Supreme Court of Kentucky

CASE NO. 2013-SC-685

APPEAL FROM KENTUCKY COURT OF APPEALS
No. 2012-CA-952

APPEAL FROM LINCOLN CIRCUIT COURT
CIVIL ACTION NO. 2010-CI-82

NISSAN MOTOR COMPANY, LTD. AND
NISSAN NORTH AMERICA, INC. — APPELLANTS

v.

AMANDA MADDOX — APPELLEE

AMICI CURIAE BRIEF FOR ASSOCIATION OF GLOBAL AUTOMAKERS, AMERICAN TORT REFORM ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLANTS

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Certificate of Service

I hereby certify that a copy of the foregoing was sent by U.S. first class mail October 29, 2014 to: Hon. David Tapp, Judge, and Teresa Reed, Court Clerk, both at Lincoln County Judicial Center, 100 E. Main Street, Stanford, KY 40484; Richard Hay, Sarah Hay Knight, Law Office of Richard Hay, 203 W. Columbia St., P.O. Box 1124, Somerset, KY 42502-1124; J. Paul Long, Jr., 324 W. Main St., P.O. Box 85, Stanford, KY 40484-0085; John L. Tate, Bethany A. Breetz, Stites & Harbison PLLC, 400 W. Market St., Suite 1800, Louisville, KY 40202; and David T. Schaefer, Anne K. Guillory, Dinsmore & Shohl LLP, 101 S. Fifth St., Suite 2500, Louisville, KY 40202.

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STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Amici adopt appellants' statement of the case as relevant to the argument herein.

INTRODUCTION

The lower court's ruling to allow punitive damages in this case has raised significant concern among regulated communities, not solely the car industry. Punitive damages are meant to punish and deter egregiously wrongful conduct. Yet, the lower court allowed Plaintiff to subject Nissan to punitive damages *because* Nissan diligently adhered to federal safety standards and, in so doing, designed a seat belt restraint system that provided the most benefit to the most people. Plaintiff's counsel, taking a page out of DC Comics' upside-down *Bizarro World*, successfully argued that Nissan's stellar safety ratings were somehow *proof* that Nissan flagrantly disregarded public safety. There is no factual or legal basis for punitive damages in this case.

Here, it is undisputed that the model vehicle in which Plaintiff was a passenger, the 2001 Nissan Pathfinder, met or exceeded all applicable government safety standards for seat belt restraint systems. This includes both the mandatory Federal Motor Vehicle Safety Standards ("FMVSS") and the voluntary, more stringent safety standards under the New Car Assessment Program ("NCAP"). The right front passenger restraint system, which is where Plaintiff was sitting, received "five stars," which is the highest rating.

The criteria for these ratings represent the considered judgment of government regulators, in consultation with consumer advocates and industry representatives, about how to balance safety features for seat belt restraint systems with other factors. These factors include the potential for seatbelts to harm people by over-restraining them, the effectiveness of the assembly to function in a variety of circumstances, and practical

considerations. As with many areas where governments set safety standards, it is understood that all risks cannot be eliminated for all people in all situations.

For seatbelt assemblies, the government required tests on the average male adult, which is about 171 pounds, in order to maximize beneficial results for the most people. It was the regulators' judgment not to include tests on dummies representing people on either end of the weight spectrum. Measures to accommodate heavier people might make the assembly more dangerous for those who are lighter and vice versa. Further, real-time data has shown no appreciable difference in the effectiveness of the seat belt devices used here (load limiters) for individuals who are heavier or taller than average. Even if tests were required on heavier or lighter test dummies, tests cannot be performed for all people in all situations. Some people would still remain outside of the tested range.

Here, there is no indication that the seat belt assembly failed to work. Just the opposite is true. The injuries to Plaintiff's husband who was driving the car and was of average size were much less serious than her alleged injuries. In this upside down case, though, Plaintiff seeks to use the success of the seatbelt in protecting her husband as evidence of Nissan's wrongdoing, including its reprehensibility toward her.

Given the seatbelt assembly's stellar safety ratings and fact that the seatbelts worked properly, it is highly debatable whether the law should even allow for a finding of a product defect.[1] *Amici* understand that this issue, though, is not before the Court. What

[1] The Restatement Third; Products Liability suggests that a product should be considered non-defective as a matter of law "when the safety standard or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise." *See* Restatement Third; Products Liability, § 4 cmt. e.

should be clear is that adhering to government safety standards, exceeding additional voluntary safety standards, and making a properly working product cannot be evidence of punitive damages. If this Court were to rule otherwise, businesses in all regulated industries would have no notice of and could not avoid the expense and considerable tarnish of punitive damages despite their best efforts to meet and exceed safety standards. *Amici* urge this Court to reverse the ruling below and find the punitive damages award unsupported by the evidence in this case. Assiduous efforts to comply with federal and industry safety standards help protect consumers and should be lauded, not punished.

ARGUMENT

I. Nissan's Conduct In Meeting and Exceeding Government Safety Standards Does Not Merit Punishment

Punitive damages in Kentucky, as in other states, are reserved for the narrow set of circumstances when a defendant, not only wrongfully injures someone, but does so through "outrageous" or "malicious" conduct. *See MV Transp. Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014); *see also Turner v. Werner Enterprises, Inc.*, 442 F. Supp.2d 384, 385 (E.D. Ky. 2006) (applying Kentucky punitive damages law as requiring "misconduct [either negligent or intentional] that is 'outrageous,' meaning it is 'willful, malicious, and without justification"). The purpose of punitive damages, as the name implies, is to punish such reprehensible conduct and deter the defendant and others from engaging in this level of misconduct in the future. *See* Restatement (Second) of Torts § 908 (1979); William L. Prosser, John W. Wade and Victor E. Schwartz, *Cases and Materials on Torts* 566 (12 Ed. 2010). Given the penal nature of punitive damages, Kentucky, along with other states, use the heightened burden of proof of clear and convincing evidence. *See* KRS § 41.184(2) ("A plaintiff shall recover punitive damages only upon proving, by

clear and convincing evidence, that the defendant from who such damages are sought acted toward the plaintiff with oppression, fraud or malice."). The Supreme Court of the United States also has put limits on punitive damages to guard against over-punishment. *See BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (providing constitutional limits on the amount of punitive damages that can be levied in a given case).

In the case at bar, there are no allegations that rise to this level of reprehensibility. Plaintiff's claim for punitive damages is based largely on the fact that Nissan diligently followed federal safety standards and designed a seat belt assembly to provide the biggest benefit for the most people. *See* Op. at *4. Specifically, Plaintiff's argument is that "the restraint system was unsafe *because* it was designed . . . to work best" for the average person and that Nissan made enhancements to the seat belt assembly that enhanced its safety performance. *Id.* (emphasis added). It is undisputed that the model Pathfinder in which Plaintiff was a passenger earned the highest ratings under FMVSS 208. This model sports utility vehicle also achieved NCAP's top 5-Star rating, which is voluntary, and requires a more rigorous test, than under FMVSS 208 and measures safety for collisions at nearly identical speeds and impact of the accident here. *See id.* at 7. This clear commitment to passenger safety should be lauded, not punished. There is no evidence of malice that can be implied from these facts; Plaintiff does not even try to suggest that these safety awards were gained through ill-gotten means.

Yet, the lower court allowed Plaintiff to rhetorically use this stellar safety record as clear and convincing evidence of Nissan's outrageous or malicious conduct toward her. The court even accepted Plaintiff's suggestion that the fact that her husband, who

was driving the car, "walked out of the vehicle at the crash site" as further evidence of such reprehensibility. Op. at 23. Contrary to these findings, exceeding government safety standards does not demonstrate "trickery or deceit" or "cavalier willingness to expose the public to an unreasonable risk." Op. at 23. As the Supreme Court of Georgia held, allowing punitive damages "where the offender has taken all the steps required by the supervising state authority and has expended substantial sums in doing so, would make the standard 'conscious indifference to consequences' a requirement without substance." *General Refractories Co. v. Rogers*, 239 S.E.2d 795, 799-800 (Ga. 1977). Complying with the law and government safety standards is not "flagrant" misconduct. *See In re Miamisburg Train Derailment Litig.*, 725 N.E.2d 838 (Oh. Ct. App. 1999) ("No reasonable person could reconcile the appellees' compliance with the regulation in question with the notion that their behavior was somehow 'outrageous.' 'flagrant,' or 'criminal.'"). Punishing conduct aimed at safety under the clear terms from the federal government is allowing punitive damages to be awarded where they should have no applicability at all.

In ruling otherwise, the lower court made several missteps. First, it cites to *Sufix, U.S.A. Inc. v. Cook*, 128 S.W.3d 838 (Ky. App. 2004), for the proposition that failure to test for defects constitutes a proper basis for instructing a jury on punitive damages. *See* Op. at 23. *Sufix*, though, is not comparable to the case at bar. In that case, the defendant "could not document any testing" of its product at all. Here, Nissan submitted the Pathfinder to extensive testing, both required and voluntarily, in full accordance with government and industry standards. 128 S.W.3d at 841. There are a multitude of ways that people can be injured as a result of foreseeable uses and misuses of products,

including automobiles. Punitive damages should not be available just because a defendant did not test the exact scenario resulting in a Plaintiff's injury.

Second, the court conflated the availability of punitive damages with the magnitude of Plaintiff's injuries. The latter is not a permissible factor in the threshold inquiry of whether the defendant's conduct rises to the level of reprehensibility for punitive damages. *See* Op. at 23 (basing availability of punitive damages, in part, on Plaintiff's "severe physical injuries"). *State Farm v. Campbell*, which the lower court cites for including the severity of plaintiff's injury, does not suggest otherwise. 538 U.S. 408, 409 (2003). Under *State Farm*, the severity of injury can be a factor only in assessing the amount of punitive damages needed to deter the egregious misconduct at issue; it does not speak to the reprehensibility of that conduct. *See id.* This is because punitive damages do not compensate the plaintiff for his or her injuries, but "consist of an additional sum, over and above the compensation of the plaintiff for the harm suffered." Prosser, Wade, & Schwartz at 566.[2] The threshold inquiry must remain tightly focused on a defendant's conduct so that people can be on notice that they are engaging in the type of misconduct that may be subject to punishment. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) (severe liability "that could not have been anticipated" stretches constitutional limits); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability).

The Court should reverse the lower court's decision to allow punitive damages here because Nissan did what they were encouraged to do, namely, follow and exceed

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[2] For a discussion of how evidence of a defendant's wrongdoing is improperly used to inflate compensatory damages, namely pain and suffering, see Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

government safety standards. Following the law and exceeding government safety standards does not remotely amount to "outrageous" or "malicious" conduct.

II. Punishing Companies that Follow NHTSA Safety Regulations for Load Limiters, or Other Safety Devices, Will Hinder Public Safety

Safety features, including seat belt assemblies, cannot be made to protect all injuries in all accidents. Manufacturers and regulators have to balance the needs of many individuals and choose which risks are most likely to occur and how best they can be prevented or mitigated. A successful safety device is one that helps reduce the risk or extent of injury, often significantly, in many instances in which people can be harmed. The purpose of the FMVSS 208 and NCAP's 5-Star safety rating is to establish the acceptable testing protocols, risk levels and balancing of interests for seat belt assemblies.

A. NHTSA Studies Have Shown that Seat Belts With Load Limiters Save Lives and Do Not Disadvantage Heavier Individuals

By all measures, federal testing protocols for seat belts, both generally and with respect to load limiters, have led to remarkable safety improvements.[3] Nationwide, seat belts saved more than 72,000 lives from 2005 to 2009. *See* Nat'l Highway Traffic Safety Admin., DOT HS 811 383, *Lives Saved in 2009 by Restraint Use and Minimum-Drinking-Age Laws*. Lap and shoulder belts reduce risk of fatal injury by 45 percent and moderate-to-critical injury by some 50 percent. *See* Nat'l Highway Traffic Safety Admin., DOT HS 811 827, *Passenger Vehicles* at 5. Further, in light trucks, such as Plaintiff's Pathfinder, "seat belts reduce the risk of fatal injury by 60 percent and moderate-to-critical injury by 65 percent." *See id.*

These numbers have grown over the past couple of decades and will grow as seat

[3] Seat belts "are one of the most cost-effective lifesaving devices ever invented." Steven D. Levitt & Stephen J. Dubner, *Super Freakonomics* 149 (2009).

belt use becomes universal. In Kentucky, where seat belt use is at 83.7 percent, seat belts saved more than 1,400 lives from 2008 through 2012, and, had seat belt use been at 100 percent, it would have saved nearly another 650 people. *See* Traffic Safety Facts: Kentucky, Nat'l Highway Traffic Safety Admin., at http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/21_KY/ 2012/21_KY_2012.htm#TAB5A; *Passive Safety Features*, Brain on Board, http://brainonboard.ca/safety_features/passive_safety_features.php (detailing how seat belts, air bags and head restraints create a "life space" for vehicle occupants and significantly reduce injuries from collisions).

The use of load limiters, which is at the core of Plaintiff's punitive damage allegations, has become an integral part of this success because load limiters help absorb the force of the seat belt, which can cause injuries in frontal collisions. For many individuals, presumably including Plaintiff's husband here, load limiters reduce head and chest injuries. In 2013, NHTSA reported that when vehicles have load limiters and pretensioners, "the Head Injury Criterion was reduced (i.e., improved) by an average of 232 units, chest acceleration by 6.6 g's, and chest deflection by 10.6 mm, for drivers and right front passengers. Each of these reductions was statistically significant." *See* Nat'l Highway Traffic Safety Admin., DOT HS 811 835, *Effectiveness of Pretensioners and Load Limiters for Enhancing Fatality Reduction by Seat Belts* 2 (2013). Because load limiters "improve seat belt performance," NHTSA "has long encouraged" their use. *Id.* By model year 2002, 84 percent of cars had load limiters, and by 2007, all new cars were voluntarily equipped with load limiters for driver and front passenger seats. *See id.* at 3.

Importantly, NHTSA has specifically considered Plaintiff's hypothesis that load limiters may be "less advantageous for heavier drivers because they would spool out

more" of the belt in a severe head on collision. *Id.* at 35. This study did "not show any clear-cut differences between lighter and heavier" individuals. *Id.* NHTSA also studied the relative effectiveness of load limiters on taller individuals under the same theory. Similarly, there was nothing "to suggest a drastic loss of belt effectiveness for taller occupants when belts are equipped with load limiters." *Id.*

Plaintiff's rhetoric of "stars over safety" is objectively wrong. If, in order to avoid the potentiality for punitive damages in future car accidents, car manufacturers recall, reduced the use of, or disable load limiters in Kentucky, Kentuckians will suffer preventable injuries without any statistically significant countervailing consideration that doing so will benefit heavier individuals.

B. Punitive Damages Should Not "Regulate" Conduct that is Not Objectively Outrageous or Done With Malice

This case provides a stark example of why the bar for punitive damages is intended to be high, along with the dangers of punishing conduct that is not objectively reprehensible, but actually encouraged by federal safety regulators.[4] As demonstrated here, regulators must be given room to assess a full range of data in determining which safety devices should be used, including when and how they should be designed. Their hands should not be tied by punitive damages in court decisions looking at only a narrow slice of information relating to a single plaintiff's alleged injuries. Public health and safety decisions must consider the many individuals who are not before courts because

[4] Prominent scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such an impact "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J. Jan. 12, 2000, at A22. He initially favored this litigation for advancing regulatory agendas, but realized their danger, concluding they were "faux legislation, which sacrifices democracy." *Id.*

their lives are saved and improved by devices such as load limiters.[5]

The availability for punitive damages in this case is also inapposite to the way safety features are developed, particularly in the auto industry. As NHTSA's ongoing analysis of load limiters shows, federal regulators know they often balance competing interests. Making a car safer in one way could have negative consequences elsewhere. Sometimes a benefit-risk judgment call must be made. Similarly, NHTSA regulators sometimes want manufacturers to explore several safety options so they can learn from results, which will ultimately lead to newer safety technologies. *See* Lawrence L. Hershman, *The U.S. New Car Assessment Program (NCAP): Past, Present and Future*, NHTSA, Paper No. 390, *available at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-01/esv/esv17/proceed/00245.pdf (stating NCAP's goal of encouraging "vehicle manufacturers to design higher levels of safety into their vehicles"). The Supreme Court of the United States has recognized the importance of these dynamics and the impact of unwise regulation through litigation on public safety. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 879 (2000) (favorably quoting the government's position that manufacturers be given time to learn how to make airbags better for different crashes and people). Punishing choices made in good faith during this process will impede the development of safety devices.

The importance of this case is underscored by the fact that the auto industry is entering an exciting new era of vehicle safety technology, including with respect to seat belt assemblies. *See, e.g.,* Paul A. Eisenstein, *Driving Safety: The Latest Must-Have*

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[5] The Supreme Court of the United States, in other contexts, has explained the dangers of unwise regulation through litigation, including the fact that "judges are confined by a record comprising the evidence the parties present" in a single case. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

Features in New Models, nbcnews.com, Dec. 2, 2013, *at* http://www.nbcnews.com/business/driving-safety-latest-must-have-features-new-models-D11674419 (discussing several such safety features in development). For example, car manufacturers are developing technology to help seat belts and air bags become "predictive" so they can react differently to different types of crashes. Lei Zhou, *The Rise of Safety Innovations in Intelligent Mobility*, Deloitte Rev., at 147 (2013). Manufacturers are also researching technology that can, within milliseconds, send signals "whether to tighten the safety belts or activate the airbags, and if so, how much force [they need] to exert." Continental, Chassis & Safety Division, Intelligent Passive Safety Technologies: Best Possible Protection for Everyone 8 (2010), *at* http://www.continental-automotive.cn/www/download/automotive_de_de/general/chassis/presse/download/passive_safety_en.pdf. Also, inflatable seat belts that can spread the force of a crash over a larger area to reduce injuries are almost on the market. Alex Nishimoto, *The ABCs of Vehicle Safety: Tech That Keeps Your Car Shiny Side Up*, MotorTrend (Apr. 4, 2013), *at* http://www.motortrend.com/features/consumer/1304_the_abcs_of_vehicle_safety/.

If the lower court's ruling stands and car manufacturers are punished in the few incidents when such safety features are not desirable, the law will chill these and other safety innovations. Tort law's promotion of public safety, which includes when to make punitive damages available, should reinforce, not contradict, good faith decisions by companies, especially when encouraged by federal regulators.

III. Regulated Communities Should Be Encouraged, Not Punished, For Following Safety Regulations and Guidelines

The outcome of this case, if allowed to stand, will reverberate throughout regulated communities. In recent decades, America has entered an era of increased

regulation.[6] Government agencies have significantly expanded their role in taking preventative measures to safeguard the public from potential hazards. They issue product safety standards, approve the design and labeling of certain products, oversee product marketing, and regulate workplace practices. Businesses, both large and small, should have assurance that when they assiduously follow safety regulations and guidelines established by the appropriate regulatory bodies, and, as here, exceed those safety standards, inflammatory rhetoric will not trump adherence to reasoned rules and policies. They should be rewarded, not punished, for following the law. *See* Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 Harv. J. on Leg. 315, 353-62 (2014).

In addition to extensive NHTSA regulations, for example, the Consumer Product Safety Commission has safety standards for products such as baby bouncers, bike helmets, bunk beds, cribs, and various aspects and types of toys. *See* U.S. Consumer Prod. Safety Comm'n, Regulations, Mandatory Standards and Bans, *at* http:// www.cpsc.gov/en/Regulations-Laws--Standards/Regulations-Mandatory-Standards-Bans/ (providing C.F.R. references for numerous safety standards). Both the U.S. Department of Agriculture and Food & Drug Administration set requirements to prevent foodborne illnesses. *See* 9 C.F.R. pt. 300.2 (providing responsibilities of the Food Safety and Inspection Service); 21 C.F.R. part 110 (requiring use of current good manufacturing processes). The Occupational Safety and Health Administration establishes workplace safety requirements for the use of protective equipment, product labeling, and exposure to

[6] In 1960, there were 22,877 pages in the Federal Register; in 2012 there were 174,545 pages. *See* Small Businesses for Sensible Regulations, Quick Facts (Nat'l Fed. Independent Business 2014) (last visited Oct. 23, 2014, *at* http://www.sensible regulations.org/resources/facts-and-figures/#sthash.9NuABOmT.dpuf.

hazardous chemicals. *See generally* 29 C.F.R. pt. 1910.

Compliance with safety standards should not be used against Nissan or others. Safety standards can help protect consumers, but not eliminate all risk. Government regulators carefully weigh the interests of different types of consumers, patients, and workers; consider the likelihood and severity of risks; and evaluate how cost-effectively changes in the manufacturing or design of a product, or a warning accompanying it, can reduce those risks. These judgments may seem cold or calculated in the context of a personal injury case, particularly when injuries are as extensive as here. In seeking punitive damages, plaintiffs often point to internal discussions about how a company made such judgments. Here, Plaintiff's counsel used rhetoric in place of facts, and slogans instead of law, to urge punishment of a company that fulfilled its safety obligations and more.

The fact of the matter is that many companies, as with Nissan in this case, pursue government safety standards vigorously and in good faith, even though keeping up with new and changing regulations can be challenging. Consider the impact on small businesses. *Amicus* NFIB Small Business Legal Center has highlighted a report issued under the Small Business Administration finding that small businesses, which are firms employing fewer than 20 employees, "bear the largest burden of federal regulations. As of 2008, small businesses face an annual regulatory cost of $10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms." Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* 8 (SBA Office of Advocacy, 2010). Whether a business is small or large, it is perverse to turn this exertion of considerable time, energy and resources – all of which are encouraged and incentivized

by governing agencies – against it in tort litigation.

If plaintiffs want to seek punitive damages in a case, they should have presented facts that demonstrate actual reprehensible conduct. Mere epithets about a company's successful compliance efforts should not serve as the foundation for punitive damage awards.

CONCLUSION

For these reasons, *amici* respectfully request the Court to reverse the ruling below and find the punitive damages award unsupported by the evidence in this case.

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