pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-685

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

v.

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

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

AMANDA MADDOX — APPELLEE

REPLY BRIEF FOR 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 January 13, 2015, to: Hon. David Tapp, Judge, Lincoln Circuit Court, 100 E. Main Street, Stanford, KY 40484; Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Richard Hay, Sarah Hay Knight, Law Office of Richard Hay, 203 W. Columbia St., P.O. Box 1124, Somerset, KY 42502-1124, and J. Paul Long, Jr., 324 W. Main St., P.O. Box 85, Stanford, KY 40484-0085.

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132 S.W.3d 790, 797-98 (Ky. 2004) 1

Meyer v. Chapman Printing Co., Inc.,
840 S.W.2d 814, 821 (Ky. 1992) 1

Lewis v. Bledsoe Surface Mining Co.,
798 S.W.2d 459, 461-62 (Ky. 1990) 1

Osborne v. Keeney, 399 S.W.3d 1, 8-9 (Ky. 2012) 1

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Sand Hill Energy, Inc. v. Ford Motor Co.,
83 S.W.3d 483, 490 (Ky. 1998) 1

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998) 1

Kroger v. Willgruber, 920 S.W.2d 61, 64 (Ky. 1996) 1

National Coll. Athletic Ass'n v. Hornung,
754 S.W.2d 855, 860 (Ky. 1988) 1

Phelps v. Louisville Water Co.,
103 S.W.3d 46, 51-52 (Ky. 2003) 1

Horton v. Union Light, Heat & Power Co.,
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A. The standard of review in this case is "clear and convincing" evidence.

Kentucky law allows punitive damages only upon a showing of "clear and convincing" evidence of outrageous conduct or reckless disregard for the safety of others. (Nissan Brief at 15-18.) Maddox strives to change the standard of review by repeatedly ignoring the required quantum and quality of proof and claiming that "any evidence"[1] is sufficient to establish reckless disregard. (Maddox Brief at 1, 22-25, 28-29, 30.) Maddox's proposed standard of review is wrong, and the so-called authorities upon which she relies are primarily decisions in which punitive damages were not at issue[2] or discussions of the standard for directing a verdict on compensatory damage claims.[3]

When punitive damages are reviewed on appeal, Kentucky law requires analysis under the clear and convincing standard. In *Gibson*, for example, in the section on "the specific question of punitive damages," this Court observes they "may be awarded" upon a finding of "gross negligence." 410 S.W.3d at 59 (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51-52 (Ky. 2003)). "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others." *Id.* (quoting *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (Ky. 1985)). *Gibson* holds: "KRS 411.184(2) requires that this *reckless or wanton behavior be proven by the elevated standard of 'clear and convincing evidence'*"

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[1] In virtually every case, there will be individual facts to argue to support liability, but such facts do not entitle the plaintiff to punitive damages.

[2] *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 797-98 (Ky. 2004); *Meyer v. Chapman Printing Co., Inc.* 840 S.W.2d 814, 821 (Ky. 1992); *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990)

[3] *Osborne v. Keeney*, 399 S.W.3d 1, 8-9 (Ky. 2012); *Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56, 59 (Ky. 2013); *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 490 (Ky. 1998); *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998); *Kroger v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996); *National Coll. Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)

(emphasis added). Under the "clear and convincing evidence" standard employed by this Court, the defendant in *Gibson* "was entitled to a directed verdict with respect to punitive damages." *Id.* at 60.

Maddox also claims that Nissan's conduct "can be viewed as more reckless, wanton and reprehensible than" a number of cursorily-cited cases. (Maddox Brief at 24-25.) For example, in the most recent of those cases, Maddox advances the unbelievable argument that Nissan's conduct was more reprehensible than the defendant's conduct in *MV Transportation v. Allgeier*, 433 S.W.3d 324 (Ky. 2014). (Maddox Brief at 25, 30.) In *Allgeier*, after its driver's "ordinary negligence" caused Allgeier to fall, MV agents, "following policies put in place by MV, placed its own financial self-interests ahead of Allgeier's urgent need for medical assistance, and callously left Allgeier suffering helplessly in dire pain and distress in subfreezing weather for an unnecessarily prolonged period of time," "in wanton disregard for her life and safety." *Id.* at 338-39. But hyperbole is no substitute for facts, and Maddox's comparison of Nissan's conduct to the actions by defendants in *Allgeier* and the remaining string of cases is grossly misleading. (*See, e.g.*, Nissan Brief at 24-25.)

On the other hand, Maddox essentially ignores that Nissan established in its brief that the Court of Appeals did not follow Kentucky law or the U.S. Constitution, both of which restrict punitive damages to reprehensible conduct. (Nissan Brief at 23-37.) Instead of responding, Maddox makes the conclusory assertion that the Court of Appeals did not err (Maddox Brief at 31), sprinkles the word "reprehensible" everywhere she can (*e.g, id.* at 21), and changes the subject to an argument about the ratio of punitive to

compensatory damages. (*Id.* at 32.) Since the ratio of punitive to compensatory damages is not an issue on appeal, Maddox's argument on this subject is pure diversion.

B. Maddox fails to present clear and convincing evidence.

Because Nissan's achievement of the highest possible government safety rating for the 2001 Pathfinder's right front passenger restraint system can never, on its face, come anywhere close to "clear and convincing" evidence of gross misconduct, Maddox's brief to this Court resorts to a variety of tricks and conceits. She uses deception by numbers: "9 to 10 inches of seat belt spoolout in a collision is defective." (Maddox Brief at 14.) She uses innuendo: "Nissan destroyed developmental tests." (*Id.* at 21.) She uses guilt by association: Nissan's conduct "can be viewed as more reckless, wanton and reprehensible than the following situations." (*Id.* at 24.) And she uses pseudo-compilations of alleged misstatements: Appendix Tab 1.[4] (*Id.*, App. 1-6.)

This is Maddox's one-two punch—first redefine the standard of review and then deploy tricks and conceits to create an impression of malevolent conduct. Maddox points to no concrete facts, however—no testimony by Nissan employees, no Nissan documents or memos, no ignored consumer complaints, no government investigations or recalls, and

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[4] In Appendix Tab 1, Maddox tries to put a nefarious spin on multiple statements in Nissan's brief, but this is another diversion. Maddox admits that many of the contested statements are true (e.g., Sapp died and Dwayne Maddox survived), and Nissan's citations to this and other statements (e.g. Dwayne's testimony that "all the bones and cartilage were destroyed in his heel") are accurate. The statements and record citations in Nissan's brief should be compared with Maddox's assertions in the appendix. In other portions of Tab 1, Maddox ignores Nissan's actual statements and "responds" to statements not made. For example, in response to Nissan's correct assertion that "Amanda's own witness could not identify a similar model *vehicle* that would have prevented" her serious injuries, Amanda responds with a list of pieces and parts from different cars—pieces and parts that were never even tested together to see how they would have responded with a person of Amanda's size, let alone that were not included in a "similar model vehicle." Finally, Maddox pretends to take umbrage at the accuracy of a Nissan footnote referencing for the Court's information the existence of a publication showing that, in the year this accident occurred, the relationship between vehicle speed and injury severity was well established: "The 50th percentile speed for slightly injured drivers is 11 mph, for seriously injured drivers it is 24 mph and for fatally injured drivers it is 34 mph." *See* Nissan Brief at p. 1, fn 1. That this published data applies to belted drivers—not unbelted drivers like Sapp—is hardly a winning point.

no similar incidents or accidents—no factual evidence of any kind probative of gross negligence.

1. The amount of seatbelt payout is not evidence of gross negligence.

In various forms and multiple places, Maddox's brief repeatedly asserts that "[a] seat belt system which allows 9 to 10 inches of seat belt spoolout in a collision is defective and unreasonably dangerous." (*Id.* at 14.) Maddox repeats "9 to 10 inches" so often it goes beyond being her synonym for defective design and transforms into evidence of intentional misconduct: Nissan allegedly "knew" 9 to 10 inches of seat belt payout "defeated the purpose of seat belts." (*Id.* at 18, 29.)

For starters, the measurement of "9 to 10 inches" is actually an *estimate*, an approximation, by Maddox's witnesses. Although Maddox claims that her witnesses, Gary Whitman and Paul Lewis, measured the seat belt payout at 9.5 to 10 inches, Whitman testified that he *estimated* the payout between 9 to 10 inches and Lewis testified the length to be "*roughly* about nine and a half inches give or take a quarter of an inch or so." (Maddox Brief at 2; VR 12/6/11 at 11:56:38-56:54; VR 12/7/11 at 11:04:19-04:29.)

Next, Maddox's claim that it was uncontested that Nissan's seat belt system "spooled out significantly more seat belt than allowed by Nissan's own design specification" (Maddox Brief at 7) is factually false. Nissan's design specification for seat belt payout in this vehicle was 225mm—a figure absent from plaintiff's brief. (*See* VR 12/6/11 at 12:32:34-44; VR 12/14/11 at 12:24:59-25:08.) Witnesses for both Nissan and plaintiff estimated that 225mm is about 9 inches. (*Id.*) Nevertheless, employing deception by numbers, Maddox makes "9 to 10 inches" sound abhorrent *per se*.

And it's not a coincidence that "9 to 10 inches" of seat belt was featured in Maddox's evidence of the General Motors recall of a totally different seat belt system in

totally different vehicles under totally different accident scenarios. (VR 12/6/11 at 13:21:24-22:56.) As Maddox argued in closing, "[w]hen General Motors was faced with 9 to 10 inches of seat belt payout, what did it do? GM recalled the product." (VR 12/15/11 at 14:30:58-31:11.)

Viewed factually and dispassionately, Maddox's "9 to 10 inches" argument is flawed on every level—from the accuracy of the numbers themselves to the meaning she gives them. As the photo on page 11 of Maddox's brief helps illustrate, "measuring" payout actually is an inexact process—which explains varying estimates by different witnesses. Whitman in fact conceded that the low end of the estimated measurement is "in the ballpark" of Nissan's design specification. (VR 12/6/11 at 15:50:29-50:42.)

Clear and convincing facts, not rhetoric, are the proper judicial measure of gross negligence. Plaintiff's attempt to turn an alleged "9 to 10 inches" of payout into "reprehensible" conduct simply does not stand up to reasonable scrutiny.[5]

2. Maddox equates document management with "missing" evidence.

Despite not raising in the Court of Appeals the supposed destruction by Nissan of developmental tests that might have helped Maddox's case, and despite not arguing in the trial court that "missing" tests should be a basis for punitive damages, Maddox now argues that discarding test records somehow "is sufficient to support an inference" of reckless and wanton conduct. (Maddox Brief at 25-26.) Poppycock.

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[5] Maddox takes issue with the dissenting opinion's correct statement that no evidence supported her conclusion that Nissan changed its seat belt design "knowing that it was placing heavier occupants at risk." (*Id.* at 27.) But Maddox's claim that heavier occupants put greater force on seat belts than lighter occupants means that, while a load limiter with less payout may have decreased some of her abdominal and gastric bypass injuries, it would have increased the likelihood she would have sustained severe chest and thoracic injury. (VR 12/7/11 at 12:29:09-40:54.) Further, while plaintiff may or may not be correct that 1¾ inches is "a safe amount of spoolout" for a 171 pound dummy but could be "catastrophic" for a 240-pound person who places a greater dynamic load on the belt (thus necessitating greater payout), Maddox fails to provide any record citations for the allegation that Nissan "knowingly traded off the safety of heavier occupants" (Maddox Brief at 29) because there is no such evidence in the record.

As Maddox admits, it is standard practice in the automotive industry to conduct seatbelt tests for occupants ranging from the 5th to 95th percentile. (*Id.* at 6.) This type of testing for occupants across the spectrum, typically done during development, is primarily done via "sled tests," which allow dummy movement and forces to be measured without the cost of crashing vehicles. (*Id.*; VR 12/14/11 at 12:48:36-50:00.)

The development of the Pathfinder for model years 1996 - 2004 was underway by 1993 and development of the load limiter occurred in the late 1990s. (VR 12/13 at 10:52:25-53:00, 11:24:13-11:26:29.) During development, Nissan performed both component tests and crash tests to reach the final specifications. (*Id.* at 11:57:10-12:00:46.) Under Nissan's record retention policy, developmental tests were retained for one year after the start of production of the model at issue and then discarded because they were no longer needed. (*Id.*; Nissan amended responses to document requests 6 and 11, TR 465; amended answer to interrogatory 13, TR 551.) Implementation of this routine policy meant that applicable tests were discarded years before Maddox's accident in 2009—which itself was eight years after Maddox's 2001 Pathfinder rolled off the assembly line.

Maddox also suggests that Nissan's introduction at trial of a sled test report prepared by Nissan's seatbelt supplier—tests using a 95th percentile dummy—was nefarious and that Nissan's portrayal of the test was false. (Maddox Brief at 6-7.) This is another farfetched conceit.

At trial, Nissan presented the Japanese language report of a dynamic strength test (a sled test) using a 95th percentile dummy that was performed on the Pathfinder by the seatbelt manufacturer who supplied the seatbelt. (VR 12/13/11 at 12:33:25-39:16.)

While the English translation of the report—supplied to plaintiff—indicated the sled test on the 95th percentile dummy was performed at 50 km/hour (30 mph), the official Japanese version indicated that it was performed according to the "specified way form," meaning that it was performed pursuant to a "request to the supplier to do the test using" a "way form," which testimony indicated was for a 35 mph test. (*Id.* at 13:00:42-02:26.)

The only dispute at trial was the speed at which the test was done. At most, it was a minor discrepancy. There was no dispute regarding the fact that a 95th percentile dummy was used or that the report had been provided to the plaintiff. Also, Nissan's design specification required the tester to observe dummy movement (for example, to see if the lap belt comes off the pelvis or if any unusual or problematic dummy movement occurred). (*Id.* at 13:35:16-37:31.) The supplier's sled test equipped with a 95th percentile dummy revealed no issues with the seat belt. (*Id.* at 13:37:48-38:28.)

No evidence was presented and no argument was made at any point in the proceedings below that Nissan intentionally or in bad faith destroyed its developmental testing. The only evidence in the record is that, pursuant to Nissan's record retention policy, Nissan's developmental testing was discarded a year after the start of production of the model at issue. Maddox's substitute for clear and convincing evidence—accusing Nissan of destroying evidence—was employed here simply because "destroyed" sounds like a bad act.

Oddly, Maddox cites *University Medical Center, Inc. v. Beglin,* 375 S.W.3d 783 (Ky. 2011), for the proposition that nonproduction of a document is sufficient to support an adverse inference. (Maddox Brief at 26.) But Maddox neither submitted nor obtained a missing evidence instruction at trial. An adverse inference instruction is not warranted

when reports are lost or discarded under ordinary circumstances, such as destruction in the normal course of business. Lawson, *The Kentucky Evidence Law Handbook* § 2.65[3] (4th ed. 2003) ("An inference based on destruction (or loss) may not be drawn if the destroyer acted inadvertently (mere negligence) or if there is an adequate explanation for the destruction (or loss)."); *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971 (9th Cir. 2009) (no missing evidence inference is proper when evidence was destroyed long before litigation was anticipated).

As this Court held in *Beglin:* "All agree that the *Sanborn* instruction [requiring a finding that evidence containing "material information" was "intentionally and in bad faith lost or destroyed"] accurately sets forth the elements necessary to permit a jury to draw an adverse inference from missing evidence." 375 S.W.3d at 788. Despite her innuendo about "missing" evidence, Maddox does not and cannot demonstrate the *Sanborn* elements are present here. Maddox neither submitted nor obtained a missing evidence instruction, and the jury was not permitted to draw an adverse inference. Yet Maddox now uses the "destroyed evidence" trick to support her claim for punitive damages.

The misuse of "missing" evidence by Maddox illustrates why Kentucky has a high bar for punitive damages: a plaintiff can make a thing sound malicious even when it is not and even when her argument is belated.

3. Outstanding performance on voluntary federal safety tests weighs against—not in favor of—punitive damages.

The section of Maddox's brief entitled "Arguments and Inferences" (pp. 18-21) provides unintended support for why clear and convincing facts, not rhetoric, are the proper basis for punitive damages. For example, Maddox characterizes Nissan as "being

envious of other car companies scoring a five star frontal crash rating" and deciding on a "cheap fix" despite "knowing that 9 to 10 inches of seat belt spoolout defeated the purpose of seat belts." (Maddox Brief at 18.)

Maddox fails to provide support in the record for these claims, and there is none. Indeed, because the purpose of the restraint system is not actually defeated by increased payout for larger passengers, Maddox was unable to present at trial a shred of evidence of any similar injuries involving the Pathfinder's restraint system and overweight passengers.

More importantly, Maddox's rhetoric regarding Nissan's 5-star rating further demonstrates the need for facts, not argument, to support punitive damages. Although Maddox asserts that she "never claimed that 'designing and testing an occupant restraint system as required by federal regulations was improper" (Maddox Brief at 31), her "stars over safety" theme at trial did just that. She continues that theme in this Court through such over-the-top assertions as achieving a 5-star rating (meaning that the car is deemed even safer under the federal standards) is "reprehensible." (*Id.* at 21.) Even if Nissan's compliance with federal government standards and Nissan's production of cars deemed safer under those standards does not operate as a complete shield, at the very least it should not be used as a sword, let alone a *reason* to award punitive damages. (*See* Nissan Brief at 18-21.)

Maddox does her best to minimize the significance of Federal Motor Vehicle Safety Standards, including the New Car Assessment Program. (Maddox Brief at 4-5.) She refers to FMVSS as "minimum standards," but the official foreword to the regulations states the purpose of FMVS standards is to ensure "that the public is protected

against unreasonable risk of crashes occurring as a result of the design, construction, or performance of motor vehicles and is also protected against unreasonable risk of death or injury in the event crashes do occur." (National Highway Traffic Safety Administration, Foreword, http://www.nhtsa.gov/cars/rules/import/FMVSS/ (last visited Jan. 11, 2015.) In other words, compliance with FMVSS safeguards against "unreasonable" risks, not every possible risk.

In this vein, the markedly different injuries suffered by Maddox compared to her husband do not, as she contends, prove a design defect, let alone outrageous conduct sufficient to sustain punitive damages. Although Maddox asserts that her husband "was subjected to the exact same accident forces," she ignores her own admission that, due to larger mass, a heavier person will always be subjected to greater forces than a lighter person under otherwise identical conditions. (Maddox Brief at 21, 15.) The disparate injuries are undeniable proof that legally mandated compliance with FMVSS 208, 209, and 210 cannot be accomplished while protecting equally well all sizes and shapes of human beings. Maddox tacitly admits this fact by acknowledging that the "*only* reason Amanda's seat belt spooled out so much here . . . was because Amanda weighed more." (*Id.* at 15.) For the sake of argument, if Amanda had been driving the Pathfinder with her husband in the passenger seat, would serious injury to her (in a position with a 4-star rating, not 5) "prove" that the driver's restraint system was defective and the passenger restraint system was not? The answer is no.

Counsel for Appellants