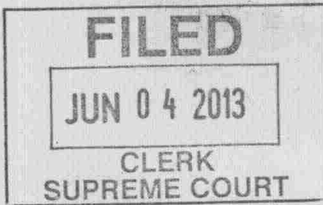

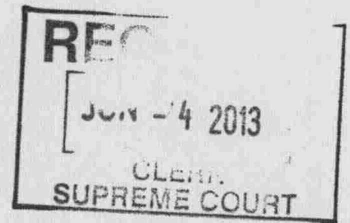

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000109
CASE NO. 2012-SC-000615

NISSAN NORTH AMERICA, INC., *et al* — APPELLANTS/CROSS-APPELLEES

v.

SANDRA DENISE MESSERLY, *et al.* — APPELLEES/CROSS-APPELLANTS

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

Court of Appeals Case No. 2010-CA-00717
Boone Circuit Court Case No. 05-CI-00924

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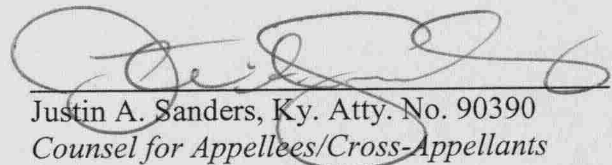
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2013, a copy of this brief was served on each of the following: **Sam Givens**, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; **Hon. Robert McGinnis**, Special Judge, Boone Circuit Court, 5 Justice Center, 115 Court Street, Cynthiana, Kentucky 41031; to **Hon. David T. Schaefer** and **Hon. Anne K. Guillory**, Dinsmore & Shohl, 101 South Fifth Street, 2500 National City Tower, Louisville, Kentucky 40202-3175; **Hon. E. Paul Cauley** and **Hon. S. Vance Wittie**, Sedgwick LLP, 1717 Main Street, Suite 5400, Dallas, Texas 75201; **Hon. Kevin C. Burke**, 125 South Seventh Street, Louisville, Kentucky 40202; and **Hon. Peter Perlman**, Peter Perlman Law Offices, P.S.C., 388 South Broadway, Lexington, Kentucky 40508.



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Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010). 3

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ARGUMENT

The Messerlys have urged this Court to apply its sound reasoning in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), in this case so that characterizing the back-over hazard of the 2002 Nissan Xterra as "obvious" is not a bar to recovery, but merely a factor for the jury to consider in apportioning comparative fault. In *McIntosh,* this Court cited the Restatement (Third) of Tort with approval in *holding* that "The incompatibility between the open and obvious doctrine as an absolute bar to recovery and comparative fault is great" and rejecting or abrogating that doctrine in cases in which injury is *foreseeable*, despite the fact that the hazard may be characterized as "open and obvious." Appellant, Nissan, argues that *McIntosh* should not be applied because it was a premises liability case, whereas we are dealing with products liability law in this case.

The fact that *McIntosh* was a premises liability case and this is a products liability case is a "distinction without a difference." The policy justifications and rationale are precisely the same. The "open and obvious doctrine" is not exclusively a part of *either* premises liability law or products liability law. It is part of the outmoded, unjust law of *contributory fault* that was rejected by this Court in *Hilen v. Hays,* 673 S.W.2d 713, 720 (Ky. 1984). See: *McIntosh,* p. 389. Equally, or perhaps more importantly, contributory fault was fully replaced by the public policy declaration of the Kentucky General Assembly when it adopted comparative fault as the law of the Commonwealth in *all tort actions, including product liability actions:*

> **411.182 Allocation of fault in tort actions -- Award of damages -- Effect of release.**
> (1) *In all tort actions, including products liability actions,* involving fault of more than one (1) party to the action, including third-party defendants

> and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
> (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
> . . . . (emphasis added by italics)

It is because the "open and obvious doctrine" is incompatible with comparative fault that it was abrogated in *McIntosh;* it was not because *McIntosh* was a premises liability case. Indeed, the holding of that important case is controlling authority on the issue presented here.

Appellant, Nissan, is so challenged to articulate a plausible argument to support its contention that the open and obvious doctrine should continue to be followed in products liability cases, despite *Hilen v. Hays* and KRS 411.182, that Nissan contradicts its own arguments in its brief as to what the fact finder must consider in determining whether a product is defective and unreasonably dangerous. Nissan also mischaracterizes the outcome being sought by the Messerlys in their cross appeal.

A. Nissan's response to the Messerlys' cross appeal contradicts its own arguments regarding the determination of whether a product is defective and unreasonably dangerous.

At page 10 of its reply brief, Nissan states, "[t]his Court has continually adhered to a negligence-based standard for determining whether a product's design may be regarded as defective and unreasonably dangerous." Nissan's position regarding defectiveness is couched squarely and unequivocally in terms of whether an "ordinarily prudent company" would place a particular product on the market.

Five pages later, however, in the section of its brief responding to the Messerlys' cross appeal, Nissan abandoned its argument supporting a negligence-based standard and argues, instead: [t]his case does not concern duty at all but whether the product was unreasonably dangerous."[1] "(T)he question is not the conduct of the parties but the status of the product."[2]

Nissan cannot have it both ways, of course. That the dangers associated with a product are "obvious" is a double-edged sword. Consistent with the holding in *McIntosh*, if the blind zone hazard is, in fact, one that should be "obvious" to the consumer, then it is undoubtedly obvious to the manufacturer. In fact, Nissan's knowledge and awareness of the dangers associated with its vehicle blind zones, in the absence of the use of counter-measures such as cameras and sensors, is well-documented by a great deal of evidence proving that Nissan devoted years to research and development of strategies and counter-measures to eliminate the backover hazards associated with the "blind zones" and the rear of vehicles. The same evidence about Nissan's R&D efforts further shows that Nissan knew and understood that no matter how "open and obvious" the hazards were, without devices such as rear-looking video and sensors, it is *foreseeable* that deaths and injuries would continue to occur—in precisely the manner that Foxx Messerly was killed. In *McIntosh,* at page 390, this Court discussed "Kentucky's focus on foreseeability in its analysis of whether or not a defendant had a duty." Those considerations are the same in this products liability action as they were in the premises liability analysis of *McIntosh.*

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[1] Appellants' Reply Brief/Response Brief to Cross Appeal at p. 15.
[2] Id. at p. 16.

In response to the mountain of evidence in this case showing that Nissan conducted years of research and development to address the hazards of backing a vehicle into space where the driver cannot see, the most Nissan can offer as to Sandy Messerly's "awareness" of the blind zone is the "application of social knowledge with which all users are charged."[3] Surely, in this era of comparative fault, a jury should be able to weigh and evaluate the relative culpability of the parties based on their relative knowledge, appreciation, and ability to reduce or eliminate the hazard and, thus, prevent the harm. Nissan cannot credibly argue that anyone but Nissan was in the best position to reduce or eliminate the 2002 Xterra's blind zone. Indeed, Nissan had developed highly effective cameras and sensors specifically designed and intended to make the area directly behind the vehicle visible to the driver. Nissan's negligent or intentional failure to equip the Xterra with rear-facing, life-saving visibility aids exposes Nissan to liability for the death of Foxx Messerly, the extent of which must be determined by a jury at trial.

B. Contrary to Nissan's contentions, the Messerlys do not advocate the position that obviousness of a product hazard is irrelevant to the issue of whether a product is defective and unreasonably dangerous.

Nissan is completely wrong in asserting that the Messerlys' cross appeal somehow seeks "[removal of] the obviousness of the hazard from the considerations relevant to determining whether a product is unreasonably dangerous."[4] On the contrary, the Messerlys recognize that "patency of the danger," i.e., obviousness, is one of a number of factors enumerated in *Montgomery Elevator Company v. McCullough*, 676 S.W.2d 776, 780-81 (Ky. 1984) and the *McIntosh* case, to be considered by the trier of fact.

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[3] Id.
[4] Id. at p. 15.

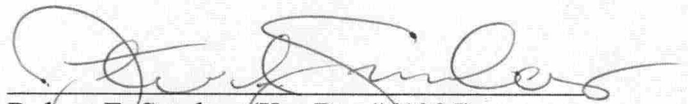
The Messerlys' position as to the alleged obviousness of the blind zone hazard has been consistent and clear throughout this appeal. First, the blind zone hazard is ***not*** one that is obvious, well-understood, and adequately appreciated by most drivers. There is a genuine issue of material fact as to the obviousness of the blind zone hazard. Second, to the extent that the blind zone *is* well-understood and a matter of common knowledge, the obviousness of the hazard should not completely bar recovery by the plaintiff from the manufacturer on the basis of defective design, but should be a factor considered by the jury in apportioning fault, consistent with this Court's holding in *McIntosh*. The Messerlys have never contended that obviousness of a hazard should be "removed" as a relevant consideration for determining the defectiveness of a product.

Nissan's position that obviousness of a hazard precludes recovery by a plaintiff and absolves a manufacturer of any responsibility is based on a handful of outdated decisions based on this Court's holding in *Jones v. Hutchison Mfg. Co.*, 502 S.W.2d 66 (Ky. 1973). As stated in the Messerlys' cross appeal brief, *Jones* is a pre-comparative fault case. It was decided at a time where a plaintiff was barred from recovery if he was found to be contributorily negligent. As this Court properly recognized in *McIntosh*, precluding recovery based on obviousness of a particular hazard is inconsistent with comparative fault principles. Because KRS 411.182 expressly states that comparative fault applies to products liability cases, the Messerlys' reliance upon the reasoning in *McIntosh* regarding the incompatibility between comparative fault and obviousness of a danger as a bar to recovery is appropriate.

CONCLUSION

Nissan makes no credible argument against the application of the legal reasoning of *McIntosh* to products liability cases. Nissan's self-contradicting arguments should be rejected by this Court, as should Nissan's suggestion that the Messerlys have ever advocated the notion that a jury should not consider the "obviousness" of a hazard in apportioning comparative fault. This Court should apply its reasoning in *McIntosh* to the present case by holding that the "obviousness" of the blind zone hazard associated with the 2002 Nissan Xterra, if indeed the hazard was obvious, is a factor for the jury to consider in apportioning fault between the parties, not a complete bar to recovery.

Respectfully Submitted.



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