's evidentiary rulings in connection with its expert testimony were contrary to the law and prevented it from mounting legally permissible defenses to the products liability claims. We agree with Mitsubishi on the second ground and remand for a new trial.

On September 25, 2004, Lyann Agresar was driving a 2000 Mitsubishi Nativa. Scott Laliberte was seated in the vehicle's front passenger seat. Both occupants were wearing their seat belts. During the trip, Agresar lost control of the vehicle while traveling seventy to eighty-five miles per hour. The vehicle rolled over multiple times. While the vehicle was rolling, Laliberte's stitched loop seat belt performed as designed and tore loose, providing ten inches of additional seat belt webbing. Additionally, Laliberte's seatback deformed and reclined rearward to the point that it contacted the rear seat in the vehicle. Laliberte was partially ejected through the rear passenger window, which had broken, causing his head to come in contact with the ground. He subsequently died from injuries he sustained in the accident. Agresar remained in the vehicle during the accident and sustained no permanent injuries.

Peter Laliberte, the personal representative of Laliberte's estate, filed a products liability lawsuit against Mitsubishi, seeking compensatory and punitive damages based on theories of strict liability and negligence. He claimed that design defects in the seat belt, seatback, and side window glass caused Laliberte to be partially ejected; and absent these defects, he would not have been injured. The jury found the vehicle's seat belt design was defective and a legal cause of Laliberte's injuries, resulting in his death.

The first issue on appeal arose when plaintiff's counsel requested that the jurors be allowed to inspect two Mitsubishi Montero sport utility vehicles for demonstrative purposes.[1] While the jurors were inspecting the vehicles, it was discovered that the front passenger seatbacks of both vehicles would not fully recline. Although it was later revealed that this problem was caused by a coin in each of the seats' reclining mechanisms, counsel agreed that the court should instruct the jury that there was a problem with the passenger seats and that they should operate like the driver seats. Two separate jury instructions were given, and each time the court inadvertently used the word "defect" in describing the problem with the reclining mechanisms in the passenger seats. The instruction also informed the jury that the front passenger seatbacks had originally reclined like the driver seats. After the second instruction, one of the jurors questioned what the judge meant by use of the word "defect." The judge responded, "No, it simply doesn't operate or something similar to that."

Mitsubishi moved for a mistrial, arguing that the court's use of the term "defect" was highly prejudicial because it was a comment on the evidence and ultimate issue in dispute. The court denied the motion, finding that there was no reasonable doubt that the jurors understood that the coin in the recliner mechanism was wholly unrelated to the design defect allegations involved in the case. The court next gave the following curative instruction to the jury:

> Immediately before lunch on Thursday you viewed exemplars of both the 2000 and 2000.5 Mitsubishi Montero. The exemplars were provided by Plaintiff. As you know, the right front seats in both vehicles did not recline. We have since learned that a quarter was located in the inboard inertial locking mechanism of each seat that prevented the seats from reclining. Mistakenly during the view, I referred

[1] The Nativa and Montero are substantially the same vehicle.

> to the failure of the right front passenger seats to recline as a defect. This was a misstatement by me. Obviously the inboard inertial locking mechanism did not operate correctly because there was a quarter in each mechanism preventing proper operation. Simply put, the exemplars' right front passenger seats' inability to recline during your inspection was caused solely by the placement of the coins which operated as stops, and had nothing to do with the mechanism's design or manufacture. I now instruct you, that when considering the evidence in this case, you must completely disregard the issue with the right front passenger seats' on the exemplars inability to recline. If you anticipate any problem following this instruction, please raise your hand.

No member of the jury responded either verbally or by hand gesture.

Mitsubishi argues that the trial court's comments constituted a statement on the evidence and the ultimate issue to be decided, in violation of section 90.106, Florida Statutes (2008) ("A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused."). *See also Jacques v. State*, 883 So. 2d 902, 905 (Fla. 4th DCA 2004) ("For the trial court to accuse defense counsel of misrepresenting the evidence not only cast counsel in a poor light in front of the jury but, more importantly, supported the state's argument by implying to the jury that, in the court's view, Fondrose was a biased witness."); *Vaughn v. Progressive Cas. Ins. Co.*, 907 So. 2d 1248, 1252 (Fla. 5th DCA 2005).

By arguing that the court's comment violated section 90.106, Mitsubishi seeks to have us apply a de novo standard of review. However, given the context within which the statement was made, and a reasonable interpretation of the trial court's use of the word "defect" within that context, we hold that the trial court's comment was not intended to serve as a comment on the evidence or the court's opinion on the ultimate issue of liability. Accordingly, we review the trial court's denial of Mitsubishi's motion for mistrial under an abuse of discretion standard. *See Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999) ("[A] motion for mistrial is subject to an abuse of discretion standard of review." "A motion for mistrial falls within the sound discretion of the trial court, and should be granted only when necessary to ensure that the defendant receives a fair trial." *Siprien v. State*, 812 So. 2d 536, 539 (Fla. 4th DCA 2002).

Under an abuse of discretion standard, inadvertent and adequately-cured comments by a judge are not grounds for a mistrial. *See Baker v. State*, 578 So. 2d 37, 38 (Fla. 4th DCA 1991) ("[T]he inadvertent comment in the instant case does not involve a trial judge's improper comment upon the testimony of witnesses or departure from an impartial role.").

It is clear on the record before us that the trial court's reference to the seat being defective was inadvertent and not calculated to serve as a comment on the evidence. Moreover, any confusion on the part of the jurors was quickly resolved by the trial court giving a curative instruction and then inquiring whether any juror could not follow the instruction. No juror responded that he or she could not. Accordingly, we hold that the trial court did not abuse its discretion by denying Mitsubishi's motion for mistrial.

Turning to the second issue on appeal, Mitsubishi claims that the trial court's exclusion of certain defense expert witnesses' test results left it stranded with bare expert opinions that were "drained of force and color" because they were unsupported by demonstrable proof. Mitsubishi argues that the plaintiff capitalized on these evidentiary rulings during closing by implying that the expert opinions were not supported by science. In sum, Mitsubishi argues that the court's rulings resulted in extreme prejudice, entitling it to a new trial.

In its complaint, the plaintiff alleged that the Nativa's front passenger seat belt was defectively designed because it allowed too much slack in the belt during the accident. The plaintiff further asserted that the seatback was defective because it yielded rearward in the accident. The plaintiff claimed that this combination of defects allowed Laliberte to be partially ejected, resulting in his death. At issue in this case were two vehicle components of the 2000 Nativa: (1) the seat belt associated with the right front passenger seat, and (2) the seatback.

The front passenger seat belt in the 2000 Nativa incorporated an energy management ("EM") or energy absorbing ("EA") stitched loop system.[2] This stitched loop seat belt system was designed in such a manner that ten inches of seat belt webbing was folded over and sewn together with a series of threaded stitches contained within a plastic scabbard. The seat belt stitches were designed to break loose and introduce additional seat belt webbing into the right front passenger's

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[2] These terms were used interchangeably at trial.

restraint system to better manage occupant movement in frontal impacts.

The vehicle's seatbacks were designed with an outboard recliner mechanism that allowed them to recline or straighten to a comfortable position. In a rear impact, the seatback was designed to yield rearward in response to force, and was intended to deform in order to dissipate energy. The passenger seatback also had a unique inertial lock on the inboard side that was designed to engage in the event of a significant impact that resulted in rearward-moving forces. Once engaged, the inertial lock allowed these collision forces to dissipate throughout the rest of the system.

At trial, Mitsubishi argued that Laliberte's injuries were caused by the severity of the accident and not by any design defects in the seat belt or seatback. As to its use of the EM stitched loop seat belt design, Mitsubishi's experts testified that, even if Mitsubishi had utilized the other seat belt systems suggested by the plaintiff's experts, Laliberte still could have been ejected from the vehicle and suffered the same injuries. Moreover, the EM loop design provided safety features not present in the other designs. With respect to the design of the Nativa's passenger seat, Mitsubishi's experts opined that: (1) its passenger seat design was safe; (2) the plaintiff's alternative seat design posed greater dangers to the occupant; and (3) the seat conformed to industry custom and standards. To support these conclusions, Mitsubishi attempted, through its experts, to introduce demonstrative evidence consisting of photographic slides, statistics, and video showing various tests performed on the passenger seats of other makes and models. At issue is whether the trial court's evidentiary rulings regarding the introduction of the following demonstrative evidence in connection with four tests performed by Mitsubishi's experts constituted reversible error.

**Spit Test**

As part of its defense, Mitsubishi argued that, even if the EM loop had not been used in its seat belt design, Laliberte still could have been ejected. Mitsubishi's seat belt design expert and biomechanic expert conducted demonstrations called spit tests, in which a surrogate of Laliberte's size was placed in the front passenger seat of a similar vehicle with a seat belt that did not have the EM loop. The seat was reclined, and the car was essentially turned on a spit. The tests were utilized to demonstrate the movement of the occupant and to show how far the body can reach even when a seat belt without an EM loop is incorporated into the seat belt design. The plaintiff argued that the spit tests were

misleading and prejudicial because they would lead the jurors to believe that Laliberte was partially ejected in the same way, despite the differences between moving on command and moving in response to an unexpected dynamic rollover. The trial court excluded the demonstrative aids showing the spit tests, finding that the tests had an overwhelming possibility of misleading the jury because they were based on different scenarios. The trial court did permit Mitsubishi's expert to opine that Laliberte would have died anyway, regardless of the EM loop.

**Pull Tests of Different Manufacturers' Seats**

The plaintiff's expert testified that Laliberte's injuries occurred because the vehicle's seatback was designed to yield too easily, and that a design incorporating a stiff seatback, that is a design requiring greater force before yielding, would have kept the plaintiff in his seat during the accident. To counter the opinion of the plaintiff's expert, Mitsubishi's experts performed pull tests on several different vehicles to see how much force it takes to cause those vehicles' seats to deform. Mitsubishi wanted to introduce photographs of these tests and a chart summarizing the results in order to illustrate how much force was necessary to deform not only the Nativa seat, but also the seats in other vehicles on the road. In opposition to the introduction of this evidence, the plaintiff countered that the pull tests were not comparable because the tests were performed on dissimilar vehicles and seats under different crash scenarios. This, the plaintiff argued, would have the effect of misleading the jury to believe that the tests were intended to recreate the accident. The court prohibited Mitsubishi from introducing into evidence photographs of the pull test as well as the chart summarizing the test results.

**Sled Tests of Stiff Seats**

Using a different vehicle and passenger seat, and a test dummy with different physical characteristics than those of the occupants in this case, Mitsubishi also sought to introduce demonstrative evidence of sled tests, which simulated a rear-impact collision at thirty-two miles per hour using a sled. Mitsubishi argued that the sled tests would have shown the danger of a stiffer seatback and how it can cause hyperextension of the neck. In opposition to the introduction of the sled test evidence, the plaintiff again took the position that the dissimilarities between the actual conditions and test conditions made the evidence highly prejudicial and misleading to the jury. Although the court allowed Mitsubishi's expert to testify as to the strength of the Nativa's seat for certain model years, the court prohibited the expert from showing slides of the actual tests or their results.

**NHTSA[3] Testing**

Mitsubishi sought to introduce evidence of "301 testing" to show that a variety of seats in different vehicles tested by NHTSA perform in a similar manner to the seat in the Nativa. In other words, Mitsubishi wanted to show that the Nativa's seat performed as well as other vehicles' seats. In opposition to the introduction of this evidence, the plaintiff argued that this test was used to measure fuel system integrity. Mitsubishi's expert countered that, while there are portions of the "301 test" that are related to fuel tanks, the tests also measured the movement of surrogates or dummies within the vehicle. The trial court excluded the evidence on the grounds that the test was not relevant to the facts of the case.

On these four evidentiary rulings, the parties disagree as to our standard of review. Mitsubishi argues that our review is de novo because the trial court's conclusion that the demonstrative evidence was highly prejudicial arose out of the court's misapplication of the doctrine of substantial similarity. *See Shands Teaching Hosp. & Clinics, Inc. v. Dunn,* 977 So. 2d 594, 598 (Fla. 1st DCA 2007) ("[T]he de novo standard applies if the issue presented on appeal is whether the trial court erred in applying a provision of the Florida Evidence Code."). The plaintiff disagrees and argues that because the trial court engaged in a classic section 90.403, Florida Statutes (2007)[4], analysis, and ultimately excluded the demonstrative aids at issue due to the "overwhelming possibility of misleading the jury," the standard of review is abuse of discretion. *See Trees ex rel. Trees v. K-Mart Corp.*, 467 So. 2d 401, 403 (Fla. 4th DCA 1985) ("The determination of relevancy is within the discretion of the trial court. Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." (citations omitted)).

The trial court conducted a number of hearings in connection with the admission of Mitsubishi's demonstrative aids. Ultimately, the court acknowledged that, while there were a host of objections, the most compelling objection was that the demonstrative aids contained different

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[3] National Highway Traffic Safety Administration.

[4] Section 90.403 states in pertinent part: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

crash scenarios, different seats, and different forces compared to those present in the accident. The court went on to conclude that these differences made the evidence less probative or relevant. Therefore, the court concluded that admission of such evidence would be highly prejudicial. Essentially, the trial court was applying the doctrine of substantial similarity to determine whether to admit Mitsubishi's evidence.

We hold that the appropriate standard of review of the trial court's ruling on the admissibility of the demonstrative evidence consisting of scientific experiments or demonstrations is abuse of discretion. *See Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 859 (Fla. 3d DCA 2007). In so doing, we recognize that, under this standard of review, evidentiary rulings are accorded great deference. However, "'[a]n abuse of discretion can occur where the district court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment.'" *Tran v. Toyota Motor Corp.,* 420 F.3d 1310, 1315 (11th Cir. 2005) (quoting *United States. v. Brown,* 415 F.3d 1257, 1266 (11th Cir. 2005)).

This case presents a unique question: Whether the trial court abused its discretion by incorrectly applying the doctrine of substantial similarity to test whether Mitsubishi's demonstrative evidence was relevant to the issues in the case.

Generally, the doctrine of substantial similarity applies in a products liability claim when a party, most often a plaintiff, attempts to introduce evidence of prior accidents or recreates the accident involving the defendant's product, in order to show notice of defect, magnitude of the danger involved, the defendant's ability to correct a known defect, or the lack of safety for intended uses. *See Tran,* 420 F.3d at 1316; *see also Jodoin v. Toyota Motor Corp.*, 284 F.3d 272, 278-80 (1st Cir. 2002); *Perret v. Seaboard Coast Line R.R. Co.*, 299 So. 2d 590, 591-94 (Fla. 1974) (noting that such evidence may not be offered to prove negligence or culpability); *Hall-Edwards*, 971 So. 2d at 858-60; *Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 379-80 (Fla. 4th DCA 1991).[5]

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[5] Prior to our decision in *Dempsey*, the Third District "note[d] that the 'rule of substantial similarity' between test conditions and actual conditions . . . has been eroded as to other types of experimental evidence." *Rindfleisch v. Carnival Cruise Lines, Inc.,* 498 So. 2d 488, 492 (Fla. 3d DCA 1986).

Citing *Tran,* Mitsubishi argues that it was error for the trial court to exclude its experts' scientific experiments and demonstrations where the evidence was not being offered to re-create the accident. In *Tran*, the plaintiff was injured in an automobile accident while operating her Toyota Cressida. 420 F.3d at 1311-12. The plaintiff sued Toyota Motor Company for, among other things, defective design in the automatic shoulder belt system used in the Cressida. *Id.* at 1312. During trial, and over plaintiff's objection, the court allowed Toyota to introduce into evidence a study consisting of an examination of other accidents involving the Cressida's restraint system. *Id.* at 1316. Toyota's purpose for introducing the study was to show the automatic shoulder belt system's overall effectiveness in a variety of accident scenarios. *Id.*

On appeal, the plaintiff asserted that the trial court erred because the accidents depicted in the study were not substantially similar to the accident giving rise to her claim. *Id.* In affirming the trial court's ruling, the appellate court held that "[t]he substantial similarity doctrine does not apply to situations, like this one, where the evidence is 'pointedly dissimilar' and 'not offered to reenact the accident.'" *Id.* (quoting *Heath v. Suzuki Motor Corp.,* 126 F.3d 1391, 1396-97 (11th Cir. 1997)).

Our analysis necessarily requires that we first look to the purpose for which Mitsubishi sought to have the demonstrative evidence admitted. During the trial, Mitsubishi's experts opined that: (1) even if Mitsubishi had used the other seat belt systems suggested by the plaintiff's experts, Laliberte still could have been ejected from the vehicle and suffered the same injuries; (2) the EM loop design provided safety features not present in the other designs; (3) with respect to the design of the Nativa's passenger seat, the plaintiff's alternative seat design posed greater dangers to the occupant; and (4) the seat conformed to industry custom and standards. Thus, the purpose of the evidence was not to replicate the accident to prove that the seat belt or seatback operated in a manner different than that proposed by the plaintiff's expert. Rather the evidence supported Mitsubishi's otherwise valid defenses to the plaintiff's defective product claims. *See Jimenez v. Gulf & W. Mfg. Co.*, 458 So. 2d 58, 60 (Fla. 3d DCA 1984) (noting that industry practice or custom is a defense to a products liability claim); *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983) (noting that, in a product liability claim, the jury may consider "the availability of other, safer products to meet the same need").

Our difficulty with the evidentiary ruling is that the trial court applied the wrong test. It should not have applied the doctrine of substantial similarity to evidence that was not intended to recreate the accident. We

hold that the application of the doctrine of substantial similarity to test the relevancy of Mitsubishi's demonstrative evidence was an abuse of discretion because the evidence was relevant to the purpose for which it was tendered - to prove Mitsubishi's defenses. *See Jodoin*, 284 F.3d at 278; *McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1402-03 (8th Cir. 1994); *see also Heath,* 126 F.3d at 1396-97 (holding that evidence pertaining to rollovers of three dissimilar vehicles was properly admitted because the evidence was not offered to "reenact the accident" but rather was introduced for "purposes of illustrating the physical principles behind rollover accidents").[6] Turning to the second component of the *Tran* test, we hold that the demonstrative evidence depicted situations which were sufficiently dissimilar to the actual accident so that there was little chance that the jury might be misled or confused. Our conclusion is supported by the fact that the trial court excluded the evidence on the basis that the scenarios depicted were not substantially similar to the crash scenario in the accident.[7] Thus, the trial court's probative versus prejudicial analysis under section 90.403 was fatally flawed.

The dissent correctly points out that the trial court permitted Mitsubishi's experts to verbally describe the content of much of the demonstrative aids while excluding the actual audio visual devices on the basis that there was "the overwhelming possibility of misleading the jury." In so doing, we are left to question why the trial court would have allowed the experts to testify about the very things that the court found would likely mislead the jury? While we agree that trial courts are afforded broad discretion in these circumstances, the exercise of that discretion must be based upon the correct application of the rules of evidence.

We next consider whether the error was harmless. "'The focus [of the harmless error test] is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.'" *Barnes v. State*, 970 So. 2d 332, 339 (Fla. 2007) (quoting *State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986)). The trial court's error was not harmless. We reach this conclusion because

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[6] "Florida's Evidence Code is patterned substantially upon the Federal Rules of Evidence." *Marsh v. Valyou*, 977 So. 2d 543, 554 (Fla. 2007) (Anstead, J., specially concurring). Thus, federal case law is persuasive authority in Florida courts.

[7] Mitsubishi correctly points out that a cautionary jury instruction would have eliminated any concerns that the jury might misinterpret the purpose for which the evidence was being introduced. *See Heath,* 126 F.3d at 1397 n.14.

Mitsubishi's defenses necessarily required expert opinion testimony. When the trial court excluded Mitsubishi's demonstrative evidence, its expert's opinions were barren and unsubstantiated. Moreover, during closing argument, the plaintiff's counsel capitalized on the error by arguing that the testing performed by Mitsubishi's expert was "really irrelevant," that Mitsubishi's expert "never tested a seat in a rollover condition." Mitsubishi argues, and we agree, that in the context of an expert opinion, the force and effect of the opinion being proffered is greatly enhanced when supported by studies and data upon which the opinion is based. Accordingly, we reverse and remand for a new trial.

*Reversed and Remanded.*

MAY, J., concurs.
CIKLIN, J., dissents with opinion.

CIKLIN, J., dissenting.

I must respectfully dissent.

Mitsubishi argues—and the majority agrees—that the trial court misconstrued the purpose for which the disallowed demonstrative aids were offered and engaged in the wrong legal analysis when crafting its evidentiary rulings. Both Mitsubishi and the majority contend that the trial court, when considering the proffered demonstrative aids, evaluated them as if they were intended to reenact the accident.

The record reveals that the trial court engaged in a painstaking process with respect to its analysis of Mitsubishi's proffered demonstrative aids. Had the trial court erred in the manner in which Mitsubishi describes, all of Mitsubishi's proffered demonstrations would have been indiscriminately excluded in wholesale fashion. This is not what occurred and after extensive consideration—and hours of hearings—the trial court *did* permit Mitsubishi to present abundant evidence, demonstrative and non-demonstrative alike, much of it over the plaintiff's numerous objections. While the trial court did consider the substantial similarity rule when culling through the proffered evidence, that was but one consideration and ultimately not the basis of its evidentiary rulings. The trial court, when excluding certain photographs, charts and video clips (but yet permitting, for the most part, Mitsubishi's experts to verbally describe the content of these audio visual devices), cited "the overwhelming possibility of misleading the jury."

Notwithstanding the plaintiff's objections, Mitsubishi's seatback expert, Andrew Levitt, was permitted to tell the jury that the seat in which the decedent was sitting was "a very good seat" and the strength of the seat was so good that it was in the "upper twenty-five percent of seats that were available on the market." Mr. Levitt was permitted to criticize the plaintiff's theory regarding seat rigidity, telling the jurors that as seats become more and more rigidified, they store energy and potentially snap heads back more aggressively than do seats which yield and absorb some of the energy. The trial court permitted Mr. Levitt to offer substantial testimony which included his reference to statistics he gathered during his testing of seats in other litigation in which he was retained as an expert.

The court also permitted Mitsubishi seatbelt expert, Robert Gratzinger to discuss—in great detail—his global research related to numerous rollover tests involving Mitsubishi and non-Mitsubishi products, which involved both belted and unbelted occupants. The trial court permitted Gratzinger to tell the jury, based on his research, that Scott Laliberte would have died regardless of any design defects in the seatbelt because the subject accident involved an impact to the right rear corner of the roof area. While the trial court would not permit Gratzinger to offer evidence of his experiments through spit testing, he was permitted to opine unequivocally that the decedent's head could have hit the pavement even without the energy absorbing stitched loop system.

Mitsubishi's biomechanical expert, Deborah Marth, conducted similar testing and was permitted to testify about general principles common to all rollovers—whether Mitsubishi brand or not. Marth testified that Laliberte injured his head during the rollover sequence when the right rear portion of the vehicle impacted the ground and moved him rearward and laterally toward the side of the vehicle. She suggested to the jury that had the right front passenger seat not moved (and the energy absorption loop not been present), the centrifugal force would have still killed the decedent in the same manner in which he died. While the trial court would not permit Marth to use a video of the spit test she performed, she was permitted to show a drawing to depict her opinion of Laliberte's physical position when he received his injury. Additionally, during Marth's testimony, Mitsubishi was permitted to present to the jury a video clip of the pull test which had been performed with the inertial lock in the "on" position. She was further permitted to present parts of a video clip of the NHTSA testing which showed the front passenger seat and crash dummy yielding rearward. Finally—over the plaintiff's objection—the trial court, during Marth's testimony, permitted Mitsubishi to publish a brief portion of a video clip showing the spit test

performed by Marth which, Marth testified, illustrated the centrifugal force generated by vehicle rotation.

Over the plaintiff's objection, Mitsubishi was permitted to assemble an actual life-size model of the Nativa in the courtroom. Mitsubishi's experts vividly utilized this demonstrative tool when testifying.

All relevant evidence must successfully pass through the gate of section 90.403, Florida Statutes, before being presented to the jury. Indeed, section 90.403 renders otherwise relevant evidence inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or the possibility that the jury may be misled. When raised as an issue, the trial court is required to weigh the logical strength of the proffered evidence to prove the material fact or issue against the other facts in the record and balance it against the strength of the reason for exclusion. In both a pretrial hearing on a motion in limine and again at the time of trial, the lower court ultimately ruled that due to the "overwhelming possibility of misleading the jury" there was a need to exclude certain Mitsubishi demonstrative evidence.

Overall, broad discretion rests with the trial court in matters relating to the admissibility of relevant evidence and that ruling will not be overturned absent a clear abuse of discretion. As noted by this court in *Trees v. K-Mart Corp.*, 467 So. 2d 401, 403 (Fla. 4th DCA 1985):

> The determination of relevancy is within the discretion of the trial court. *Ferradas v. State,* 434 So. 2d 24 (Fla. 3d DCA 1983); *Nelson v. State,* 395 So. 2d 176 (Fla. 1st DCA 1980). Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion. *Brown v. United States,* 409 A. 2d 1093 (D.C.App. 1979); *see also Kramas v. Security Gas & Oil, Inc.,* 672 F. 2d 766 (9th Cir. 1982), *cert. denied,* 459 U.S. 1035, 103 S. Ct. 444, 74 L.Ed. 2d 600; *Miller v. Poretsky,* 595 F. 2d 780 (D.C.Cir. 1978); *Rust v. Guinn,* 429 N.E. 2d 299 (Ind. 1st DCA 1981); *see generally Blanco v. State,* 452 So. 2d 520 (Fla. 1984); *Welty v. State,* 402 So. 2d 1159 (Fla. 1981); *Morales v. State,* 451 So. 2d 941, 943 (Fla. 5th DCA 1984).

"The weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two." *Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991).

As this court concluded in *Trees*, "[w]hether, under the facts of this case, the court's ruling struck the proper balance between probative value and unfair prejudice is a matter about which reasonable people could differ." 467 So. 2d at 403.

Simply put, the trial court sensitively balanced the relevance of Mitsubishi's demonstrative aids against the danger of unfair prejudice and confusion and made the right calls—or at least made the calls that were best performed by the person wearing the boots on the ground.

> "[U]nder the abuse of discretion standard of review there will be occasions in which we affirm the [trial] court even though we would have gone the other way had it been our call." *Rasbury v. Internal Revenue Serv.* (*In re Rasbury*), 24 F. 3d 159, 168 (11th Cir. 1994). . . . Given our deferential standard of review, however, we cannot say that the [trial] court's decision fell outside its permissible "range of choice." *United States v. Kelly*, 888 F. 2d 732, 745 (11th Cir. 1989).

*Tran v. Toyota Motor Corp.*, 420 F. 3d 1310, 1315-16 (11th Cir. 2005).

Because Mitsubishi has failed to demonstrate an abuse of discretion as to certain of the trial court's evidentiary rulings, I would affirm.

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Elizabeth T. Maass, Judge; L.T. Case No. 2005-006369 CA AI.

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***Not final until disposition of timely filed motion for rehearing.***