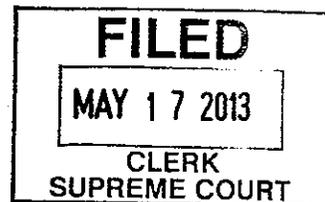


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
No. 2012-SC-000109  
No. 2012-SC-000615



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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**APPELLANTS' REPLY BRIEF/RESPONSE BRIEF TO CROSS-APPEAL**

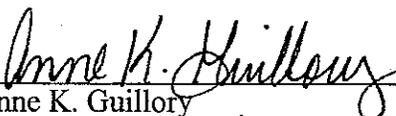
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**CERTIFICATE OF SERVICE**

I hereby certify that this Reply 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**, 360 Democrat Drive, Frankfort, Kentucky 40601; and to **Hon. Robert McGinnis, Special Judge**, 5 Justice Center, 115 Court Street, Cynthiana, Kentucky 41031, all on this 16<sup>th</sup> day of May, 2013.

  
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Anne K. Guillory

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## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews *de novo* the trial court's grant of summary judgment. This is not a case which turns upon disputed issues of material facts. For instance, the Messerlys do not dispute Nissan's evidence that no industry or government standard required the use of backup cameras or sensors in the design of vehicles in the 2002 model year. Nissan does not dispute the Messerlys' evidence that such devices were technologically feasible. The question on appeal relates to the legal *significance* of these undisputed facts. Nissan contends that under settled Kentucky law, a products liability claimant who does nothing more than present evidence of an alleged safer alternative design to ameliorate a foreseeable risk has not raised an issue of fact whether the product as designed is unreasonably dangerous. The Messerlys argue that just such evidence suffices to reach a jury. Which party is correct presents the controlling legal issue in this appeal.

The sole issue under Rule 56.03 is whether Nissan is entitled to judgment as a matter of law. The Messerlys place great reliance on *Steelvest, Inc. v. Scansteel Service Center, Inc.*,<sup>1</sup> but *Steelvest* does nothing to help frame the issue on appeal. Given the undisputed facts in the trial court record, the Messerlys either have raised an actionable design defect claim under Kentucky product liability law, or they have not. The resolution of that question is a legal issue.

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<sup>1</sup> 807 S.W.2d 476 (Ky. 1991).

## II. THE COURT OF APPEALS OPINION WAS BASED ON A MISREADING OF PRECEDENT

The Messerlys do not defend the holding of the Court of Appeals that the factors used to assess whether a product is unreasonably dangerous always present a fact question for the jury. Instead they simply deny the Court of Appeals made such a holding. The language of the opinion, however, leaves no room for doubt. It states that, “We believe *Montgomery Elevator* elucidated these considerations for the *trier of fact*, i.e. the jury when deciding whether the product is ‘in a defective condition unreasonably dangerous.’”<sup>2</sup> There was no reason for the Court of Appeals to make this assertion unless it intended to hold the trial court had erred in deciding the issue as one of law in the course of adjudicating Nissan’s summary judgment motion. It read *Montgomery Elevator* as somehow precluding a trial court from applying the factors governing the determination of whether a product’s design is unreasonably dangerous.

The Messerlys suggest that the Court of Appeals merely held that they had raised a fact issue sufficient to defeat summary judgment. They quote the sentence, “*Montgomery Elevator* clearly places [the question of defectiveness] in the purview of the jury in the case *sub judice*.”<sup>3</sup> Yet, they never explain how *Montgomery Elevator* is relevant to whether they raised a fact issue in this case. *Montgomery Elevator v. McCullough*<sup>4</sup> concerned whether a purchaser’s failure to adopt a post-sale remedial measure constituted a superseding cause that relieved the manufacturer from liability.<sup>5</sup> It had nothing to say about the question of obvious, well-understood risks inherent in the product’s function or whether evidence of a safer alternative design creates a fact issue.

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<sup>2</sup> *Messerly v. Nissan*, 2011 Ky. App. LEXIS 234 at \*14 (Dec. 2, 2011) (emphasis in original).

<sup>3</sup> *Id.* at \*15.

<sup>4</sup> 676 S.W.2d 776 (Ky. 1984).

<sup>5</sup> *Id.* at 782.

It made no sense for the Court of Appeals to refer to *Montgomery Elevator* unless it read the case as establishing a broad rule that unreasonable dangerousness always presents a case for the jury. As indicated, the Court of Appeals stated that it read *Montgomery Elevator* in just that way. There is no escaping the Court's explicit holding.

Nor is there any question that the holding was error. The Messerlys concede that it is appropriate to determine the question as a matter of law in some cases. As Nissan's opening Brief pointed out, several cases cited by *Montgomery Elevator* itself had determined that products were unreasonably dangerous as a matter of law<sup>6</sup> and *Montgomery Elevator* did not purport to change or limit those cases. The Court of Appeals reversed the judgment of the trial court based on a fundamental misconception of Kentucky law. This error requires correction.

### **III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE XTERRA WAS NOT UNREASONABLY DANGEROUS AS A MATTER OF LAW**

#### **A. The Backover Risk Is Inherent**

The Messerlys acknowledge that a court can determine that a product is not unreasonably dangerous as a matter of law where the hazard in question is obvious, well understood, and inherent in the product's use.<sup>7</sup> This conclusion is mandated by the *Jones/Byler/Walker*<sup>8</sup> line of authority and the Messerlys do not argue that these cases should be overturned or repudiated. They attempt to distinguish the present case by arguing that the risk of striking a pedestrian while backing is not really inherent to the product because backup cameras have the capacity to eliminate the blind spot.

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<sup>6</sup> Brief of Appellants, pp. 7-8.

<sup>7</sup> Brief of Appellees, pp. 17-18.

<sup>8</sup> *Jones v. Hutchison Mfg. Co.*, 502 S.W.2d 66 (Ky. 1973); *Byler v. Scripto-Tokai Corp.*, 944 F.2d 904 (Table), 1991 WL 181749 (6th Cir. 1991); *Walker v. Phillip Morris U.S.A. Inc.*, 610 F. Supp. 2d 785 (W.D. Ky. 2009).

The Messerlys' argument misunderstands the concept of inherent risk and misidentifies the risk at issue. The risk at issue is not the mere existence of an area of limited visibility. So-called blind spots do not injure people. Vehicles backing over people cause the injuries. None of the technologies advocated by the Messerlys eliminate the risk of such injuries.

The summary judgment record conclusively dispelled any notion that backup aids are a panacea in preventing backover injuries. In its 2006 Report to Congress, the National Highway Traffic Safety Administration concluded that:

[W]hile there may be some mitigating effect on backover crashes with current parking aids, their effectiveness is expected to be low. The findings from performance testing and available human factors experiments suggest that parking aids would not be effective countermeasures for preventing backover crashes.<sup>9</sup>

Given the inherent limitations of such devices, NHTSA estimated that camera systems would mitigate only 42% of backover injuries, while sensor systems would be only 18% effective in mitigating such injuries.<sup>10</sup>

Visibility is not the only factor in crash avoidance. If it were, there would never be any frontal crashes, for the windshield provides unimpaired forward vision. Yet pedestrians in front of vehicles continue to be struck. The advanced backing technologies still require that the driver of the vehicle properly utilize them and continue to follow normal safe driving practices. Back-up sensors do not even detect all stationary objects behind a vehicle, and may especially fail to detect rapidly-moving small children. Camera-based systems can only be effective when the operator is looking at the display

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<sup>9</sup> NHTSA, Report to Congress, "Vehicle Backover Avoidance Technology Study" (Nov. 2006), p. 8 (*See* Brief of Appellants, Appendix Tab F).

<sup>10</sup> *Id.*

screen and the child is already in direct view of the camera. Real world drivers do not always use the system. For either type of system, the operator of the vehicle must receive the information, act upon it quickly enough, and with sufficient force, to stop the vehicle.<sup>11</sup>

The Messerlys presented no evidence that backup aids *eliminate* backover crash risks.<sup>12</sup> They did, however, present a 2008 NHTSA study where over half the drivers with rear camera systems still crashed into the test objects—and these were stationary objects, not mobile and unpredictable children.<sup>13</sup>

Consequently, the case presented here is indistinguishable from *Jones, Byler, and Walker*. In each case, plaintiff presented evidence of an alleged safer design that would have ameliorated the risk. In each case, the court found that the product was not unreasonably dangerous as a matter of law because the risk was obvious, well understood, and inherent in the product's use. The fact that plaintiffs advocated a technology to reduce the risk did not make the risk posed by the auger, lighter, or cigarettes any less inherent to their respective functions.

The Messerlys assert that “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.’”<sup>14</sup> They mischaracterize

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<sup>11</sup> *Id.* at 28-31.

<sup>12</sup> The Messerlys seriously mischaracterize the record evidence on this point. They assert that press releases regarding Nissan's development of *experimental* vehicles equipped with backing aids such as infrared sensors, somehow provide evidence that the devices eliminate the risk of backing injury. *See* Tab 7 of the Appendix to the Messerlys' Brief to the Court of Appeals. The cited document does not assert, much less prove, that the technology “virtually eliminated the grave risk of serious physical injury and death to pedestrians presented by backing into the blind zone.” *Id.* at 4. The document serves only to establish that Nissan was actively engaged in addressing backing injuries.

<sup>13</sup> *See* Brief of Appellants, Appendix Tab F, pp. 28-31; Messerlys' Response to Motion for Summary Judgment, Ex. 17.

<sup>14</sup> Brief of Appellees, p. 21.

Nissan's position. Obviously, in evaluating whether a product is unreasonably dangerous, the availability of a safer alternative design is an important consideration. Indeed, the product cannot be adjudged defective unless a feasible alternative design exists.<sup>15</sup>

Nissan has observed that courts do not consider the availability of an alternative design in determining whether the risk is *inherent* to the product. A risk is inherent if it arises from the product's very function. The risk involved in this case is inherent because the vehicle must be both massive and mobile. The existence of a proposed technology to lessen the risk does not mean the risk is not inherent. *Jones, Byerly, and Walker* all involved allegations that a safer alternative design would have reduced the risk involved in those cases. Yet, in each case the risk was still regarded as inherent to the product. In each instance, the product could not fulfill its intended function without posing some hazard. The Messerlys have suggested design alternatives that allegedly reduce the risk of backover injuries. This does not mean that the risk is not inherent to the operation of motor vehicles.

**B. The Backover Risk Is Obvious**

The risk of striking a person while backing a vehicle is part of general social knowledge. The fact that the driver cannot see all areas immediately behind the vehicle is apparent from simple observation and is part of every new driver's training. The Messerlys contend the fact that backover injuries continue to occur somehow creates an inference that the hazard is not obvious. On the contrary, as this Court has recognized the fact that a number of similar accidents have occurred only serves to confirm common

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<sup>15</sup> *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004).

knowledge.<sup>16</sup> The Messerlys label this a “perverse twist of logic,” but it is a simple application of common sense. Things that occur frequently are more prone to pass into common knowledge than things that occur rarely. There are still an inordinate number of drunk driving accidents, but nobody would accept statistics of those accidents as evidence that the public was *unaware* of the risk of drunk driving. There are still many intersectional collisions but that would hardly be taken as evidence that the public was unaware of the functions of traffic control signs and devices. That would indeed be a “perverse twist of logic.”

The Messerlys then suggest that even if the public is aware of the existence of blind spots in general, the number of accidents suggest that the risk is not fully appreciated. There is no indication, however, that the public is unaware of the serious consequences that occur when a person is struck by a backing car or that it is unaware of the need to exercise caution while backing a vehicle because of the limited visibility involved. The question is whether the hazard is part of general social knowledge. Nissan was not required to show that the public has a detailed knowledge of the number of backover accidents or a precise understanding of the dimensions of a particular vehicle’s blind spot. Once again, *Jones* provides the touchstone. This Court observed that it is “common knowledge that injuries frequently occur in the operation of farm machinery of the type here involved. Where the person using it is careless serious consequences occur.”<sup>17</sup> In reaching this conclusion the Court did not require that the general public possess detailed information regarding the number of farm accidents or precise knowledge of how the auger functioned. What mattered was that the risk was within

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<sup>16</sup> *Jones*, 502 S.W.2d at 70.

<sup>17</sup> *Id.*

general social knowledge. It cannot be seriously argued that the risk of injuries from a backing vehicle is not at least as well known as the dangers of corn auger blades. Under the standards employed by this Court, the hazard in this case is obvious and well understood.

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

“Proof of nothing more than that a particular injury would not have occurred had the product 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>18</sup> The Messerlys recognize the rule but observe that the cases do not indicate what factors other than safer design would suffice to raise a fact issue.<sup>19</sup> They suggest the answer may be found in the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY. But reference to the Restatement supports Nissan’s position, not the Messerlys’ position. Under the Restatement’s formulation a product may be judged defective in design when the foreseeable risks of harm could have been avoided by the adoption of a reasonable alternative design *and* the omission of the design renders the product “not reasonably safe.”<sup>20</sup> The Restatement is consistent with Kentucky law, which recognizes that a safer alternative design is a necessary but, alone, insufficient basis for liability.<sup>21</sup> Both Kentucky and the Restatement require proof of both a safer alternative design *and* that the product is unreasonably dangerous without such a design.

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<sup>18</sup> *Jones*, 502 S.W.2d at 70-71 (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) (applying 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*, 936 F. Supp. 1436, 1442 (W.D. Ky. 1996) (acknowledging rule).

<sup>19</sup> Brief of Appellees, p. 21.

<sup>20</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998). *See also*, *Toyota v. Gregory*, 136 S.W.3d at 41.

<sup>21</sup> *Toyota v. Gregory*, 136 S.W.3d at 41-42.

The Messerlys would merge the two independent requirements into one. They contend that a fact issue on design defect is created whenever the claimant can point to evidence of an alternative design to ameliorate a foreseeable hazard. To add foreseeability to the requirement of alternate design is to add nothing. Alternative designs are not developed to address unforeseen risks. Hence, the “alternative design plus foreseeability” formula proposed by the Messerlys and the amici boils down to alternative design alone. Such a holding would be inconsistent with the existing case authority. It cannot be plausibly argued that the risks involved in cases like *Jones*, *Byerly* or *Walker* was unforeseeable. Indeed, the risks involved in those cases were determined to be inherent in the use of such of products. In each of those cases the courts held that the product was not unreasonably dangerous as a matter of law.

The Court should not depart from the established jurisprudence. It is vital that products liability law retain the requirement that the product be adjudged unreasonably dangerous as designed in addition to the requirement of a safer alternative design. Kentucky law has recognized that “[t]he maker is not required to design the best possible product, or one as good as others make or a better product than the one he has, so long as it is *reasonably safe*.”<sup>22</sup> To omit the unreasonable danger requirement would effectively impose a duty on the manufacturer to adopt every feasible safety device even if the product is already reasonably safe. It would have to adopt any feasible safety device regardless of whether the benefits of the device were slight or its costs were high. There may be legitimate reasons for the manufacturer to delay implementation of a new safety technology. Its efficacy may be unproven. It may threaten to impair the functionality of

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

the product. It may add significantly to consumer costs, or detract from consumer acceptance. While a plaintiff may challenge the manufacturer's decision, there must be some evidentiary basis for doing so other than the occurrence of an unfortunate accident that the proposed technology would have allegedly prevented. For this reason, Kentucky courts have embraced the negligence standard for judging the design with its implicit requirement of the violation of some existing standard.

#### **IV. THE COURT SHOULD REJECT THE PROPOSED NO-STANDARDS APPROACH ADVOCATED BY THE MESSERLYS**

The Messerlys do not contest the fact that the Xterra complied with FMVSS 111, the only rear visibility standard applicable to the vehicle when it was sold. Nor do they contest that industry standards did not require the use of backup cameras or sensors at that time. Nor do they argue that consumers expected vehicles to be equipped with backup cameras or sensors during the 2002 model year. Nevertheless, they argue that the jury should be allowed to impose a post-facto judgment that the Xterra should have been equipped with the devices even in the absence of any evidence that any qualified person believed that the devices should have been required during the 2002 model year. In essence, they contend that a products liability claimant need not show that the criticized design violated any existing standard of care.

This Court has continually adhered to a negligence-based standard for determining whether a product's design may be regarded as defective and unreasonably dangerous. The "test is whether an ordinarily prudent company, being fully aware of the risk would not have put [the product] on the market."<sup>23</sup> The use of a negligence standard implicitly requires an inquiry into whether the sale of the product would have violated an

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<sup>23</sup> *Nichols v. Union Underwear Co.*, 602 S.W. 2d 429, 433 (Ky. 1980). *See also, Toyota v. Gregory*, 136 S.W. 3d at 42.

existing standard of care. Defining the standard of care is particularly important when evaluating the conduct of professional or specialized activities. Hence, to establish negligence as to an attorney or a physician it is necessary to establish departure from the governing standard of care.<sup>24</sup> This court has observed that product design involves the exercise of skill and judgment and hence in questions of deliberate design choices, the manufacturer's liability, though called strict, "appears to rest primarily upon a departure from proper standards of care so that the test is essentially a matter of negligence."<sup>25</sup>

The Fourth Circuit's conclusion in *Sexton v. Bell Helmets* that Kentucky law requires proof of the violation of some existing standard of care is well-supported.<sup>26</sup> The Messerlys attempt to belittle the decision but provide no analysis indicating that it is an inaccurate statement of Kentucky law.

Furthermore, *Sexton* was cited by the Sixth Circuit when it affirmed summary judgment in favor of a tractor manufacturer in a case strikingly similar to the present one. *Jordan v. Massey-Ferguson, Inc.*<sup>27</sup> In *Jordan*, the plaintiff complained that the tractor in question was defective and unreasonably dangerous because it was not equipped with a mandatory<sup>28</sup> rollover protection device ("ROPS").<sup>29</sup> The evidence showed that no governmental or industry standard in effect when the tractor was sold required a ROPS as mandatory equipment and that consumers did not expect mandatory rollover protection. Citing *Sexton*, the Court rejected the plea for liability without proof that the product

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<sup>24</sup> See *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. 1978) (attorney malpractice); *Savage v. Three Rivers Medical Center*, 390 S.W. 3d 104, 118 (Ky. 2012) (medical malpractice).

<sup>25</sup> *Jones*, 502 S.W. 2d at 69.

<sup>26</sup> 926 F.2d at 337.

<sup>27</sup> 100 F.3d 956 (Table), 1996 WL 662876 (6th Cir. Nov. 12, 1996)

<sup>28</sup> The ROPS device was an option for the model the decedent had purchased and he had not selected it.

<sup>29</sup> 1996 WL 662876 at \*1.

violated an existing standard:

Essentially plaintiff argues that despite the prevailing standard of industry, government and consumers, defendant should have designed the [tractor] with mandatory ROPS because it could have done so. The fact that a manufacturer could have made a safer product, however, does not demonstrate that it should have made a safer product, especially when the existing expectations and standards of industry, government and consumers did not demand or desire such safety.”<sup>30</sup>

The Messerlys make the same plea rejected by the court in *Jordan*. They argue that because backup cameras and sensors were technologically feasible, Nissan was required to employ them even if no government or industry standard mandated their use and consumers did not expect them. Yet, two separate federal appellate courts construing Kentucky law have held that a product that meets all existing standards and fulfills consumer expectations cannot be found unreasonably dangerous as a matter of law.

The Messerlys also argue that compliance with industry and government standards do not constitute a complete defense to a products liability claim. Nissan has never contended otherwise. For one thing, it is possible that a product might comply with government standards but not industry standards or vice versa. It is also possible that in a given case, the applicable standard could be found in another source such as consumer expectations.<sup>31</sup>

What Kentucky has never accepted, however, is the notion that a product can be judged defective based on standards that did not exist at the time the product was produced and sold. As *Sexton* notes, societal expectations of safety change over time. A design that would be totally unacceptable today – a vehicle without seat belts, for

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<sup>30</sup> *Id.* at \*3.

<sup>31</sup> *See Sexton*, 926 F.2d at 336-37 (evaluating whether helmet that met government and industry standards also met consumer expectations).

example – may have been acceptable for decades.<sup>32</sup>

This case presents a clear illustration why hindsight judgments about product design are unfair. Amicus KidsandCars.org is presumably as zealous an advocate of child safety as can be imagined. Yet, nowhere does the organization show that it or any other responsible organization or person counseled, before the Xterra was manufactured or sold, that backing aids should be included on all vehicles. Indeed, the Congressional testimony of its spokesperson cited in the Amicus Brief<sup>33</sup> shows that in 2005, three years after the model year of the Xterra, the organization was supporting a Senate bill to *study* the backover issue. Somehow, however, Amicus concludes that Nissan is legally responsible for Foxx Messerly's death because it did not equip the Xterra with backup sensors or cameras during the 2002 model year.

The Messerlys cite KRS 411.310(2) which provides for a presumption that a product is not defective if its design, manufacture and testing conformed to generally recognized and prevailing standards or the state of the art at the time of its design and manufacture. They reason that the presumption can be rebutted by a preponderance of the evidence and thus the statute recognizes the possibility that a product could be defective despite having met all applicable standards. This analysis is incorrect.

The statute does not purport to define the conditions under which a product may be adjudged defective by reason of its design. In Kentucky the adoption of strict liability, the definition of the elements of products liability under strict liability and negligence, and the factors used in determining whether a product is unreasonably dangerous have been determined as a matter of common law. As shown, that common law requires proof

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<sup>32</sup> *Id.* at 337.

<sup>33</sup> Brief on Behalf of Amicus Curiae, KidsandCars.org, p. 4, citing [http://www.kidsandcars.org/upload/\[pdfs/articles/2005/2005-06-23-Janette-Testimony.pdf](http://www.kidsandcars.org/upload/[pdfs/articles/2005/2005-06-23-Janette-Testimony.pdf).

of the violation of a standard of care in cases involving deliberate design choices. No language in the statute indicates that the legislature intended to alter the common law or regulate its development with respect to what constitutes a design defect.

The Messerlys cling to the notion that an entire industry may adopt a negligent design, citing *C.D. Herme, Inc. v. R.C. Tway Co.*<sup>34</sup> However, they disregard the important limitations upon the industry-wide negligence doctrine established by this Court in *Jones*. While the Court recognized the possibility that an industry-sanctioned design could be deficient, liability was limited to the rare cases “where common knowledge and ordinary judgment will recognize unreasonable danger.”<sup>35</sup> Far from endorsing standardless liability, *Jones* merely recognizes that in some cases common knowledge and judgment will supply the applicable standard rather than the industry itself. This case is not one where common knowledge or ordinary judgment would have indicated that it was necessary to supply a backup camera or sensor with the Xterra. The Messerlys have never contended otherwise and, in fact, their entire position has been, however erroneous, that the dangers of backing injuries are not obvious and apparent.

The citation to *Owens-Corning Fiberglas Corp. v. Golightly*<sup>36</sup> is likewise unavailing. There this Court upheld an award of punitive damages over the manufacturer’s plea that KRS 411.310(2) insulated it from liability because its design conformed to the then-existing state of the art. The court rejected the argument because the jury’s verdict was based on evidence that the defendant had marketed a dangerous product without adequate warnings and had minimized and misrepresented the product’s

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<sup>34</sup> 294 S.W.2d 534, 537 (Ky. 1956).

<sup>35</sup> 502 S.W.2d at 69.

<sup>36</sup> 976 S.W.2d 409 (Ky. 1998).

dangers. This Court did not hold that the product could be determined defective in design even if the design met all existing standards.

Finally, the Messerlys cite examples of other backover cases in other jurisdictions that were decided in jury trials, rather than by summary judgment. The importance of these examples is entirely unclear. They are not Kentucky cases, do not purport to apply Kentucky law, and do not supply any analysis pertinent to the legal issues in dispute.

**V. THE COURT SHOULD NOT CONFLATE PREMISES DEFECT AND PRODUCTS LIABILITY LAW**

The Messerlys persist in arguing that this Court's decision in *Kentucky River Medical Center v. McIntosh*<sup>37</sup> abolishing the prior rule that a landowner has no duty to warn of an open and obvious hazard somehow alters the Commonwealth's products liability law by removing the obviousness of the hazard from the considerations relevant to determining whether a product is unreasonably dangerous. The Court of Appeals correctly refused to apply premises liability concepts to a products liability case.<sup>38</sup>

As Nissan's opening Brief pointed out, *McIntosh* concerned an entirely different question—whether the obviousness of the hazard relieved the land occupier of duty. This case does not concern duty at all but whether the product was unreasonably dangerous. The obviousness of the risk has always been recognized as a relevant factor in determining whether the product poses an unreasonable danger.<sup>39</sup> Settled precedent indicates that where an obvious, well-understood risk, inherent in the function of the product exists that product is not unreasonably dangerous as a matter of law. To remove a consideration of the obviousness of the product's risk from the question of

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<sup>37</sup> 319 S.W.3d 385 (Ky. 2010).

<sup>38</sup> Opinion, p. 9, n.3.

<sup>39</sup> *Montgomery Elevator*, 676 S.W.2d at 780-81.

unreasonable danger would work a radical change in products liability—a change that could be justified only by powerful policy considerations.

The adoption of comparative fault principles does not mandate a change in the long-standing rules. After all, the question is not the conduct of the parties but the status of the product. If, taking the relevant factors into account the product is not defective, there is no reason to assess the conduct of the claimant or any other person. Comparative fault has been the law of the Commonwealth since at least 1984. As the Messerlys state, it certainly applies to products liability cases. Yet courts, including this one, have continued to cite and rely upon *Jones* and its progeny.<sup>40</sup> Further, none of the language in the *McIntosh* opinion even hints that the holding is applicable to a determination of whether a product is unreasonably dangerous.

The Messerlys offer no compelling policy reason why comparative fault should subsume consideration of the obvious, well-understood, inherent risks. In rejecting the no-duty rule, *McIntosh* observed that a premises invitee might be prevented by circumstances from discovering even an obvious danger. By contrast, in judging the unreasonable danger of a product, the obvious hazard presented by the product need not be “discovered” by its user. The risk is inherent in the product itself and involves the objective application of social knowledge with which all users are charged.<sup>41</sup>

## **VI. THE CRITICISM OF THE TRIAL COURT IS UNFOUNDED**

Section IV of the Messerlys’ Brief criticizes statements made by Judge McGinnis from the bench and Judge McGinnis’ overall approach to considering the merits of the

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<sup>40</sup> See, e.g., *Toyota Motor Corp. v. Gregory*, 136 S.W.3d at 40.

<sup>41</sup> See *Lederman v. Pacific Indus., Inc.*, 119 F.3d 551, 554 (7th Cir. 1997), *Lamb by Shepard v. Sears Roebuck & Co.*, 1 F.3d 1184, 1189-90 (11th Cir. 1993); *Box v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1395-96 (5th Cir. 1992); *Gray v. Manitowoc Co.*, 771 F.2d 866, 871 (5th Cir. 1985); *Greene v. AP Prods., Ltd.*, 717 N.W.2d 855 (Mich. 2006).

Messerlys' claim. In an argument that is frankly offensive toward the trial court, the Messerlys suggest that Judge McGinnis did not act fairly and impartially in granting Nissan's summary judgment motion. However, the Messerlys never sought to disqualify Judge McGinnis or move for his recusal, a failure which should preclude their after-the-fact objections now.

The criticisms of Judge McGinnis are particularly inappropriate at this stage because the controlling question is whether the summary judgment was legally correct, not the methodology of the judge that rendered the judgment. Precisely *how* Judge McGinnis arrived at his ruling is irrelevant to the appeal. Appellate review is concerned with whether the trial court reached the right destination, not in critiquing how the trial judge arrived at that destination.<sup>42</sup> The question is whether the record shows that Nissan was entitled to summary judgment. It is well settled that an appellate court may affirm a lower court for any reason supported by the record.<sup>43</sup>

But beyond that procedural point is a larger issue. Our judicial system should encourage, not discourage, judges to be actively and vigorously engaged in the decision-making process. In pretrial motion hearings, judges are not required to preside in stony silence. Judges should feel free to question and challenge counsel – and express opinions – regarding the legal strengths and weaknesses of the cases before them.<sup>44</sup> Oral arguments exist for the very purpose of allowing judges to critically evaluate the merits of the parties' positions and voice their concerns. Some judges do so more than others,

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<sup>42</sup> *Vega v. Kosair Charities Committee, Inc.*, 832 S.W.2d 895, 897 (Ky. App. 1992); *Clark v. Young*, 692 S.W.2d 285, 289 (Ky. App. 1985).

<sup>43</sup> *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009); *see also, Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006) (summary judgment is affirmed where it is sustainable on any basis).

<sup>44</sup> Of course, it is not appropriate for a trial judge to express opinions about the merits of a case during trial, in the presence of the jury, but that is not the situation here.

and the fact that Judge McGinnis is no “potted plant” is no basis to criticize his ruling. It is clear from the record that many of his comments were in direct response to specific arguments made by the Messerlys’ counsel. Judge McGinnis was *engaged* in this case, and that is how it should be.

Further, judges are not required to check their common sense at the courthouse door. Judges, like jurors, are free to call upon their everyday experiences in deciding the cases before them. Contrary to the Messerlys’ hyperbolic assertions, Judge McGinnis did not conduct any “experiments” or “fact-finding”<sup>45</sup> – he did not take any measurements or photographs, or perform any testing. Like every licensed driver in Kentucky and elsewhere, he has operated a motor vehicle in reverse. From his use of a Toyota Avalon passenger car, he knew (as everyone knows) that all vehicles have limited rear visibility. He simply discussed with counsel his perspective, obtained from common experience, on the factual underpinnings of the Messerlys’ claims and the legal context in which he was required to evaluate them. It was proper for him to do so, especially in a case in which social knowledge is a critical factor. To the extent he signaled his belief that the obviousness of the “blind zone hazard” was a key issue in this case, Nissan submits that he was absolutely correct.

Finally, Judge McGinnis’ decision to consider Nissan’s summary judgment motion before discovery was complete was a proper exercise of sound case management and not an abuse of discretion. Sufficient discovery had been done to identify the controlling facts and issues. Judge McGinnis properly determined that the case was ripe for a dispositive motion in 2009 because another two or three years of discovery would

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<sup>45</sup> See Brief of Appellants, pp. 39, 40.

have been an unnecessary waste of *both* parties' resources, a determination with which the Messerlys' counsel agreed at the October 23, 2009 hearing.<sup>46</sup> The Messerlys did not move for a continuance of the hearing to discuss further discovery and, even upon appeal, the Messerlys do not point to any discovery they contend would have allowed them to make additional arguments against the summary judgment motion. Their complaints about the judge are void of procedural, legal or factual substance and should be completely rejected.

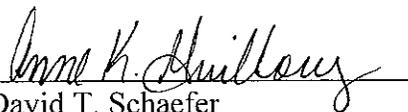
### CONCLUSION

This Court should uphold long-standing principles of Kentucky law and reverse the judgment of the Court of Appeals, instructing that Court to reinstate the judgment of the Circuit Court.

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<sup>46</sup> The Messerlys' counsel stated: "Judge, for our part I think that [the filing of a dispositive motion] would be a great idea. I can see that this issue troubles the Court a great deal and I don't think that either side wants to spend the next two years and God knows how much money pursuing this case. . . ." (10-23-09, 10:32:00 – 10:33:00).

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