

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000109
CASE NO. 2012-SC-000615

NISSAN NORTH AMERICA, INC., *et al* APPELLANTS/CROSS-APPELLEES

v.

SANDRA DENISE MESSERLY, *et al.* APPELLEES/CROSS-APPELLANTS

BRIEF OF APPELLEES/CROSS-APPELLANTS
Court of Appeals Case No. 2010-CA-00717
Boone Circuit Court Case No. 05-CI-00924

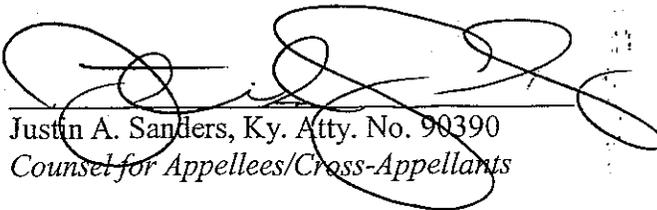
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CERTIFICATE OF SERVICE

I hereby certify that on this ^{16th} ~~15th~~ day of March, 2013, ten (10) originals this brief were transmitted to **Susan Stokley Clary**, Clerk of the Kentucky Supreme Court, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601, with one (1) copy being served on each of the following: **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; to **Hon. David T. Schaefer** and **Hon. Anne K. Guillory**, Dinsmore & Shohl, 101 South Fifth Street, 2500 National City Tower, Louisville, Kentucky 40202-3175; **Hon. E. Paul Cauley** and **Hon. S. Vance Wittie**, Sedgwick LLP, 1717 Main Street, Suite 5400, Dallas, Texas 75201; **Hon. Kevin C. Burke**, 125 South Seventh Street, Louisville, Kentucky 40202; and **Hon. Peter Perlman**, Peter Perlman Law Offices, P.S.C., 388 South Broadway, Lexington, Kentucky 40508.


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INTRODUCTION

This is a products liability wrongful death case in which the Plaintiffs appealed from an order granting summary judgment in favor of the Defendants.¹ The Court of Appeals reversed the ruling of the Circuit Court.² This Court granted Nissan's motion for discretionary review and the Messerlys' cross-motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees/Cross-Appellants request oral argument. Oral argument will benefit the Court because the issues on appeal require a clear understanding of the applicable law of Kentucky regarding a claim of product defect, negligence of a product manufacturer, and the law regarding summary judgment. Oral argument will give the Court an opportunity to discuss any unclear issues with counsel, assuring the best opportunity for a just resolution of the case.

¹ See Appendix, Tab 1, Order of the Boone Circuit Court, April 12, 2010.

² See Appendix, Tab 2, Kentucky Court of Appeals Opinion Reversing and Remanding.

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STATEMENT OF THE CASE

I. Nissan's Knowledge of the Hazard and Leadership in Development & Use of Back-over Prevention Technologies

For decades, Nissan¹ has been acutely aware that blind zones at the rear of automobiles create a danger of serious injury or death when a driver backs into space where (s)he cannot see. The most likely victims are small children.² Indeed, Nissan's efforts to develop rear visibility and sensing technology to prevent back-over deaths and injuries include more than four decades of research, design, and development. Most of the back-over prevention features Nissan now advertises as "state of the art technology" were actually developed in the 1970s and early 1980s. By the 1990s, Nissan had fully developed rear-looking video equipment and sonar detection systems that eliminate or substantially reduce the hazard. The equipment is inexpensive, durable, and reliable. Best of all, the technology works. The concept is simple; the devices enable drivers to detect people and objects behind their vehicles, thus greatly reducing the risk of striking or "backing-over" pedestrians.

Nissan has built and sold cars with rear visibility and sensing equipment for 30 years, but offered this important safety equipment only on its most expensive models. On more economical vehicles marketed to young families with children, including the Xterra SUV in this case, Nissan did not make back-over prevention equipment available – not

¹ Defendants are collectively referred to in this Brief as "Nissan."

² See Appendix, Tab 3, NHTSA *Report to Congress, Fatalities and Injuries in Motor Vehicle Backing Crashes*, (Nov. 2008), at p. 14-15. Attached as Exhibit 5 to Plaintiff's Response to Defendant's Motion for Summary Judgment, filed in the trial court record on January 21, 2010; Also found as Appendix 6 to the Brief for Appellants in the Court of Appeals.

even as optional equipment for parents willing to pay extra to protect their kids. Nissan used safety as a marketing gimmick to steer consumers to its most expensive models.³

In 1971, Nissan built the ESV Concept car with a periscope on the roof for increased visibility when driving in reverse. In 1977, Nissan developed the AD-2 Concept car with a wrap-around rear window for increased visibility. By 1983, Nissan developed the NX-21 Concept Car with a “projection screen and voice warning system” in place of mirrors to enhance rear visibility. The 1989 Nissan Neo-X was equipped with infrared cameras in both bumpers to detect people outside the vehicle when in reverse.

In the early 1990s, Nissan began promoting its “Triple Safety” concept throughout Asia and Europe. A main component of Triple Safety was “information safety” to warn the driver of potential dangers. Nissan said “approximately 90% of the information needed for safe vehicle operation is obtained visually.” To “improve safety” Nissan developed devices to increase visibility.⁴ One Nissan safety technology to increase driver visibility was a “back monitor,” which enhanced “the driver’s ability to recognize and judge the driving environment.”⁵ Nissan considered the “back monitor”

³ The Court of Appeals criticized the Messerlys for not citing to the case record to support their contention that Nissan only provided back-over prevention technologies on its most expensive American models in 2002. It must be noted that the judge in the trial court entered summary judgment before the parties had the opportunity to conduct meaningful discovery, including discovery regarding the relative expense of particular Nissan vehicle models. Plaintiffs did not have the opportunity to fully develop the relevant facts in the record to which precise citations could be made.

Nissan did confirm in its responses to written discovery, however, that rear facing video and/or sensors were available on two of its Infiniti models in the 2002 model year, as well as on the 2002 Nissan Pathfinder. Infiniti is the name of Nissan’s “luxury” brand, and the Pathfinder was, upon information and belief, Nissan’s most expensive sport-utility vehicle in the 2002 model year. Nissan has *never* disputed the Messerlys’ factual statements as to the high cost of its vehicles equipped with these technologies, relative to its other vehicle lines, either at the trial court or at appellate court levels. When viewing the facts in a light most favorable to the Messerlys, as the party opposing summary judgment, it would be reasonable for this Court to consider as true their factual statements that Nissan made these devices available only on its most expensive vehicles in the U.S. for the model year 2002.

⁴ See Appendix, Tab 4, 1997 Triple Safety brochure, pp. 3 and 6.

⁵ Id.

one of the most critical safety devices on its vehicles, because it substantially enhances the driver's ability to "obtain visually" persons and things around the vehicle.

Nissan began putting rear visibility devices (video cameras and sonar or other sensors) on production vehicles intended for sale in Asia and Europe by 1993.⁶ The 1993 Nissan Largo came equipped with an optional factory-installed backup *sensor* system.⁷ By 1998, Nissan was mass producing vehicles for sale in Japan and Europe with factory installed rear view *camera* systems.⁸ Throughout the 1990s, Nissan consistently marketed and advertised its rear view sensors and back-up video monitors on its Asian and European production line vehicles as "safety features."⁹

Nissan also worked with the Japanese Ministry of Transport on the Advanced Safety Vehicle Project ("ASV"). In 1991, as part of ASV, Nissan designed and built the ASV-2, a vehicle incorporating devices to reduce accidents with pedestrians,¹⁰ including a Nighttime Pedestrian Monitoring System. The system used an infrared camera to detect humans in the blind zone behind the ASV-2 by contrasting the temperature of pedestrians with the surrounding environment, then projecting an infrared image of the pedestrian on a dashboard monitor.¹¹ Another device on the ASV-2 was a Blind-Spot Obstacle Collision Prevention Support System. This device alerted the driver to the presence of pedestrians *and* stopped the backing vehicle if the infrared sensors detected human body

⁶ See Appendix, Tab 5, Response to Request No. 9 in Nissan Motor Co., LTD.'s Objections and Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents.

⁷ Id.

⁸ Id.

⁹ See Appendix, Tab 6, August 19, 1998 Nissan Press Release; Appendix, Tab 4, 1997 Triple Safety brochure, pp. 3 and 6.

¹⁰ See Appendix, Tab 7, April 5, 2000 Nissan Press Release - "Nissan Develops Nissan ASV-2 Advanced Safety Vehicle."

¹¹ Id.

heat in close proximity to the rear of the car. The purpose of this device, Nissan said, was to prevent a driver from backing over a child in the vehicle's blind zone.¹²

Long before it produced the car involved in this case, Nissan had perfected equipment that virtually eliminated the grave risk of serious physical injury and death to pedestrians presented by backing into the blind zone at the rear of a car not equipped with rear-looking video or sensors. Nissan put rear-looking video cameras and sensors into mass production on cars it sold in Asian markets and on its expensive high-end models sold in America more than ten years before the vehicle involved in this case was built.

For over a decade before the Messerly family bought its 2002 Xterra, Nissan knew its rear visibility devices and warning systems were effective. As evidenced by the vehicle Nissan made for Asian and European markets, Nissan knew it was economically feasible to mass produce vehicles with rear-looking video and sensors. At both the trial court level and at the Court of Appeals, Nissan argued that rear-facing cameras and sensors are somehow not safety devices, but merely "convenience features" designed to help drivers park their cars. Notwithstanding its prior efforts to market rear facing video and sonar as safety features in non-American markets, Nissan contended in this case that the devices were only meant to avoid property damage and "were not designed or developed as safety devices to prevent back over accidents *with people*."¹³ However, in the brief it filed with this Court, Nissan apparently abandoned that disingenuous assertion and no longer disputes the fact that devices designed to allow a driver to view the space into which he is backing are obviously safety features.

II. How Foxx Messerly Was Killed

¹² Id.

¹³ See Nissan's Memorandum in Support of Motion for Summary Judgment in the Boone Circuit Court, at p. 11, fn. 11; Brief of Appellees in the Court of Appeals, at p. 18, fn. 68.

About 2:30 p.m. on Thursday, April 15, 2004, Sandra (“Sandy”) Messerly took her two sons, Foxx, age 19 months, and Carter, age 5 weeks, outside to play. It was the first warm day of Spring and Sandy wanted her children to enjoy being outdoors. Curtis Messerly, Sandy’s husband and the boys’ Dad, was on his way home from work. Earlier that morning, Foxx had helped his Mom plant flowers and played on their outdoor trampoline. While Sandy and the boys waited for Curtis, Foxx and his mom decided to play ball on the concrete parking pad just outside the garage. The family’s 2002 Nissan Xterra was parked on the pad, taking up a lot of room in their intended play space. Sandy decided to back the Xterra a few feet, off the concrete pad and onto the adjacent gravel driveway to make room to play on the pavement.

When Mom went to move the vehicle, Carter was strapped into his stroller just outside the open garage door. Foxx was in the garage, sitting on his Daddy’s ATV, making motor noises and pretending to drive it. Sandy was confident her children were in positions of safety when she walked around the Xterra to the driver’s side door on the opposite side of the parking pad from the garage. Sandy climbed in, stepped on the brake, and started the engine. She shifted into reverse, checked her mirrors, and looked over her right shoulder, out the back window. Finally, she carefully eased her foot off the brake and started to roll the Xterra backward very slowly.

After backing just a few feet, Sandy heard Foxx yell, “Mom!” She immediately stopped, put the car in park, and got out. She ran to the front of the Xterra, toward the garage, to see why her son had cried out. Expecting Foxx to still be inside the garage, but not seeing him there, Sandy turned back to face the Xterra. She was horrified to see her young son lying face down in the driveway under the right rear tire of the Nissan SUV.

Sandy tried to pull Foxx from under the car, but he was trapped. She had to get back in the driver's seat to move the Xterra forward slightly to free Foxx from beneath the tire. She ran to him again and saw immediately that his face and head were injured. Foxx was not breathing and had no pulse. Sandy picked Foxx up, ran into the kitchen, and called 911. Following instructions from the dispatcher, Sandy performed CPR on Foxx while an ambulance raced to the Messerly home.

Sandy could see her son's injuries were severe. She told the dispatcher Foxx's skull was "not intact" and his jaw was "really broken." When instructed to open his mouth to clear his airway, Sandy told the dispatcher Foxx's teeth were "all messed up ... [and] all moved around." He was still not breathing. When she tried to give Foxx mouth-to-mouth, Sandy saw that "blood [was] coming out the side of his head." Sandy could tell that no air was going into Foxx's lungs. Horrified, she told the dispatcher, "he's dead." Shortly after, she hung up from the 911 operator and dialed her husband's cell phone. Mr. Messerly was still driving home when he heard the terrible news.

III. Procedural History of the Case

This products liability action was filed May 19, 2005, against Defendants, Nissan North America, Inc. ("NNA") and Kerry Nissan, Inc. When discovery disclosed that Nissan Motor Co., Ltd. ("Nissan Japan"), a Japanese corporation, was responsible for the design of the Xterra, Plaintiffs tendered an amended complaint and moved for leave to add Nissan Japan as a defendant, pursuant to CR 15.03. Leave was granted by order of July 10, 2007. NNA is a wholly-owned subsidiary of Nissan Japan.

On November 29, 2007, Nissan Japan filed a motion to dismiss the amended complaint as time barred by the applicable statute of limitations. A hearing was

scheduled for January 2008. In an order signed and entered January 8, 2008, Special Judge Kevin Horne *granted* Nissan Japan's motion to dismiss. Soon after dismissing Nissan Japan, Judge Horne retired. The case was reassigned to Judge Robert W. McGinnis, a regular Circuit Judge of the 18th Circuit sitting in Boone Circuit by special appointment. On February 14, 2008, Plaintiffs moved to vacate Judge Horne's order, on the grounds that the decision to dismiss Nissan Japan was erroneous. On March 14, 2008, Judge McGinnis presided over the hearing on that motion.

At that hearing, in addition to discussing the merits of Plaintiffs' motion, Judge McGinnis made several statements on the record indicating that he was considering granting summary judgment for defendants, despite the fact that no defendants had filed any such motion or indicated that such a motion would be forthcoming. Judge McGinnis volunteered the following observations, inviting a defense motion for summary judgment and implying that he had already made up his mind without considering *any evidence*:

- “Frankly, since I knew I had this case, I’m backing my car out of the parking lot yesterday, which is an Avalon, and if a kid was sitting behind my car, I couldn’t see him either.”¹⁴
- “If you get past this motion, you’re going to have to get past me to get to a jury with some kind of authority telling me that this kind of design defect is, in fact, actionable, because my gut reaction is, it doesn’t matter what kind of a vehicle it is. If it’s a small child you can’t see out of any vehicle, and you know that because when you look through your rear view mirror, you can’t see anything below a certain level and behind the vehicle. It’s just common sense.”¹⁵

On May 6, 2008, Judge McGinnis granted Plaintiffs' motion to vacate the order dismissing Nissan Japan as a defendant. After that, Plaintiffs served interrogatories and

¹⁴ See video recorded hearing in Boone Circuit Court of 3/14/2008, beginning at time stamp 10:28:37.

¹⁵ See video recorded hearing in Boone Circuit Court of 3/14/2008, beginning at time stamp 10:29:16.

requests for production of documents upon Nissan Japan, seeking information about the company's knowledge regarding hazards posed by vehicle blind zones and information about Nissan research, design, and testing of technologies that could greatly reduce or eliminate those hazards, including rear-facing video cameras and rear sonar sensors.

Nissan Japan provided incomplete and non-responsive answers to Plaintiffs' discovery requests.¹⁶ Plaintiffs filed a motion to compel discovery responses from Nissan Japan on September 23, 2009. Defendants filed a memorandum opposing Plaintiffs' motion. A hearing was set for October 23, 2009. At that hearing, Judge McGinnis spent very little time discussing the discovery issues. Instead, the judge engaged the parties in a lengthy discussion of whether this case should be submitted to a jury for resolution. As in the hearing in March 2008, Judge McGinnis expressed his belief that summary judgment could be appropriate in the case, even though defendants had still never raised the issue or filed a motion for summary judgment. Among the statements made by Judge McGinnis at the October 23, 2009, were the following:

- "I drive an '01 Avalon, which is probably, has the best visual of any car on the road, but the new Avalon's got a trunk that's jacked up, and you can't see out of the back of that thing. Or most Chrysler products. Or most SUVs. Or most of any kind of car."¹⁷
- "Seat belts weren't mandated in cars. Seat belts save lives...They didn't exist, then there was an option, and then eventually they were mandated by the government. Same

¹⁶ The facts set forth above, in I(a) of this Facts of the Case section, is almost exclusively based on information learned by Plaintiffs through independent research, and not through discovery. Plaintiffs' costly and extensive independent research revealed that Nissan had been studying the back-over problem for decades, and developing and using technologies to reduce or eliminate the back-over hazards on cars sold in Japan and Europe for years before Nissan began offering them as added-cost options on luxury vehicles sold in the U.S. Plaintiffs' discovery requests sought information and documents related to what Plaintiffs had found through their own efforts, but the Nissan defendants provided very little, if any, meaningful, substantive confirmation and virtually no new information. For more information, please see Plaintiffs' Second Motion to Compel, filed September 23, 2009.

¹⁷ See video recorded hearing in Boone Circuit Court of 10/23/2009, beginning at time stamp 10:13:57.

type of thing with these backup systems. If they were mandated by the government, and they weren't provided, then you've got, obviously, an issue, just like with a seatbelt, possibly. But they're not mandated."¹⁸

- "This (obviousness of blind zone hazards and similar blind zone hazards associated with most SUVs) is ultimately going to be the issue in this case. This is what it's all coming down to, and you may not get it to a jury."¹⁹
- "You haven't convinced me yet that [Nissan has] special knowledge in their hands that doesn't exist with ... a normal human being using common sense."²⁰
- "If this thing gets to a jury, and there's a holding against the car company, you're going to appeal it, and it's going to go there anyway on that very issue (of whether Plaintiff's design defect claim is actionable)."²¹

Near the end of the hearing on Plaintiffs' motion to compel, Judge McGinnis suggested that the discovery issues be set aside, and the issue of whether Defendants were entitled to judgment as a matter of law be litigated first. In other words, he invited the Nissan defendants to file a motion for summary judgment. They did. The parties briefed the issue. A hearing on the motion took place on March 30, 2010.

At the hearing, the parties argued their respective positions. Judge McGinnis posed few questions to either Mr. Schaefer, arguing for Nissan, or Mr. Robert E. Sanders, arguing for Plaintiffs, during their presentations. Following oral arguments, Judge McGinnis indicated that he would likely grant defendants' motion, although he still wished to review some materials before issuing an order. He spoke at length on the record, setting forth his reasoning as to why he would likely be granting judgment in the

¹⁸ See video recorded hearing in Boone Circuit Court of 10/23/2009, beginning at time stamp 10:16:18.

¹⁹ See video recorded hearing in Boone Circuit Court of 10/23/2009, beginning at time stamp 10:19:00.

²⁰ See video recorded hearing in Boone Circuit Court of 10/23/2009, beginning at time stamp 10:23:49.

²¹ See video recorded hearing in Boone Circuit Court of 10/23/2009, beginning at time stamp 10:33:11.

defendants' favor as a matter of law. Among the statements Judge McGinnis made at the March 30, 2010 hearing were the following:

- "Something I've toiled with is continuing, when I back my own car up since I've had this case, I think about it, and I can't see out the back of my car, and it's an Avalon. It's not an SUV. I've got an SUV; you can't see out of it, either. Can't see out of any car on the road. ... You wouldn't be able to see [a child] out of most vehicles. So you get back into that situation, and I think it gets right back to this 'obvious' situation. Is it an obvious danger, and if it is, I think it is very well within the realm of the court to make a finding and summary the case."²²
- "If it does get to trial, I think you have to look at this: even if it did have such a camera, to see the camera, you'd have to look forward. You're still going to look back, either this way (over right shoulder) or this way (over left shoulder), most of the time this way (over the right shoulder), before you back up, because it's people's inclination to do so. If you look back, then you don't see anything coming in the camera. You're looking at the camera, and a child comes in from the side, you're not going to see him. So there's many ways that even a camera's not going to solve the problem or protect...you can't protect completely."²³
- "If a finding is made here, or ultimately there's a jury verdict that finds fault on behalf of the car manufacturer, then it opens up the door for probably every single backup accident that happens with any car manufacturer that doesn't supply these things. It could even throw in liability if they do supply these technologies, because if you're depending on something in front of you, you may very well not see something when you should be looking back..."²⁴
- "From a practical standpoint on how this case goes, this is an issue that, ultimately, no matter how this case goes, is going to have to be decided by an appellate court. For the simple reason, you say there's been two trials, both verdicts for the car manufacturer. So if that happens here, it's a dead case. That's the end of the case. If [Plaintiffs] win, you all (Defendants) will undoubtedly take this thing as far up as

²² See video recorded hearing in Boone Circuit Court of 3/30/2010, beginning at time stamp 10:59:26.

²³ See video recorded hearing in Boone Circuit Court of 3/30/2010, beginning at time stamp 11:00:06.

²⁴ See video recorded hearing in Boone Circuit Court of 3/30/2010, beginning at time stamp 11:01:35.

you have to take it, because of the effect it has on the entire automobile industry. So it's going to be years and years and years down the pike. So I'm not going to summarize this if I don't believe it can be summarized, but by the same token, there are advantages to it being summarized at this point. It goes to the Court of Appeals, the Supreme Court, whatever may be the case, they make a decision of whether, in fact, you do get a verdict, it's going to stick, because it's very likely, in my opinion, that if you do get a jury verdict eventually, it will not stick, because of these issues we're talking about specifically. So those are some of my thoughts in making this decision."²⁵

In an order entered April 12, 2010, Judge McGinnis sustained Nissan's motion for summary judgment, ruling *as a matter of law* that the Nissan Xterra is not defective, and that Nissan acted non-negligently in the design, manufacture, and marketing of the Xterra. The order adopts the rationale of the Defendants' briefs and arguments as grounds for the ruling. The comments and statements that Judge McGinnis made on the record at all three hearings over which he presided in this case tend to show, however, that his reasons for granting summary judgment extend far beyond the evidence in the court record or any arguments made by the parties. The judge failed to apply the appropriate legal standard for summary judgment. He conducted independent research and experimentation with his own vehicle. He misapplied, or failed to apply, the proper legal test for whether a product can be declared non-defective as a matter of law.

The Kentucky Court of Appeals reversed the ruling of the Boone Circuit Court, correctly holding that "the evidence presented to the trial court presented a jury question in light of [*Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776 (Ky. 1984)]." *Messerly v. Nissan North America, Inc.*, 2011 Ky. App. LEXIS 234 (Dec. 2, 2011) at *15. Nissan filed a motion for discretionary review, which this Court granted. The

²⁵ See video recorded hearing in Boone Circuit Court of 3/30/2010, beginning at time stamp 11:02:20.

Messerly's filed a cross-motion for discretionary review regarding the application of this Court's holding in *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) to the facts of this case, which the Court likewise granted.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

This Court has *held* that "summary judgment is not a trick device for the premature termination of litigation." *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974). It is to be "cautiously applied." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try." *Steelvest*, 807 S.W.2d at 480. Summary judgment is only proper where ". . . it appears *impossible* for the nonmoving party to produce evidence at trial warranting a judgment in his favor." *Id.* The movant must "...establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied." *Roberson*, 516 S.W.2d. at 840.

The court must look at the entire record of the case, including "the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with [any] affidavits." CR. 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480. Even where the trial court believes the party opposing the motion may ultimately not prevail at trial, summary judgment should not be rendered if there is any issue of material fact. *See id.* The role of the trial judge is to "examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480.

II. THE COURT OF APPEALS (COA) DID NOT MISCONSTRUE ANY LEGAL AUTHORITY CITED BY APPELLANTS. THE COA CORRECTLY FOUND THAT THE EVIDENCE IN THE RECORD GIVES RISE TO ISSUES OF MATERIAL FACT.

Nissan argues that the 2002 Xterra is not defective as a matter of law, based upon the "obvious and unavoidable" doctrine. Nissan relies upon several cases discussed in *Montgomery Elevator Co.*, supra. p. 11, including *Hercules Powder Co. v. Hicks*, 453 S.W.2d (Ky. 1970); *Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197 (Ky. 1976); and *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66 (Ky. 1973), for the proposition that courts can, in limited circumstances, determine as a matter of law that a product is not unreasonably dangerous and, therefore, not defective. *See* Brief of Appellants at p. 7.

Nissan insists that the Court of Appeals ignored or overlooked the cases it cited, and misconstrued the holding in *Montgomery Elevator* to mean that the question of whether a particular product is unreasonably dangerous is one that can *never* be determined as a matter of law. One need only read the opinion of the COA to see that Nissan apparently failed to understand it.

The Court of Appeals framed the issue in this case as, “whether the trial court erred by granting summary judgment to Nissan, i.e., whether the risk of a back-over injury in the 2002 Xterra was a question for the jury in light of the evidence presented by the parties and our laws.” *Messerly*, 2011 Ky. App. LEXIS at *12-13 (emphasis added). The Court of Appeals reversed the trial court’s order granting summary judgment on the grounds that, “*Montgomery Elevator* clearly places [the question of defectiveness] in the purview of the jury in the case sub judice” and that “the evidence presented to the trial court presented a jury question” as to the unreasonable dangerousness of the Nissan Xterra. *Messerly*, 2011 Ky. App. LEXIS at *15 (emphasis added). The Court of Appeals rejected Nissan’s argument that the Xterra belongs in an extremely narrow class of products -- such as dynamite, guns, cigarette lighters, and grain augers -- that are so inherently and unavoidably dangerous that liability against the manufacturer is precluded, as a matter of law, for harm caused by the products’ known, unavoidable, and inherent dangers.

The COA Opinion Reversing and Remanding painstakingly and accurately sets forth the arguments made by both Nissan and the Messerlys. The detail with which the Court recited the arguments evidences the court’s clear understanding of the substance of the briefs and oral arguments, including legal authorities cited. Nissan made the same arguments regarding the significance of the holdings in *Montgomery Elevator* and the cases cited therein on three separate occasions in the Court of Appeals-- in its Brief of Appellees (see pp. 8 – 9, 14 – 15, 20), Sur-Reply of Appellees (see pp. 1 – 2), and Appellees’ Petition for Rehearing (see pp. 2 – 4). The Court of Appeals could not have

overlooked Nissan's arguments on the subject even if it had tried. The COA did not fail to understand Nissan's argument; it simply, and correctly, disagreed.

The Court of Appeals' discussion recited Nissan's arguments: that "products with obvious, well-understood and inherent risks are not defective;" "the risk of back-over injuries is inherent in motor vehicles;" "the risk of back-over injuries is obvious and well understood;" and "defectiveness is not invariably a fact question." *Id.* at *12. Later in its Opinion, the COA again acknowledges Nissan's position that "as a matter of law the court could decide" whether a product is unreasonably dangerous. *Id.* at *14-15.

The Court of Appeals based its reversal on "the evidence presented to the trial court," not a misreading of *Montgomery Elevator*. *Id.* at *15. That evidence shows that blind zones are neither "inherent" nor "unavoidable." The hazard is eliminated through use of the devices and technology Nissan, itself, helped pioneer -- rear looking video cameras and sensors. Automobiles are not like explosives, guns, or cigarette lighters because it is not a *requirement* of driving an automobile that one much back blindly into space the driver cannot see. Nissan proved that long ago with the cars it sells in Europe and Asia and the luxury cars it sells in the USA. Nowhere in the Opinion Reversing and Remanding does the Court of Appeals hold or even infer that a product may *never* be declared non-defective as a matter of law, as Nissan inaccurately contends. Rejecting Nissan's assertion that a family SUV is as unavoidably dangerous as dynamite, corn augurs, or guns, the Court of Appeals properly *held*, based on the facts in the trial court record, that the question of whether the Xterra is unreasonably dangerous is one to be answered by a jury at trial.

III. THE COA CORRECTLY HELD THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER THE XTERRA WAS IN A DEFECTIVE CONDITION AND UNREASONABLY DANGEROUS.

A design defect claim, whether founded on strict liability or negligence, requires the *fact finder* to “decide whether the manufacturer that placed in commerce the product made according to an intended design acted prudently, i.e., was the design a defective condition which was unreasonably dangerous.” *Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 433 (Ky. 1980). The fact finder is the jury, not the trial judge, unless there is a “complete absence of proof” that a product is unreasonably dangerous. *Boon Edam, Inc. v. Saunders*, 324 S.W.3d 422, 430 (Ky. App. 2010); *see also Nichols*, 602 S.W.2d at 433; *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530 (Ky. 2003); *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991); *C. D. Herme, Inc. v. R. C. Tway Co.*, 294 S.W.2d 534, 538 (Ky. 1956) (explaining that the question of whether reasonable care has been exercised in a design defect case is for the jury to answer).

The manufacturer is presumed to know the qualities, characteristics, and actual condition of his product at the time he sells it. *Nichols*, 602 S.W.2d at 433; *Montgomery Elevator Co.*, 676 S.W.2d at 780. Thus, if the product is found to be in a defective condition, the remaining issue for the jury is whether the defect rendered the product unreasonably dangerous. *See Nichols*, 602 S.W.2d at 433. In order to determine whether a product is unreasonably dangerous, the jury must consider a number of factors, including: “deviation from industry standards, obviousness of the danger, consumer knowledge, weighing of risks against benefits, feasibility of making a safer product, subsequent maintenance and repair, misuse, the products’ inherently unsafe characteristics, and other factors, depending on what is relevant in each particular cause

of action.” *Smith v. Louis Berkman Co.*, 894 F. Supp. 1084, 1092 (W.D. Ky. 1995); *see also Nichols*, 602 S.W.2d at 433.

In the instant case, the Court’s only task for purposes of considering whether summary judgment was proper is to determine whether, viewing the facts in a light most favorable to the Plaintiffs, there exists a genuine issue of fact as to: (1) whether the Xterra at issue was defective and unreasonably dangerous, i.e., whether the plaintiff can make out a jury question on strict liability; or (2) whether Nissan acted *negligently* for failing to incorporate inexpensive, reliable safety equipment in the Xterra that likely would have eliminated the hazardous blind zone that caused the death of the plaintiffs’ child.

This Court has only permitted a trial court to take the question of whether a product was unreasonably dangerous away from the jury in two very limited circumstances, as noted by the Sixth Circuit Court of Appeals in *Byler v. Scripto-Tokai Corp.*, 1991 U.S. App. LEXIS 22277 at *7-8 (6th Cir. 1991). The first circumstance was where the purchaser’s failure to properly maintain the product, not the original design itself, caused the defect and the injury. *See Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197 (Ky. 1976). This exception has no application to this case.

The second circumstance in which it *may* be appropriate for a trial court to rule, as a matter of law, that a product is not defective is where an inherent, intrinsic danger in the product is obviously apparent and appreciated by all users, *and* the product presents a real, unavoidable danger no matter how it is designed. *Byler*, 1991 U.S. App. LEXIS 22277, at *8 n 1. In *Byler*, the Sixth Circuit affirmed a summary judgment in a defendant manufacturer’s favor, holding that a butane lighter was not defective because the inherent

danger of the lighter, i.e., risk of fire, was obvious and unavoidable.²⁶ *Id.* at *10-11. In reaching this conclusion, the Court reasoned that a butane lighter is not only inherently dangerous, but that “the very purpose of a lighter is to create a flame.” *Id.* at *10. Therefore, the risk of fire is not one that can ever be eliminated, no matter how safely the lighter is designed, without impairing the lighter’s utility or eliminating it altogether. The court likened the obvious and unavoidable dangers of a butane lighter to those of: i) dynamite, *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583 (Ky. 1970); ii) a revolver, *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19 (Ky. 1979); and iii) the fast-moving metal blades of a corn auger, *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66 (Ky. 1973). In each of those cases, not only was the product at issue considered inherently dangerous, but the very nature of each product “invites contemplation of the real possibility of danger regardless of its design” *Byler*, 1991 U.S. App. LEXIS 22277 at *8 n. 1. Just as a lighter is absolutely useless if it fails to produce a flame, so too are dynamite, a revolver, and a corn auger useless if they fail to explode, fire bullets, and use moving blades or a screw flighting to propel corn, respectively.

In *Walker v. Phillip Morris USA, Inc.*, 2009 U.S. Dist. LEXIS 14252 (W.D. Ky. 2009), the plaintiffs alleged that Phillip Morris’s cigarettes were defective because they were not “fire proof.” *Id.* at *5. The United States District Court for the Western District of Kentucky held that cigarettes were not unreasonably dangerous because the danger from cigarettes was inherent and intrinsic to the functionality of the product. *Id.* at *10.

²⁶ *Byler* was a products liability action brought to recover damages for a child who was burned while playing with a butane cigarette lighter. The incident was witnessed by several adults, none of whom intervened to take the lighter away from the child. All of the adults in *Byler* who witnessed the child using the lighter admitted in depositions that they were well aware of the dangers and appreciated the magnitude of the risks associated with lighters. *Id.* at *10. The plaintiffs in this case, by contrast, testified that they did *not* know about the dangers of the blind zone or that children were being killed in back-over accidents.

Similar to the holding in *Byler*, the *Walker* court explained that the danger of a burning cigarette was **obvious and unavoidable**, since it is obvious that “cigarettes must be lit and burned” to work and the danger is unavoidable since you cannot smoke a cigarette without it being on fire and the tobacco burning. *Id.*

A. **There is a genuine question of material fact as to whether the Nissan Xterra’s blind zone is an inherent and unavoidable hazard.**

The word “inherent” means, “part of the very nature of something, and therefore permanently characteristic of it or necessarily involved in it.”²⁷ All the cases that Nissan relies upon in its argument that the Xterra is “inherently dangerous” involve products that must do something dangerous to function. *Dynamite* is inherently dangerous because its essential purpose is to cause a violent explosion.²⁸ *Guns* are inherently dangerous because the essential purpose of a gun is to shoot a deadly projectile. *Cigarette lighters* are inherently dangerous because the essential purpose of a lighter is to create fire. *Corn augers* are inherently dangerous because they rely on a whirling screw auger or blades to propel corn up into a silo or barn. *Cigarettes* are inherently dangerous because the essential purpose of a cigarette is to burn and create smoke.

Nissan tries to compare the Xterra to those products by pointing out that a vehicle must be massive, must be able to protect its occupants, and must be able to move backward and forward with considerable speed in order to serve its intended function.²⁹ Nissan does not and *cannot* claim, however, that a vehicle must have a blind zone

²⁷ Encarta Dictionary of the English language (North America)

²⁸ In *Hicks*, the plaintiffs never contended that the dynamite in question was defective in design, thus there was no analysis as to whether the dynamite was “unreasonably dangerous.” *Hicks*, 453 S.W.2d at 587. The Court also noted that the manufacturer of the dynamite did not know or have any reason to know that the dynamite would be misused in the manner that caused the plaintiff’s injury. *Id.* at 588.

²⁹ See Brief of Appellants at p. 11.

directly behind it to function. The blind zone is not an inherent, unavoidable characteristic of the 2002 Nissan Xterra. The lack of rear visibility in the Xterra could have been completely designed out of the vehicle by the simple and inexpensive placement of a rearview camera and sensors—as NISSAN was already doing for vehicles in sold in Asia and Europe, and on premium models sold in the USA. As NHTSA informed Congress, the effectiveness of rearview cameras to detect pedestrians in the rear of the vehicle while the vehicle is traveling in reverse is “100 percent, since the systems have the capability to show any object within their field of view.”³⁰ If a product can be designed in such a way as to eliminate a hazardous condition, then by definition, that hazard is not inherent to the design of the product and the danger is not “unavoidable.”

Nissan had the design and technological capability to eliminate the rear blind zone hazard, and with it, the risk of serious injury or death to children, years before the Messerly Xterra was built. Nissan was installing rearview cameras or similar technologies on its concept cars for well over 20 years before the date of the subject accident. It had been factory-installing rearview cameras on its Japanese and European production line vehicles since 1998, and was offering them as options on its American luxury models in the 2002 model year. One can only wonder how Nissan can claim that the blind zone is an inherent and unavoidable characteristic of the Xterra when it had eliminated the risk in virtually all its cars sold in Japan and in premium models in America at the time it manufactured the Xterra.

B. The consideration of a safer alternative design in determining whether a product’s design is unreasonably dangerous is completely appropriate and consistent with Kentucky products liability law.

³⁰ See Appendix, Tab 8, Federal Motor Vehicle Safety; Rearview Mirrors, 49 CFR Part 571, p. 58-59.

Throughout this litigation, Nissan has taken the position that a court must first find that a product design is unreasonably dangerous “without considering how the hazard might be lessened by the adoption of a safer alternative design.”³¹ Nissan somehow believes that the existence of a safer alternative design “does not matter” unless the design in question has already been found to be unreasonably dangerous.

Nissan’s position is flatly contradicted by this Court’s decision in *Montgomery Elevator*, which states, in relevant part:

Considerations such as **feasibility of making a safer product**, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products’ inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured “in a defective condition unreasonably dangerous,” are **all factors bearing on the principal question** rather than separate legal questions. In a particular case, as with any question of substantial factor or intervening cause, they may be decisive. 676 S.W.2d at 780-81.

Nissan cites *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35 (Ky. 2004), and *Jones, supra*, 502 S.W.2d at 70-71, for the idea that a plaintiff in a products liability case must show more than “just” the existence of a safer alternative design to impose liability upon a manufacturer.³² Interestingly, neither *Gregory* nor *Jones* specifies precisely *what* a plaintiff must show to get his products liability case to a jury. Nissan cited no authority establishing a minimum threshold showing a plaintiff must make to create a jury issue in a products case. The best guide we currently have is the Restatement of the Law (Third), Torts: Products Liability, §2(b) (1998), which this Court cites with approval in *Gregory*. The Restatement (Third) says 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

³¹ Brief of Appellants at p. 13.

³² See Brief of Appellants at p. 14.

predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe.

Under the Restatement (Third), once a plaintiff presents evidence of foreseeable harm and a reasonable, safer alternative design, a jury then determines whether the product at issue is unreasonably dangerous. The jury would be instructed to do so utilizing the factors set forth in *Montgomery Elevator*.

Applied to the instant case, the back-over hazard was undeniably foreseeable -- indeed *known* -- to Nissan. Nissan had spent decades studying the hazards of blind zones at the rear of motor vehicles, including the risks of back-over deaths and injuries. Nissan had developed and perfected reliable, durable, inexpensive technology to eliminate the blind zone and allow a driver to detect pedestrians to the rear of the vehicle and avoid striking them.³³ Nissan had made that equipment and technology available on its most expensive cars, but withheld it from less expensive models, like the Xterra, that are marketed and sold to young families with children. Nissan had a proven alternative design that it was, in fact, selling on its expensive models prior to the manufacture of the subject vehicle. Nissan had been mass-producing vehicles all over the world with rear sensors, rear cameras, or both years before the Messerly vehicle was manufactured in 2002. Other than the additional profit from forcing consumers to pony up for a more expensive vehicle, there was absolutely no reason why Nissan could not have equipped the Xterra with the same equipment.

Notwithstanding Nissan's argument that the existence of a safer alternative design "does not matter," that consideration should be considered a primary, perhaps controlling, factor in a jury's determination that the design of the Xterra was unreasonably dangerous.

³³ See Statement of the Case, *supra*, pp. 1 – 4.

See Prosser, Handbook of the Law of Torts, section 99, page 644 (4th Edition 1971) (explaining that "the fact that others [or the defendants themselves] are making a similar product with a safer design may be important evidence bearing upon the defendant's reasonable care"), cited with approval in *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69 (Ky. 1973). Safer alternative design, more than any other factor in *Montgomery Elevator*, most directly promotes the public policy that is advanced by modern products liability law-- that products should be reasonably safe for people to use. If a product can be made safer, at minimal cost, without impairing the utility of the product, it should be.

In *Jones*, it was uncontradicted that "the design involved was regarded by the industry as the safest possible under the circumstances to achieve proper functioning of the product." *Jones*, 502 S.W.2d at 70. The alternative design advocated by the plaintiffs in that case was merely a theoretical design postulated for litigation, that was neither known nor available prior to the time of the accident. *Id.* at 71. In the present case, the Xterra was absolutely not designed as safely as possible while still being able to function adequately. The argument cannot even be reasonably made, considering the evidence in a light most favorable to Plaintiffs. The safety technologies being advocated by Plaintiffs would actually improve the utility of the Xterra, and they were fully available to and in use by Nissan at the time the Xterra at issue was manufactured.

While Nissan is clearly wrong in arguing that a court must determine whether a product is unreasonably dangerous without even considering how safely it *could be* made, it is ridiculous for Appellants to suggest that the Messerlys have shown "nothing more" than a safer alternative design was feasible. Appellees have demonstrated that many issues of material fact exist relevant to whether the Xterra was unreasonably

dangerous. Appellees have offered proof establishing all of the following: driving a massive vehicle into space where the driver cannot see creates a substantial and unnecessary risk of death or serious bodily injury to pedestrians, especially children and the elderly; existence of a safer alternative design that would improve safety by eliminating the blind zone; the technology of the safer alternative design is proven, reliable, robust, inexpensive, and does not impair the vehicle's utility; the hazards of a blind zone at the rear of a motor vehicle is *not* an unavoidable or inherent risk; the safer alternative design is consistent with all governmental regulations, industry standards, and/or state of the art; and, perhaps most enlightening, the safer alternative design was in actual use by the Nissan defendants themselves and had been in use by Nissan for years in cars built for sale in Europe and Asia, including Japan. As discussed in the next section, there are legitimate jury questions as to whether drivers and the general public truly appreciate the nature and extent of the back-over danger. There is also a genuine factual dispute about whether a reasonable automobile manufacturer, with the same depth of knowledge about the back-over hazard and access to the technologies available to Nissan to reduce or eliminate the hazard, would have placed the Nissan Xterra into the stream of commerce without appropriate back-over prevention devices, i.e., rearview video cameras and sonar sensors.

The evidence presented by Appellees gives rise to genuine issues of fact as to whether the Nissan Xterra was unreasonably dangerous. This Court should affirm the decision of the Court of Appeals and remand this matter to the Boone Circuit Court for completion of discovery and trial.

C. The dangers caused by the lack of rear visibility in the Xterra are not obvious. There is a genuine question of material fact as to whether

ordinary consumers appreciate the existence or magnitude of the hazard posed by vehicular blind zones.

Nissan argues that the hazards posed by SUV blind zones are open, obvious, and known to all consumers. Nissan failed to support these claims with any studies, data, or other competent evidence. Nissan did not, and could not, establish beyond question that consumers fully appreciate the magnitude of danger to life and limb caused by the lack of rear visibility in ordinary passenger vehicles. Plaintiffs, in contrast, submitted ample evidence in the record to create a genuine question of fact on the issue.³⁴ Plaintiffs submitted NHTSA's Report to Congress showing that every year in America, there are over 292 fatalities and an additional 18,000 injuries as a result of back-over incidents. Roughly 6 people are killed and another 346 are injured every week in the USA alone as a result of being backed over by a vehicle. SUVs like the Nissan Xterra and pickup trucks cause more back-over deaths than any other vehicle types on the road.³⁵ Out of the 18,000 non-fatal injuries every year from back-over accidents, an estimated 10,000 are considered more severe than minor injuries with "an estimated 3,000 per year [being] incapacitating injuries."³⁶ Most back-over victims are children under the age of five, just like Foxx Messerly.³⁷ The location where back-over accidents occur most frequently, as in the present case, is driveways.³⁸

There is a genuine issue of material fact in this case as to whether, and to what extent, the risks caused by a lack of rear visibility are "obvious, well understood, and appreciated" by consumers. While it is true that most drivers are generally aware that

³⁴ See Appendix, Tab 3, NHTSA *Report to Congress, Fatalities and Injuries in Motor Vehicle Backing Crashes*, (Nov. 2008), p. 11.

³⁵ *Id.* at p. 14.

³⁶ *Id.* at p. 14.

³⁷ *Id.* at p. 14-15.

³⁸ *Id.* at p. 18-19.

their vehicle has a blind zone, their awareness of the gravity of the risks posed by that blind zone is in no way comparable to the obvious risk of danger associated with guns, fire, fast spinning blades, and dynamite. A driver's general awareness of the existence of a blind zone does not equate to an awareness of how large their blind zone is, or how quickly a child may enter the blind zone, completely undetected, and be killed in a matter of seconds, no matter how much caution the driver exercises.³⁹ As the Sixth Circuit Court of Appeals has simply and eloquently stated, "[a] danger may be obvious but not appreciated ... [e]ven where a danger is appreciated, circumstances may cause it to be momentarily forgotten." *Krugh v. Miehle Co.*, 503 F.2d 121, 127 (6th Cir.1974) (citations omitted). Therefore, awareness or obviousness alone should not and does not preclude a finding of negligence on the part of the defendant. *See id.*

As the driver's manual attached to Nissan's brief exemplifies, licensed drivers have been taught for decades that they can prevent backing into a person or object located in the blind zone by checking their rearview mirrors and looking over their right shoulder while backing their vehicle. Nothing, however, could be farther from the truth. Sandy Messerly *did all of those things*. If there had been a photographer present to photograph Mrs. Messerly as she started her backing maneuver moments before she ran over her child, they could have used *her picture* in the page of the driver's manual that Nissan pasted into its brief. The picture shows a driver in the exact position that Mrs. Messerly was in when she began moving her car.⁴⁰ The advice from the Kentucky Driver's Manual will *not* prevent the back-over death of a child; the equipment that Nissan has been

³⁹ See Brief on Behalf of Amicus Curiae, KidsAndCars.org, at p. 10.

⁴⁰ See Appendix, Tab 9, Excerpt from Discovery Deposition of Sandra Messerly at pp. 93:18 - 94:4.

putting on its cars sold in Japan and Europe and on its most expensive cars sold in the U.S.A. *will* prevent back-over deaths and injuries.

Like Sandra Messerly, most drivers are ignorant of the fact that even if they exercise all possible care within a driver's control--by exiting and walking around the vehicle and surveying the area to make certain there is no person behind the vehicle, using their mirrors, and looking over their right shoulder while driving in reverse--serious injury and death can still result solely because of the unreasonably dangerous enormity of the blind zone.⁴¹ Most drivers, especially operators of SUV s similar in size to the Nissan Xterra, do not realize that no matter what precautions they take or how much care they use, they will still not be able see a small child within 10 to 18 feet behind their vehicle.⁴²

While most drivers fail to realize the magnitude of the blind zone hazard, back-over injuries due to the rearward blind zone were undeniably foreseeable -- indeed *known* to and studied by Nissan before and at the time the subject vehicle was manufactured. For years before Foxx Messerly was killed by his family's Xterra, Nissan had been studying the hazards of blind zones to the rear of motor vehicles, including the risks of back-over deaths and injuries. In an article entitled, "Low-Cost Infrared Imaging Sensors for Automotive Applications,"⁴³ Nissan engineers wrote:

There can be a time difference ranging from several seconds to several minutes between the time a driver enters the 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

⁴¹ See Brief on Behalf of Amicus Curiae, KidsAndCars.org, at p. 10.

⁴² See *id.*; Appendix, Tab 10, Blind-zone measurements: Small SUVs, Consumer Report.org, (updated April 2008).

⁴³ See Appendix, Tab 11; found in the trial court record as Exhibit 8 to Plaintiffs' Response to the Defendants' Motion for Summary Judgment, filed in the trial court record on January 21, 2010.

have been reported where blind spot accidents have occurred even though the driver confirmed the safety of the environment around the vehicle before getting in. The [infrared] imaging sensors [utilized on the Nissan ASV-2], capable of detecting IR radiation emitted by the human body regardless of whether it is day or night, were adopted for this system because it was thought that a function for selectively detecting the human body and other heat sources would be the best way of helping prevent such blind spot accidents.

This published document proves Nissan's knowledge and appreciation of: i) the risk of serious physical injury or death created by the blind zone; ii) the fact that forcing drivers to drive in reverse blind may cause even the most careful driver to experience a back-over accident; iii) the limitations Nissan's vehicle design places upon a driver's ability to see what is behind the vehicle; and iv) the obvious safety benefits of devices that increase the driver's ability to see and avoid striking pedestrians behind the vehicle.

The evidence in the record shows that consumers *do not* appreciate the blind zone hazard; that the blind zone hazard is *neither* "open" nor "obvious;" and that the risk is substantially reduced or eliminated when vehicles are equipped with sensors and video. Nissan, on the other hand, insists through a perverse twist of logic that the enormous number of preventable deaths and injuries reported by organizations such as the National Highway Transportation Safety Administration establishes *as a matter of law* that the blind zone hazard is obvious and well understood. When viewed in a light most favorable to Plaintiffs/Respondents (as the party opposing summary judgment at the trial level), the statistical evidence in the factual record creates a quintessential factual dispute: do the number of deaths and injuries signify that the back-over hazard is known and obvious to the general public, or do so many injuries still occur every year precisely because the back-over hazard is generally unknown or unappreciated by the public? Does the fact that so few back-overs occur involving vehicles equipped with rear-looking

video and sensors mean that the hazard is reasonably preventable with the use of a readily available, proven alternative design?⁴⁴ Whose interpretation of the statistics is correct?

Those questions must be answered by a jury.

The trial court ignored evidence presented by Plaintiffs and improperly decided factual issues that should have been tried to a jury. The trial judge ignored the fact that Nissan provided nothing more than an appeal to “common sense,” but no evidence, to establish that blind zones are an open and obvious danger. The trial court failed to view the record in a light most favorable to Plaintiffs and granted Nissan’s motion for summary judgment in contravention of Kentucky’s well-established summary judgment standard. The Court of Appeals correctly reversed. Its decision should be affirmed.

IV. A FINDING THAT A PARTICULAR HAZARD IS ‘OBVIOUS’ IS NOT PROPER GROUNDS FOR RELIEVING A PRODUCT MANUFACTURER OF LIABILITY AS A MATTER OF LAW. “OBVIOUSNESS” IS MERELY A FACTOR FOR THE JURY TO CONSIDER IN ALLOCATING COMPARATIVE FAULT AMONG THE PARTIES.

In *Kentucky River Med. Ctr. v. McIntosh*, 318 S.W.3d 385 (Ky. 2010), this Court held that the traditional rule relieving a landowner of liability for harm caused by an open and obvious hazard is incompatible with Kentucky’s doctrine of comparative fault. Under *McIntosh*, the jury may consider the obviousness of a hazard as a factor in apportioning fault among all at-fault parties. *See id.* at 392, 395. The rule should be the same in products liability cases where it is alleged that the hazard at issue is “obvious.”

KRS 411.182 (enacted July 15, 1988), the statute that codified comparative fault in Kentucky, is not limited to premises liability cases. KRS 411.182 expressly applies

⁴⁴ An examination of the record reveals just four (4) documented back-over incidents involving a vehicle equipped with a “backup or parking aid,” whereas thousands of back-overs occur every year involving vehicles without the rear facing cameras or sensors. *See* Appendix, Tab 3, NHTSA *Report to Congress, Fatalities and Injuries in Motor Vehicle Backing Crashes*, (Nov. 2008), p. 25.

“[i]n all tort actions, *including products liability actions.*” While the context is different, products liability rather than premises liability, the public policy considerations are the same: alleged “obviousness” is simply one factor to consider in the allocation of comparative fault. There is no reason for this Court to limit the holding in *McIntosh* to premises liability cases. The legislature has declared as express public policy that comparative fault applies to products liability actions. Limiting *McIntosh* to premises cases would result in an unjust and unjustifiable inconsistency in the application of KRS 411.182 and the principles of pure comparative fault across different areas of tort law.

The Kentucky cases that Nissan cites in support of its argument that it should be relieved of liability on the basis that the Xterra is “inherently dangerous,” *Jones, Hicks, and Bloyd*, all pre-date the adoption of comparative fault by this Court in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), and the codification of comparative fault in KRS 411.182. The Court in *Hicks* stated, “[t]he contributory fault of Hicks would foreclose his recovery under any theory advanced.” “Contributory negligence” as a complete bar to recovery is entirely inconsistent with Kentucky’s public policy of assessing liability in proportion to parties’ comparative fault. Contributory fault is, in fact, the antithesis of comparative fault; the outmoded notion that comparative fault *replaced*. The “inherently dangerous” line of cases is outdated and of little value in determining whether, as a matter of law, a court should declare that a product is not unreasonably dangerous.⁴⁵

⁴⁵ *Jones, Hicks, and Bloyd* are distinguishable for other reasons as well. In *Hicks*, the plaintiffs never contended that the dynamite in question was defective in design, thus there was no analysis as to whether the dynamite was “unreasonably dangerous.” *Hicks*, 453 S.W.2d at 587. The Court also noted that the manufacturer of the dynamite did not know or have any reason to know that the dynamite would be misused in the manner that caused the plaintiff’s injury. *Id.* at 588. In *Jones*, it was uncontradicted that “the design involved was regarded by the industry as the safest possible under the circumstances to achieve proper functioning of the product.” *Jones*, 502 S.W.2d at 70. Further, the alternative design advocated by the plaintiffs was merely a theoretical fix postulated for trial that was neither known nor available prior to

In *McIntosh*, the 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) land possessor was not also negligent for failing to fix an unreasonable danger in the first place.” *Id.* at 391. The Court adopted the reasoning of the Supreme Court of Mississippi that, “[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)].

McIntosh held that courts must determine whether it was reasonably foreseeable that an invitee would be injured by a danger on defendant’s land. If the trial court determines that the injury was foreseeable, but that the defendant failed to “take reasonable precautions to prevent the injury, he can be held liable.” *Id.* If the danger was *obvious*, the jury may apportion fault between the plaintiff and the defendant. *Id.*

The fact that the present case involves a defective product, rather than a dangerous condition on a landowner’s property, does not make the *McIntosh* Court’s reasoning any less applicable here. Indeed, the whole point of this case is that the blind zone hazard, even assuming it is “obvious,” *could be alleviated or eliminated* by the use of a superior alternative design: rear-facing video and sensors that allow drivers to see where they are going when moving their vehicle in reverse. Nissan, as the manufacturer of the Xterra, was in the best position to eliminate the blind zone hazard, and thus should be “burdened with that responsibility.”

the time of the accident. *Id.* at 71. In *Bloyd*, this Court held that the manufacturer of a revolver could not have foreseen the owner’s storing of the gun. *Bloyd*, 586 S.W.2d at 22.

Nissan had a proven alternative, safer design that it was, in fact, selling on its expensive models prior to the manufacture of the subject vehicle. Nissan had been mass-producing vehicles all over the world with rear sensors, rear cameras, or both years before the Messerly vehicle was manufactured in 2002. Other than the additional profit from forcing consumers to pony up for a more expensive vehicle, there was absolutely no reason why Nissan could not have equipped the Xterra with the same equipment. Important safety equipment that is cost-effective, reliable, durable, and readily applicable to all models of automobiles to reduce or eliminate a substantial hazard should not be an added-cost option or manipulated to steer consumers to buy more expensive models. Because the risk of harm from back-overs was known and appreciated by Nissan, the company had a duty to utilize the countermeasures to reduce or eliminate that risk in the design of *all its vehicles*. The duty to exercise reasonable care to prevent foreseeable harm is universal, not owed only to the more fortunate who can afford the most expensive models in Nissan's product line. *Grayson Fraternal Order of Eagles Aerie No. 3738, Inc. vs. Claywell, Ky.*, 736 S.W.2d. 328 (1987); *Gas Service Co., Inc. v. City of London, Ky.*, 687 S.W.2d 144, 148 (1985).

A jury could find that the Xterra was defective in design, or that Nissan was negligent, based on the fact that the blind zone hazard was foreseeable and known to Nissan, and despite having economically and technologically feasible alternative designs that could have greatly reduced or eliminated the blind zone, the company failed to equip the vehicle with those life-saving devices. This Court should hold that its reasoning in *McIntosh* regarding obviousness as a consideration for the jury in assessing comparative fault in premises cases applies equally to product liability cases.

V. THERE IS NO REQUIREMENT THAT A PRODUCT MUST VIOLATE A GOVERNMENT OR INDUSTRY STANDARD TO BE FOUND UNREASONABLY DANGEROUS .

Nissan argues that, in order to establish liability against a product manufacturer, a plaintiff must prove that the product violated some existing government or industry standard.⁴⁶ However, there is no such requirement, implicit or otherwise, in Kentucky law.⁴⁷ Under KRS 411.310(2), there is a *presumption* of non-defectiveness where the product meets certain standards or state of the art, as determined by the trier of fact, but the presumption is rebuttable and does not preclude an ultimate finding that the product is defective and unreasonably dangerous. KRS 411.310(2) reads:

In any product liability action, it shall be *presumed, until rebutted by a preponderance of the evidence to the contrary*, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured. (emphasis added)

KRS 411.310(2) is consistent with general products liability jurisprudence that even where a product is *presumed* to be non-defective, it is not non-defective as a matter of law. To illustrate, Plaintiffs are aware of only two other wrongful death back-over cases similar to the present case that have been litigated to completion at the trial level. Neither was resolved by summary judgment; both were decided by juries at trial.

⁴⁶ See Brief of Appellants at p. 17.

⁴⁷ Nissan relies on a *Sexton v. Bell Helmets*, 926 F.2d 331, a federal 1991 Fourth Circuit Court of Appeals case, for the idea that Kentucky law requires proof of a violation of some standard to support a finding that a product is defective and unreasonably dangerous. Nissan is particularly fond of *Sexton* because despite being a case about a motorcycle helmet, dicta in the case says that, at least in 1991, a vehicle should not be considered defective for failing to come equipped with back-over prevention devices. Considering that *Sexton* was a federal court's speculation on what the Kentucky Supreme Court might have said about the issue 11 years before the Messerly vehicle was manufactured, and that the discussion about back-over prevention devices appears in dicta that was completely unrelated to the facts of that case, this Court should give very little weight, if any at all, to that case. The language in KRS 411.310(2) is a more appropriate consideration.

Plaintiffs in the first case, *Wright v. Ford Motor Co.*, USDC ED Tex., No. 1:04-CV-011, survived Ford's motion for summary judgment, despite a Texas statute creating a presumption that an automobile is non-defective if it complies with federal safety standards. In *Wright*, the issue of whether the Ford Expedition was unreasonably dangerous because it was designed without backup sensors survived summary judgment and was tried to a jury, even though the Expedition met the requirements of Federal Motor Vehicle Safety Standard ("FMVSS") 111 governing rearview mirrors.⁴⁸ The issue was not ruled upon by the court as a matter of law.

The second back-over case litigated to conclusion was *Clemens v. Nissan Motor Co., Ltd. et al.*, United States District Court for the Northern District of Texas, Case No. 304 CV 2584N ECF. In *Clemens*, the vehicle at issue was a Nissan Infiniti QX4 SUV. Nissan was defended by Mr. E. Paul Cauley, who also serves as Nissan's trial counsel in this case, and faced very similar allegations of product defect based upon the lack of back-over prevention devices on a Nissan-manufactured vehicle. Just like in *Wright*, the question of whether the vehicle was in a defective condition unreasonably dangerous went to the jury. **Nissan did not even file a motion for summary judgment**, despite the statutory presumption in Texas that the QX4 was not defective, since the vehicle complied with FMVSS 111. By choosing not to file a summary judgment motion, Nissan conceded in *Clemens* that the question of a manufacturer's liability in a back-over incident is an issue of fact.

⁴⁸ The Federal Motor Vehicle Safety Standard ("FMVSS") that most closely applies to rear visibility and rear-facing sensors and video cameras is FMVSS 111, 'Rearview Mirrors.' However, the National Highway Traffic Safety Administration ("NHTSA") has expressly "stated that the requirements in [FMVSS] 111, 'Rearview Mirrors', *do not address the visibility of the area directly and immediately behind a vehicle.*" See *Wright v. Ford Motor Co.*, 508 F.3d 263, 270 (5th Cir. 2007). As such, FMVSS 111 is completely inadequate for purposes of eliminating or reducing the risk of serious bodily injury or death posed by the substantial blind zone immediately behind the Xterra.

Compliance with standards promulgated under the provisions of The Federal Motor Vehicle Safety Act, (FMVSA), 49 U.S.C. § 30101, does *not* absolve an automobile manufacturer of liability under either strict liability or negligence theories of liability. The FMVSA explicitly states and federal courts uniformly *hold* that compliance with the Federal Motor Vehicle Safety Standards (FMVSS) promulgated pursuant to the Act is just the beginning of the analysis of a manufacturer's liability. FMVSS are *minimum* standards. *King v. Ford Motor Co.*, 209 F.3d 886, 891 (6th Cir. 2000). "The FMVSS provide only the '*minimum standards* for motor vehicle or motor vehicle equipment performance.'" *Id.* at 891, quoting 49 U.S.C. § 30102(a)(9). "The Safety Act's savings clause, which states that compliance with an FMVSS does not shield a manufacturer from liability at common law, contemplates that *manufacturers may be held liable for failure to exceed these minimum standards when their decisions were unreasonable.*" *Id.* (emphasis added). *See also Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980) (holding that Chrysler was liable for the negligent design of its vehicle in spite of its compliance with federal safety standards).⁴⁹

Kentucky courts reject the idea that a product's compliance with generally accepted industry standards shields an otherwise negligent manufacturer from liability. In *C. D. Herme, Inc. v. R. C. Tway Co.*, 294 S.W.2d 534, 537 (Ky. 1956), the Kentucky Court of Appeals explained, "Even an entire industry, by adopting careless methods to save time and effort or money, cannot be permitted to set its own uncontrolled standards. And if the only test is to be what has been done before, no industry will have any great incentive to make progress in the direction of safety." (quoting Prosser, Torts, First Edition, Sec. 37). This Court held the entire asbestos industry was liable for negligence,

⁴⁹ *See also* Appendix, Tab 12, Affidavit of Allan Kam.

despite compliance with universally accepted industry standards and practices in the case of *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998).

In that case, Owens-Corning Fiberglas (OCF) appealed a jury verdict awarding damages, including punitive damages for injuries that the plaintiff suffered because of asbestos exposure. *Id.* at 409. OCF posited a “state of the art” defense by arguing that “the fact that other companies were also manufacturing and distributing asbestos-containing products which were inherently dangerous when used in the manner in which they were intended to be used should preclude OCF from being held liable for doing the same thing.” *Id.* at 410. The court, in rejecting the “industry standard” and “state of the art” arguments, reiterated the well established rule followed in Kentucky:

We agree that if an industry adopts careless methods, it cannot be permitted to set its own uncontrolled standard. *Herme v. Tway*, Ky., 294 S.W.2d 534 (1956). If the only test is to be that which has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety.” *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 70 (Ky. 1973).

Id. at 411.

In rejecting OCF’s defense, this Court further explained that the purpose behind the state of the art defense is “to protect a manufacturer from liability for failure to *anticipate* safety features which were unknown or unavailable at the time the product in question was manufactured and distributed.” *Id.* (citations omitted)(emphasis added). Because “[t]here was substantial probative evidence in this case that OCF knew of the health risks associated with the use of Kaylo both before and during the time it manufactured the product and placed it in the stream of commerce; and that it knowingly marketed Kaylo without warning labels, and concealed, minimized and/or misrepresented

in its advertisements the health risks involved in working with the product,” the Court affirmed the punitive damages award entered against OCF. *Id.*

In *Jones, supra*, it was uncontested that the product design was the safest possible to achieve proper functioning of the product, and the plaintiff’s proposed design was not known or available to the manufacturer at the time the product was made. The corn auger was therefore found not to be unreasonably dangerous. Similar to *Owens-Corning Fiberglas Corp.*, and distinguishable from *Jones*, rearview video cameras and sensors were known and available to Nissan at the time it manufactured the 2002 Xterra. Nissan was selling the safety devices on other models in the USA and *all* models in Japan and other Eur-asian countries. Unlike *Jones*, there is clear, convincing, and uncontroverted evidence in this case that Nissan’s design of the 2002 Xterra was not the safest possible design in the industry, or even the safest design in Nissan’s own fleet of production line vehicles. Nissan’s “everyone else is doing it” defense does not relieve it of liability.

The fact that the rest of the automobile industry may have been just as negligent as Nissan in failing to equip all vehicles with inexpensive rear visibility safety technologies that would save lives and prevent serious injuries is irrelevant. Nissan had subjective, particularized knowledge of the back-over hazard, as well as the means to reduce or eliminate the hazard. A jury could reasonably find that Nissan was negligent for failing to equip the 2002 Xterra with the same safety devices it was putting on premium models, choosing instead to exploit safety to maximize profits.

Even if Nissan could point to an actual ‘requirement’ under Kentucky law that a product must violate some standard to be considered defective and unreasonably dangerous, the question of whether the 2002 Xterra conformed to the “generally

recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured” is one of fact for the jury. Nissan points to the percentage of vehicles that were equipped with video and sensors as proof that the Xterra met industry and consumer standards for rear visibility. However, a reasonable jury could find that the companies that *did* use the technologies at issue at the time the Xterra was designed and manufactured, including Nissan, had “raised the bar” and set the standard against which all other vehicles should be judged.

VI. THE TRIAL JUDGE GRANTED APPELLANTS’ SUMMARY JUDGMENT MOTION ON INAPPROPRIATE GROUNDS. THE JUDGE MADE FACTUAL FINDINGS THAT WERE NOT BASED ON THE EVIDENCE IN THE RECORD, CONDUCTED INDEPENDENT INVESTIGATION OF THE BLIND ZONE BEHIND HIS OWN VEHICLE, AND IGNORED THE LAW CONCERNING SUMMARY JUDGMENT.

Appellate courts review trial court decisions to grant summary judgment *de novo*. In this case, however, the trial judge’s considerations and reasoning in granting summary judgment, as set forth in the video recordings of court hearings from March 14, 2008, October 23, 2009, and March 30, 2010, were so improper that they warrant discussion.

From the first day of his involvement in this case, Judge McGinnis indicated that Plaintiffs would have difficulty getting “past [him] to get to a jury.” At the March 14, 2008 hearing on Plaintiffs’ motion to vacate Judge Horne’s order dismissing Nissan Japan as a defendant, Judge McGinnis expressed his personal opinion that vehicular blind zones are an “obvious” hazard. He stated that anyone with “common sense” should realize that a small child cannot be seen behind a vehicle. These *sua sponte* statements about the supposed obviousness of the hazard at issue were based on nothing in the case record. They were merely conclusions reached by the judge following experiments he performed and observations he had made in his personal Toyota Avalon sedan the day

before the hearing and outside the presence of the parties or their counsel. Judge McGinnis' experiences with his Toyota Avalon are irrelevant. There is nothing in the court record about his Toyota Avalon, except the judge's musings as he invited a motion for summary judgment.

At that hearing, Judge McGinnis warned Plaintiffs that, given what he called the obvious nature of the blind zone hazard, they would have to show "some kind of authority" showing that their claims against Nissan were actionable and could be tried to a jury. Nissan *never* made any mention of summary judgment at that hearing prior to the judge raising the issue. The judge's discussion and opinions about Plaintiffs' chances of surviving summary judgment at that point in the litigation, and at that hearing, were premature and inappropriate. Authorities were *in fact* provided to Judge McGinnis to show that summary judgment was not warranted -- documents from the two back-over cases tried to jury verdicts in federal courts in Texas, one of which was against Nissan and defended by the same trial counsel who is defending this case. "Authority" did not help Plaintiffs. The judge had made his mind up before Nissan even filed its motion.

At the October 23, 2009 hearing on Plaintiffs' motion to compel discovery from Nissan, Judge McGinnis continued to criticize Plaintiffs' case and foretell the likelihood that he would grant summary judgment in Nissan's favor. As in the previous hearing, the judge's statements were inappropriate and contrary to Kentucky standards. Judge McGinnis described for a second time the experiments and observations he had made in his Toyota Avalon. He made factual conclusions about the rear visibility of vehicles manufactured by several other automakers besides Nissan. The judge's observations and findings regarding his car and other makes of vehicles were completely outside the facts

and record of this case. He compared the use of back-over prevention devices by automakers to the development of seat belts, drawing the unfounded and inaccurate conclusion that until back-over prevention devices are *mandated* by the federal government, as seat belts are, car companies cannot be held liable for failure to equip vehicles with them. The judge declared, with no legal basis and prior to any briefing of the issue by the parties, that the obviousness of the blind zone hazard would be the key issue in whether the case would ever be tried to a jury.

Judge McGinnis justified his favoring summary judgment by pointing out that, even if Plaintiffs were to get a verdict in their favor, Nissan would just appeal the case anyway on the issue of the obviousness of the danger. It was inappropriate for the judge to consider granting summary judgment on the basis of a hypothetical appeal that might occur some unknown time in the future. More importantly, Judge McGinnis expressly admitted that a jury could foreseeably find for Plaintiffs at trial!

The hearing on Nissan's motion for summary judgment took place on March 30, 2010, after Judge McGinnis had invited Nissan to file their motion and already indicated his intention of granting it. Following oral arguments by all parties, Judge McGinnis stated on the video record that he would very likely award summary judgment in Nissan's favor, and he spoke at length of his reasons for doing so.

For the third time in three separate hearings, the judge discussed the limited rearward visibility of his Toyota Avalon and made findings of fact about the obvious nature of the blind zone hazard based on his independent observations outside the record. He made additional findings of fact regarding "people's inclination" to look over their shoulders, without a scintilla of evidence in the record about habits or inclinations of

drivers. The learned judge failed to view the evidence in a light most favorable to Plaintiffs when he made “factual findings” that rearview cameras are ineffective at reducing or eliminating blind zone hazards, because, according to Judge McGinnis, drivers will either fail to observe the rearview monitor, or fail to observe their other surroundings while looking at the monitor. These findings of “fact” were based on the judge’s interpretation of human factors issues that, to the extent that they are in the court record, give rise to questions of fact for a jury.

Judge McGinnis reasoned that summary judgment would be appropriate in this case, because if Plaintiffs were to get a judgment in their favor at trial, it would “open the door” for future litigation against other automakers who fail to equip their vehicles with back-over prevention devices, and even those that do provide them. Of course, hypothetical future litigation against other car companies for unrelated incidents is *completely* irrelevant to this case, and the judge’s consideration of such is a patently wrong and unjust basis for summary judgment. It is strange that the judge lamented the fact that Plaintiffs’ case could pave the way for automakers to feel compelled to make cars safer for children. Promoting changes that make products safer is, we submit, one of the salutary effects of robust products liability law. Public policy encourages change to enhance safety through the carrot and stick effect of the civil justice system.

At the March 30, 2010 hearing, Judge McGinnis also repeated his belief that summary judgment at this stage was appropriate, because, in the event of a Plaintiffs’ verdict, Defendants would appeal the case anyway. Either way, reasoned the judge, the issue would have to be taken up by the appellate courts at some point. As in the October 23, 2009 hearing, Judge McGinnis’s statements about future litigation and the supposed

inevitability of an appeal in this case acknowledge the possibility that a jury could have ultimately found for Plaintiffs at trial. Despite acknowledging the possibility that the Plaintiffs *could prevail at trial*, Judge McGinnis granted summary judgment in Nissan's favor, a clear violation of the *Steevest* standard.

This Court is charged with conducting a *de novo* analysis of summary judgment in this case. However, a review of the court proceedings on March 14, 2008, October 23, 2009, and March 30, 2010 will show reversible errors in Judge McGinnis's reasoning and considerations in granting the defendants judgment in their favor as a matter of law.

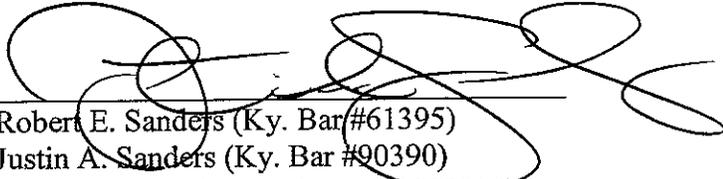
CONCLUSION

Appellees' claims present genuine issues of material fact and show that there is a clear possibility that Plaintiffs may prevail at trial. The decision of the Court of Appeals, reversing summary judgment, should be affirmed. This case should be remanded to the Boone Circuit Court for completion of discovery and trial by jury.

The Court is asked, in affirming the decision of the Court of Appeals, to address the cross-appeal issue concerning the application of the reasoning of *Kentucky River Med. Ctr. v. McIntosh*, 318 S.W.3d 385 (Ky. 2010) to products liability cases. The legislature established Kentucky public policy in KRS 411.182 that comparative fault applies "[i]n all tort actions, *including products liability actions*." When this case is remanded to the Boone Circuit Court for trial, it should be with directions to instruct the jury that decides whether the 2002 Nissan Xterra was defective and unreasonably dangerous that whether the hazard was "obvious" is just one of a number of factors enumerated in *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980) to consider

when apportioning fault, just as the Court has already stated is the rule in premises liability cases in the *McIntosh* case.

Respectfully Submitted.



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APPENDIX

Messerly v. Nissan North America, Inc., et al., Case No. 05-CI-00924, Boone Circuit Court, Division III, Order, April 12, 2010 Tab 1

Messerly v. Nissan North America, Inc., et al., Case No. 2010-CA-000717-MR, Opinion Reversing and Remanding, December 5, 2011 Tab 2

NHTSA *Report to Congress, Fatalities and Injuries in Motor Vehicle Backing Crashes*, November 2008 Tab 3

Excerpt from Nissan “Triple Safety: An Approach to Safety” Brochure Tab 4

Response to Interrogatory No. 9 in Nissan Motor Co., Ltd.’s Objection and Responses to Plaintiffs’ First Set of Interrogatories and Request for Production of Documents Tab 5

Nissan Press Release, August 19, 1998, “Nissan Develops the ‘ITS CAR 2001-i’ Tab 6

Nissan Press Release, April 5, 2000, “Nissan Develops Nissan ASV-2 Advanced Safety Vehicle” Tab 7

Excerpt from Department of Transportation Federal Motor Vehicle Safety; Rearview Mirrors, 49 CFR Part 571 Tab 8

Excerpt from Discovery Deposition of Sandra Denise Messerly, November 15, 2005 Tab 9

Consumer Reports.org Blind-zone measurements: Small SUVs, April 2008 Tab 10

Article: Low-Cost Infrared Imaging Sensors for Automotive Applications, M. Hirota, et. al, Nissan Motor Co., Ltd Tab 11

Affidavit of Allan J. Kam (exhibits omitted) Tab 12