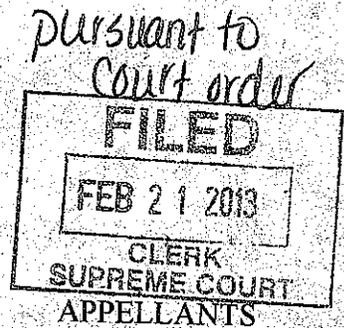


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000109



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

v. KENTUCKY COURT OF APPEALS CASE NO. 2010-CA-00717
APPEAL FROM BOONE CIRCUIT COURT CASE NO. 05-CI-924
HON. ROBERT MCGINNIS, SPECIAL JUDGE

SANDRA DENISE MESSERLY, *et al.*

APPELLEES

BRIEF ON BEHALF OF *AMICUS CURIAE*,
KIDSANDCARS.ORG

Submitted By:



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CERTIFICATE OF SERVICE

I hereby certify, pursuant to CR 76.12(6) and CR 76.20(7), that on this ^{29th} day of January, 2013, copies of this brief were served, via U.S. First Class, postage prepaid, to: Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Robert McGinnis, Special Judge, Boone Circuit Court, 5 Justice Center, 115 Court Street, Cynthiana, Kentucky 41031; Hon. Robert E. Sanders, Hon. Justin A. Sanders, Hon. W. Matthew Nakajima, The Sanders Law Firm, The Charles H. Fisk House, 1017 Russell Street, Covington, Kentucky 41011; Hon. Eric P. Von Wiegen, 4804 Sorrell Way, Lexington, Kentucky 40514; Hon. David T. Schaefer and Hon. Anne K. Guillory of Dinsmore & Shohl, 101 South Fifth Street, 2500 National City Tower, Louisville, Kentucky 40202-3175; Hon. E. Paul Cauley and Hon. S. Vance Wittie, of Sedgwick LLP, 1717 Main Street, Suite 5400, Dallas, Texas 75201, and Hon. Kevin C. Burke, 125 South Seventh Street, Louisville, Kentucky 40202.



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INTRODUCTION

This Court should affirm the Kentucky Court of Appeals and remand this action to the Boone Circuit Court for completion of discovery and trial. The Appellants were in the best position to prevent Foxx Messerly's death by eliminating the Nissan Xterra's rearward blindzone with the rearview safety technology being advocated by the Appellees. Appellants' decision to make Xterra drivers completely blind to the rear of their vehicles was unreasonable and failed to rise to the level of care that would be expected of an ordinary, prudent manufacturer in Nissan's position and with Nissan's level of sophistication with rearview cameras and sensors and knowledge about the large blindzone that exists behind all Xterra vehicles.

Appellants had specific, well-documented knowledge of the risks of serious bodily injury and death that the vehicle's blindzone poses to children. Prior to 2002, Appellants had conducted decades of research and testing on automobile blindzones. Appellants understood that the movements of young children are often spontaneous and unpredictable, and that a small child can wind up unexpectedly in a dangerous position behind a vehicle moving in reverse, without the driver being aware of their presence. Appellants had developed and perfected, prior to the time of manufacture of the 2002 Nissan Xterra, effective and reliable rearview cameras and sensors that could have been installed as standard equipment on the vehicle, at nominal added cost to Appellants or their customers. That technology would have greatly reduced the hazard of the blind zone to the rear of the Xterra and, likely, saved the life of Foxx Messerly.

NATURE OF THE INTEREST OF *AMICUS CURIAE*

KidsAndCars.org (“KAC”) is a national nonprofit child safety organization dedicated to preventing injuries and death to children in and around motor vehicles. Since its founding in 1999, KAC has been leading a prevention movement by promoting awareness among parents, caregivers, legislators, auto manufacturers, and the public at large about the multitude of hazards posed to children in and around motor vehicles. KAC employs and combines a number of strategies – data collection, education and public awareness, policy change, product redesign, and survivor advocacy – in its efforts to reduce automobile-related child fatalities and injuries.

Janette Fennell, President and founder of KAC, started the organization Trunk Releases Urgently Needed Coalition (TRUNC) following a 1995 kidnapping incident in which she and her husband were robbed, assaulted, then forcibly locked and left for dead inside the trunk of their vehicle. Fortunately, the couple was able to escape the car trunk, but their infant son, who had been in his car seat inside the vehicle at the time the crime occurred, was no longer with them. Eventually they were reunited with their son, who had been left alone in his car seat in front of their home. That horrific event inspired Janette to start a campaign to convince automakers and the federal government that trunk entrapment was a serious safety issue – not just to victims of crime and kidnapping, but to curious children who, during innocent play, could accidentally get locked inside the trunk of a car and suffer serious injuries or death. Janette’s persistence paid off. A federal regulation was issued mandating glow-in-the-dark internal trunk release mechanisms as standard equipment in all vehicles

manufactured for sale or lease in the United States after September 1, 2001. There has not been a trunk entrapment fatality in a car with an internal trunk release.

While working on the trunk entrapment issue, Ms. Fennell was frequently contacted by individuals and safety organizations asking for assistance on other vehicle-related safety issues, such as power window strangulations, vehicle fires, falls from vehicles, and parked vehicles unintentionally set into motion by children. Unlike traffic collisions and other accidents that occur on public roads and highways, most of the injuries that Janette was learning about were happening to kids in and around vehicles in private driveways and parking lots. She discovered that the federal government was not compiling any data about these “nontraffic incidents,” despite the fact that they appeared to be responsible for an alarmingly high number of deaths and serious injuries to children. TRUNC became KidsAndCars.org and undertook the monumental tasks of collecting nontraffic data and trying to bring national attention to the whole gambit of serious child safety issues in the context of automobiles.

In the early 2000s, KAC recognized that backovers, such as the one that killed Foxx Messerly and gave rise to this litigation, were among the deadliest of all the various types of nontraffic incidents [See: <http://www.kidsandcars.org/backovers.html>]. Like all the other nontraffic hazards the organization had researched, KAC found that no government agency was keeping track of, or working to address, backover deaths and injuries. KAC approached the publishers of Consumer Reports magazine about studying and publicizing the correlation between vehicle blindzones and backover incidents. Thanks to the efforts of KAC, Consumer Reports now

measures the rearward blindzone as part of its standard review process of all makes and models of passenger vehicles they test.

KAC is recognized as a national leader for child safety advocacy as it relates to nontraffic incidents, especially injuries and deaths related to vehicle movement into the rearward blindzone, or “backovers.” KAC collaborates and consults with other safety organizations, including Consumers Union, the publisher of Consumer Reports; the American Academy of Pediatrics; the Traffic Safety Center at the School of Public Health, University of California, Berkeley; Advocates for Highway and Auto Safety; and others in its mission to keep children safe in and around cars.

KAC spokespersons have testified several times before Congress, the National Highway Traffic Safety Administration (NHTSA), and other governmental bodies in Washington, D.C., regarding vehicular safety for children. On June 23, 2005, Janette Fennell testified before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce during the hearing on “Reauthorization of the National Highway Traffic Safety Administration.”¹ She testified before the same subcommittee on May 18, 2009, for a hearing entitled, “Auto Safety: Existing Mandates and Emerging Issues.”² More recently, on March 23, 2011, Ms. Fennell testified before NHTSA during its “Public Hearing on Rear Visibility.”³ On all three occasions, Janette discussed backovers and urged government policy makers to promptly establish and enforce a meaningful, life-saving rear visibility

¹ A transcript of Ms. Fennell’s testimony at this hearing is available at <http://www.kidsandcars.org/upload/pdfs/articles/2005/2005-06-23-Janette-Testimony.pdf>

² A transcript of Ms. Fennell’s testimony at this hearing is available at <http://www.kidsandcars.org/upload/pdfs/articles/2009/2009-05-18-Janette-Testimony.pdf>

³ A transcript of the NHTSA hearing is available at <https://docs.google.com/file/d/0B-c3FrLaiunZM0lsa1pNenA2NFU/edit>

standard. Janette also attended NHTSA's Rear Visibility Technical Workshop on March 11, 2011, where she, as well as engineers and technical specialists from virtually every major automaker, discussed issues relevant to the test procedure described in NHTSA's proposed rear visibility standard.

KAC created outreach and support programs for families who have lost children to nontraffic incidents, including backovers. These programs enable and empower survivors to tell their stories to lawmakers and traffic safety policymakers as part of KAC's advocacy for safer vehicles. KAC survivor-advocates were key to the 2008 passage of the Cameron Gulbransen Kids Transportation Safety Act ("KTSA"), a stand-alone bill and the first transportation safety bill adopted in the United States since 2005. The KTSA, in part, requires the U.S. Department of Transportation to issue a rear visibility safety standard that will define the required field of view when backing up and provide drivers with a means of detecting a person or object behind their vehicles. It is a virtual certainty that automakers will be required to install rearview cameras as standard equipment on every vehicle sold or leased in the United States in order to comply with the standard. KAC believes that the most effective rear view systems are those that combine a camera and audio sensor, just like the systems Nissan had been placing in its vehicles in non-U.S. markets several years before the Messerly Xterra was manufactured in 2002.

KidsAndCars.org has a substantial interest in the present case, because Appellees' theory of liability is consistent with this organization's philosophy when it comes to safety issues concerning children in and around motor vehicles: if automakers refuse to incorporate effective, economically feasible, life-saving

technologies into their vehicle designs voluntarily, then survivors and other concerned citizens who want to see predictable and preventable tragedies *prevented* must resort to other means to compel the manufacturers to include them. This case has the potential to be a very strong factor in bringing the safety benefits of rear-looking video and sensing systems to the attention of the public. With increased public *demand* for inclusion of this critical safety technology, manufacturers are more likely to make the equipment standard on all vehicles, rather than reserving it as a profit enhancing option on more costly premium models or bundling it with non-safety extras, as appears to have been the marketing strategy of Nissan and some other auto makers when the Messerly Xterra was made.

Legislative remedies are just one avenue for effecting positive change. Access to the courts for survivors of nontraffic victims is equally important. Trial by jury is the only tool that families like the Messerlys have, on an individual basis, to require manufacturers like Nissan to answer for their conduct and be held accountable for choosing profits over the lives and health of children and the emotional well-being of the broken families those children leave behind. This case should be remanded to the Boone Circuit Court to give Appellees their rightful opportunity to present and prove their case to a jury of their peers.

ARGUMENT

The most basic rule of driving is that a driver must have a clear view of their surroundings to maneuver a vehicle safely. It is impossible for a driver to avoid hitting what (s)he cannot see. Every vehicle on the road today has rear view mirrors – yet few vehicles have an actual *rear view*. Without a rear view, it is impossible for a driver to see

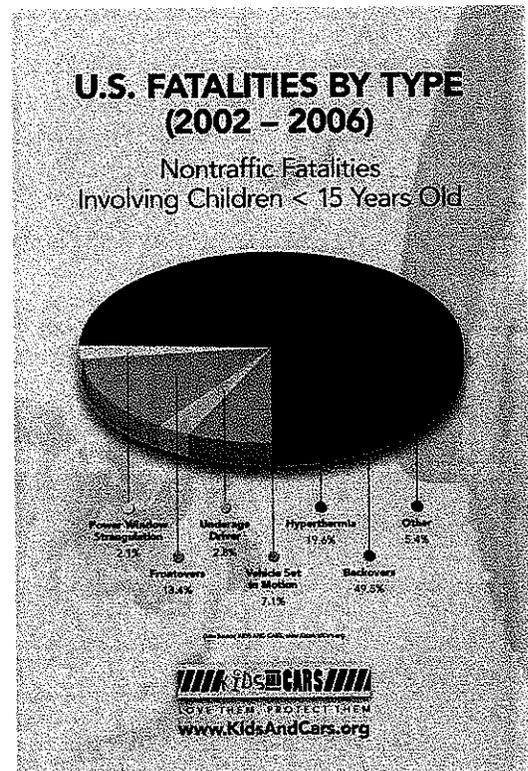
or avoid hitting an obstacle behind the vehicle while it is backing up. In instances where that “obstacle” is a 30-pound toddler, and the vehicle is a 4,000-pound SUV, the child does not have a chance. The consequences are immediate, irreversible, and often deadly.

From 2002 – 2006, an astonishing 49.5% of all known nontraffic child fatalities in the United States were backovers. KAC and the U.S. government estimate that at least 50 children are backed over every week by a vehicle in a driveway or parking lot. On average, two of the children are killed, and the rest seriously injured.

Most child backovers, including the incident that killed Foxx Messerly, fit a distinct pattern: the victim is between the ages of 12-23 months; the driver is the child’s parent or other close relative; unknown to the driver of the vehicle, the child follows him/her and gets behind the vehicle; the driver is unaware that the child has left a position of safety; and the

child is killed or seriously injured by the backing vehicle. This set of facts repeats itself so often, week after week across the country, that KAC has dubbed it the “Bye-Bye Syndrome.” Foxx Messerly’s death is a classic “Bye-Bye Syndrome” case.

Not every backover injury or death fits the “Bye-Bye Syndrome” pattern. Many backovers occur in a parking lot rather than a private driveway. The person operating the vehicle is not always a family member, although the driver is related to the child victim



approximately 70% of the time. There can always be some variance in the specific facts and circumstances of each incident, but there is one common fact present in every child backover fatality - the driver was unable to see the child behind the vehicle.

Giving drivers the ability to see what is behind the vehicle is absolutely the most effective means of preventing backover incidents and just makes common sense. Public education about backover hazards and individual drivers taking precautions every time they back their cars are vitally important. Visibility, however, is the ultimate *key* to prevention.

Nissan's Visibility Philosophy

One would think, judging from its publications, that Nissan would agree that visibility is vital in preventing backovers. A brochure published by Nissan entitled, "Triple Safety: An Approach to Safety," poignantly states, "Approximately 90% of the information needed for safe vehicle operation is obtained visually."⁴ Nissan discussed visibility under the heading, "Information Safety," the first of its three so-called "Citadels of Safety." The paragraph goes on to state:

"Information Safety concerns the provision of effective information to the driver, focusing in particular on visibility. The aim here is to help improve safety by supporting the driver's ability to recognize and judge the driving environment."

When applied to backovers and how to prevent them, Nissan's brochure makes perfect sense. Providing drivers with visual information to help them recognize and judge the driving environment is precisely what is needed. "Back Monitor," another term for a Rearview Monitor, is listed as one of several "Example Technologies" touted by

⁴ See Exhibit 1 to Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, at page 3, in Packet 4 of the Record on Appeal.

Nissan as a tool for increasing and improving “Information Safety.” From 1991 – 2002 (the year the subject Xterra was manufactured), Nissan was selling *thirty-four (34) different vehicle models* in non-U.S. markets that were available with back up audio sensors, rearview cameras, or a combination of the two.⁵

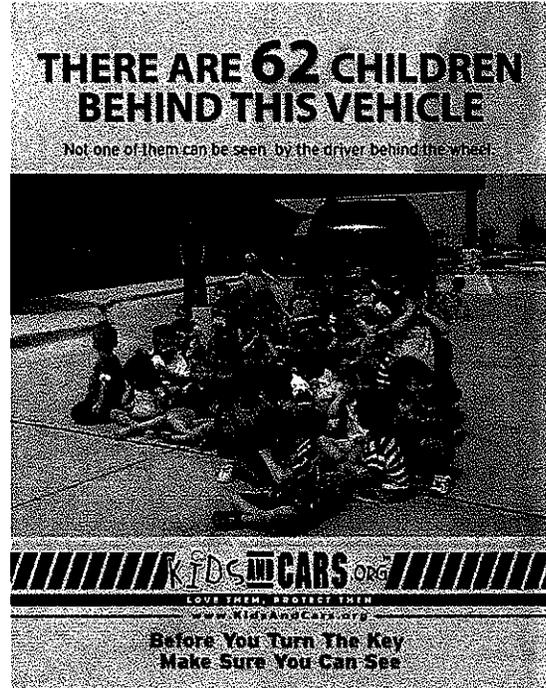
It is difficult to understand why Nissan would, in the years since it acknowledged the critical importance of visibility for the safe operation of motor vehicles, continue making and selling vehicles in the United States that force drivers to back blindly. In 2002, Nissan made these life-saving technologies available on only three U.S. models: audio sensors on the 2002 Infiniti QX4 and 2002 Nissan Pathfinder, and a rearview camera system on the 2002 Infiniti Q45. Upon information and belief, through and including the 2012 model year, Nissan has never offered rearview cameras or back up audio sensor systems on the Xterra. Ironically, the QX4, Q45, and Pathfinder are high-end, premium priced vehicles intended for and marketed to older, more affluent consumers. The Xterra is a more modestly priced, medium-sized SUV, intended for and marketed to younger consumers with small children.

It is also difficult to reconcile Nissan’s statements about the company’s aim to “help improve safety by supporting the driver’s ability to recognize and judge the driving environment,” with the position Appellants have taken in this case – that Sandy Messerly is solely responsible for failing to avoid hitting her son when backing her Xterra. Had Nissan “supported Sandy Messerly’s ability to recognize and judge the driving environment,” by including the rearview cameras and sensors on her Xterra that it had installed on its more expensive U.S. models that year, Foxx Messerly would be a healthy,

⁵ See: Exhibit 2 to Plaintiffs’ Memorandum In Opposition to Defendants’ Motion for Summary Judgment; Nissan’s answer to interrogatory no. 9 in Packet 4 of the Record on Appeal.

happy, living, breathing fourth-grader today. Instead, Nissan decided to manipulate safety to maximize profit. It made a deliberate business decision about which families it would aid in keeping their children safe from backovers—those willing or able to buy the high-end models. Children whose parents could only afford an Xterra were left at risk.

The importance of auto manufacturers' recognition of visibility when backing as a safety priority is amplified by the fact that ordinary drivers are *not* aware or do not appreciate how little they can see behind their vehicles and how large the blindzone is. Some drivers mistakenly believe that blindzone backovers can be avoided if drivers are simply more careful, and that anyone who backs a vehicle over a child must have been careless. These individuals are mistakenly



convinced that so long as the driver checks behind the vehicle before getting in, uses the rear view and side mirrors, and turns and looks out the rear window while reversing, no harm will result.

Such thinking is a clear and unmistakable indication of one's lack of knowledge of backover tragedies and how they occur. Those who have studied the backover problem, such as KAC, automakers, and NHTSA, realize that careful driving is certainly important, but is not a cure-all. Anyone with knowledge of the Messerly case knows that, too. The uncontroverted facts are that Sandy Messerly walked around the rear of her

vehicle before getting in the driver's seat. She checked her rear view and side mirrors before backing. She turned and looked out the rear window as she slowly backed up, with the intention of moving the car from the parking pad so Foxx could play there.⁶ She was operating her vehicle "safely." She believed, unfortunately, that her son Foxx was in a position of safety, inside the garage and away from the vehicle. Had she been able to see behind her vehicle, Sandy would have been able to see that Foxx had followed her behind the vehicle. The Xterra's lack of a rear view, the sole result of Nissan's decision not to include rearview technology in the vehicle's design, was unquestionably a, and likely the substantial factor in causing Foxx's death.

Good driving habits, including walking around the vehicle and properly using rearview and side mirrors, are important. However, consistent with Appellants' emphasis on providing visual information to the driver, visibility is the ultimate key to backover prevention. It is impossible to avoid hitting something or someone you literally cannot see.

Unpredictable Movements of Children

Without the ability to *see* behind the vehicle, even the most careful driver can back over and kill a small child. The simple reason is, children are unpredictable. Any parent or caregiver can tell you how easily and quickly a determined young child can momentarily escape the control of even the most vigilant adult supervisor. Many can relate stories of how easily and quickly a child inside a house can slip out the front door undetected. That split-second is all it takes - the "Bye Bye Syndrome" causes the child to

⁶ See Deposition of Sandra Denise Messerly, November 15, 2005, attached as Exhibit 6 to Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, at p. 93-94.

follow the driver behind the vehicle (because they either want to give the driver one more hug or kiss goodbye, or are experiencing "separation anxiety"). The driver, having checked and seen no person or objects behind the car just moments earlier, assumes it is safe to begin backing and does so -- blind to the rear and thus unaware of the child's presence.

Similar to the discussion of the vital role visibility plays in safe driving found in Nissan's Triple Safety literature, Nissan engineers articulate the substantial difficulties of avoiding backovers as concisely and accurately as KAC has ever seen it written, in an article entitled, "Low Cost Infrared Imaging Sensors for Automotive Applications," Section 3: "Blind Spot Pedestrian Detection System Research:"⁷

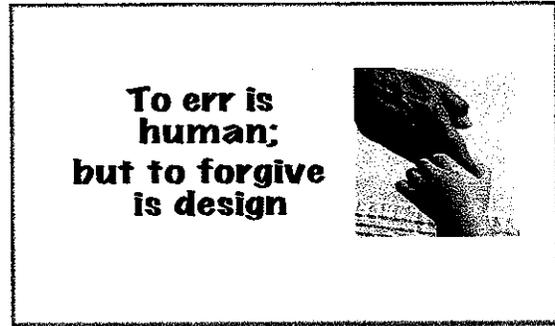
There can be a time difference ranging from several seconds to several minutes between the time a driver enters a vehicle and starts the engine and the time the vehicle is put in motion. It is possible that the circumstances around the vehicle may change during that interval. **Because children in particular are apt to do unexpected things, incidents have been reported where blind spot⁸ accidents occurred even though the driver confirmed the safety of the environment around the vehicle before getting in.** (emphasis added)

That conclusion of Nissan's engineers is a compelling justification for the proposition that Nissan should have installed rearview cameras and sensors as standard equipment on the Xterra and all its other vehicles. Children cannot be re-engineered. They have always been and will always be fast-moving, curious, and lacking the cognitive ability to appreciate the full extent of risks posed to life and limb by Mommy and Daddy's cars parked in the driveway.

⁷ This article was attached as Exhibit 8 to Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment.

⁸ The term "blind spot" in this excerpt is the equivalent of the term "blindzone" used throughout this brief. In KAC's view, "blind spot" more accurately describes the area where, when changing lanes, a driver has difficulty seeing a vehicle in an adjacent lane. The area behind a vehicle that is invisible to the driver is far too vast to be called a "spot." NHTSA and Consumer Reports also use "blindzone" to refer to the blind area behind the vehicle.

Products, on the other hand, can and whenever reasonably possible, should be re-engineered and re-designed to make them safer for children and others. When auto manufacturers have economically and technologically feasible design alternatives available that would save lives, they have a duty to use them – and relevant to this case, they have a duty not to make them available only as a luxury feature on its top trim packages that only the wealthiest car buyers can afford.



Nissan's Development of Rear Visibility Technology

To some companies in the auto industry, pedestrian safety and nontraffic incidents may be afterthoughts in the vehicle design process. As the record in this case makes crystal clear, however, Nissan spent decades prior to the manufacture of the 2002 Xterra researching and developing rearview safety technology, specifically to reduce the numbers of backover injuries and deaths to pedestrians. Nissan had subjective knowledge of the high incidence of backovers all over the globe long before KidsAndCars.org was established, and even longer before the U.S. government began collecting and maintaining statistics and data about backovers.

The outcome of so many years of research and development was that, by 2002, Nissan had become an industry leader in rear visibility technology. It had developed reliable, cost-effective, robust, functional rearview cameras and audio sensors that could have and absolutely should have been installed on the Xterra, as well as every other 2002

Nissan vehicle. Indeed, Nissan was using the life-saving technologies on other vehicle models in the same model year. By its own admission, Nissan had also been providing an actual rear view to many, if not all of its customers in foreign markets before 2002, specifically for the purpose of improving pedestrian safety and to curb the known and growing problem of injuries and deaths caused by backovers.

Nissan's Shortcomings in the U.S. Market

When Nissan brought rearview technology to the U.S. market more than a decade ago, the carmaker had a golden opportunity to be among the leaders of a life-saving rear visibility safety revolution in this country. If it had done so, thousands of children's lives would have been saved over the years since. Families would have been spared senseless and devastating losses. Scores of mothers, fathers, grandparents and other relatives would be living without the crushing guilt and despair they feel because they were at the wheel when a beloved child was backed over and killed. It would have been unnecessary for KAC to promote backover awareness and work with legislators to help mandate the necessary safety technologies, if Nissan had voluntarily and proactively installed them as standard equipment and encouraged the rest of the auto industry to do the same.

Perhaps Nissan's accountants overruled their safety engineers. Whatever the explanation, Nissan used the introduction of rear view video and sensor systems into the U.S. market as a means to maximize profit, rather than as an opportunity to enhance child safety like it had elsewhere around the globe. Nissan relabeled important safety technologies as, "convenience features" or "parking aids," while only hinting at the safety implications. If Nissan had been candid with U.S. consumers by overtly promoting rear

view video and sensors as the revolutionary safety improvements they were, there would have been no way Nissan could omit the devices from the vehicles they marketed to young families, while making them available on their premium priced models to promote sales of those higher priced vehicles.

Nissan has continued, in this case, to insist that a rear blindzone is an *unavoidable* hazard, *inherent* in the design of every motor vehicle. That is simply not true. The rear blindzone is easily eliminated by rear view video and sensor technology—largely developed and perfected by Nissan. Well before 2002, when the Messerly Xterra was made, Nissan and other automakers began installing rearview cameras and sensors and including such devices in the designs of their production line vehicles in Japan and other countries. The equipment was inexpensive, reliable, and robust. It adds little to the cost of a car, does nothing to impair the utility of the vehicle as a product, and virtually eliminates the backover hazards. Rearward blindzones are not “inherent” to all vehicles or an “unavoidable” characteristic of vehicle design.⁹

Conclusion

The Kentucky Court of Appeals correctly recognized that the questions of defectiveness of the Nissan Xterra, the reasonableness of Appellants’ conduct, and the legal cause of the death of Foxx Messerly are fact issues that must be tried to a jury. The record in this case clearly supports the Court of Appeals’ ruling and the Appellees’ theories of liability against Appellants. This case should be remanded to the Boone Circuit Court with directions to move forward with discovery and trial.

⁹ Consumer Reports, in its vehicle review process, measures how far a particular vehicle’s blindzone extends behind the vehicle. If the vehicle has an available rearview camera, Consumer Reports notes that the blindzone goes to zero feet with the camera installed.