

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-685

NISSAN MOTOR COMPANY, LTD. AND
NISSAN NORTH AMERICA, INC.

APPELLANTS

APPEAL FROM KENTUCKY COURT OF APPEALS
No. 2012-CA-952

APPEAL FROM LINCOLN CIRCUIT COURT
CIVIL ACTION No. 2010-CI-82

AMANDA MADDOX

APPELLEE

**MOTION OF DRI—THE VOICE OF THE DEFENSE BAR TO FILE
AN AMICUS CURIAE BRIEF**

DRI—THE VOICE OF THE DEFENSE BAR (DRI) moves the Court, pursuant to CR 76.12(7), for permission to file the Amicus Curiae Brief tendered herewith.

The tendered amicus curiae brief addresses the reasons why this Court should adopt the view of the Georgia Supreme Court that, as a general rule, punitive damages are improper where a defendant has adhered to safety regulations. *See Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993). The amicus curiae brief also addresses why a case does not warrant a departure from this general rule if the defendant's challenged conduct increased the safety for the majority of the population. These points are relevant to the viability of the punitive damages award at issue in this appeal. *See* Brief for Appellants 16-37. The Court of Appeals' opinion, if affirmed, will undercut Kentucky's legitimate

interests in directing punitive damages only towards conduct that is intolerable to society.

DRI is an international organization that includes more than 22,000 attorneys defending businesses and individuals in civil litigation. To this end, DRI seeks to address issues important to defense attorneys, to promote the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. DRI has a strong interest in securing a decision by this Court that, as a general rule, punitive damages are improper where a defendant has fully complied with applicable safety regulations. Such a decision will enhance the predictability of the law for future defendants, which both advances their interests in receiving fair notice of punishable conduct, and also advances Kentucky's interests in improving the deterrent effect of punitive damages by more clearly delimiting what conduct might be punishable.

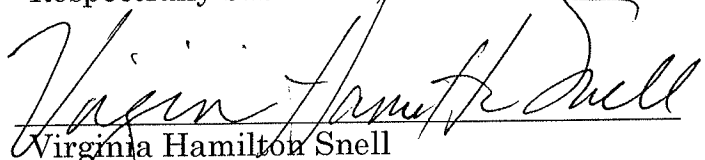
DRI also has a strong interest in a decision that there is no exception to the general rule where the defendant's decision to make its product safer for the majority of its consumers is the conduct alleged to support the plaintiff's claim to punitive damages. Such a decision will help preserve the ability of the clients of DRI's members to continue improving their products without exposing

themselves to unexpected liability that might discourage such efforts. This Court's decision will be of significant importance not only to the parties in this case, but to all potential defendants that manufacture consumer products.

Accordingly, DRI respectfully asks this Court to accept and consider its amicus curiae brief attached hereto.

Dated: October 29, 2014

Respectfully submitted,



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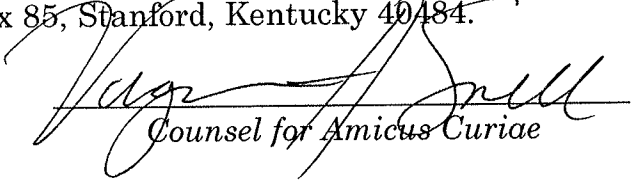
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It is hereby certified that on this 29th day of October, 2014, copies of this Brief were served upon the following via U.S. Mail: Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601; Hon. David Tapp, Judge, Lincoln Circuit Court, 100 E. Main St., Stanford, Kentucky 40484; John L. Tate, Bethany A. Breetz, Stites & Harbison, PLLC, 400 W. Market St., Suite 1800, Louisville, Kentucky 40202; David T. Schaefer, Anne K. Guillory, Dinsmore & Shohl LLP, 101 S. Fifth St., Suite 2500 Louisville, Kentucky 40202; Richard Hay, Sarah Hay Knight, Law Office of Richard Hay, 203 W. Columbia St., P.O. Box 1124, Somerset, Kentucky 42502; and J. Paul Long, Jr., 324 W. Main St., P.O. Box 85, Stanford, Kentucky 40484.



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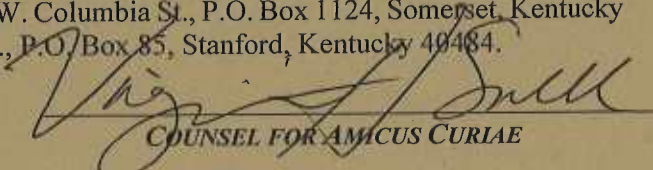
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SUMMARY OF THE ARGUMENT

When a manufacturer complies with government safety regulations, voluntarily submits its product for even more stringent government safety testing, and passes those tests with flying colors, those acts are fundamentally inconsistent with the sort of “intolerable conduct” that warrants punitive damages. Punitive damages require clear and convincing evidence of a specific intent to injure the plaintiff, or of wanton or reckless disregard for the lives, safety, or property of others. As a general matter, compliance with safety regulations proves that a defendant acted with regard for the safety others. That is true even if a plaintiff later claims that the product is defective because it could have been made safer for that particular plaintiff. For this reason, the Georgia Supreme Court has announced that, as a general rule, punitive damages are improper where a defendant has adhered to safety regulations. *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993).

This Court should adopt Georgia’s general rule because it would advance Kentucky’s legitimate interests in directing punitive damages only towards conduct that is intolerable to society, and away from conduct that is tolerated in the considered judgment of public regulators. The general rule also increases the predictability of the law and is consistent with Kentucky law as it is already applied.

Moreover, applying the general rule is especially appropriate where the defendant's conduct increased the safety for the majority of the population. DRI understands that, in this case, it is not disputed that when Nissan added the load limiter to its Pathfinder, pushing its passenger frontal crash rating from four stars to five stars, the Pathfinder really did become safer for the majority of the population. No defendant deserves to be punished for this type of conduct, or can expect to be punished for this type of conduct.

ARGUMENT

I. PUNITIVE DAMAGES ARE, AS A GENERAL RULE, IMPROPER WHERE A DEFENDANT HAS COMPLIED WITH APPLICABLE SAFETY REGULATIONS.

A. An award of punitive damages requires clear and convincing evidence of a defendant's intent to injure the plaintiff or a defendant's wanton or reckless disregard for others' lives, safety, or property.

"Kentucky's punitive damage statutes, KRS 411.184 and KRS 411.186, were enacted 'to further [Kentucky's] legitimate interests in punishing unlawful conduct and deterring its repetition.'" *Ragland v. DiGiuro*, 352 S.W.3d 908, 916 (Ky. App. 2010) (footnote omitted) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)). In other words, punitive damages serve the purpose "of expressing society's disapproval of intolerable conduct and deterring such

conduct where no other remedy would suffice.” *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 390 (Ky. 1985) (quoting Jane Mallor & Barry Roberts, *Punitive Damages Toward a Principled Approach*, 31 Hastings L.J. 639, 641 (1980)).

The punitive damages statutes authorize an award only upon clear and convincing evidence that the defendant acted with fraud, oppression, or malice. KRS 411.184(2). “Oppression” is conduct “*specifically intended* by the defendant to subject the plaintiff to cruel and unjust hardship.” KRS 411.184(1)(a) (emphasis added). “Fraud” is “an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and *made with the intention of causing injury* to the plaintiff.” KRS 411.184(1)(b) (emphasis added). And “[m]alice” is defined as “either conduct which is *specifically intended* by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff *and with a subjective awareness* that such conduct will result in human death or bodily harm.” KRS 411.184(1)(c) (emphases added).

This Court has held that KRS 411.184(1)(c) cannot constitutionally preclude punitive damages for conduct that amounts to gross negligence. *Williams v. Wilson*, 972 S.W.2d 260, 264 (Ky. 1998); *see Ragland*, 352 S.W.3d at 916 n.4. Thus, punitive damages are available if a plaintiff presents clear and

convincing evidence of gross negligence. *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 59 (Ky. 2013).

To prove the gross negligence required for punitive damages, a plaintiff must provide clear and convincing evidence both of the failure to exercise reasonable care, and “that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others.” *Id.* (quoting *Horton*, 690 S.W.2d at 389-90). Gross negligence is “something more than the failure to exercise slight care,” *Cooper v. Barth*, 464 S.W.2d 233, 234 (Ky. 1971), but it does “require[] a finding of a failure to exercise even slight care,” *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 268 (Ky. App. 2008). Without evidence of a specific intent to injure the plaintiff or express malice, punitive damages are unavailable unless a defendant’s conduct was “so outrageous that malice could be implied from the facts of the situation.” *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003); *see also Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004).

B. This Court should hold, as a general rule, that a plaintiff cannot prove punitive damages where the defendant has complied with applicable safety regulations.

DRI is not aware of any Kentucky Supreme Court authority that addresses whether punitive damages are available when there are government safety standards that apply to the defendant’s conduct, and the defendant meets those standards.

When Georgia's Supreme Court was confronted with this issue, it wisely adopted the view that "punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to . . . safety regulations." *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993). This is because "such compliance does tend to show that there is no clear and convincing evidence of 'wilful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences.'"¹ *Id.* (quoting *Gen. Refractories Co. v. Rogers*, 239 S.E.2d 795, 798 (Ga. 1977)). The Georgia Supreme Court therefore held that because the defendant complied with the applicable environmental and safety regulations, an award of punitive damages was not supported by the evidence. *Id.*

There are many reasons why Georgia's general rule makes sense.

First, the general rule advances the underlying purpose of punitive damages awards by directing those awards only to cases where there truly is intolerable conduct worthy of society's disapproval. *See Horton*, 690 S.W.2d at 390 (explaining purpose of punitive damages). Where a government entity has set safety standards and the defendant meets those standards, it is a strong indication that society *approves* of the defendant's conduct through the actions of

¹ Georgia's law on punitive damages is similar to Kentucky's. *Compare* Ga. Code Ann. § 51-12-5.1(b) (punitive damages require clear and convincing evidence of "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences"), *with* discussion *supra* Part I.A.

its official standards-setting body. Punitive damages in such a situation would be inconsistent with their fundamental purpose to express society's disapproval.

Second, the general rule helps increase the predictability of what conduct is punishable, which advances both a potential defendant's due process interest in having notice of conduct that is required to avoid punishment, and also society's interest in the deterrence of deplorable conduct. Punitive damages are a quasi-criminal remedy, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001), yet may be imposed without many of the safeguards afforded to criminal defendants, *Gore*, 517 U.S. at 574 n.22. Nevertheless, punitive damages defendants are entitled to "the basic protection against 'judgments without notice' afforded by the Due Process Clause." *Id.* A general rule that complying with a government safety standard will not expose a potential defendant to punitive damages helps protect the defendant's legitimate interest in fair notice of when it might be punished, especially because "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

Society's interest in deterrence also benefits from a defendant's ability to predict when it might be exposed to punitive damages. A potential defendant will not be deterred from societally disapproved conduct if the defendant cannot predict what that disapproved conduct might be. See E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev.

1053, 1058 (1989) (“[O]nly information about the liability consequences of specific practices or modes of engaging in the activity is likely to enhance specific predictability and thereby shape the way that the activity is conducted.”).

Third, the general rule helps protect the government’s ability to set universally applicable policies and standards. Safety regulations often represent the considered judgment of those tasked with protecting the public regarding the appropriate way to promote safety without paralyzing an industry’s ability to develop new products. Safety regulations are often “set in a wide gray area where the difficulties of defining defectiveness (the ‘proper’ mix of safety and its tradeoffs) are especially great.” David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 41-42 (1982). The general rule that punitive damages are unavailable when those safety standards are met will encourage manufacturers to act in accordance with the regulator’s views of the proper balance of competing interests.

Fourth, the general rule is consistent with Kentucky law as currently applied. Compliance with safety regulations proves that the defendant did exercise at least “slight care,” and therefore punitive damages are unavailable. *See Peoples Bank of N. Ky.*, 277 S.W.3d at 268. For example, in *Logan v. Cooper Tire & Rubber Co.*, Civil Action No. 10-03-KSF, 2011 WL 2453491 (E.D. Ky. June 10, 2011), the court dismissed plaintiff’s claim for punitive damages

because the defendant's tires complied with all regulatory testing requirements, even though the defendant knew of problems with tread separation. *Id.* at *3-4. Also, in *Cameron v. DaimlerChrysler Corp.*, No. Civ.A. 504CV24JMH, 2005 WL 2674990 (E.D. Ky. 2005), the court dismissed plaintiff's claim for punitive damages because the defendant's brake assembly system complied with federal safety standards, even though the plaintiff provided evidence that alternative designs were safer and more cost effective. *Id.* at *9. Thus, although Kentucky courts have not yet articulated the general rule adopted by the Georgia Supreme Court, that general rule is consistent with decisions applying Kentucky law. Future courts would therefore benefit from an explicit articulation of the general rule.

Fifth, the general rule is consistent with the views of many commentators who have examined the relationship between regulatory compliance and punitive damages. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."); David G. Owen & Mary J. Davis, *Owen & Davis on Products Liability* § 26:33 ("The basic concept of the compliance-with-law punitive damages defense appears logical and fair, for ordinarily a manufacturer or other product supplier is far from quasi-criminal in doing what the government explicitly permitted or required it to do."); Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 Utah

L. Rev. 115, 155 (2008) (“[E]ven if safety standards are not optimal, good faith compliance with them would still be inconsistent with the type of intent that is necessary to impose punitive damages.”); Paul C. Weiler et al., American Law Institute, *Enterprise Responsibility for Personal Injury: Reporters’ Study*, II, B, 3, IV (1991) (“[A]t a minimum, regulatory compliance should preclude the award of any punitive damages.”).

II. THERE SHOULD BE NO EXCEPTION TO THE GENERAL RULE IF THE DEFENDANT’S CONDUCT INCREASED SAFETY FOR THE MAJORITY OF THE POPULATION.

The general rule announced in *Stone Man* has been applied to preclude punitive damages where the defendant complied with the Federal Motor Vehicle Safety Standards (FMVSS). *See Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 844-46 (N.D. Ga. 1996) (defendant’s brake system and instrument panel met the FMVSS). Of course, adoption of the general rule would not make compliance with federal regulations an absolute defense against punitive damages in *all* circumstances.

For example, in *General Motors Corp. v. Moseley*, the court declined to follow the general rule because it found evidence that the defendant was aware that its placement of fuel tanks outside the frame of its full-size pickup trucks would cause them to explode, and thus there was “evidence of a knowing endangerment of all who may come in contact” with the defendant’s trucks. 447 S.E.2d 302, 311 (Ga. App. 1994), *abrogated on other grounds by Webster v.*

Boyett, 496 S.E.2d 459, 463 & n.26 (Ga. App. 1998). And in *Gryc v. Dayton-Hudson Corp.*, the court allowed punitive damages when a child's pajamas caught on fire despite the defendant's fabric's compliance with the required flammability tests because it was "almost conclusively" established that the defendant knew that the test was invalid and could not evaluate the flammability of its products, and because the test "was adopted as a result of industry influence and, therefore, served to protect the textile industry rather than the public." 297 N.W.2d 727, 733-34 (Minn. 1980). Importantly, one of the defendant's top officials admitted in a memo: "We are always sitting on somewhat of a powder keg as regards our flannelette being so inflammable." *Id.* at 734.

Based on DRI's review of the facts in this case that appear to be undisputed, Nissan's decision to add a load limiter to its Pathfinder seatbelt system is nowhere near the type of outrageous conduct that would warrant a departure from the general rule that punitive damages are improper where a defendant complied with safety regulations. The parties apparently do not dispute that (1) FMVSS 208 provides safety standards for restraint systems; (2) FMVSS 208 mandates crash testing at 30 miles per hour using a dummy representing a 50th percentile male weighing 171 pounds; (3) Nissan voluntarily submitted its Pathfinder for crash testing at 35 miles per hour under the government's New Car Assessment Program; and (4) the Pathfinder performed well enough in the government's crash testing to earn the highest possible

are unavailable when safety standards are met. *Cf. Mosely*, 447 S.E.2d at 311. Nor is such conduct anything like blind adherence to a regulation known to bear no relation to safety. *Cf. Gryc*, 297 N.W.2d at 733-34.

Instead, such conduct resembles the quintessential case for applying the general rule. For a product even to be found defective, the plaintiff must prove an alternative design that “must contribute to greater overall safety.” Restatement (Third) of Torts: Products Liability § 2, Reporters’ Note, cmt. f (1998). But “[o]ften, measuring ‘safety’ is a complex judgment. A product made safer for some situations, may become more dangerous in others.” Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance That Protects Public Safety*, 84 Tul. L. Rev. 1203, 1209 (2010). Even if a jury believed that a defendant did not make this complex judgment correctly when it adopted a device that increased safety for the majority of the population, “an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue.” *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994). And especially if a product complies with safety regulations, the existence of a feasible and cost effective alternative design is not sufficient to prove punitive damages. *Cameron*, 2005 WL 2674990, at *9.

Furthermore, a manufacturer’s alleged failure to perform the plaintiff’s preferred type of testing on its own cannot support an award of punitive

damages. Here, Maddox does not dispute that the Pathfinder's restraint system was subjected to a *sled* test using the 95th percentile dummy without any issues, although Maddox faults Nissan for not performing a full *crash* test. (See Br. for Appellants 11 n.9; Ct. of Appeals Br. for Appellees 4 n.19.) But even "generalized knowledge of a possible danger, coupled with defendant's failure to test" cannot support punitive damages. *Hillrichs*, 514 N.W.2d at 100. (See also Br. for Appellants 24-26 (distinguishing *Suffix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838 (Ky. App. 2004)).) That is because punitive damages are reserved for cases in which a defendant consciously disregards a *known* risk, ignoring the *probable* dangerous consequences of its acts.

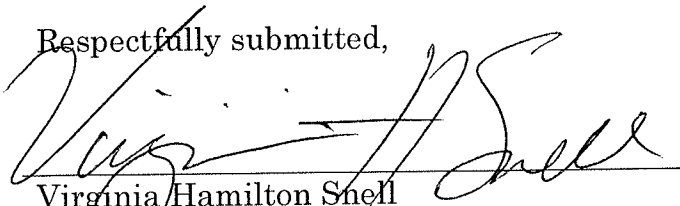
Instead of engaging deeply with Kentucky's standard for whether punitive damages are available at all, the Court of Appeals emphasized the U.S. Supreme Court's guideposts for determining whether the *amount* of punitive damages comports with the outer limits of Constitutional due process. (See Ct. of Appeals Op. Affirming 22-24 (citing *Gore*, 517 U.S. at 575 and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)).) In so doing, the court put the cart before the horse—conflating the issue of excessiveness with the fundamental question of whether the conduct at issue was even punishable at all. DRI respectfully requests that this Court consider whether punitive damages are available in the first instance, and hold that they are not if a defendant complied with the applicable safety regulations, especially where compliance increased safety for the majority of the population.

CONCLUSION

For the foregoing reasons, this Court should adopt the rule embraced by the Georgia Supreme Court—that punitive damages are generally not available when the defendant has fully complied with governmental safety standards.

Dated: October 29, 2014

Respectfully submitted,



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