

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-00109-DG

NISSAN NORTH AMERICA, INC., *et al.*

APPELLANTS

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2010-CA-00717-MR

SANDRA DENISE MESSERLY, *et al*

APPELLEES

**BRIEF ON BEHALF OF AMICUS CURIAE,
KENTUCKY JUSTICE ASSOCIATION**

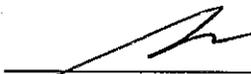
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2013, ten (10) originals of this motion were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, KY 40601, with one (1) copy served by regular mail upon each of the following Sam Givens, Clerk, Kentucky Court of Appeals, 36 Democrat Drive, Frankfort, KY 40601; Hon. Robert McGinnis, Special Judge, Boone Circuit Court, 5 Justice Center, 115 Court Street, Cynthiana, KY 41031; Robert Sanders, Esq., Justin Sanders, Esq., W. Matthew Nakijima, Esq., The Sanders Law Firm, The Charles H. Fisk House, 1017 Russell Street, Covington, KY 41011; Eric W. Von Wiegen, Esq., 4804 Sorrell Way, Lexington, KY 40514; David T. Schaefer, Esq., Anne K. Guillory, Esq., Dinsmore & Shohl, 101 South Fifth Street, 2500 National City Tower, Louisville, KY 40202; and E. Paul Cauley, Esq. Sedwick, Detert, Moran & Arnold LLP, 1717 Main Street, Suite 5400, Dallas, TX 75201.



KEVIN C. BURKE

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INTRODUCTION

Does Kentucky law impose a duty on Nissan and other product manufacturers to prevent foreseeable injury through feasibly safe product design?

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization with over 1400 members dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury. The Kentucky Justice Association respectfully submits that all product manufacturers, including Nissan, have a duty to design safe products for the benefit of all Kentuckians.

Viewed in a light most favorable to Appellees, the facts reveal that Nissan has for some time installed relatively inexpensive rear-sensing or rear video equipment on some but not all of its SUVs. Nissan developed this technology decades ago, implemented it on the vehicles it sold abroad, and offered or installed it only on more expensive models in the United States. Nissan did so because its own research showed that the technology reduced or eliminated blind zones and prevented injury or death to pedestrians—especially children who happened to be standing behind a vehicle. However, for reasons which are not yet clear, Nissan failed to include or even offer this safety feature on the “family-friendly” 2002 Xterra. Had Nissan incorporated the safety feature in the design of the Xterra, Foxx Messerly would be alive today.

Unfortunately, meaningful discovery in this case was short-lived. The circuit court

relied on its own observations and experiments and determined that vehicle blind zones are “obvious” and therefore Nissan had no duty. The court suggested that Nissan file a motion for summary judgment so discovery issues could be avoided. After the parties briefed the issue, the court entered summary judgment in favor of Nissan. According to the circuit court’s reasoning, Nissan—and presumably all manufacturers of any product with a blind zone—have no duty to incorporate feasible safety features to prevent foreseeable injury.

This case is of substantial interest to the Kentucky Justice Association because the circuit court’s reasoning, if adopted on appeal, would effectively grant immunity to an automobile manufacturer based on the “obvious and unavoidable” doctrine – and would do so despite the availability of low-cost safety features which reduce or eliminate the danger. Such an opinion would be at odds with modern Kentucky products liability law.

The Kentucky cases applying the obvious and unavoidable doctrine were decided before the adoption of comparative fault principles. They were also decided before the adoption of the “risk-utility” test in product design cases. Moreover, the vast majority of jurisdictions to consider design defect claims regarding other types of vehicles (including trucks, industrial machinery, and even riding lawnmowers) find that manufacturers owe a duty to reduce or eliminate blind zones where feasible alternate designs exist. Design defect claims present a jury issue under those circumstances. Indeed, the two courts to consider design defect claims against SUV manufacturers in blind zone/back-over cases submitted the design defect claims to juries. *See Wright v. Ford Motor Co.*, USDC ED Tex., No. 1:04-CV-011 (applying Texas law); *Clemens v. Nissan Motor Co.*, USDC ND Tex., No. 304 CV 2584 (applying Texas law).

The circuit court's reasoning is inconsistent with modern Kentucky case law and the majority of jurisdictions to consider the same or similar issue. On December 2, 2011, the Court of Appeals appropriately reversed summary judgment and remanded the case for further proceedings because genuine issues of fact existed on Appellees' design defect claim. This Court should affirm the Court of Appeals, and this case should be remanded to the circuit court so the parties can proceed with discovery.

ARGUMENT

I. IN PRODUCT DESIGN DEFECT CASES, DUTY IS DETERMINED BY FORESEEABILITY OF HARM AND FEASIBILITY OF SAFER DESIGN – NOT THE “OBVIOUS AND UNAVOIDABLE” DOCTRINE

The “obvious and unavoidable” label is a factual conclusion, not a legal standard. Modern products liability law asks whether the injury is foreseeable and whether a feasible safer design exists. If so, then a jury considers the design defect claim. The alleged “obviousness” of the product's danger is but one factor for the jury to consider.

In *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776 (Ky. 1984) this Court collected Kentucky cases applying the “obvious and unavoidable” doctrine. *Id.* at 781-82. *See Sturm, Ruger & Co., Inc. v. Bloyd*, 586 S.W.2d 19 (Ky. 1979) (manufacturer not liable for accidental discharge of gun); *Jones v. Hutchison Manufacturing, Inc.*, 502 S.W.2d 66 (Ky. 1973)(danger of corn auger so apparent it was unreasonable to fix liability on the manufacturer for the injury); and *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583 (Ky. 1970)(danger in carelessly handling dynamite obvious).

In *McCullough*, a child's foot was caught in an escalator. Prior to the injury, the

manufacturer notified the store where the injury occurred of specific action the store could take to prevent injury. The store did nothing to correct the problem. After examining the obvious and unavoidable doctrine, this Court held that the manufacturer was liable because the manufacturer knew or should have known of the danger and a safer design existed. This Court reversed the Court of Appeals and reinstated a verdict in favor of the plaintiff. Importantly, this Court in *McCullough* did not give any indication that the “obvious and unavoidable” extended beyond the specific factual circumstances of the above-cited cases.

Although the cases cited in *McCullough* are labeled as “obvious and unavoidable” cases, a closer examination reveals that, in each case, either the injury was unforeseeable or no feasible alternate design existed. For instance, in *Sturm, Ruger & Co., Inc. v. Bloyd, supra*, the plaintiff’s injury resulted from what the Court described as an unreasonable and unanticipated use of weapon. In *Jones v. Hutchison Manufacturing, Inc, supra*, the Court noted that plaintiff presented only a “theoretical” design alternative which was unavailable at time of manufacture. In *Hercules Powder Co. v. Hicks, supra*, the Court mentioned that the defendant-manufacturer could not have anticipated that dynamite would be misused in the manner identified.¹

The cases collected in *McCullough* also share several things in common:

First, they were decided before the adoption of pure comparative fault in *Hilen v.*

¹ The cases are also cited as part of a larger discussion involving superseding causation. Interestingly, this Court noted that superseding causation asks whether the injury “is unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim.” *McCullough*, 676 S.W.2d at 780 (emphasis added).

Hays, 673 S.W.2d 713 (Ky. 1984) later codified in KRS 411.182 (enacted July 15, 1988).² KRS 411.182 abandoned contributory negligence principles at the heart of the conclusory “obvious and unavoidable” doctrine. KRS 411.182 clearly applies to all tort actions “including products liability actions.”

Second, the cases were decided before the adoption of the risk-utility test in product design defect cases. Kentucky products liability law, based primarily on the Restatement (Second) of Torts, §402A, evolved from the antiquated “consumer expectations test” which focuses on the observations and conduct of the consumer (also framed in terms of the “obvious and unavoidable” nature of a product), to the “knowledgeable manufacturer test” which focuses on what the manufacturer knew at the time of sale, to the “risk-utility test” which combines components of the other tests plus other factors. See David J. Leibson, 13 *Kentucky Practice: Tort Law* § 13.7 (2010). While some authorities suggest Kentucky adopted the risk-utility test in *McCullough*, others credit this Court’s decision in *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530 (Ky. 2003). See Leibson, *supra*. In any event, the risk-utility test requires consideration of numerous “factors” such as “feasibility of making a safer product, patency [or “obviousness”] of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the product’s inherently unsafe characteristic.” *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d at 780. Although *McCullough* posits that a single factor “may” be dispositive in an appropriate case, this Court in *Ostendorf* clarified that the factors must be considered by “the trier of fact.” *Ostendorf*,

² *Montgomery Elevator* was decided July 5, 1984 – the same day as *Hilen*. The decision in (footnote continued on next page)

122 S.W.3d at 535 (quoting *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 538 N.W.2d 325, 329 (Mich. 1995); see also *Smith v. Louis Berkman Co.*, 894 F. Supp. 1084, 1092 (W.D. Ky. 1995) (jury must conduct risk-utility analysis). In other words, once the jury is presented with a foreseeable danger and a feasible safer design, the jury—not the judge—determines whether a product is defective based on the multi-factor risk-utility analysis.

Third, the cases were decided before the American Law Institute penned the Restatement of the Law (Third), Torts. The Restatement evaluates design defect claims under risk-utility and foreseeability principles. This Court favorably cited the Restatement of the Law (Third), Torts: Products Liability, §2(b) (1998) in *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 41 (Ky. 2004). In *Gregory*, the plaintiff claimed that Toyota's airbags were defectively designed and caused excessive injury when deployed. The trial court submitted the design defect claim to the jury. The jury returned a defense verdict. The relevant section of the Restatement cited in *Gregory* states that a product:

...is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe.

The Restatement asks only whether there was foreseeable injury and a feasible safer design. Importantly, this Court in *Gregory* did not apply the obvious and unavoidable doctrine even though automobile airbags are arguably "obvious" and any resulting injury "unavoidable." Indeed, neither *Gregory* nor subsequent Kentucky case applies the obvious and unavoidable

Hilen had prospective application only. *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984).

doctrine as a bar to an otherwise valid design defect claim.

Remarkably, the obvious and unavoidable doctrine survived in name because federal courts looked to pre-comparative fault and pre-risk-utility Kentucky case law. *See, e.g., Byler v. Scripto-Tokai Corp.*, 1991 U.S. App. LEXIS 22277 at *7-8 (6th Cir. 1991)(collecting Kentucky cases and applying the obvious and unavoidable doctrine to butane lighters); *Walker v. Philip Morris USA, Inc.*, 2009 U.S. Dist. LEXIS 14252 (W.D. Ky. 2009)(collecting Kentucky cases and applying the obvious and unavoidable doctrine to cigarettes), *vacated and remanded to state court by Walker v. Philip Morris USA, Inc.*, 443 Fed. App. 946 (6th Cir. 2011).³ Neither federal case involved vehicle safety features. Neither case evaluated the product in terms of foreseeability and feasibility as indicated in *Gregory*. In any event, Kentucky Courts are not bound by a federal court's interpretation of state law. *LKS Pizza, Inc. v. Com. ex rel. Rudolph*, 169 S.W.3d 46, 49 (Ky.App. 2005)(“we are not bound by a federal court's interpretation of state law”), *citing Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 705 (Ky. 1975).

Although the federal cases are distinguishable based on their unique facts and antiquated reasoning, there is a more compelling reason to take the federal cases with a grain of salt. Recently, this Court in *Kentucky River Med. Ctr. v. McIntosh*, 318 S.W.3d385 (Ky. 2010) abandoned the “open and obvious” doctrine in premises liability cases. This Court held that the traditional rule relieving a landowner of liability due to an open and obvious hazard is incompatible with Kentucky’s doctrine of comparative fault and the Restatement (Third)

of Torts. Although *McIntosh* involved negligence, and the present case involves both negligence and strict liability theories, the analysis in *McIntosh* is instructive.

In *McIntosh*, this Court explained that “[b]y concluding that a danger was open and obvious, we can conclude that the invitee was negligent for falling victim to it ... [b]ut this does not necessarily mean that the [defendant] was not also negligent for failing to fix an unreasonable danger in the first place.” *Id.* at 391. The opinion adopted the reasoning of the Supreme Court of Mississippi which found the open and obvious doctrine incompatible with comparative fault principles: “[t]he party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.” *Id.* at 392 (quoting *Tharp v. Bunge Corp.* 641 So.2d 20, 25 (Miss. 1994).

The proper focus is appropriately on “foreseeability.” If the injury is foreseeable, but the defendant fails to “take reasonable precautions to prevent the injury, he can be held liable.” *Id.* Accordingly, if the danger is “obvious,” the jury may apportion fault between the plaintiff and the defendant. There is nothing unique about this reasoning. This Court applied two fundamental tenets of modern tort law: (1) duty is governed by foreseeability, and (2) so-called “obvious” dangers, or dangers which are equally apparent to plaintiff and defendant, are not a bar to recovery in pure comparative fault jurisdictions. Those same principles apply in the present case.

³ The Sixth Circuit vacated *Walker* because the district court never had federal subject matter (footnote continued on next page)

Here, Nissan argues that it has no duty because the dangers presented by blind zones on SUVs are “obvious” to consumers. While one can debate whether consumers can ever have as much knowledge as automobile manufacturers given manufacturer testing and crash experiments, the record reveals that Nissan was intimately aware of the danger created by the blind zones on its SUVs. Given that knowledge, Nissan actually developed and installed low-cost rear-sensors and rear facing video *for the specific purpose of eliminating the danger*. Nissan simply chose not install the safety feature on the Xterra. Thus, the danger was foreseeable to Nissan and a feasible alternative design existed. The alleged “obvious” character of the Xterra’s design from the consumer’s perspective (assuming it is “obvious”) should therefore be considered by a jury.

Given the principles in *McIntosh*, the comparative fault principles codified in KRS 411.182, this Court’s adoption of the risk-utility test, and modern Kentucky case law addressing design defect claims, there is no place for the “obvious and unavoidable” doctrine—especially not in automobile design defect cases where the injury is foreseeable to the manufacturer and a feasible safer design exists at the time of manufacture. Accordingly, the Court of Appeals appropriately reversed entry of summary judgment.

**II. THE COURT OF APPEALS CORRECTLY REVERSED AND REMANDED;
THE CIRCUIT COURT’S REASONING IS INCOMPATIBLE WITH
THE MAJORITY OF JURISDICTIONS TO CONSIDER SIMILAR
DESIGN DEFECT CLAIMS**

Two courts have considered design defect claims against SUV manufacturers under virtually identical facts as the present case. The federal district courts in those cases applied

jurisdiction.

Texas law. Texas, like Kentucky, applies a risk-utility analysis in product design defect cases. In both cases the courts submitted plaintiffs' design defect claims to a jury. *See Wright v. Ford Motor Co.*, USDC ED Tex., No. 1:04-CV-011 *aff'd by Wright v. Ford Motor Co.*, 508 F.3d 263 (5th Cir. 2007); *Clemens v. Nissan Motor Co.*, USDC ND Tex., No. 304 CV 2584.

However, many other courts have considered injuries resulting from vehicle blind zones. In the majority of cases, the courts applied a risk-utility analysis. The courts also applied foreseeability and feasibility principles, just like Kentucky. The courts held that the design defect claims presented a jury issue. *See Ogletree v. Navistar Int. Transp.*, 271 Ga. 644, 522 S.E.2d 467, 470 (Ga. 1999)(design defect: truck manufacturer failed to install back-up alarm in roll-over injury case); *Tirrell v. Navistar Intl.*, 248 N.J. Super. 390, 591 A.2d 643, 651 (N.J. Super. A.D. 1991)(design defect: flatbed trailer manufacturer failed to include back-up signal in roll-over injury case); *Domingue v. Excalibur Minerals of Louisiana*, 2006 La. App. LEXIS 1593, 936 So. 2d 282 (La. App. 2006)(design defect: operator blind zones on dump truck contributed to roll-over); *Fernandez v. Ford Motor Co.*, 118 N.M. 100, 879 P.2d 101, 113 (N.M. App. 1994) (design defect: tractor-trailer failed to incorporate back-up alarm in roll-over injury case); *Jones v. White Motor Corp.*, 61 Ohio App. 2d 162; 401 N.E.2d 223 (Ohio 6th Div. 1978)(design defect: operator blind zones on hauling vehicle contributed to roll-over injury); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000)(design defect: operator blind zones on milling machine contributed to roll-over injury); *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841 (D.C. Cir. 1998)(design defect and inadequate warnings: operator blind zones on milling machine contributed to roll-over

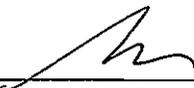
injury); *Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997)(design defect: operator blind zone on road profiler contributed to roll-over injury); *Childers v. Joseph*, 842 F.2d 689, 697 (3d Cir. 1988)(design defect: lack of back-up alarm on digger/derrick truck contributed to roll-over injury); *O'Neil v. Electrolux Home Products, Inc.*, 2008 U.S. Dist. LEXIS 39998 (D.Mass 2008)(design defect: lawn tractor and bagger created operator blind zone when tractor was in put in reverse and contributed to roll-over injury); *D.C. v. Sears, Roebuck & Co.*, 2007 U.S. Dist. LEXIS 53452 (W.D.Wash. 2007)(same).

There is no reason for a different outcome in this case. Nissan has the same duty as other product manufacturers under Kentucky law. The Court of Appeals therefore appropriately reversed the circuit court's entry of summary judgment.

CONCLUSION

The circuit court's reasoning is inconsistent with comparative fault principles, the risk-utility test, the Restatement position, modern Kentucky case law, and the majority of jurisdictions to consider the same or similar issue. The "obvious and unavoidable" doctrine does not bar a product design defect claim where a feasible alternate design could have prevented foreseeable injury. Accordingly, the Court of Appeals correctly reversed the circuit court's entry of summary judgment. *Amicus Curiae* the Kentucky Justice Association respectfully requests that this Court affirm the Opinion of the Court of Appeals and remand the case to Boone Circuit Court for discovery.

Respectfully submitted,



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