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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000952-MR

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

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 10-CI-00082

AMANDA MADDOX APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

COMBS, JUDGE: Nissan Motor Company, Ltd., and Nissan North America, Inc., (collectively, "Nissan") appeal the judgment of the Lincoln Circuit Court which held them liable for injuries sustained by Amanda Maddox (now Gifford). After our review, we affirm.

On June 6, 2009, after dining with friends, Amanda and her husband, Dwayne Maddox,[1] drove home on Highway 127 in their 2001 Nissan Pathfinder. Pertinent to this appeal, we note that they both had undergone gastric bypass surgery several years earlier; Amanda weighed 240 pounds, and Dwayne weighed 170 pounds.

On this particular evening, as Dwayne and Amanda approached Bowen Road, another driver, Edward Sapp, turned his Nissan Altima from Bowen Road onto Highway 127 and drove in the wrong lane toward the Pathfinder. The driver of a sports-utility vehicle (SUV) in front of the Pathfinder saw Sapp's car bearing down in the wrong lane and managed to swerve into the right shoulder, narrowly averting a collision. However, Dwayne was unable to react, and the two vehicles collided head on. A Pontiac G6 then rear-ended the Pathfinder. (The Pontiac is not, however, involved in our analysis of this case.)

Both the Altima and the Pathfinder were severely damaged. The Pontiac received only minor damage. Sapp, who was greatly intoxicated, died at the scene before first responders arrived. Dwayne suffered a shattered right heel, but he was able to exit the Pathfinder on foot before the occupants of the Pontiac put him into their backseat. The occupants of the Pontiac had not been injured.

[1] During the pendency of the underlying litigation, Dwayne and Amanda divorced. Amanda has since remarried and now uses the last name Gifford.

Amanda, however, was trapped inside the front passenger seat of the Pathfinder. Rescuers extricated her from the vehicle with hydraulic equipment, and she was then transported by helicopter to the University of Kentucky Medical Center.

Amanda's injuries were extensive. She suffered fractures of her sternum, several ribs, left wrist, vertebrae, and hip. Her hip came out of socket, and the socket itself was fractured; this injury has resulted in permanent nerve damage. A dire condition resulted when Amanda's gastric bypass ruptured. In order for her injuries to heal from the inside out, she maintained an open abdominal wound – with her internal organs visible. She was unable to eat food for seven months. She was hospitalized for 139 days and was later confined at home for several months. Among other complications, she suffered a stroke due to an infection related to the wound. Amanda underwent more than 75 surgical procedures.

Before the crash, Amanda had worked as a home health nurse. Fifteen months after the crash, she attempted to return to work, but she was physically unable to perform her duties as a result of the lasting effects of her injuries. At the time of trial, Amanda was pursuing an advanced degree in order to become qualified for nursing jobs that are less physically demanding.

On February 22, 2010, Amanda filed a lawsuit against Sapp's estate and against Nissan. She alleged that Sapp had negligently caused the crash and

that Nissan's design of the Pathfinder's restraint system negligently caused the severity of her injuries. An eight-day trial took place between December 5 and December 15, 2011.

At trial, Nissan argued that it could not have been negligent because the restraint system complied with federal safety regulations and that it had performed correctly. Amanda did not dispute that the Pathfinder's restraint system was compliant. Instead, she argued that the restraint system was unsafe because it was designed only to protect persons weighing approximately 171 pounds – the weight of the test dummy used in federally mandated crash tests. Her theory was that Nissan designed the restraint system to work best on dummies of that size in order to receive a higher safety rating and, therefore, to be more appealing and marketable to consumers.

It was undisputed that a component of the seatbelt, the load limiter, had caused Amanda's seatbelt to spool out approximately nine extra inches of webbing. It was also undisputed that Nissan had added the load limiter to the Pathfinder restraint system in 1999 and that its performance rating in certain government tests improved as a result of the addition of this feature. Amanda's theory was that because the tests were only performed on one size of crash test dummies, Nissan negligently pursued the higher ratings instead of making the vehicle safe for consumers of all sizes.

Marks on Dwayne's seatbelt showed that it had spooled out approximately four inches of webbing. Amanda claimed that the extra webbing, combined with the collapse of the front of her seat, caused her to submarine. "Submarining" occurs when a person slides underneath a seatbelt. Amanda's experts testified that the submarining caused her gastric bypass to rupture. Amanda argued that if Nissan had properly limited the amount of webbing that the load limiter could spool out, she would not have submarined.

Nissan's experts contended that Amanda had not submarined. They touted the load limiter's benefits -- primarily the reduction of chest injuries caused by seatbelts. Nissan claimed that Amanda's injuries were severe because of her weight and that her healing process was delayed because she was a tobacco smoker. Nissan also argued that without the load limiter, Amanda's injuries would have been worse.

The jury ultimately agreed with Amanda. It apportioned 30% of fault to Sapp[2] and 70% of fault to Nissan. It found that Nissan was responsible for $2,577,547 in compensatory damages and punitive damages of $2,500,000. This appeal follows.

Nissan's first argument is that the trial court should have granted its motion for directed verdict because the Pathfinder was not defective, having

[2] Sapp's estate did not assert any defenses at trial, and it is not a party to the appeal.

achieved high ratings in the federal New Car Assessment Program (NCAP).

When we review a directed verdict motion, we must accept as true the evidence that supports the jury verdict, allowing the prevailing party all reasonable inferences. *Lewis v. Bledsoe Surface Mining Co*., 798 S.W.2d 459, 461 (Ky. 1990). Unless the verdict is "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice," we must affirm the judgment. *Id*. at 462. (Internal citations omitted).

Federal Motor Vehicle Safety Standards (FMVSS) are promulgated by the Secretary of Transportation. *See* 49 U.S.C. § 30101. FMVSS 208 provides standards of restraint systems and mandates crash tests at 30 miles per hour. NCAP is a program created by the National Highway and Traffic Safety Administration (NHTSA). It is a voluntary program that allows manufacturers to test their vehicles using more stringent standards than those dictated by the FMVSS and to receive star ratings reflecting their performance.[3] Five stars are the maximum rating and indicate the best level of crash protection.

NCAP frontal crash tests are based on FMVSS 208 but are conducted at speeds of 35 miles per hour. The crash test dummy used represents a 50th percentile male weighing 171 pounds. There is a dummy for a 95th percentile male

[3] *Overview of NCAP and Congressional Mandate,* Federal Register, https://www.federalregister.gov/articles/2011/07/29/2011-19049/new-car-assessment-program-ncap-safety-labeling, (last accessed on June 5, 2013).

that weighs 223 pounds. The 2001 Nissan Pathfinder achieved a rating of five stars in frontal crash tests utilizing the 50th percentile dummy. Nissan now argues – as it did to the jury – that the test results prove that Amanda survived the crash because of the Pathfinder's safety features. However, compliance with safety regulations does not preclude common-law negligence claims. 49 U.S.C. § 30103(e); *see also King v. Ford Motor Co*., 209 F.3d 886, 892 (6th Cir. 2000). Therefore, we must examine the evidence under the directed-verdict standard that governs our review.

Amanda's experts presented evidence that the crash between the Pathfinder and the Altima was nearly identical to an NCAP frontal crash test. The delta-v (a physics term for change in velocity) measurement in a test is approximately 38 miles per hour, and the delta-v of the Pathfinder was approximately 38 miles per hour. Like a frontal crash test, the Pathfinder and the Altima collided almost directly head-on; the experts agreed that the variation was minimal. The Pathfinder had one occupant (Dwayne), who weighed the same as a 50th percentile dummy, and one occupant (Amanda), who weighed more than a 95th percentile dummy. Dwayne's injuries were very similar to those of the crash test dummy, and his injuries were not life-threatening. Amanda's injuries, however, were extensive and devastating. All experts agreed that Dwayne's side of the car

had experienced somewhat more force than Amanda's because the vehicles collided at a slight angle.

Amanda asked the jury to determine that Nissan had designed the Pathfinder to provide maximum protection for the 50th percentile dummy while neglecting the safety of larger occupants. She claimed that Nissan merely wanted to achieve the five-star rating in order to be more appealing to consumers. She also pointed out that while Nissan consistently touted the safety of the load limiter in the seatbelt, the back seatbelts do not have load limiters, and crash tests are not performed on back seat occupants. Amanda also cited weaknesses in the testimony of Nissan's witnesses, such as a lack of analysis of her collapsed seat. After our review of the full record and pertinent authorities, we are not persuaded that the verdict was unsupported by the evidence or that it was a result of passion. Thus, we affirm the denial of the motion for a directed verdict.

Plaintiffs in a products liability action may plead negligence claims based on one of three theories: 1) design defect; 2) manufacturing defect; or 3) failure to warn. *Clark v. Hauck Mfg. Co*., 910 S.W.2d 247, 251 (Ky. 1995). Amanda presented both a failure-to-warn theory and a design-defect claim. Although the jury needed to find against Nissan according to only one theory in order to find it liable, it determined that Nissan was liable under both theories. *See Martin v. Ohio County Hospital Corp*., 295 S.W.3d 104, 115-16 (Ky. 2009).

In support of the failure-to-warn theory, Amanda contended that Nissan negligently failed to warn users of the dangers posed by the load limiter. In Kentucky, manufacturers have the duty "to warn of dangers known to them but not known to persons whose use of the product can reasonably be anticipated." *Watters v. TSR, Inc*., 904 F.2d 378, 381 (6th Cir. 1990). Adequacy of a warning is a question for a jury. *Post v. American Cleaning Equipment Corp*., 437 S.W.2d 516, 521 (Ky. 1968).

In Jury Instruction Number 4, the jury was given the option of finding:

> for Amanda Maddox against Nissan if [it] believe[d] from the evidence that Nissan failed to provide an adequate warning to passengers, including Amanda Maddox, that the vehicle was equipped with a load limiter and could cause injuries similar to the ones suffered by Amanda Maddox, and that such a warning would have lessened or prevented Amanda Maddox's injuries.

Nissan claims that it was error for the jury to receive this instruction because Amanda did not prove any causal connection between the load limiter and her injuries. We disagree.

A defendant's conduct is deemed to have caused an injury if the conduct was a substantial factor in bringing about the injury. *Morales v. American Honda Motor Co., Inc.*, 71 F.3d 531, 537 (6th Cir. 1995) (citing *Deutsch v. Shein*, 497 S.W.2d 141, 144 (Ky. 1980)). Circumstantial evidence can be used to

determine causality, and it is a question for a jury. *Id*. The standard of proof is whether the evidence "tilt[s] the balance from possibility to probability." *Id*. (quoting *Calhoun v. Honda Motor Co., Ltd*., 738 F.2d at 130).

It is undisputed that the driver's manual of the Pathfinder did not mention the load limiter and that the vehicle posed a risk to individuals weighing more than the 50th percentile dummy. Several of Amanda's expert witnesses testified that her injuries were caused or exacerbated by the load limiter's release of excessive webbing into the seatbelt. Nissan's experts testified that it spooled out so much due to Amanda's weight. Amanda's occupancy-protection expert witness, Gary Whitman, testified that he is not an expert regarding the content of warnings. However, he is experienced at recognizing when a warning is needed, and he testified that the Nissan should have warned consumers about the risks of the load limiter. The evidence presented constituted a reasonable basis for the jury to conclude that Nissan was aware of the risk and that it negligently failed to provide warning to users of the seatbelt.

Nissan also argues that Amanda did not offer specifics of what the warning should contain. However, Nissan does not cite to any authority that imposes such a duty on a consumer, and we are unaware of any. Our research has revealed no such duty on the part of a consumer.

Nissan also claims that Amanda did not offer proof that she would have heeded such a warning, but she is not required to do so. A seller may assume that a user will follow an adequate warning. *Bryant v. Hercules*, 325 F.Supp. 241, 246 (W.D. Ky. 1970) (quoting Restatement (Second) of Torts § 402A, comment j). It is impermissible for Nissan to shift its burden of proof to Amanda. *Morales v. American Honda Motor Co., Inc*., *supra*. We are unable to conclude that it was improper for the jury to have been instructed about Nissan's failure to warn.

Nissan also argues that the trial court should have granted its motion for directed verdict on the ground that Amanda failed to prove the elements necessary for a *prima facie* crashworthiness claim; *i.e.*, her theory of a design defect. A crashworthiness claim does not allege that the design defect *caused* the crash. Instead, it asserts that "a vehicle was defective in its alleged ***inability to withstand an accident*** and prevent injuries that would not have otherwise occurred." *Estate of Bigham v. DaimlerChrysler Corp*., 462 F.Supp.2d 766, 772 (E.D. Ky. 2006). (Emphasis added.)

Three elements are necessary to prove a crashworthiness claim:

(1) an alternative safer design, practical under the circumstances;
(2) proof of what injuries, if any, would have resulted had the alternative, safer design been used; and
(3) some method of establishing the extent of enhanced injuries attributable to the defective design.

Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 41 (Ky. 2004). Nissan argues that Amanda failed to prove an alternative safer design. In its order denying Nissan's post-trial motions, the trial court observed that it was unclear whether Amanda had met this burden of proof. However, we have reviewed the full record (including the entire trial) and have concluded that she did meet her burden of proof.

Amanda's expert Whitman presented not one but several alternative designs during his testimony. He explained that a cinching latch plate would not have allowed webbing to spool into the lap belt. He also pointed out that the restraint system in the Pathfinder had been safer *before* the load limiter was added. Whitman also demonstrated stronger seat plans and alternative seat designs from Volvo and Saab that would not have collapsed during the crash. He showed the jury a retractor from a Volvo that limits the load limiter. It would not have allowed the excessive webbing to spool out into Amanda's seatbelt. At the end of his direct examination, Whitman was asked, "If we don't use this Nissan seat belt design, are there safer alternative designs?" He then offered a thorough summary of all the evidence that he had just presented concerning the specifics of alternative designs.

Nissan cites *Bigham, supra*, for the proposition that Amanda was required to subject the alternative safer designs to rigorous testing before they could meet the threshold of proof. We have reviewed both *Bigham* and *Gregory*,

and we conclude that Whitman's testimony satisfies the criteria for a *prima facie* crashworthiness claim.

In *Bigham*, the expert offered speculative alternative designs but did not have examples and had not created examples of what theoretically would have helped. The Sixth Circuit rejected the testimony as being too speculative. However, the Supreme Court of Kentucky accepted as sufficient the expert testimony in *Gregory*, which was similar to the testimony in the case before us. The expert in *Gregory* offered only one alternative component– an airbag used in a Honda. In the case before us, the expert provided several examples from other manufacturers of both seatbelt components and seats. Therefore, we are satisfied that Amanda met the first prong of a crashworthiness claim.

Nissan also claims that Amanda did not prove the remaining two elements of a crashworthiness claim as set forth in *Gregory*: what her injuries would have been without the load limiter or that the load limiter caused her enhanced injuries. However, Amanda's experts specifically testified that she submarined under the seat due to the excessive webbing from the load limiter. The submarining caused her catastrophic intestinal injury -- as well as her hip injury. Nissan does not offer authority[4] for its contention that the proof should have been

[4] Nissan cites to one federal district case that is unpublished. Unpublished ***Kentucky*** cases may be cited**.** Nissan provided a Lexis-Nexis citation, and this court uses Westlaw. *See* CR 76.28(4)(c). Nissan did not attach the case as an appendix to its brief as required by the rule.

otherwise. We reiterate that causation evidence in products liability cases may be circumstantial. *Morales v. American Honda Motor Co., supra*. Nissan's experts had testified that Amanda's injuries would have been more severe without the load limiter. It was the jury's prerogative to choose which experts were more believable.

Nissan contends that it was improper for Amanda to use Dwayne as an example of what her injuries likely would have been if the Pathfinder had not been defective. On the contrary, we can think of no better example. They were in the same vehicle in the same crash.[5] Also, it is significant that Dwayne's seatbelt spooled out only four inches, essentially demonstrating that a load limiter that did not allow nine inches of extra webbing would have reduced Amanda's injuries.

We also note that Amanda asked Nissan for records of crash tests performed with heavier dummies as an indication of what Amanda's injuries might have been. However, Nissan did not produce them during discovery. Thus, it seems inequitable for Nissan to contend that Amanda's proof is insufficient for lacking what Nissan itself failed to provide. Therefore, we are not persuaded that

[5] Crash tests are very expensive. One source indicates that test dummies cost anywhere from $25,000 to $125,000. A single test can cost $100,000. http://autos.aol.com/article/how-crash-tests-work/ (last consulted on 06/12/2013). Requiring plaintiffs to provide this level of proof would effectively bar all crashworthiness plaintiffs from litigation as cost prohibitive. No Kentucky case law places such a requirement on plaintiffs, and we shall not create that precedent.

the trial court committed error when it denied Nissan's directed verdict on the crashworthiness claim.

Nissan also challenges as incorrect the jury instructions related to the crashworthiness claim. Because jury instructions are considered a matter of law, we must review them *de novo*. *Howell v. Commonwealth*, 296 S.W.3d 430, 432-33 (Ky. App. 2009).

Nissan relies on *Toyota v. Gregory*, *supra*, to support its contention that the trial court should have instructed the jury about the existence of an alternative feasible design. We disagree. In *Gregory*, the trial court had instructed the jury on the alternative design, and the appellant, Toyota, argued that the instruction was erroneous. Again, in *Gregory*, the expert offered proof of only one alternative component – an airbag used in a Honda. Amanda has offered proof of more than one alternative safer design. The Supreme Court held that, "***while it was not required to do so***, the trial court did not err in instructing the jury that it must find proof of a feasible alternative safer design." *Id*. at 42. (Emphasis added.) We are not persuaded by Nissan that we should construe this holding in any other way than its plain language. Nissan has not provided any authority suggesting that *Gregory* is no longer good law. We are bound to follow the precedent of the Supreme Court. *See* Rule[s] of the Supreme Court of Kentucky (SCR) 1.030(8)(a). Therefore, we do not find any error in the jury instructions.

Nissan further argues that it was error for the trial court to permit Amanda to introduce a General Motors (GM) recall from 2003. The recall pertained to the load limiter in the seatbelts of three 1997 SUV models. GM determined that the load limiter would spool out ten extra inches of webbing if fully deployed. In "a severe multiple rollover event," a belted driver could be ejected from the vehicle as a result of the extra webbing. The GM recall was presented during expert testimony of Whitman. Nissan contends that the recall information was irrelevant and prejudicial. However, we disagree.

Our standard of review for evidentiary issues is whether the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). Our Supreme Court has defined "abuse of discretion" as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

While Nissan suggests that recall evidence is entitled to a higher scrutiny than that of abuse of discretion, we have been unable to find an example of any other standard of review. We agree that Kentucky courts have not provided a case directly on point. Nissan has offered *Brock v. Caterpillar*, 94 F.3d 220 (6th Cir. 1996), as instructive. *Brock*, however, did not involve a recall, but it concerned comparative evidence between two different models of bulldozers

manufactured by the same company. In *Brock*, the Sixth Circuit deemed the comparative evidence improper because its relevance was "outweighed by the prejudicial effect . . . because of the dissimilarities in the bulldozers." *Id*. at 225. The court opined that Federal Rule[s] of Evidence (FRE) 403 should have been applied. The Kentucky equivalent is Kentucky Rule[s] of Evidence (KRE) 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

It is virtually axiomatic that all relevant evidence is prejudicial to the party against whom it is offered. Robert G. Lawson, *Kentucky Evidence Law Handbook*, §2.10(4)(b) at 89 (4th Edition 2003). Evidence that is ***unduly prejudicial*** "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *Id*. (*quoting Carter v. Hewitt*, 617 S.W.2d 961, 972 (3rd Cir. 1980)).

Nissan has also cited a Sixth Circuit case in which the court held that it was improper to allow the jury to hear a recall notice. *Calhoun v. Honda Motor Co., Ltd*., 738 F.2d 126 (6th Cir. 1984). The *Calhoun* court applied the same line of reasoning as did the *Brock* court. It rejected the recall notice because causation of the motor accident had not been determined or proven.

Because Kentucky case law regarding the admissibility of recall notices is indeed sparse, we sought guidance from other jurisdictions. Although the jurisdictions are diverse, their legal analyses share common themes. Some courts held that recall notices were inadmissible either because of the existence of an evidentiary rule equivalent to KRE 403 or because of a lack of other evidence. *See Nay v. General Motors*, 850 P.2d 1260 (Utah 1993); *Landry v. Adam*, 282 So.2d 590 (La. Ct. App. 1973) (However, the error was not reversible); *Carballo-Rodriguez v. Clark Equip. Co*., 147 F.Supp.2d 66 (D. Puerto Rico 2001); *Muniga v. General Motors Corp*., 302 N.W.2d 565 (Mich. Ct. App. 1980).

Other courts, however, applied the balancing mechanism of KRE 403 and held that recall notices were properly admitted. *Manieri v. Volkswagenwerk*, 376 A.2d 1317 (N.J. 1977); *Longenecker v. General Motors Corp*., 594 F.2d 1283 (9th Cir. 1979); *Farner v. Paccar, Inc*., 562 F.2d 518 (8th Cir. 1977). In some instances, the recall evidence was admissible because of the presence of other independent proof, including expert testimony. *Harley-Davidson Motor Co., Inc. v. Daniel*, 260 S.E.2d 20 (Ga. 1979); *DiCosolo v. Janssen Pharmaceuticals, Inc*., 951 N.E.2d 1238 (Il. App. Ct. 2011). Some other courts held that recall notices were admissible because they were presented to the jury with limiting instructions. *Higgins v. General Motors Corp*., 465 S.W.2d 898 (Ark. 1971); *Herndon v. Seven Bar Flying Serv., Inc*., 716 F.2d 1322 (10th Cir. 1983).

In this case, we are persuaded that the recall evidence was properly admitted. The court prefaced its comments by admonishing the jury, "This is being introduced for a very limited purpose. You may consider it establishes – if it does so at all – that excessive payout poses a particular danger." The court then permitted Amanda's expert witness Whitman to read one paragraph of the recall notice to the jury:

> General Motors has decided that a defect that relates to motor vehicle safety exists in certain 1997 Chevrolet Blazer, GMC Jimmy, and Oldsmobile Bravada utility vehicles. The subject vehicles were manufactured with a driver's seat belt buckle assembly that contains an energy-absorbing loop. Sustained loads of sufficient magnitude and duration on the belt in severe crashes could fully deploy the buckle energy-absorbing loop, introducing a total of 10 additional inches of webbing into the seat belt system. The free falling latch plate used in this system may allow webbing to dynamically distribute between the lap and shoulder belt as the driver's position changes during a multiple rollover event. If the energy-absorbing loop fully deploys in a severe multiple rollover event, it is possible that a belted driver may experience partial or even complete ejection from the vehicle.

Letter from Lyndon R. Lie, Dir. Prod. Investigations, General Motors North America, to K.N. Weinstein, Assoc. Adm'r for Safety Assurance, NHTSA. The court admitted the recall evidence as relevant. Additionally, although the GM recall was based on rollover accidents, Amanda also presented the preamble to an amendment of FMVSS rule 209, Seat Belt Assemblies, which advises as follows:

> If a load-limiting belt design elongates to the extent that it would provide no protection in roll-over accidents, ***it would also not provide any protection in frontal crashes***. Therefore, it is not likely that manufacturers would permit such extensive elongation in their systems. Moreover . . . the elongation that would occur even with load-limiting systems ***would not be as great in roll-over accidents as in frontal accidents***. . . . Manufacturers ***should be cognizant*** of the point . . . during the development of their systems.

Docket No. 80-12, Notice 2. (Emphases added.)

Under the authorities cited, we cannot agree that the evidence was prejudicial. The evidence was very near the end of Whitman's direct examination. Nissan then began its cross-examination by carefully distinguishing the recall notice, observing first that it was issued by GM and not by Nissan. It was for vehicles older than the 2001 Pathfinder. It was for a different type of load limiter and a different type of energy-absorbing loop than that of the Pathfinder. The vehicles' seatbelt systems had different assemblies, and the recall was for a rollover event, not a frontal crash.

Nissan's thorough cross-examination, coupled with the court's narrowly tailored admonition, made it clear to the jury that the purpose of the recall notice was to prove that the amount of excess webbing spooling from Amanda's seatbelt was indeed dangerous. Amanda was not trying to prove anything about the function of the load limiter. It was undisputed that her seatbelt had spooled out between nine and ten inches of webbing.

Furthermore, we note that courts have allowed recall notices for one product to be admitted as evidence in a case concerning another product. *Hessen v. Jaguar Cars, Inc*., 915 F.2d 641 (11th Cir.) (Models of Jaguars were not the same, but the defect was the same); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986) (Pinto recall was for a defect in a Mustang that had not been recalled, but the defect was the same); *Maietta v. International Harvester Co*., 496 A.2d 286 (Maine 1985) (School bus recall was admissible because the school bus had the same braking system as the dump truck that was at issue); *Fisher v. Walsh Parts & Serv. Co., Inc*., 277 F.Supp.2d 496 (E.D. Penn. 2003) (Expert testimony permissibly included recall about a similar part utilized by a different manufacturer for a similar defect). The GM recall was one small part of a several days' worth of proof that Amanda submitted. Because Nissan was able to point out all the differences between the recalled vehicles and the Pathfinder, we are unable to conclude that it was unduly prejudiced by the admission of the notice.

Finally, Nissan argues that the trial court erred in allowing the jury to award punitive damages. Punitive damages may be awarded only when the tortfeasor has acted with gross negligence. *Kinney v. Butcher*, 131 S.W.3d 357, 358-59 (Ky. App. 2004). *Gross negligence* has been defined as:

> something more than the failure to exercise slight care. We have stated that there must be an element either of malice or willfulness or such an utter and wanton

> disregard of the rights of others as from which it may be assumed the act was malicious or willful.

Cooper v. Barth, 464 S.W.2d 233, 234 (Ky. 1971). The most important consideration of whether punitive damages are warranted is "the degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599 (1996). Five factors are used to determine the reprehensibility of the conduct:

> the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409, 123 S. Ct. 1513, 1515-16, 155 L. Ed. 2d 585 (2003).

Nissan claims that it could not have acted with malice or with disregard of others because of: its performance on safety tests; the fact that load limiters are a recognized safety device; and the fact that the 2001 Pathfinder has not been the subject of recalls related to its restraint system. Nonetheless, we disagree.

As the trial court discussed with counsel while hearing Nissan's motion for directed verdict, the evidence was undisputed that the Pathfinder performed very well *within certain parameters*. Dwayne fit within those

parameters, and he walked out of the vehicle at the crash site. Experts for both parties agreed that the percentiles for the dummies had not been updated since they were set by the government during the 1970's. They also agreed that since then, our society has become larger – in girth as well as population. In spite of these facts, Nissan was unable to produce evidence that it had tested the Pathfinder to determine how safe it was in frontal crashes for users who weighed more than the 171-pound dummy (again, a 50th percentile model).

This court has held directly that lack of testing for defects constitutes a proper basis for instructing a jury on punitive damages. *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838 (Ky. App. 2004). In that case, we pronounced, "[w]hile its conduct may not have been as reprehensible as some deliberate wrongdoing, its cavalier willingness to expose the public to an unreasonable risk of severe physical injury was egregious enough to merit a significant penalty." *Id*. at 842.

Additionally, factors in this case are in congruence with the factors from *State Farm* -- indicating that punitive damages are not barred in this case. It is undisputed that Amanda suffered severe physical injuries. Amanda presented evidence that Nissan exposed other occupants to risk. Every time that Nissan manufactured a Pathfinder with the load limiter, it repeated the conduct. Her evidence provided the jury with a reasonable inference that Nissan had utilized trickery or deceit by designing the vehicle for the safety of a crash test dummy of

average size and not for foreseeably heavier passengers. (BMW recites "mere negligence" as a factor.) Amanda admits that the financial vulnerability factor does not apply to her; she is attending school and has the ability to seek employment in sedentary jobs. Nonetheless, in the light of the lack of proof of Nissan's testing and the wide scope of risk to others, it was not palpably or flagrantly against the evidence for the jury to find that punitive damages were appropriate. We have no basis to reverse the decision of the trial court or to disturb its legitimate exercise of its discretion on this issue.

Accordingly, we affirm the Lincoln Circuit Court in all respects.

NICKELL, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I fully agree with the reasoning and result of the majority opinion upholding the jury's verdict and award of compensatory damages. In the current case, Amanda sought to recover under either a failure-to-warn theory or a design-defect/crashworthiness theory. I agree with the majority that the trial court properly instructed the jury under both theories. Furthermore, I agree with the majority that Amanda presented sufficient evidence of an alternative safer design to submit her crashworthiness claim to the jury. And finally, I agree that the

evidence of the 2003 GM recall was relevant for the limited purpose of establishing that Nissan was aware of the danger caused by the design of a load limiter which allowed an excessive amount of web spooling. The trial court properly admonished the jury regarding the limited purpose for which the recall notice was being admitted, and Nissan was able to extensively cross-examine the testimony to establish the significant differences between the designs of its load limiter and GM's load limiter. Thus, I agree with the majority that the trial court did not abuse its discretion by admitting evidence of the GM recall.

As I view this case, the most significant and difficult issue presented is whether the trial court properly instructed the jury on punitive damages. However, neither party devotes much time or attention to this argument. Nissan relegates its argument to the last three pages of its 25-page primary brief and one and a half pages of its reply brief. Amanda devotes even less space in her brief and mainly focuses on the amount of damages awarded. Where the parties themselves have not given great weight to a particular point, I am not inclined to devote much time or effort to it either. Moreover, I am very hesitant to reverse a jury's award of punitive damages since the jury had a full opportunity to consider the evidence presented at trial.

Nevertheless, I have come to the conclusion that Amanda presented insufficient evidence to justify submitting the issue of punitive damages to the jury.

A party is entitled to have the jury instructed on the issue of punitive damages "if there was any evidence to support an award of punitive damages." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky App. 1996). Punitive damages are given to the plaintiff over and above the full compensation for his injuries for the purpose of punishing the defendant, teaching him not to do it again, and deterring others from following his example. *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974). For these reasons, KRS 411.184 authorizes an award of damages only upon a showing by clear and convincing evidence that the defendant acted with fraud, oppression, or malice. However, the Kentucky Supreme Court has held that, under the common law, punitive damages may be awarded on a showing of gross negligence and that KRS 411.184 cannot constitutionally exclude recovery of punitive damages on this basis. *Williams v. Wilson*, 972 S.W.2d 260, 264 (Ky. 1998).

"Gross negligence is a wanton or reckless disregard for the lives, safety or property of others." *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51–52 (Ky. 2003). The threshold for the award of punitive damages is whether the misconduct was "outrageous" in character, not whether the injury was intentionally or negligently inflicted. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985). In a case where gross negligence is used as the basis for punitive damages, gross negligence has the same character of outrage justifying

punitive damages as willful and malicious misconduct in torts where the injury is intentionally inflicted. Just as malice need not be expressed and may be implied from outrageous conduct, so too may wanton or reckless disregard for the rights of others be implied from the nature of the misconduct. *Id.* at 389–90. However, a finding of gross negligence clearly requires more than a failure to exercise ordinary care. It requires a finding of a failure to exercise even slight care such as to demonstrate a wanton or reckless disregard for the rights of others. *Phelps*, 103 S.W.3d at 51–52. *See also People's Bank of Northern Kentucky, Inc. v. Crowe Chizek & Co.*, LLC, 277 S.W.3d 255, 268 (Ky. App. 2008).

The majority cites to *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838 (Ky. App. 2004), as holding that a manufacturer's failure to test for defects may constitute a proper basis for instructing a jury on punitive damages. But in *Sufix*, the manufacturer developed and marketed a trimmer head with a plastic housing that was not strong enough to withstand the normal forces associated with its typical use. Furthermore, the manufacturer could not document any testing of the design, and the design had been rejected when it attempted to distribute the product in Italy. This court concluded that the manufacturer's failure to test for defects that pose a risk of serious injury and that are susceptible to adequate pre-release testing can amount to a conscious or reckless disregard for the rights and safety of others and thus can justify an award of punitive damages. *Id.* at 842.

In contrast, Nissan conducted extensive testing of the design of the load limiter prior to its release beginning with the 2000 model year of the Pathfinder SUV. There is no question that Nissan's testing complied with federal standards. In addition to the testing during the development phase, Nissan voluntarily submitted the vehicle for additional testing under the standards set out by the National Highway and Traffic Safety Administration's (NHTSA) New Car Asssessment Program (NCAP). The NCAP frontal crash tests are more stringent than those required by federal regulations. The 2000 Nissan Pathfinder received NCAP's highest safety rating of five-stars.

The crash test dummy used in the NCAP test represents a 50th percentile male weighing 171 pounds. There is a crash-test dummy representing a 95th percentile male weighing 223 pounds. But given the expense of conducting the test, NCAP concluded that a single test using the median dummy would provide the most-accurate indicator of the effectiveness of the restraint system for the largest number of prospective users. Unfortunately, that assessment was incorrect, at least in this case. The restraint system operated exactly as designed for Dwayne, but it completely failed for Amanda, who weighed significantly more than the test parameters had allowed.

In a design defect case, courts use some form of risk-utility analysis to assess the decisions made by manufacturers with respect to the design of their

products. *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530, 535 (Ky. 2003). Because the manufacturer chooses the design of its product, the focus of the inquiry must be on its conduct rather than the product. *Id.* "Hence, the trier of fact must employ a risk-utility balancing test that considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen 'to determine whether ... the manufacturer exercised reasonable care in making the design choices it made.'" *Id., quoting Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 329-30 (Mi. 1995). I have no difficulty in finding sufficient evidence to support that jury's finding that Nissan was negligent in designing the load limiter and in failing to test it under the conditions which were presented in this case.

However, I disagree with the majority that Nissan's actions demonstrate a wanton or reckless indifference to the rights, safety, or property of others. Nissan's compliance with federal regulations and additional voluntary standards shows that it exercised at least slight care under the circumstances. Although Amanda claims that Nissan changed its seatbelt design knowing that it was placing occupants heavier than 171 pounds at risk, there was no evidence to support this conclusion.

Furthermore, Nissan was fully aware of the danger caused by excessive spooling of seatbelt webbing during an accident, and it redesigned its seatbelt with a load limiter to address that problem. At most, Nissan simply failed

to appreciate the significant risk that its load limiter would catastrophically fail in accidents when used by passengers weighing more than the 95th percentile dummy. Nissan's failure to appreciate that risk amounts to negligence, but I cannot agree that it warranted an award of punitive damages. Therefore, I would reverse the award of punitive damages in this case.

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