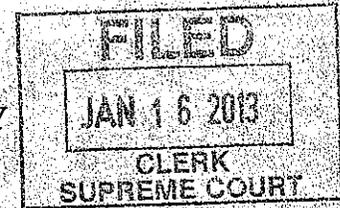


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
No. 2012-SC-000109



NISSAN NORTH AMERICA, INC., et al.

APPELLANTS

VS.

SANDRA DENISE MESSERLY, et al.

APPELLEES

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COURT OF APPEALS NO. 2010-CA-000717  
APPEAL FROM BOONE CIRCUIT COURT  
HON. ROBERT MCGINNIS, SPECIAL JUDGE  
NO. 05-CI-00924

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BRIEF OF APPELLANTS

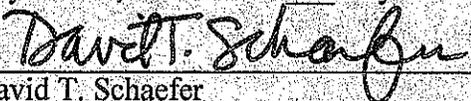
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CERTIFICATE OF SERVICE

I hereby certify that this Brief has been served by mailing a true copy hereof to Hon. Robert F. Sanders, Hon. Justin A. Sanders, and Hon. W. Matthew Nakajima of The Sanders Law Firm, The Charles H. Fisk House, 1017 Russell Street, Covington, Kentucky 41011; to Hon. Eric W. von Wiegen, 4804 Sorrell Way, Lexington, Kentucky 40514; to Hon. Kevin C. Burke, 125 South Seventh Street, Louisville, Kentucky 40202; to Sam P. Givens, Jr., Clerk of the Court of Appeals, 360A Democrat Drive, Frankfort, Kentucky 40601; and to Hon. Robert McGinnis, Special Judge, 5 Justice Center, 115 Court Street, Cynthiana, Kentucky 41031, all on this 11 day of January 2013.

  
David T. Schaefer

## INTRODUCTION

This is a products liability case in which the Messerlys allege design defects in their 2002 Nissan Xterra. Nissan seeks reinstatement of the summary judgment granted by the Boone Circuit Court.

**STATEMENT CONCERNING ORAL ARGUMENT**

Nissan believes that oral argument will be beneficial to the Court in its consideration of this matter.

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## STATEMENT OF THE CASE

### THE ACCIDENT

This is a products liability case. The accident facts are not in dispute. Plaintiffs Sandra and Curtis Messerly owned a 2002 Nissan Xterra mid-size sport utility vehicle. On April 15, 2005, Sandra Messerly and her two children were outside the family home when she decided to move her Xterra from a concrete pad behind her home to make more room for the children to play. She left her five-week-old son, Carter, strapped into his stroller just outside the open garage door. Foxx, her nineteen-month-old son, was in the garage sitting on his father's all-terrain vehicle (ATV). Sandra Messerly started the Xterra, checked her mirrors, and looked over her shoulder, but never looked into the garage to check on her children. Unfortunately, Foxx got off the ATV, left the garage, and moved to a location behind the Xterra. As Sandra Messerly was backing up, she hit Foxx with the right rear tire of the Xterra. Foxx sustained fatal injuries.<sup>1</sup>

The Messerlys sued Nissan, alleging that the vehicle was defective because it was not equipped with some form of rear video system or back-up sensor system. They asserted claims for negligence and strict liability.

### NISSAN'S SUMMARY JUDGMENT MOTION

Nissan moved for summary judgment, contending that the Xterra was not unreasonably dangerous as a matter of law. Nissan showed that the risk of striking a pedestrian in a backover accident was an inherent characteristic of all vehicles, including the Xterra, that was obvious and well understood by ordinary consumers. Nissan also demonstrated that there were no regulations that required the use of rearview cameras or

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<sup>1</sup> This account is derived from the opinion of the Court of Appeals (Appendix, Tab B).

sensors in 2002 model year vehicles and that an overwhelming majority of vehicles for that model year was not equipped with special backup aids. Finally, Nissan also contended that requiring backup aids would unduly constrict consumer choice.

Nissan's Motion was supported by substantial evidence. It included:

- The Vehicle Backover Avoidance Technology Study of November 2006 in which the National Highway Traffic Safety Administration ("NHTSA") of the U.S. Department of Transportation observed, "[a]lmost all vehicles have a rear blind zone that could obscure the driver's visibility of small children."<sup>2</sup>
- Photographs of the Nissan Xterra showing that limitations in the vehicle's rear visibility are apparent by simple observation.<sup>3</sup>
- Kentucky Driver's Manual specifically addressing limited rear visibility, the potential for children to be obscured, and the need for added care confirming such information is common sense and common knowledge:

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<sup>2</sup> Exhibit A to Nissan's Memorandum in Support of Motion for Summary Judgment, p. 22.

<sup>3</sup> *Id.*, Exhibit B.

## **BACKING**

Backing requires extra caution because it is difficult to see behind your vehicle.

Here are some rules you should follow whenever you have to back your vehicle.

- Check behind your vehicle before you get in. Children or small objects are difficult to see from the driver's seat.



- When backing straight to the rear or to the right, look over your right shoulder directly through the rear window. When backing to your left, look over your left shoulder. Do not depend on your mirrors.
- Back slowly. Your vehicle is more difficult to control when you are backing. Continue looking back until you come to a complete stop.

- NHTSA publications confirming the small number of vehicles equipped with backup aids during the relevant period and, in fact, showing that five years after the Xterra was produced, only 14% of the vehicles produced for the 2007 model year were equipped with any kind of backup aid. In other words, 86% of all vehicles produced for model year 2007 still did not have any backup aids.<sup>5</sup>
- Deposition testimony of Curtis Messerly indicating that the Messerlys made a choice not to purchase backup aids even after the accident.<sup>6</sup>
- Deposition testimony of Sandra Messerly providing similar testimony.<sup>7</sup>

### **THE MESSERLYS' RESPONSE**

In opposing the summary judgment motion, the Messerlys submitted evidence that fell into two categories: (1) evidence concerning the availability of rear-view

<sup>4</sup> *Id.*, Exhibit C (Appendix, Tab C).

<sup>5</sup> 74 Fed. Reg. 9478, 9486 (March 4, 2009).

<sup>6</sup> *Id.*, Exhibit D, pp. 33-40, 45-48 (Appendix, Tab D).

<sup>7</sup> *Id.*, Exhibit E, pp. 32-34 (Appendix, Tab E).

cameras or sensors, and (2) statistical evidence of the number of backover injuries and deaths. The Messerlys noted that Nissan had employed rear-view cameras in experimental safety vehicles and that backup aids were available in some vehicles sold by Nissan, largely in other countries, at the time of the accident.<sup>8</sup> The Messerlys also submitted the affidavit of Allan J. Kam, a former attorney with NHTSA.<sup>9</sup> Kam's testimony dealt principally with the NHTSA administrative process and Federal Motor Vehicle Safety Standard ("FMVSS") 111, which governs rear visibility. Kam noted that the standard did not require advanced technologies but was, like all FMVSS standards, only a minimum standard that a manufacturer must meet but is free to exceed.<sup>10</sup>

#### **COURSE OF PROCEEDINGS**

The Circuit Court granted the summary judgment motion without providing an opinion.<sup>11</sup> The Court of Appeals, with one judge dissenting, reversed the Circuit Court's judgment, holding that the case presented a fact issue for the jury's resolution. *Messerly v. Nissan North America, Inc.*, 2011 Ky. App. LEXIS 234 (Dec. 2, 2011).<sup>12</sup> This Court granted Nissan's Motion for Discretionary Review and a Cross-Motion for Discretionary Review filed by the Messerlys.

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<sup>8</sup> Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, Exhibits 2, 3.

<sup>9</sup> See Tab 7 of the Appendix to the Messerlys' Brief to the Court of Appeals.

<sup>10</sup> *Id.* at pp. 4-5.

<sup>11</sup> Appendix, Tab A.

<sup>12</sup> Appendix, Tab B.

## ARGUMENT

The Circuit Court correctly granted summary judgment because Nissan showed that the facts of the case fell within the line of cases holding that as a matter of law, a product is not unreasonably dangerous where the risk involved is obvious, well-understood by consumers, and inherent in the use of the product. The danger of striking a child or other pedestrian while backing a vehicle provides a paradigm case of an obvious, well-understood and inherent risk.

The Court of Appeals erred in reading this Court's opinion in *Montgomery Elevator Co. v. McCullough*<sup>13</sup> to hold that the question of whether a product is unreasonably dangerous is always one of fact for the jury. On the contrary, this Court has consistently held that in an appropriate case a court may determine that a product is not defective as a matter of law.

The Court of Appeals held that the evidence submitted by the Messerlys was sufficient to raise a fact issue but did not explain why. As a matter of law, the evidence was not sufficient. While it is necessary to show that an alternative design would have prevented an injury in order to make out a defective design case, such evidence alone cannot show that the design actually used was unreasonably dangerous. Likewise, the statistical evidence showing the number of injuries in backing accidents does not establish that the Xterra was unreasonably dangerous in its design. If anything, such statistics merely serve to confirm that the risk is part of general societal knowledge.

Kentucky law provides that a product is unreasonably dangerous only if a prudent manufacturer with knowledge of its characteristics would not have sold it. Necessarily

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<sup>13</sup> 676 S.W.2d 776 (Ky. 1984).

this requires showing that the product violated some existing standard when it was sold. It was undisputed, however, that the Xterra complied with the existing government standards regarding rear visibility and that no industry standard required the use of rear-view cameras or back-up sensors, and that such devices were not expected by consumers. Without evidence of non-compliance with some existing standard, the Messerlys could not establish that the Xterra was defective. They supplied no such evidence.

Finally, the result of the case should not be altered by this court's opinion in *Kentucky River Med. Center v. McIntosh*.<sup>14</sup> That case concerned a different area of the law—premises liability—and involved wholly separate legal issues and policy considerations. There is no need to import premises liability law into products liability.

**I. WHETHER A PRODUCT IS UNREASONABLY DANGEROUS MAY BE DETERMINED AS A MATTER OF LAW IN A PROPER CASE**

The Court of Appeals construed *Montgomery Elevator Co. v. McCullough*<sup>15</sup> as holding that the question of whether a product is unreasonably dangerous is invariably a fact question for the jury. “We believe *Montgomery Elevator* elucidated these considerations for the *trier of fact*, i.e. the jury, when determining whether a product is ‘in a defective condition unreasonably dangerous.’”<sup>16</sup> This reading of *Montgomery Elevator* is incorrect. This Court clearly indicated that, in a proper case, the non-defective nature of a product may be determined as a matter of law in a summary judgment proceeding or directed verdict.

*Montgomery Elevator* concerned injuries to a child whose shoelaces were caught between the tread and side skirt of an escalator. The escalator's manufacturer contended

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<sup>14</sup> 319 S.W.3d 385 (Ky. 2010).

<sup>15</sup> 676 S.W.2d 776 (Ky. 1984).

<sup>16</sup> *Messerly v. Nissan*, 2011 Ky. App. LEXIS 234 at \*14 (emphasis in original).

that a post-sale letter to purchasers warning of the escalator's propensity to ensnare tennis shoes and suggesting remedial measures combined with the purchaser's failure to adopt the remedial measure constituted a superseding cause that precluded the manufacturer's liability. This Court disagreed, holding that the warnings and acts of the purchaser did not preclude causation and that the manufacturer had a non-delegable duty to warn the ultimate user or to remedy the defect.<sup>17</sup>

In its review of Kentucky law, the court identified a number of factors that may bear upon whether a product is in a "defective condition unreasonably dangerous" by virtue of its design, including: (1) feasibility of making a safer product; (2) patency of the danger; (3) warnings and instructions; (4) maintenance and repair; (5) misuse; and (6) inherently unsafe characteristics.<sup>18</sup> Far from stating that these factors invariably created a fact question for the jury, this Court carefully noted that, "[i]n a particular case, [the considerations] may be decisive."<sup>19</sup>

Indeed, *Montgomery Elevator* specifically referred to three prior cases where the issue was decided as a matter of law.

- *Jones v. Hutchinson Mfg. Inc.*,<sup>20</sup> where the court determined that the danger was so apparent that, *as a matter of law*, it was unreasonable to fix liability on the manufacturer for an injury caused by its use.
- *Ulrich v. Kasco Abrasives Co.*,<sup>21</sup> where the subsequent failure to keep the product in a safe working order was deemed the sole cause of the disintegration of a grinding wheel, not the wheel's original design.
- *Hercules Powder Co. v. Hicks*,<sup>22</sup> where the Court determined that dynamite was so inherently unsafe that it was unreasonable to hold the

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<sup>17</sup> *Montgomery Elevator*, 676 S.W.2d at 782.

<sup>18</sup> *Id.* at 780-81.

<sup>19</sup> *Id.* at 781.

<sup>20</sup> 502 S.W.2d 66 (Ky. 1973).

<sup>21</sup> 532 S.W.2d 197 (Ky. 1976).

manufacturer responsible for failure to warn when it exploded on careless handling.<sup>23</sup>

As the Court in *Montgomery Elevator* summarized: “These are all cases where this Court has decided that *as a matter of law*, because of the particular circumstances, the facts did not establish original manufacture of a product in a ‘defective condition unreasonably dangerous.’”<sup>24</sup>

*Montgomery Elevator* did not overrule or limit any of these cases in any way. Nor does anything in the holding of the case suggest that a question of defective design always presents a fact issue. Therefore, it is clear that the Court of Appeals misapplied the case, which in no way suggests that the summary judgment was incorrect.

## II. THE TRIAL COURT’S JUDGMENT IS CONSISTENT WITH EXISTING KENTUCKY LAW

### A. A Product Is Not Unreasonably Dangerous Because of An Obvious, Well-Understood Hazard Inherent to the Product’s Use

Nissan’s summary judgment motion was tailored to Kentucky’s well-established products liability jurisprudence. It relied upon a line of authority holding that a product is not unreasonably dangerous where the risk in question is obvious, well understood by the ordinary consumer, and inherent in the product’s use. Despite the importance of this line of authority, the Court of Appeals did not address any of the cases in its opinion.

*Jones v. Hutchinson Mfg. Co., Inc.*<sup>25</sup> is particularly important. This Court affirmed a summary judgment in favor of the manufacturer of a grain auger in a case where a five-year-old child suffered a traumatic amputation when she slid into the auger.

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<sup>22</sup> 453 S.W.2d 583 (Ky. 1970).

<sup>23</sup> *Montgomery Elevator*, 676 S.W.2d at 781.

<sup>24</sup> *Id.*

<sup>25</sup> 502 S.W.2d 66 (Ky. 1973).

Plaintiff presented expert testimony that a feasible design to guard the auger's opening would have prevented the injury without impairing the auger's utility.<sup>26</sup> The court found that the auger was not in a "defective condition unreasonably dangerous" as a matter of law. The hazard associated with the auger's metal blades was readily apparent. The summary judgment evidence conclusively established that the auger was constructed according to prevailing industry standards. While the court acknowledged the possibility that the practice of an entire industry could be negligent, such cases occur only where "common knowledge and ordinary judgment will recognize unreasonable danger."<sup>27</sup>

Two aspects of the Court's holding are especially pertinent to the arguments raised in this appeal. First, this Court rejected the argument that a fact issue about design defect could be raised merely by introducing evidence about the existence of a claimed alternative safer design. "Proof of nothing more than that a particular injury would not have occurred had the product which caused the injury been designed differently is not sufficient to establish a breach of the manufacturer's or seller's duty as to the design of the product."<sup>28</sup> Second, the product's unreasonable danger could not be established by evidence that similar accidents had also occurred. Such evidence "served to prove nothing other than to confirm common knowledge."<sup>29</sup>

The *Jones* case established a precedent followed in subsequent cases. In *Byler v. Scripto-Tokai Corp.*,<sup>30</sup> the Sixth Circuit determined that a butane cigarette lighter was not unreasonably dangerous as a matter of law in a case where a young child started a fire

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<sup>26</sup> *Id.* at 68-69.

<sup>27</sup> *Id.* at 70.

<sup>28</sup> *Id.* at 70.

<sup>29</sup> *Id.*

<sup>30</sup> 944 F.2d 904 (Table), 1991 WL 181749 (6th Cir. 1991).

that killed four people. The court reviewed Kentucky law and concluded that “Courts should examine the facts of each case before it, and then declare a product not to be unreasonably dangerous as a matter of law only if the facts show a type of obvious and unavoidable danger.”<sup>31</sup> The lighter’s risk was both obvious and unavoidable in light of the product’s intended use.

The court in *Walker v. Philip Morris U.S.A. Inc.*<sup>32</sup> considered whether cigarette and furniture manufacturers were liable for a multi-fatality fire caused when a lit cigarette came into contact with upholstered furniture. Plaintiffs argued that alternative designs in the form of fire-safe cigarettes and different types of upholstery existed that would have prevented the injury. Nevertheless, the court found that the products were not unreasonably dangerous as a matter of law. The court stressed that the dangers were obvious and inherent in the use of the products:

The dangers of a burning cigarette coming into contact with a piece of upholstered furniture are obvious. The relevant inherent characteristics of both products are readily observable and familiar to consumers: to be used, cigarettes must be lit and burn. To be used, upholstered furniture must be sat upon; and to be comfortable and attractive, it may be made with materials which could be flammable. If a burning cigarette is placed in contact with a piece of upholstered furniture or any other combustible material, it presents a risk of fire. If a piece of upholstered furniture is placed in contact with a burning cigarette or any other source of high heat, it presents a risk of fire. Burning cigarettes are dangerous, but not unreasonably so. Upholstered furniture, by the same token, can be dangerous under unusual circumstances, but not unreasonably so.

In fact, our entire world is a potentially dangerous place in which to live. We use and are surrounded by hot, sharp, electrically charged, slippery, hard, combustible, explosive,

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<sup>31</sup> *Id.* at \*3.

<sup>32</sup> 610 F. Supp. 2d 785 (W.D. Ky. 2009).

potentially deadly, possibly injurious, noxious, fast and heavy things. All are dangerous. But if they were all unreasonably dangerous, even the cave man would have to put out his cooking fire. We find here, without difficulty, that cigarettes which have burning embers and couches which might be lit on fire if brought in contact with a burning cigarette, are not thereby unreasonably dangerous as a matter of law.<sup>33</sup>

**B. The Backover Risk is Obvious, Well-Understood and Inherent**

Nissan's summary judgment motion employed the *Jones/Byler/Walker* line of authority to show that the Xterra was not unreasonably dangerous as a matter of law. The dangers that a backing vehicle might strike a child are obvious and well understood by ordinary consumers. As NHTSA has noted, "Almost all vehicles have a rear blind zone that could obscure the driver's visibility of small children."<sup>34</sup> Nissan presented photographic evidence depicting the rear visibility of the Xterra, including its blind spot.

Moreover, the danger that a pedestrian might be struck is inherent in the product's use. An automobile must be capable of both forward and backwards movement. It must be capable of moving at considerable speed. It must be sufficiently massive to provide room for passengers and their cargo, and to adequately protect those passengers in the event of a collision. If the vehicle strikes a pedestrian, serious injury or death may result. This fact is well understood and universally acknowledged. Consequently, the law places a responsibility on the operator of the vehicle to avoid contact with pedestrians,<sup>35</sup> or in

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<sup>33</sup> *Id.* at 788. The *Walker* case was subsequently vacated on jurisdictional grounds by the Sixth Circuit Court of Appeals, which held that the district court erred in failing to remand the case to state court. *Walker v. Philip Morris, U.S.A. Inc.*, 443 Fed. Appx. 946, 2011 U.S. App. LEXIS 22046 (6th Cir. 2011). The Sixth Circuit's disposition of the case did not reach the merits and the district court's opinion remains published authority.

<sup>34</sup> NHTSA, Report to Congress, "Vehicle Backover Avoidance Technology Study" (Nov. 2006) p. 22 (Appendix, Tab F).

<sup>35</sup> See *Guyan Chevrolet Co. v. Dillow*, 264 Ky. 812, 95 S.W.2d 796 (1936).

some instances upon the pedestrian to avoid the vehicle.<sup>36</sup> The special danger to children in close proximity to moving automobiles is also well known, as is the proclivity of children to act unpredictably and encounter dangers.<sup>37</sup>

The Kentucky Driver's Manual specifically warns of the need to use extra caution in backing a vehicle due to limited visibility and notes that children and small objects may be difficult to see from the driver's seat.<sup>38</sup> Under the circumstances, the hazard of striking a child while backing a vehicle must be regarded as part of general societal knowledge.

**C. The Messerlys Failed to Raise a Fact Issue**

**1. *Evidence of Alternative Design Does Not Raise a Fact Issue***

The Court of Appeals opinion held that the Messerlys had raised a fact issue regarding whether the Xterra was unreasonably dangerous. The opinion did not, however, indicate *why* the summary judgment evidence was sufficient to do so. The proof offered by the Messerlys was only directed to two subjects – the potential safer alternative design involving backup cameras or sensors, and statistical evidence of the number of backover injuries. Consequently, Nissan will address these issues.

The Messerlys contended that the risk of backover injuries is not inherent to motor vehicles because the backing aids reduce the risk of such injuries. This argument

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<sup>36</sup> See *Ward v. Owensboro River Sand & Gravel Co.*, 431 S.W.2d 884 (Ky. 1968).

<sup>37</sup> See *McGee v. Bolen*, 369 So.2d 486, 492 (Miss. 1979) (“[D]rivers of automobiles are charged with the duty to expect children to do the unexpected, to understand that they may do the ununderstandable and unpredictable, and will act on a second’s impulse”); *Sutton v. Rogers*, 222 So.2d 504, 506 (La. App. 1969) (“a motorist encountering children near streets or highways must anticipate that the very young are possessed of but limited judgment, and that their actions are likely to be sudden, unpredictable, and often foolish”); *Schmidt v. Allen*, 303 S.W.2d 652, 659 (Mo. 1957) (“impulsive acts of children are to be expected and guarded against”).

<sup>38</sup> Exhibit C to Nissan’s Memorandum in Support of Motion for Summary Judgment, p. 26 (Appendix, Tab C).

misperceives the role of the alleged safer alternative design in Kentucky law. A danger is considered unavoidable if it is inherent in the product's utility, not if there is an absence of a proposed design to reduce the risk. The corn auger in *Jones* was not defective as a matter of law because the danger was obvious and inherent and the auger's design conformed to industry standards, not because there was a lack of evidence that it could have been made safer. Indeed, Plaintiffs' expert presented evidence of a design that he contended would have prevented the injury without impairing the auger's utility. Similarly the court in *Byler* rejected liability because the obvious danger of a lighter – the creation of a flame – was inherent in the product's utility, despite claims that the lighter could have, and should have, been made child-resistant. In *Walker*, the court found that the cigarettes were unavoidably dangerous and not defective, despite evidence of allegedly fire-safe cigarettes already on sale in other states. Under this authority, the *existing design* must be judged unreasonably dangerous without considering how the hazard might be lessened by the adoption of a safer alternative design. If the present design is not unreasonably dangerous to start with, the existence of a safer design does not matter. Simply put, a purportedly safer alternative design cannot make the present design not reasonably safe.

The Messerlys' contention that a fact issue as to a product's defectiveness may be raised by evidence of a proposed safer alternative design to address a foreseeable risk flies in the face of settled Kentucky law. Kentucky does require proof that a feasible alternative design would have prevented the injury.<sup>39</sup> But proof of an alternative design is not sufficient to establish that the product is unreasonably dangerous. "The maker is not

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<sup>39</sup> *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004).

required to design the best possible product or one as good as others made or a better product than he has as long as it is reasonably safe.”<sup>40</sup> Kentucky has never retreated from the holding in *Jones* – that a claimant must demonstrate “more than that a particular injury would not have occurred had the product which caused the injury been designed differently.”<sup>41</sup>

Indeed, to base liability solely on the availability of the safer design ignores part of the equation for determining defectiveness. As this Court noted in *Gregory*, the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY provides 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 reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe.<sup>42</sup>

To base liability on the existence of a safer design alone ignores the requirement that the claimant establish that the *existing* design is unreasonably dangerous.

There may be many reasons why society might choose not to require the implementation of even a feasible safety technology. The implementation of such technologies inevitably entail costs that the public may not choose to pay at a particular time, especially where the hazard involved is an obvious one, well-understood by the public. Indeed, in *Sexton v. Bell Helmets, Inc.*,<sup>43</sup> the court prophetically used backing

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<sup>40</sup> *Sturm, Ruger & Co. v. Boyd*, 586 S.W.2d 19, 21-22 (Ky. 1979).

<sup>41</sup> 502 S.W.2d at 70 (quoting 63 AM. JUR. 2D., *Products Liability* § 73, p. 79). See also *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 336 (4th Cir. 1991) (Kentucky law) (“Proof that technology existed, which if implemented would feasibly have avoided a dangerous condition, does not alone establish a defect.”); *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436, 1442 (W.D. Ky. 1996).

<sup>42</sup> *Gregory*, 136 S.W.3d at 41, quoting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2(b) (1998).

<sup>43</sup> 926 F.2d 331 (4th Cir. 1991).

injuries as a paradigm case for when the existence of a potentially safer technology does *not* render an existing design unreasonably dangerous:

[S]ociety did not consider an automobile manufactured in the 1950's defective merely because it had no seat belts. Likewise, society does not currently expect automobiles to be manufactured to eliminate all risks of blindspots when operated in reverse. Existing technology would undoubtedly permit rearview video cameras or beeper warnings which could operate while the automobile is in reverse. Nevertheless, the automobile would not be considered defective because it is not equipped with these devices.<sup>44</sup>

**2. *Evidence of the Number of Injuries Does Not Create a Fact Issue***

The other evidence the Messerlys submitted consisted of statistics on the number of backover injuries occurring in the United States to support their contention that the Xterra was unreasonably dangerous. This evidence pertained to backover injuries involving all vehicles. The Messerlys presented no evidence—statistical or otherwise—that the Xterra is more prone to backover accidents than other vehicles. Their contention was that the mere number of injuries somehow evidences that the hazard is not known or is not understood by consumers.

But this argument betrays a logical fallacy. It assumes that persons necessarily act to avoid common, well-understood risks and that, if injuries occur, that fact alone is somehow evidence that the risk is not well understood. Experience shows this supposition is false. The dangers of drinking and driving are well understood. Yet, over 30,000 persons are killed in drunk driving accidents each year. The risk of falling from a ladder is obvious and well-understood. Yet, each year more than 300 persons die in falls from ladders. By the same token, nobody contends that backover injuries continue to

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<sup>44</sup> *Id.* at 337.

occur because motorists *think* they have a perfect view when backing or *think* that serious injuries cannot occur when a pedestrian is struck.

Not surprisingly, this Court rejected the same logical fallacy in *Jones*. Plaintiffs offered evidence that other accidents had occurred with grain augers. Nevertheless, the summary judgment was affirmed because such evidence “served to prove nothing other than to confirm common knowledge.”<sup>45</sup>

The Messerlys have contended that they raised a fact issue by showing the existence of a foreseeable risk that could be ameliorated by the adoption of alternative designs. However, under existing Kentucky law such a showing is simply not enough. On its own, such evidence is inadequate to support a verdict in the Messerlys’ favor even if it is fully accepted by the jury. Nor does the evidence serve to negate the evidence presented by Nissan that the accident in question involved an obvious, well-understood and inherent risk. The Circuit Court’s judgment was correct and should have been affirmed.

**III. SUMMARY JUDGMENT WAS PROPER BECAUSE THE MESSERLYS PROVIDED NO EVIDENCE THAT THE XTERRA FAILED TO MEET ANY EXISTING STANDARD WHEN THE PRODUCT WAS SOLD**

**A. The Prevailing Test for Liability for Defective Design Requires Evidence That the Design Used Violated an Existing Standard**

Nissan argued that it was entitled to summary judgment because the design of the Xterra did not violate any standard existing at the time of its manufacture and sale. Such evidence is indispensable. Liability for defective design depends on whether it was reasonable for the manufacturer to sell the product. Ultimately, the governing question is whether an ordinarily prudent company engaged in the manufacture of such a product

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<sup>45</sup> 502 S.W.2d at 70. Similarly, the statistical evidence submitted by the Messerlys only serves to confirm that the risk of backover injury is part of common social knowledge.

would not have put it on the market.<sup>46</sup> This test applies under any theory of liability. In evaluating the dangerousness of the product, there is no practical difference between strict liability and negligence claims.<sup>47</sup> “In either event the standard is one of reasonable care.”<sup>48</sup>

Evaluating whether a prudent manufacturer would have sold the product necessarily requires considering whether the product’s design violated a standard existing at the time of sale. In *Jones*, for example, this Court emphasized the fact that the auger’s design was the same as that used throughout the industry.

This requirement was confirmed in *Sexton v. Bell Helmets, Inc.*, *supra*, a case where the Fourth Circuit applied Kentucky law in considering whether a motorcycle helmet was defective. The helmet complied with all existing government and industry standards. The plaintiff presented expert testimony that the helmet was defective, including evidence of a prototype alternative design. Nevertheless, the court reversed a jury verdict in favor of the plaintiff because the evidence did not show that the helmet’s design violated any existing standard.

A defect can therefore be identified by measuring the product against a standard articulated expressly by government or industry or established by society in its expectations held about the product at the time of its sale . . . . While society demands and expects a reasonably safe product, an examination of societal standards at any given point in time usually reveals an expectation that balances known risks and dangers against the feasibility and practicality of applying any given technology . . . .

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<sup>46</sup> *Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky. 1980).

<sup>47</sup> Of course, in some respects the distinction between strict liability and negligence retains importance even in a case alleging defective design. For instance, a nonmanufacturing seller is liable under strict liability principles even if it did not itself commit any act of negligence.

<sup>48</sup> *Jones*, 502 S.W.2d at 70. See also *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530, 535 (Ky. 2003); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 594 (Ky. 1980).

In short, a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale.<sup>49</sup>

While this Court has not explicitly articulated the requirement of an existing standard, the requirement is implicit in the prudent manufacturer standard. The Sixth Circuit has accepted that the *Sexton* standards requirement accurately reflects Kentucky law, holding that a vehicle's seat belt could not be considered defective where it complied with government and industry standards.<sup>50</sup>

Kentucky statutory law also supports the notion that defectiveness should be determined with reference to existing standards. Pursuant to KRS 411.310, a product is presumed non-defective if it complies with "generally recognized and prevailing standards." Indeed, to dispense with an existing standard requirement would fatally undermine the prudent-manufacturer test for defectiveness. Juries would be permitted to assess the product's alleged dangers using hindsight rather than applying standards of care existing at the time of the product's sale.

**B. The Xterra's Design Violated No Existing Standard**

Nissan's Motion established that the Xterra complied with FMVSS 111,<sup>51</sup> the government standard governing rear visibility.<sup>52</sup> Neither at the time the 2002 Xterra was manufactured nor today does FMVSS 111 require manufacturers to employ advanced backing technologies such as rear-view cameras. The Messerlys have never argued that

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<sup>49</sup> 926 F.2d at 337.

<sup>50</sup> See *Bowling v. General Motors Corp.*, 70 F.3d 1271 (Table), 1995 WL 704230 (6th Cir. 1995); see also *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436, 1446 (W.D. Ky. 1996).

<sup>51</sup> 49 C.F.R. 571.111.

<sup>52</sup> See *Wright v. Ford Motor Co.*, 508 F.3d 263, 270-72 (5th Cir. 2007).

the Xterra failed to comply with the standard and their own expert confirmed that the Xterra in fact complied with existing standards.

Nissan also established that no industry standard required the use of rear-view cameras or sensors. Indeed, as of 2007, five years after the Xterra was produced, only 14% of the vehicles produced for that model year were equipped with backing aids.<sup>53</sup> This evidence also tended to prove that consumers did not expect that vehicles would be equipped with such devices.<sup>54</sup>

The Messerlys presented no evidence that the Xterra failed to conform to any standard existing at the time of its sale. Indeed, they presented no evidence that any qualified person in the world believed that a reasonable manufacturer would have required rear-view cameras or sensors in 2002 model year vehicles. The Messerlys were burdened to present affirmative evidence showing a genuine issue of material fact for trial.<sup>55</sup> They failed to do so.

#### **IV. THIS COURT'S *MCINTOSH* DECISION DOES NOT CHANGE KENTUCKY'S PRODUCTS LIABILITY JURISPRUDENCE**

In the Court of Appeals, the Messerlys used this Court's recent opinion in *Kentucky River Medical Center v. McIntosh*<sup>56</sup> to argue that the rule in *Jones* and its

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<sup>53</sup> 74 Fed. Reg. 9478, 9486 (March 4, 2009).

<sup>54</sup> On December 7, 2010, NHTSA issued a Notice of Proposed Rulemaking. 75 Fed. Reg. 76185 *et seq.* The NPRM proposes a new federal standard on rear visibility. NHTSA expects that the standard will be met in the immediate future through the use of rear-view cameras. 75 Fed. Reg. 76188. Under the proposed rule, only 10% of the manufacturer's fleet need comply for vehicles manufactured between September 1, 2012 and September 1, 2013 (2013 model year – 11 years after the model year of the Messerlys' vehicle). All vehicles would not have to comply until September 1, 2014 (2015 model year – 13 years after the model year of the Messerlys' vehicle). *Id.* To date, no new standard has been approved and signed into law.

<sup>55</sup> *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

<sup>56</sup> 319 S.W.3d 385 (Ky. 2010).

progeny had somehow been changed. The Court of Appeals properly rejected that argument.<sup>57</sup>

*McIntosh* was a premises liability case. A paramedic was injured when she tripped and fell over a curb outside the hospital's emergency room.<sup>58</sup> After a verdict in the paramedic's favor, the hospital appealed, arguing that the curb was an open and obvious hazard and consequently it had no duty to correct or warn against the hazard as a matter of law.<sup>59</sup>

The primary issue for this Court was whether the open and obvious nature of the hazard negated the hospital's duty to guard against or warn about the hazard or whether, in light of modern comparative fault principles, the nature of the hazard was merely an evidentiary issue for the fact-finder to weigh in determining the fault of the parties. This Court, relying upon the Restatement of Torts and the law in the majority of jurisdictions, held that the mere fact that a hazard is open and obvious does not relieve a premises occupier of the duty to use reasonable care.<sup>60</sup>

*McIntosh* does not purport to address, let alone alter, Kentucky products liability law. It did not overrule or even mention any of the cases upon which Nissan's summary judgment motion was based. All of the cases and Restatement sections cited in *McIntosh* concerned premises liability, not products liability.

Moreover, the legal question raised by *McIntosh* is completely different from the one governing this case. *McIntosh* was concerned with a question of duty – whether a premises occupier owes a duty to ameliorate an open and obvious hazard. By contrast,

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<sup>57</sup> *Messerly*, 2011 Ky. App. LEXIS 234 at \*11, n.3.

<sup>58</sup> *McIntosh*, 319 S.W.3d at 387-88.

<sup>59</sup> *Id.* at 388.

<sup>60</sup> *Id.* at 390-92.

duty is not an issue in products cases. “There is no doubt whatever that a manufacturer is under a duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable.”<sup>61</sup> In products cases, the controlling question is whether the product is in a “defective condition unreasonably dangerous.” Determining whether a product is in such a condition requires examining multiple factors; in some cases one or more of the factors may permit the court to conclude a product is not unreasonably dangerous as a matter of law.<sup>62</sup> Among the factors courts may consider are the “patency” or obviousness of the danger and the risks inherent in the product’s operation.<sup>63</sup> *McIntosh* did nothing to undermine these principles.

The holding in *McIntosh* was based, in part, upon this Court’s observation that a premise’s invitee’s attention may be distracted so that he will not discover the obvious hazard. But a failure to discover the hazard is not an issue in the products liability jurisprudence described in *Jones*, *Byler*, and *Walker*. The hazard inheres in the very nature of the products in question. It is part of social knowledge. No smoker would fail to realize that lighting a cigarette requires a flame. No Xterra user needs to discover that it is not safe to strike a pedestrian with the vehicle.

Further, the adoption of comparative fault principles does not require or even suggest a change in the principles set forth by *Jones* and its progeny. A products liability claimant must establish that the product is in a “defective condition unreasonably dangerous.” If not, there is no liability regardless of plaintiffs’ conduct. The

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<sup>61</sup> *Jones*, 502 S.W. 2d at 69.

<sup>62</sup> *Montgomery Elevator*, 676 S.W.2d at 781.

<sup>63</sup> *Id.*

*Jones/Byler/Walker* line of authority provides one avenue for determining the issue of defectiveness as a matter of law in certain circumstances. When this line of authority applies – the risk is obvious, well-understood and inherent in the product’s use – the product seller is not liable, regardless of the claimant’s conduct.

*Jones* itself was not decided based on the negligence of the claimant, but upon the non-defectiveness of the auger. No court has ever suggested that *Jones* has been rendered obsolete by the adoption of comparative fault. Indeed, as shown, courts continue to adhere to its holding. This Court has cited *Jones* with approval as late as 2004, long after the adoption of comparative fault.<sup>64</sup> It has remained, and should remain, the law of the Commonwealth.

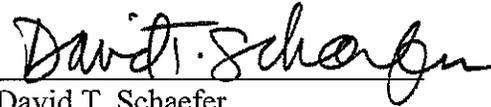
### **CONCLUSION**

The Circuit Court correctly concluded that Nissan was entitled to summary judgment. This Court should reverse the Court of Appeals and reinstate and affirm summary judgment in favor of Nissan.

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<sup>64</sup> *Gregory*, 136 S.W.3d at 40.

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## APPENDIX

### TAB:

- A. Boone Circuit Court's April 12, 2010 Opinion and Order
- B. Kentucky Court of Appeals Opinion, dated December 2, 2011
- C. Excerpts from the Kentucky Driver's Manual
- D. Excerpts from the Deposition of Curtis Alan Messerly
- E. Excerpts from the Deposition of Sandra Denise Messerly
- F. NHTSA, REPORT TO CONGRESS, "Vehicle Backover Avoidance Technology Study" (November 2006)