DISSENT and Opinion Filed June 3, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00075-CV

TOYOTA MOTOR SALES, U.S.A., INC. AND TOYOTA MOTOR CORPORATION, Appellants
V.
BENJAMIN THOMAS REAVIS AND KRISTI CAROL REAVIS, INDIVIDUALLY AND AS NEXT FRIENDS OF E.R. AND O.R., MINOR CHILDREN, Appellees

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-15296

DISSENTING OPINION

Opinion by Justice Schenck

In their appeal, Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Corporation (collectively, Toyota) raise legal and factual sufficiency challenges to the findings regarding the seatback and restraint system designs of a 2002 Lexus ES 300. They also present issues concerning whether Toyota Motor Corporation's compliance with federal safety regulations preempt any finding of fault against them under state law and of the trial court's decisions to permit certain inflammatory and irrelevant evidence to be presented to the jury. Because I disagree with the majority's judgment as to Toyota Motor Corporation, as well as the majority's

analysis of whether the Toyota entities preserved their arguments regarding preemption, whether the Reavises offered sufficient proof of a safer alternative design, and the trial court's decisions to admit objected-to evidence, I dissent.[1]

BACKGROUND AND SUMMARY

On September 25, 2016, the Reavises were traveling in their 2002 Lexus ES 300 with the parents riding in front and their two children riding in back. They were forced to stop in traffic stalled along US-75 in Dallas and were then violently rear-ended by a Honda Pilot SUV operated by Michael Mummaw who had failed to observe the road conditions ahead. Mummaw's speed was estimated to be in excess of 45 miles per hour. The force of the impact apparently caused the Lexus to violently strike the vehicle to its front and rebound, making contact with Mummaw's SUV again. While no one was killed, and the parents survived without major injury, both Reavis children suffered skull fractures and traumatic brain injuries among other severe and permanent injuries. The children's injuries now cause them to struggle to keep up with their peers academically and socially, areas where they had previously excelled.

The Reavises filed suit against Mummaw for his negligence in operating his vehicle and against Toyota, Lexus' parent company, alleging breach of warranty,

[1] I express no opinion regarding the majority's decision to grant the motion for rendition of a take-nothing judgment as to Toyota Motor Sales. As the majority notes, Toyota Motor Corporation is jointly and severally liable for the damages awarded against both Toyota entities. Thus, the issue appears to be of no material effect.

failure to warn, and product design defects and asserting other tort actions related to the design and quality of the Reavises' vehicle. The case was tried to a jury. The jury ultimately answered questions relating to (1) the role of federal law under a Texas statute that creates a presumption of non-liability where a product is manufactured in compliance with federally mandated safety standards, (2) liability for defective design and failure to warn, and (3) compensatory and exemplary damages. The jury found Toyota liable notwithstanding its compliance with governing federal safety standards. In keeping with closing arguments of the Reavises' counsel, the jury assigned only 5% of responsibility to Mummaw and 95% to Toyota, with 90% assigned to Toyota Motor Corporation and the remaining 5% to Toyota Motor Sales. The jury awarded a total of $242 million in damages, including $144 million in exemplary damages.

Although the claims against Toyota related to the engineering and design of the Reavises' 2002 Lexus vehicle, the trial court, over objection, allowed the jury to hear irrelevant and prejudicial evidence of Toyota's lobbying activities unrelated to the design issues before them, a negotiated fine Toyota had paid to the federal government relating to unintended acceleration of certain vehicles within the Toyota brand, and several clips from a 1992 *60 Minutes* television program that had been held to be inadmissible by several courts across the country addressing seatback rigidity claims. Meanwhile, the design standard that was either the sole or principal basis for the alleged design defect was the subject of a federal standard setting a

minimum yield strength for front seats (i.e., the resistance of the back of the seat to bending under the weight of the occupant as a result of a rear impact). According to the Reavises' own expert, Toyota's design exceeded that standard by nearly 700%. With at least that federal standard clearly in play, the Reavises were left to prove that the federal standard was either a product of Toyota's beguiling the regulators or was "inadequate" in the first instance and that Toyota's decision to exceed it by only 700%, for purposes of liability, if not exemplary damages, was unreasonable and resulted in an unreasonably dangerous and defective design.

However, as the Reavises' expert also conceded, and federal regulators have emphasized: "improving seatback performance is more complex than simply increasing the strength of the seatback. A proper balance in the seatback strength and compatible interaction with head restraints and seatbelts must be obtained to optimize injury mitigation." Pls. Ex. 657. In particular, increasing the seatback rigidity presents a corresponding increased risk of whiplash or spinal injury to front seat passengers—at least one of whom is always present in any operating vehicle—as the seatback no longer yields as readily to reduce the operative forces on the front seat occupants in a rear-impact collision.

The Reavises' expert acknowledged this heightened risk to front seat passengers and rejected studies suggesting such injuries may occur at or below the level of rigidity he testified to be necessary to avoid the injuries in this case. Instead, he pointed to his work designing a seat for the United States Army to argue that

increasing the seatback rigidity would not unreasonably increase the risk of whiplash injury to the front seat occupant. The Reavises' expert separately conceded that his proposed change in seatback rigidity would also create a separate risk of severe injuries to the spine of front seat occupants in the event of "ramping," as forces imparted by the collision would now force the occupant upward and over the higher, less yielding seat. To address this concern and to separately address a less-rigid seatback than the one he advocated, he proposed three changes to seatbelts: (1) reprograming the seat-belt tensioners to fire in a rear impact; (2) changing the seatbelt latch to a manual "locking/cinching" design for the lap portion of the belt (apparently similar to those used in commercial airplanes); and (3) mounting the outer portion of the lap belt to the front seat, rather than the vehicle's frame. On appeal, the Reavises now emphasize the proposed seatbelt changes either as augmenting their contention that the existing seatback design was defective and, concomitantly, that the federal seatback regulation was inadequate or that the jury may have found a defect in the seatbelt design alone and, presumably, the federal regulation thereof to also be inadequate.

Toyota leads its appeal with preemption, arguing the design of the 2002 Lexus ES 300 exceeded the federal minimum safety standards and the statute that permits a jury to find those standards "inadequate" is preempted by those same federal safety

standards and other federal law governing motor vehicle safety designs.[2] The Reavises argue Toyota waived its preemption argument. Toyota in turn argues the Reavises waived the argument that seatbelt design could be considered as part of the design defect for failure to challenge the comprehensive federal standards governing seatbelts. For reasons detailed below, I would reject both parties' waiver arguments—as both the role of federal law and the evidence relative to challenging compliance with it were before the jury—and instead conclude the Reavises failed to prove their claims relating to alleged design defects, regardless of whether the claim is preempted or the evidence was sufficient to overcome the statutory presumption of non-liability.[3]

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[2] In the chapter of the civil practice and remedies code governing product liability exists a section titled, "Compliance with Government Standards," which I will examine in further detail *infra*. For now, the text of that statute appears below to provide context.

> (a) In a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product's formula, labeling, or design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.
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> (b) The claimant may rebut the presumption in Subsection (a) by establishing that:
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> (1) **the mandatory federal safety standards or regulations applicable to the product were inadequate** to protect the public from unreasonable risks of injury or damage; or
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> (2) the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

TEX. CIV. PRAC. & REM. CODE § 82.008(a), (b) (emphasis added).

[3] I also reject the majority's reading of the civil practice and remedies code to preclude consideration of federal law or the presumption of non-liability it creates without proof of misleading the regulators with respect to the safety standard at issue.

The Reavises' theory of liability—that choosing to design a car with seatback strength far in excess of federal minimum standards and utilizing seatbelt design options permitted after decades of comprehensive federal regulation could support a conclusion that federal regulations are inadequate or that the overall design is defective as a matter of law—is unsustainable. The record reflects no evidence of any automobile that has been marketed with both the seatback strength necessary to avoid the injuries here and the proposed seatbelt changes that would protect front seat occupants. While I accept it as theoretically possible that every car ever marketed and sold to this point could be "defective" and that their manufacturers could all be subject to exemplary damages on this basis, or, that *virtually* all such cars are defective for failure to employ "locking/cinching" lap belts without regard to seatback rigidity,[4] the proof should be up to the task. Likewise, the suggestion that federal regulators who have comprehensively studied passive and active restraint systems for front seat passengers in all cars and crash scenarios, including painstaking inquiry into passengers' willingness to use manual seatbelts, cannot be dismissed without some evidence that fewer injuries or deaths would result from an alternative design.

[4] Toyota's expert testified that he was aware of at least two automobiles marketed in 2002 with cinching sliding latch plates in their seatbelts: (1) the Chrysler PT Cruiser and (2) the Chrysler Town and Country. "I didn't look at every vehicle on the market. . . . I suspect if Chrysler were doing it in those vehicles, they were doing it in the others as well." He offered no testimony as to how often drivers of such cars utilized the seatbelts or how they performed in the majority of crash scenarios.

The Texas Supreme Court has repeatedly held that proof of a design that would reduce or eliminate risk of a single accident type is insufficient to sustain a design defect claim. Were it otherwise, manufacturers would be unable to settle on any design, much less one that would promote the underlying purposes of the basis of product liability—promoting the safest overall design possible to all consumers, users, and other persons on the road.[5] Cars cannot be designed with the foreknowledge of which type of severe accident they might encounter.

It appears undisputed that the vast majority of injury-causing accidents involve frontal impacts and that the use of a seatbelt is essential to mitigating that harm. Pls. Ex. 657 (estimating rear impact scenarios account for 2–3% of severe injuries or death). The Reavises did not attempt to show, much less actually prove, that their alternative designs would be safer either as a general matter or with respect to frontal impacts.[6] There is no evidence to suggest the rate at which front seat

[5] The manufacturers cannot have the benefit of knowing each crash a vehicle will be subject to. All juries, judges, and factfinders have to understand that vehicles must be practical and safe in view of all scenarios. Here, a negligent driver slammed into the rear of the subject vehicle. In many instances, no children would be riding in the backseat. If a seatback is too rigid, the risk of whiplash and other neck and spinal injuries to the front seat occupants increases. The design choice must consider how often and in what ways a car is used.

[6] The Reavises' burden to prove their design-defect claim is set forth by the civil practice and remedies code as follows:

> (a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that:
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> (1) there was a safer alternative design; and
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> (2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.

occupants would actually use a manual locking/cinching lap belt or the net effect such a change would make in the vast majority of injury-producing crashes.

And while I have grave concerns regarding the many and serious evidentiary errors that permitted obviously irrelevant and distressing character evidence that may have taken control of the proceedings below, I would conclude that the Reavises' claims fail as a matter of Texas law, regardless of any preemption or evidentiary rulings. I would likewise avoid addressing any of the arguments regarding excessive or punitive damages, which Toyota argues resulted in due-process violations or jury charge errors.

I. THE QUESTION OF WHOSE LAW GOVERNS WAS "PLEADED" BY THE LEGISLATURE AND TOYOTA AND, IF ANYTHING, OVER-LITIGATED BELOW

The parties' principal liability arguments are centered on the application of Texas Civil Practice & Remedies Code section 82.008 concerning compliance with governmental standards. *See* TEX. CIV. PRAC. & REM. CODE § 82.008. Toyota lodged both legal and evidentiary sufficiency challenges relative to whether the Reavises rebutted the presumption of non-liability once Toyota established it

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> (b) In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:
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> > (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
> >
> > (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

TEX. CIV. PRAC. & REM. CODE § 82.005(a), (b).

complied with governmental standards. Both challenges require construction of the statute and consideration of the role and state of the pleadings at trial and the respective roles of the jury and the court. I begin with the statute.

A. Section 82.008 of the Texas Civil Practice & Remedies Code

Section 82.008 is an unusual and broadly written statute. *See* CIV. PRAC. & REM. § 82.008. In paragraph (a) it provides a "defense" to the manufacturer of a product in any products liability action that challenges some aspect of the "formulation, labeling *or design*" of a product where the formula, label or design complied with mandatory federal safety regulations. *Id.* § 82.008(a). The defense consists of a "presumption," but not of a particular fact, or at least not directly. Instead, the presumption is of a legal conclusion, namely that the product manufacturer is "not liable." The statute goes on in paragraph (b) to create two exceptions to this presumption of "non-liability." *Id.* § 82.008(b). The first poses the question of whether the federal safety standards were "inadequate" to protect the public from unreasonable risks of injury. *Id.* The second denies the presumption of non-liability where the manufacturer, "before or after marketing the product," withheld information or material relevant to the adoption of the federal standard. *Id.* As I will detail below, the only possible constitutional construction of the statute is one that incorporates (or at least adheres to) the supremacy clause (preemption) question and then poses, as either a question of fact or law, the "adequacy" of the federal pronouncement.

B. The Statutory Text and Its Application

The parties unsurprisingly present very different understandings of section 82.008. While embracing its recognition of federal standards and the presumption such standards create, Toyota also urges that the exceptions in paragraph (b) are preempted, pointing to a decision of the Fifth Circuit so holding as to sub-paragraph (b)(2) (fraud on the agency), and to other federal authorities relative to seatback designs as to sub-paragraph (b)(1). As I understand it, Toyota would treat the presumption as a factual matter to be submitted to the jury but with juries in design defect cases having no authority to evaluate the adequacy of the standard or any misfeasance in its adoption. The Reavises, meanwhile, note that preemption of a statute is an affirmative defense that must be pleaded or waived for trial. *E.g.*, *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–46 (Tex. 1991); *Great N. Am. Stationers, Inc. v. Ball*, 770 S.W.2d 631, 632–33 (Tex. App.—Dallas 1989, writ dism'd). Toyota's construction leaves the statute with essentially no room to operate where there is a federal standard: state tort law is subsumed, regardless of whether the federal standard is intended to be exclusive. The Reavises' construction requires reading the statute as authorizing the state, its courts and jurors, to grade and potentially reject determinations of regulatory bodies under federal law declared to

be "supreme" by the U.S. Constitution with respect to adequacy in subparagraph (b)(1) and to empower collateral attacks on federal law as to subparagraph (b)(2).[7]

I read section 82.008(b)(1) to acknowledge the federal law, as it explicitly does, to treat federal law as exclusive where it obviously must, *supra*, and to create a rebuttable presumption of adequacy, as it also says, that would not otherwise exist. This reading still provides defendants like Toyota with a defense that would not otherwise exist, albeit far less absolute than the one it urges. Thus, a defendant prevailing at trial may defend a favorable jury verdict as against a sufficiency challenge by pointing to the presumption wherever the jury was made aware of the federal standard. *See, e.g.*, *Trenado v. Cooper Tire & Rubber Co.*, 465 Fed. App'x 375 (5th Cir. 2012). Likewise, where the verdict is adverse to the defendant, as it is here, the defendant could present a sufficiency attack, not just on the merits of the plaintiff's claim under state tort law, but to the sufficiency of the proof as to the "adequacy" of the federal regulations.

Because I find the question of the relative roles of state and federal law to be directly addressed and, by necessity, subsumed in the statute itself as a matter of law, at least as to sub-paragraph (b)(1), the question is both legal and proper for analysis on appeal where, as here, notwithstanding Toyota's failure to expressly plead the

[7] As to this latter point, I would agree with the Fifth Circuit's opinion in *Lofton v. McNeil Consumer & Specialty Pharmaceuticals*, 672 F3d 372, 375–81 (5th Cir. 2012), if I were forced to reach the issue. As detailed *supra*, I disagree with the majority that any relevant evidence was offered.

word "preemption," the statute is raised in the trial court and litigated to the point of submission of the issue to the jury in the court's charge. *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020) ("We have often held that a party sufficiently preserves an issue for review by arguing the issue's substance, even if the party does not call the issue by name."); *see also* TEX. R. APP. P. 38.1(f) (issue statement "will be treated as covering every subsidiary question that is fairly included"). I will start with what I believe the statute necessarily embraces as the first step in any application of it.

C. Preemption, Legislative Language and Purpose, and Constitutional Avoidance

Article VI, section 2 of the U.S. Constitution declares federal laws to be "the supreme law of the land" with "judges in every state . . . bound thereby" notwithstanding "anything" in the constitution or laws of the respective states. U.S. CONST. art. VI, § 2. Acting pursuant to its authority to regulate foreign and interstate commerce, Congress enacted the National Traffic and Motor Vehicle Safety Act. That Act directs the Secretary of Transportation, through the National Highway Traffic Safety Administration, to "prescribe motor vehicle safety standards" that are "practicable" and "meet the need for motor vehicle safety."

In the trial court, Toyota identified six such standards implicated by the claim in this lawsuit. On appeal, Toyota contends that the Reavises challenged only one of these standards—FMVSS 207 governing seat back rigidity—and argues that this attack is preempted because their design indisputably complied with and exceeded

that federal standard by approximately 700%. Indeed, Toyota points us to several decisions of federal district courts applying this same standard that find it preclusive of any state-law based claim of defect arising out a design that complies with that federal safety standard.

No party contests that section 82.008(b) was both raised and litigated below. Indeed, the question of whether the federal standard was "adequate" for state law purposes was submitted to the jury as a factual question that observed that the federal regulation created a presumption of non-liability. The unavoidable legal question is whether our state statute, which expressly acknowledges the presence and role of federal regulations in this area, can be read to present the question of its "adequacy" as simply one of fact for a jury to decide. Because such a reading is inconsistent with the statutory text and the evident legislative purpose and would subject the statute to habitual constitutional infirmity, I read it otherwise and, invariably, to raise the preemption question as a matter of law in the first instance.

Given that section 82.008 says nothing about submitting any part of itself to the jury for decision, creates no factual (as opposed to legal) presumption, and invites no fact to be inferred from its presumption, one might fairly ask whether it invites *anything other than* a legal inquiry by the court. The few cases that have applied it have not addressed that question, at least not directly. The Texas Supreme Court in *Kia Motors Corporation v. Ruiz*, 432 S.W.3d 865, 872 (Tex. 2014), applied the statute and construed it as a matter of law. Several cases have addressed judgments

following jury trials in which the issue was presented to the jury in the charge, though none discusses whether or to what extent the question is legal or factual. And, none certainly, has confronted our problem of preemption as present or absent from a case that applied the statute one way or another.

In fact, the text is silent as to who decides the question of whether the federal law is adequate or whether the federal law itself answers that question in some or all instances. As noted, it raises no presumption of fact—rather than a legal conclusion (of non-liability)—and targets no further factual matter that might be inferred from it. It also has as its evident purpose the express recognition of the role of federal regulators and, by definition, could only provide further protection than what that law already provides. At the same time, however, it poses two questions in the form of exceptions that could be read alone or in conjunction with the pre-existing, generally applicable common-law, that at least could be fact questions assigned to a jury. Whether a federal design standard is "adequate" to protect the public at least roughly parallels the underlying tort standard, though it may also obviously duplicate the federal inquiry into the same question. Likewise, the question of whether the defendant defrauded the regulators lends itself to factual resolution.

1. Juries Are Not Empowered to Make Legal Decisions and Neither Judges Nor Juries Can Ignore or Invalidate Federal Law to Which They Are Directed

The question of whether section 82.008 presents *any* fact question, rather than or in addition to a legal one, is not the real problem at the moment. Judges submit

immaterial legal questions to juries all the time and just as quickly (and properly) ignore their answers. *See, e.g.*, *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 892 (Tex. 2020) ("Submitting this legal question to the jury was improper, and the trial court did not err in disregarding the jury's answer to it.").[8] The first question is whether, assuming the statute poses any factual question or questions for the jury, how could a court do so without violating the Constitution? Construing section 82.008 to pose only a factual question, and not to first incorporate the legal, constitutional preemption question, would result in the statute being routinely subject to a series of ad hoc constitutional failures.

For example, in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), the United States Supreme Court confronted the same federal statute implicated by our application of section 82.008 here and found state common-law claims to be foreclosed by the Supremacy Clause. The issue there was whether automobile manufacturers could be compelled to include airbags as a means of passive restraint or permitted, per the promulgated federal standard, to select among a variety of passive restraints, including airbags and automatic seatbelts, for example. *See id.* at 864–65. Writing for the majority, Justice Breyer concluded that while Congress had not categorically foreclosed state common-law inquiry in the form of alleged defective design for failure to include airbags, the regulators'

[8] We have the same power on appeal.

decision not to impose such a requirement was a deliberate one that considered and rejected a design mandate in furtherance of policy objectives assigned to the Department of Transportation under the statute. *See id.* at 869, 879–81.

Thus, according to the United States Supreme Court, Congress validly conferred the power to dictate the design standard at issue—mandatory airbags—and the Secretary of Transportation made the deliberate decision not to impose such a standard as part of what she saw as a superior, overall motor vehicle safety regime, and so held on May 22, 2000. Would anyone believe that a state legislature could enact a law or empower a state court or jury to re-examine that question on May 23? Obviously not. Reading our statute to reach to and acknowledge that same federal law and regulatory scheme, as it clearly does and as the parties litigated here, while leaving for the jury to decide as a matter of fact whether it agrees that the federal standard is "adequate" would amount to nullification—the discredited doctrine that preceded and may have contributed to the Civil War.

If we are now to countenance a contrary understanding of horizontal conflicts in law, the list of federal regulations subject to scrutiny for "adequacy" or "excessiveness" would be a long one, including not only automobile design

standards but toilet tank capacities,[9] lightbulb materials,[10] and countless other federal intrusions on the states' police power. As it stands, however, state judges and juries, no less than state legislators, are bound by expressions of federal law within the reach of *Wickard v. Filburn*, 317 U.S. 111 (1942). Thus, any state statute posing the question of "adequacy" must first reach and resolve the legal question of whether the federal law has already declared itself to be exclusive, and therefore invariably "adequate" for all purposes. I therefore read the statute to pose the question of adequacy first as a question of the federal law to which it is directed and reject a contrary reading that would purport to authorize juries to reverse, ignore, or reject federal law that is intended to be exclusive as absurd and unconstitutional. *See In re Ginsberg*, No. 18-0001, 2018 WL 2994940, at *6 (Tex. June 11, 2018) (special court of review appointed by Supreme Court of Texas).

2. The Pleadings Raised Both the Statute and the Preemption Issue

Generally, when we speak of preservation of issues and arguments as a case moves from one court to another we are concerned with the rights of the parties and the court to fair and reasonable notice of legal and factual issues in play. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000) (purpose

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[9] *See* Amy Hardberger, *Powering the Tap Dry: Regulatory Alternatives for the Energy-Water Nexus*, 84 U. COLO. L. REV. 529, 579 n.179 (2013) (noting low-flow toilets first mandated by Energy Policy Act of 1992).

[10] John Timmer, *DOE has decided many lightbulbs don't have to meet efficiency standards*, arsTECHNICA (Sept. 5, 2019, 2:55 PM), https://arstechnica.com/science/2019/09/doe-has-decided-many-lightbulbs-dont-have-to-meet-efficiency-standards/.

of notice–pleadings rule to give opposing party information sufficient to enable him to prepare defense). That right to fair notice is essential to avoid the parties being ambushed by each other with respect to their need to bring forward proof of facts that will later control the issues and to give the judge (or, later, justices) an opportunity to apply the law governing the issue. As to the latter point, courts, including this one, have long differed over whether the judge or the lawyers are responsible for developing and applying *all* the legal arguments that might pertain to an issue in dispute. *See Herczeg v. City of Dallas*, No. 05-19-01023-CV, 2021 WL 1169396, at *3 (Tex. App.—Dallas Mar. 29, 2021, no pet. h.) (mem. op.). I do not see this case as presenting any serious question as to whether the preemption issue was raised.

Toyota clearly "pleaded" the statute at issue and that pleading (and the statute itself, *see infra*) directly—and in my view unavoidably—framed the issue of whether federal or state law governed here, with the state law answer being "non-liability," or at least a "presumption" to that effect, where federal law controls but does not occupy the field. *See infra.* And regardless of the actual pleadings, the statutory question was actually litigated to the point of a jury submission, and properly so as rule 278 would separately authorize submission of questions that are directly defined by statute. *See* TEX. R. CIV. P. 278. As the federal law question was not only raised

in the pleadings but actually submitted to the jury as one of fact without objection,[11] I struggle to see how the issue was waived. Instead, I see the operative question here not as *whether* the issue was presented, but how the statute operates and what role it affords to courts and juries.

As detailed above, I believe the statute is properly (and necessarily) read to frame the issue in the first instance as a legal one for judicial, not lay juror, decision. Further, a judge is obliged to make that decision by express pronouncement or implication when he decides to submit a question or signs a judgment no less than a judge would make a factual finding, whether he knows he did so or not.

D. The Means Provided for Rebutting the Presumption Raised in Civil Practice & Remedies Code § 82.008(b) Are Plainly Targeted to Those Standards Alleged To Be "Inadequate" and "At Issue": Not a License for Collateral Attacks

While I ultimately prefer to avoid the need to probe the difference, if any, in the proof necessary to establish the alleged "inadequacy" of the federal regulation and liability on the underlying claim, I pause to address the majority's construction of section 82.008(b)'s exceptions to presumption of non-liability, which addresses not only the question of adequacy addressed above but includes a finding that Toyota misled the regulators as to "the standard at issue" under subparagraph (b)(2).

[11] The question of whether the federal law on point will permit its own rejection in any case is necessarily present in any case implicating section 82.008 and just as necessarily one of law for the court. In my view, the distinction between the legal question posed by the statute itself and the preemption question would be immaterial for preservation purposes. *Flakes*, 595 S.W.3d at 214.

Section 82.008 permits a plaintiff to rebut the presumption that a manufacturer is not liable for injury if the manufacturer establishes the design complied with mandatory federal safety standards. *See* CIV. PRAC. & REM. § 82.008(b). The majority concludes the Reavises rebutted the presumption in both ways permitted by section 82.008(b): (1) establishing the mandatory safety standards were inadequate and (2) Toyota withheld or misrepresented information or material relevant to the federal government's determination of the adequacy of the relevant safety standards. *See id.*

The majority concludes, without citation to any supporting authority or the relevant text, that section 82.008(b) is inapplicable to a safety standard implicated by an alleged design defect if any other standard is also implicated and can be overcome either by proof of inadequacy or fraud on the regulators. With respect to subparagraph (1), that construction ignores that the question it poses is directed to the plural, not singular, "*mandatory federal safety standards or regulations*." *See id.* § 82.008(b)(1) (emphasis added). That construction would also massively exacerbate the constitutional concerns I outlined above, purportedly permitting litigants to bypass federal law intended and declared to occupy the field by initiating an attack on any other standard that is not. With respect to subparagraph (2), the text again is quite plain: the presumption of non-liability is overcome where "the manufacturer withheld or misrepresented information or material ***relevant to*** the

federal government's or agency's determination of adequacy of ***the safety standards or regulations at issue in the action***." *See id.* § 82.008(b)(2).

Toyota points to its compliance with three different federal standards relating to seatbelts: FMVSS 208, 209, and 210. The Reavises argue, and the majority agrees, that they established the inadequacy of these standards by showing the seatbelts failed to keep the front-seat passengers in their seats when the seats yielded backwards in a rear-end collision where speeds exceeded forty-five miles per hour. This *ipse dixit* conclusion either simply assumes the existing seatback strength is itself "inadequate," or, ignores the question altogether and operates on the assumption that any seat belt standard is inadequate unless it prevents all accident-related injuries, regardless of the speed, whether the impact is from the front, rear or side, or any of the myriad other factors federal regulators considered as they set the comprehensive restraint standards the Supreme Court found to be exclusive in *Geier v. American Honda Motor Co.* *See* 529 U.S. at 877–78. If anything, those restraint standards were developed with even greater design trade-offs in mind than those involving seatback rigidity and with particular attention to whether the restraints would actually be likely to be used. *See id.* at 877 (listing "significant considerations" reflected in the 1984 version of FMVSS 208, including that "despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled").

The Reavises also argue, and the majority agrees, that they rebutted the presumption of adequacy with evidence that Toyota withheld or misrepresented information about the sufficiency of the federal safety standard governing seatback strength, FMVSS 207. However, the evidence of withholding or misrepresenting information consisted of general statements regarding Toyota's "long and robust safety culture" and safety issues related to *unintended acceleration*. The first statement was admittedly in response to a query from two members of the Senate, requesting information regarding the sufficiency of FMVSS 207, but that statement was not used to show a misrepresentation related to that specific, or any other implicated, safety standard. Instead, it was compared with the second set of evidence of Toyota's deferred prosecution agreement, which addressed neither seatback strength nor seatbelt function, but instead a specific prior bad act for which Toyota was already prosecuted and paid a substantial fine. Thus, this evidence implicated both Toyota's objections at trial insofar as it related to liability for an unrelated design defect, *e.g.*, TEX. R. EVID. 404(b), 405(b) 608(b), 403, and its due-process objections and concerns of potential successive punishment to the extent the evidence was said to relate to exemplary damages. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 423 (2003) (noting "the possibility of multiple punitive damages awards for the same conduct"). As the Supreme Court has held, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* A defendant should

be tried and held liable "for the conduct that harmed the plaintiff," not for allegedly being an "unsavory business." *Id.*

The Reavises similarly rely on evidence of Toyota's lobbying efforts that postdate the design of their car, focusing on the total amount Toyota spent. The trial court acknowledged that this evidence was completely irrelevant to the defect question at hand, but permitted it as supposedly probative of the "adequacy" of the federal regulations. To have any potential relevance for that purpose, one would have to assume that (1) Toyota lobbyists ever spoke to any federal regulator about seat back rigidity or seatbelt regulations, as there is no such indication of record; and (2), if they had, that the regulators ranging from the Ford to Biden administrations were compromised as a result. Given that we, as courts, have long declared that solicitation and acceptance of financial contributions from lawyers or parties with matters currently pending before us do not "create[] a situation where the judge's impartiality could reasonably be questioned," *Aguilar v. Anderson*, 855 S.W.2d 799, 801–02 (Tex. App.—El Paso 1993, writ denied), I find it difficult to understand how we could plausibly hold that a party's act of deploying lobbyists generally, or even with respect to a particular, relevant matter, would support the inference that the resulting decision was corrupted. Accordingly, I see no basis for finding any of the federal regulations concerning seatbelts or seatback rigidity to have been improperly influenced in any way sufficient to implicate subparagraph (b)(2) of section 82.008

and will return to the design defect question as presented in the statute in subparagraph (b)(1) and on the merits.

E. Whether the Federal Standard Governing Seatback Rigidity Preempts State Common Law Claims Is a Close and Difficult Question That Can Be Avoided in View of the Record

Focusing for the moment on the exception contained in sub-paragraph (b)(1), I read the statute to require the court to conclude, as a matter of federal law, that the federal standard is open to evaluation for its "adequacy" as a matter of state law. While the federal statute directs the Secretary of Transportation to develop standards that are adequate to "meet the need for motor vehicle safety," the authorities governing that legal determination are not as clear to me as Toyota's authorities would suggest.

The Motor Vehicle Safety Act provides as follows:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.
>
> . . . .
>
> Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

49 U.S.C. § 30103(b)(1), (e).

In *Geier*, the United States Supreme Court addressed similar language from a prior version of this legislation and held the express preemption and savings clauses read together favored the application of ordinary conflict preemption principles. *See Geier*, 529 U.S. at 870–71. The court noted the policy favored preemption of state tort suits, "for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when juries in different States reach different decisions on similar facts." *See id.* at 871. But the court also acknowledged the savings clause must have been intended to preserve some actions. *See id.* at 870.

Toyota relies on *Soliman v. Daimler AG*, CV 10-408 SJF AKT, 2011 WL 6945707, at *10 (E.D.N.Y. Aug. 8, 2011), report and recommendation adopted, 10-CV-408 SJF AKT, 2011 WL 4594313 (E.D.N.Y. Sept. 30, 2011), to argue both statutory grounds in section 82.008(b) must be preempted "because they permit a state court jury to make decisions that Congress delegated to NHTSA." In *Soliman*, the court pointed out that the federal regulations at issue there did not mandate how a seatbelt was to be anchored but rather provided manufacturers options in recognition of the fact that, "some occupants who find their safety belts to be uncomfortable react to their discomfort either by wearing their safety belts incorrectly or by not wearing them at all" and in order to "encourage the correct use of safety belts and . . . increase the overall safety belt usage rate." *See id.* The court went on to hold that, "Plaintiff's claim, which seeks to foreclose the option of

anchoring a Type 2 seatbelt to the seat, stands as an obstacle to the accomplishment and execution of the full purpose of the federal regulations." *Id.*

In contrast, the Supreme Court in *Williamson v. Mazda Motor of America Inc.*, 562 U.S. 323 (2011), concluded the underlying lawsuit did not stand as an obstacle to federal law because the court did not believe that the restriction on the choice of two kinds of seatbelts for rear inner seats was a significant regulatory objective. *Id.* at 332.

Here, it is difficult to say whether a decision to evaluate the need to develop a stronger seatback design—and to decline to do so over several decades—amounts to a conscious policy choice that would preclude forcing manufacturers to adopt the design the Reavises urge and the jury below found to be compelled by state tort law.

It is further difficult to assign a rationale to the trade-offs and lack of action in failing to strengthen a seatback more so than the federal standard given that seatbacks must also yield to protect front seat occupants. Even then, assuming the legal question of intended federal exclusivity is best answered in the negative, as I will for purposes of this dissenting opinion, the question would then turn to legal and factual sufficiency of the findings, combined in a single question below (1) that the regulation is "inadequate" under the presumption statute and (2) that the design decision by Toyota was unreasonably dangerous as a matter of generally applicable state tort law. Answering either question first depends on how the claim is presented. The Reavises urge that the product defect question, and hence the initial question of

adequacy of federal standards, reaches beyond the seatback rigidity to include seatbelt design, which itself is subject to yet another federal standard.

Toyota urges that the Reavises challenged only seatback strength and that its seatback being approximately 700% in excess of the federal standard and used in many, if not most, other vehicles leaves no room for reasonable jurors to debate. I would be inclined to agree with Toyota if the issue were so narrow. The Reavises, evidently appreciating the challenge presented by the over-compliance with the seatback rigidity standards and the broad sweep of their argument of defect on that basis—to encompass essentially all of the automobiles currently on the road—urge that the question of defect reaches to and includes not only seatback rigidity, but to seatbelt design. Toyota argues that while the jury may have heard evidence of seatbelt design and about seatbelt design standards, the Reavises did not plead that the seatbelts in their vehicle were defective or that the federal design standard was inadequate. Once again, I reject the invitation to decide this case on pleading defects where the jury heard and had evidence available to it.

II. THE JURY HEARD EVIDENCE OF BOTH SEATBACK RIGIDITY AND SEATBELT DESIGN AND COULD CONSIDER IT AS PART OF ITS INVESTIGATION OF THE ADEQUACY OF THE EXISTING FEDERAL REGULATIONS, WHETHER PLAINTIFFS HAD OVERCOME ITS PRESUMPTION, AND WHETHER PLAINTIFFS CARRIED THEIR BURDEN OF SHOWING A COGNIZABLE DEFECT

A. Assuming the Jury Properly Heard and Found that All of the Federal Regulations at Issue Were Inadequate, I Would Find That Conclusion at Odds with the Federal Regulatory Sweep.

The Reavises below argued it was the seatback standards that were inadequate to prevent their injuries, but now on appeal, they argue it is the combination of the seatback plus seatbelt standards and a holistic evaluation of at least five published standards. The consequence of this argument is to take on a huge swath of federal law and policy choices of multiple administrations to not only overcome the rebuttable presumption by showing the federal safety standards were inadequate, *see* CIV. PRAC. & REM. § 82.008(b), but also to show the alleged defect was unreasonably dangerous, *see id.* § 82.005. How great an evidentiary gap lies between those two goals is an interesting question but ultimately not one we need answer here.

Focusing the argument on its narrowest, and least challenging attack for preemption and ultimate proof purposes, the Reavises direct us to their expert who testified it was the seatback strength and seatbelt system that allowed ramping that caused the injuries to the Reavis children. In addition to increasing the seatback strength, the expert proposed three changes to the restraint system: (1) self-cinching plates on the seatbelts; (2) pretensioners firing on rear impact; and (3) anchoring the lap belt to the seat rather than floor of the vehicle. But, the seatback strength as it played out at trial showed the seats in the 2002 Lexus ES 300 were not only stronger than the controlling federal standard—by some 700 percent—but also stronger than the seats designed by the majority of the rest of the industry, including cars and light trucks manufactured by Ford, General Motors, Mercedes, BMW and others. Switching over to include the combination of seatbelt design changes saves the

Reavises from the federal safety standard governing seatback strength, but adds obviously, the federal safety standards governing seatbelts, which Toyota notes it also meets. Putting aside the question of whether that standard had to be highlighted and proved to be inadequate as well as a standalone question, any answer in favor of the Reavises would have to establish that the federal regulation has comprehensively failed to regulate what amounts to the entire industry.[12]

The idea that at least seven Presidential administrations have simply failed to address rear impact safety as a whole, including both seatback rigidity and seatbelt design, with the result that the entire industry is marketing defective products, is at odds with, at a minimum, the statements accompanying the decision to leave seatback standards in place, which recognizes that rear impacts involve not just seatback strength, but seatbelt designs and the prospect of other, far more common and more dangerous crash modalities. The regulation of seatbelts and passive restraints has, if anything, been far more comprehensive, and led to the United States Supreme Court's decision in *Geier*, holding them to be exclusive of state tort claims involving resort to passive restraints. Ultimately, those administrations may have concluded changes would effect an ultimately unhelpful compromise on safety and

[12] Seatbelt usage is a huge concern and protective measure. Seatbelt usage has been shown to be an enormous contributor to reducing death and mitigating serious injuries in crashes. Design mandates that have reduced front seat passengers' proclivity to use seatbelts have been quickly abandoned for that reason. The experts here made no effort to explain why the alternate design—including a manually cinching belt—would result in the same or greater utilization than the allegedly defective design.

thus they may have made the conscious choice not to change them.[13] Whether that conclusion is said to be one of a conscious federal preference for exclusivity (hence preemption) or merely of adequacy as a matter of our record is an interesting question. If pressed, I would hold the Department of Transportation did not intend to leave such a broad swath of review of its work product, including and especially relative to seat belts, to potentially differing jury assessments in county and district courts across Texas and the rest of the country.[14] I will pretermit an ultimate answer as to whether the Reavises overcame the presumption of adequacy of the federal standards here because in reviewing the sufficiency of evidence, it becomes clear they did not establish design defects.

B. Regardless of the Presumption Question, I Find the Necessary Evidence of Defect and of a Safer Alternate Design Lacking

While I agree with the Reavises that the question of design defect here could reach to and include the seatback strength and seatbelt design—and that doing so is conceptually necessary to support the claim—expanding the claim, as noted, adds significantly and unhelpfully to the regulatory attack, including an even stronger

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[13] But do those decisions not to change support a conscious desire to preempt the field? I do not see that as meeting the standard set forth by *Geier*. Thus, whether the federal safety standards implicated here preempt the instant product design defect claim is a difficult question to which the answer is unclear, although in all events, I view the question to be a legal one not for a jury but for a judge to determine.

[14] I previously avoided any conclusion with respect to whether the federal seatback standard was intended to be exclusive by federal regulators. The federal regulation of seatbelts, passive restraint systems, and how the two interact in terms of utilization and injury mitigation is, if anything, far more comprehensive. *Geier*, 529 U.S. at 869. Given my conclusion on the state law question, I likewise find it unnecessary to address more specifically the question of whether federal law would preempt a state law claim which, if sustained, would compel manufacturers to replace existing seat belts with a latching/cinching alternative.

potential conflict preemption and a broader common law challenge. Regardless, the evidence the Reavises actually presented to the jury, while adequate to show how Toyota might have designed the car to avoid or reduce the risk of the injuries at issue here, did not attempt to show how their safer alternative design would result in a safer product in other or even most serious accidents of the type a manufacturer (or regulator) would have to anticipate without the benefit of foreknowledge of the type of accident the car might encounter. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999) (in addition to proving safer alternative design, successful design-defect claim requires "taking into consideration the utility of the product and the risk involved in its use"). The Reavises' claim could not succeed by simply focusing on rear-impact accidents—indeed, according to the NHTSA statement issued upon its decision to leave seatback rigidity standards in place, rear impacts make up only 8% of accidents serious enough to require a vehicle "to be towed from the crash scene" and "rear impacts cause less than 2% of moderate-to-severe injuries" and about 3% of all fatalities. Pls. Ex. 657. The jury also heard evidence that this particular collision was more severe than 95% of all rear-impact collisions.

While there was some evidence suggesting increasing seatback strength did not increase the risk of neck injury to front-seat occupants in rear-end collisions, that does not address what may happen in the far more common and more often lethal, frontal collision. *See Genie Indus., Inc. v. Matak*, 462 S.W.3d 1, 7 (Tex. 2015) (quoting *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 337 (Tex. 1998))

("Importantly, however, the alternative design must not be one that would '**under other circumstances**, impose an equal or greater risk of harm.'") (emphasis added); *see also Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 313 (Tex. 2009) (concluding no defect as matter of law after weighing alternative design's decreased utility against "extremely low" risk of another being injured as plaintiff was).

Turning to the evidence of alternative seatbelt designs, the Reavises also had to show that those changes would not substantially reduce utility to the intended users of the product—namely, all automobile occupants, including front-seat occupants. *See Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 605 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). One of the three changes the Reavises' expert advocated was a switch from current latch plates to cinching latch plates on the seatbelts. While he testified briefly as to the additional economic cost, he did not attempt to explain how this would, among other things, impact the rate of use of seatbelts—something regulators struggled with for decades in setting the existing active and passive standards.[15] *See, e.g.*, *Geier*, 529 U.S. at 877. "It is not sufficient that the alternative design would have reduced or prevented the harm the plaintiff suffered if the alternative would introduce into the product other dangers of equal or greater magnitude." *See Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 125

[15] Instead, Toyota presented evidence the cinching latch plate would require manual adjustment, "can get tighter and tighter as you're driving down the road," and "can become uncomfortable." And, of course, "If seatbelts aren't comfortable and convenient, people won't wear them." While one might readily fault those who fail to use a seatbelt because of its increased complexity, manufacturers and regulators are obliged to account for misuse and negligence, as this and other cases involving third-party negligence attest.

(Tex. App.—Eastland 2001, pet. denied) (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 16 cmt. b)). Indeed, Toyota presented evidence that the recommended change of a pretensioner firing in a rear-end collision was rejected because the pretensioner can only fire once and in the event of a multi-impact collision, such as the one that occurred here, and the pretensioner provides more protection in a frontal accident rather than a rear-end accident. Further, not only did the Reavises' expert fail to address the utility of his seatbelt design or its relative safety in other crash modalities, he failed to test his safer alternative design in high-speed conditions similar to those in the instant case, instead using quasi-static testing, and he failed to use a commercially available cinching latchplate but instead used his own device. Given the lack of evidence I detailed above, I cannot conclude the Reavises established a safer alternative design as a matter of law as required to prove their design defect claim. *See Matak*, 462 S.W.3d at 7.

III. THE REAVISES FAILED TO PROVE THEIR WARNING DEFECT CLAIM

In addition to the design defect claims, the Reavises alleged that Toyota failed to warn of the risk associated with the product's intended use. I conclude that this claim fails as a matter of law because it simply repackages their design defect claim. *See, e.g.*, *Mack v. Deere & Co.*, Civil Action No. 3:12-CV-00296, 2013 WL 5945079, at *3 (S.D. Tex. Nov. 6, 2013) (citing *Lujan v. Tampo Mfg. Co.*, 825 S.W.2d 505, 510 (Tex. App.—El Paso 1992, no writ) (ruling for manufacturer because plaintiff's warning defect claim merely restated design defect claim)). Even

were such a claim permitted, the Reavises failed to present any evidence of what an "adequate warning" would have been. *See Shaw v. Trinity Indus. Inc.*, 329 S.W.3d 914, 919 (Tex. App.—Dallas 2010, no pet.).

The majority concludes the jury could infer from other warnings contained in the owner's manual what an "adequate warning" would be, a conclusion it supports with a citation to the general proposition that "direct and circumstantial evidence may be used to establish a material fact." I struggle to comprehend how this assertion would suggest anything beyond reducing the burden to come forward with some evidence of what warning might have been given. Accordingly, I would sustain Toyota's issue regarding the Reavises' failure to warn claim.[16]

IV. THE PERSISTENT RESORT TO IRRELEVANT CHARACTER EVIDENCE WOULD REQUIRE REMAND IN ANY EVENT

While we are generally obliged to consider legal sufficiency points to avoid remand where possible,[17] I will note that I have serious concerns over numerous evidentiary rulings, including the trial court's rulings on Toyota's relevance, unfair prejudice, and hearsay objections to the admission of segments of a 1992 *60 Minutes* episode discussing seatback failures. That episode featured vehicles manufactured during the 1970s and 1980s and contained no reference to the 2002 Lexus ES 300 or

[16] Moreover, the majority's conclusion that the marketing defect claim may have been found by the jury as an alternative to the design defect claim raises *Casteel* concerns that I will pretermit given my overall conclusion that the Reavises' claims against Toyota fail as a matter of law.

[17] *Windrum v. Kareh*, 581 S.W.3d 761, 781 (Tex. 2019); *see also* TEX. R. APP. P. 43.3.

its equivalent. Several courts have excluded expert testimony relying on the footage itself, one describing the segment as "a sensationalized and one-sided discussion of accidents replete with testimonial statements of plaintiffs in other lawsuits and arguments presented by their lawyer" and concluding, "[t]he program was not a scientific study and was not shown to be information upon which seating engineers would rely in designing seats." *See Gardner ex rel. Gardner v. Chrysler Corp.*, No.91-1496–PFK, 1995 WL 708682, at *3–4 (D. Kan. Nov. 1, 1995), *aff'd*, 89 F.3d 729 (10th Cir. 1996) (excluding tape from evidence because it (1) presented issues in biased journalistic manner rather than scientific one; (2) did not involve manufacturer's products; (3) presented arguments of counsel who represented other plaintiffs; (4) portrayed and presented plaintiffs in other lawsuits which arose from circumstances that were not shown to be similar to accident at issue; (5) presented statements of experts and consumer advocates who were not available for cross-examination; and (6) program postdated sale of vehicle at issue by five years); *see also Cece-York v. Saturn of Stamford, Inc.*, No. X08CV095012420S, 2010 WL 4227132, at *7 (Conn. Sup. Ct. Sept. 22, 2010) (concluding segment and like commentary discussing seatback design claims to support constructive knowledge argument are inadmissible hearsay); *Dresdner v. Meehan*, 2006 WL 910893, at *2–3 (N.J. Super. Ct. App. Div. April 11, 2006) (excluding the segment because it was highly prejudicial, proved none of elements of case, and jury would likely consider it for truth of matter in spite of limiting instruction that it was available for jury's

consideration only on issue of notice). I likewise believe the footage should have been excluded, and that failure to do so amounted to a clear abuse of discretion. Like the *Dresdner* court, I conclude the trial court's limiting instruction did not eliminate the harm caused by its admittance and would reverse the trial court's judgment on this independent basis as well.

I am also deeply concerned about the trial court's repeated admittance of other evidence offered as attacks on the general corporate culture of Toyota, including its use of lobbyists and its payment of a fine to federal authorities in connection with unintended acceleration issues. These evidentiary attacks seem more reflective of the English idiom "first you give a dog a bad name, and then you hang him." As already noted above, such evidence served little or no purpose relative to the merits of any issue, including misleading regulators as to the design defect "at issue," was repeated extensively, and appeared to encourage a verdict on wholly improper grounds. *State Farm Mut. Auto. Ins.*, 528 U.S. at 423; *In re Allstate*, 227 S.W.3d 667, 699 (Tex. 2007).

CONCLUSION

While I believe Toyota's preemption arguments were properly raised and presented below as a necessary component of the statutory standard both parties submitted to the jury, I believe this case is most simply resolved by avoiding that question in favor of the legal sufficiency challenge Toyota raises. I agree with the Reavises that the jury was entitled to consider evidence of seatbelt design, though

doing so would add greatly to their preemption conundrum that I prefer to avoid. While the Reavises presented some evidence that Toyota could have designed their 2002 Lexus ES 300 in a way that would have reduced the risk of the injuries in this accident, I do not believe they produced evidence sufficient to show the existing design was defective or that a safer alternative design was available.

Because I disagree with the majority's conclusion as to Toyota Motor Corporation and its analysis in reaching its conclusions, I dissent.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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