ORAL ARGUMENT – 03/03/04
01-0030
NISSAN MOTOR CO V. ARMSTRONG

JUNG: I will address the three issues: the evidence of causal defect; the other incidents evidence; and the evidence of punitive damage liability.

The TC admitted evidence of 775 other incidents of unintended acceleration or stuck throttle. There were two problems with this evidence. First the failure to show similarity of the incidents to the present case. And second, the fact that it was almost all hearsay. Everyone agrees about the test for admission of other incidents. That they must have involved reasonably similar but not necessarily identical circumstances. The problem is not with the definition, but with the application of that definition.

O'NEILL: Now you admitted ex. 144?

JUNG That's correct.

O'NEILL: And that contains hundreds of other incidents?

JUNG: It contains reports. Yes. That was long after our objections to the other incident evidence had been overruled.

O'NEILL: Well we don't have any record of that do we? 144 was pre-admitted wasn't it? It was your own exhibit.

JUNG: It was our exhibit but it was not pre-admitted. It was pre-marked.

O'NEILL: If it were pre-admitted would your answer be different?

JUNG: I think it would.

WAINWRIGHT: In the motion in limine hearings before the TC and the discussion of exhibits, does J. Davidson pre-admit exhibits for trial? Did he pre-admit them in this case?

JUNG: I do not believe so.

WAINWRIGHT: So they were all offered and debated and admitted, or declined to be admitted during trial?

JUNG: That's my understanding.

WAINWRIGHT: The limine brief that you submitted on the other incident evidence was that considered and ruled on?

JUNG: Yes it was, and the court overruled the limine on that point.

WAINWRIGHT: And when was that ruling?

JUNG: That was pre-trial.

WAINWRIGHT: Was defendant's ex. 144 admitted before or after the plaintiff's other incident exhibits?

JUNG: After.

O'NEILL: If that were not the case would your answer be different? My understanding is that it was admitted before plaintiff's exhibit that you complain about.

JUNG: I guess then the question would be was it admitted after the TC expressed its intention to allow other incidents evidence. We believe that the reasonable similarity standard has been stretched beyond all recognition in this case. We've prepared charts to illustrate the problems with the other incidents evidence in this case.

Turning to the first of those charts. About 30% of the other incidents, those shown in red, do not even involve cars with the challenged part. If reasonable similarity means anything in a products case, it must mean at a minimum that the other incident must involve a product with the same challenged part as the subject product.

Turning to chart 2. Beyond that it must mean that there is some evidence that the challenged part was actually involved in the other incident. The record here shows that driver error is at least the predominant cause of unintended acceleration. And that there are many other potential causes. Only 8 of the 755 incidents, about 1%, those shown in blue, were arguably shown to have involved a throttle cable boot or liner. The rest established at most the undisputed fact that unintended acceleration can happen. So only 8 of the 755 incidents were arguably shown to meet the minimum standards for relevance.

O'NEILL: If 8 were minimally relevant, then isn't it up to you to redact those pieces that are not?

JUNG: No. If the author is of the entirety we make an objection to the offer of the entirety. And then it is up to the proponent of the evidence to offer the limited portion that is relevant. So the burden of redaction is on the proponent of the evidence.

And besides which plaintiff's ex. 27 had no relevant incidents. It had nothing

to link the examples of unintended acceleration to any cause whatsoever. It was just unintended acceleration that allegedly happened 755 times.

WAINWRIGHT: When was the request made for limiting instruction, that is that the other incident evidence would only relate to notice?

JUNG: It was made on the same day as plaintiff's ex. 27 was offered. There is nothing in the record that shows what time of day it was made.

WAINWRIGHT: Was it made at the offer of the first other incident exhibits, or was plaintiff's ex. 27 not the first other incident evidence offered by plaintiffs?

JUNG: It was not made at the time of the first offer of other incidents evidence. The first other incidents evidence was not hearsay, so it was not subject to a limiting instruction to prove notice. That was the four live witnesses. Plaintiff's ex. 7 was not objected to on hearsay grounds, and so it came in for the truth. But when plaintiff's ex. 27 was objected on hearsay grounds, and that objection was overruled, it was that same day that the limiting instruction was tendered.

771 of the 775 incidents were based on hearsay and, thus, not admissible to prove the truth of their contents. But at most to prove that notice was given to Nissan.

O'NEILL: Do you agree that they would be proper to prove a notice was given?

JUNG: That depends on the 4th chart. If they meet certain standards. If they meet standards of minimal relevance. And if they pre-date the incident in question - excuse me. It would be sale of the vehicle. And that's my 4th chart.

The 4th chart shows in blue those incidents that were reported to Nissan before this vehicle was sold, and that involved a vehicle potentially with a challenged part. Now I need to emphasize that in none of those incidents, there was no other incidents evidence reported to Nissan before the sale of the vehicle about a problem with the throttle cable and boot. So in no case was there pre-manufacture notice of the particular defect claimed by the plaintiff in this case. Not one of the 775 incidents.

464 of the incidents were after the sale of the vehicle. That's shown in red in the chart. Another 197 were before the sale of the vehicle, but involved a car that doesn't even have this part. So that brings you down to 77 to 114 that had the part and were recorded before. Of those none were shown to involve a throttle cable and boot problem.

Now was all this harmful error? The CA agreed with Nissan that the admission of this evidence was prejudicial to Nissan. It relied heavily on the other incidents evidence. The plaintiff did first of all in his opening statement saying we're going to bring you a lot of incidents involving the ZX. In his examination and cross-examination of witnesses and in his

closing argument where he repeatedly referred to the over 700 incidents, these masses of other incidents evidence created a sort of hydraulic pressure to find a defect. And that's most vividly illustrated by how it influenced the CA.

O'NEILL: But some of these exhibits helped you didn't they? I mean some of these exhibits sort of indicated that there was pedal misapplication.

JUNG: I don't think any of the evidence that we're challenging indicated that.

O'NEILL: No. No. Not the ones you're challenging. But you wanted to introduce other incidents evidence of your own to show pedal misapplication.

JUNG: We introduced, and the plaintiffs introduced some studies that showed pedal misapplication as the primary cause. I don't believe that any specific incidents were introduced where it was shown that incident X occurred as a result of pedal misapplication.

O'NEILL: Tell me about ex. 145, Nissan's exhibit. Didn't that talk about other incidents in Canada?

JUNG: Was that the Transport Canada report? That was a study done by the Canadian gov't. It did not talk about specific incidents except perhaps incidentally. It was a study of the overall problem rather than the circumstances of a particular accident. It showed Transport Canada's conclusion which matched NITSA's conclusion that the predominant cause was pedal error. But that was more statistical in nature than antidotal in nature.

O'NEILL: Was there no antidotal evidence in that exhibit?

JUNG: There may have been incidentally some antidotal evidence. In the report the gov't says we investigated this specific incident and here's what we found. But that was no being offered to prove that because that particular incident involved pedal error, therefore, this incident involved pedal error. The way the evidence offered by the plaintiff was being offered to prove that that incident tended to show the cable throttle boot defect.

O'NEILL: Did you make a specific limited offer?

JUNG: No. And it came in without objection. The CA placed heavy reliance on the other incidents evidence for a multiple number of purposes. First, as important proof of causation. Just like the old tv commercial, 9 out of 10 doctors can't be wrong. The CA reasoned that 755 drivers can't all be guilty of pedal error without any basis for drawing that inference.

It relied on the evidence as support for the punitive damage finding even though as we've seen the majority of the evidence even post-dated the sale of the vehicle. And it relied on the evidence as rendering Mr. Mizen's testimony harmless. Absence of proof of similarity

went by the board. Absence of relevant timing went by the board. It is as though the other incidents evidence created its own unintended acceleration towards affirmance of a judgment against Nissan.

And the final point. It was not just a few other incidents that caused this. It was what the CA called the mountain of other incidents. What plaintiffs counsel closed in closing argument, the 700 to 750 incidents.

Plaintiff's ex. 27 was clearly objected to on both hearsay and relevance grounds, and those objections were clearly overruled in the record. So regardless of anything else it was that addition of 750 incidents that created the possibility for the CA to reason or plaintiffs to argue that there was a mountain of other incidents out there. So it was harmful even if the others were not.

Turning to punitive damage liability. The test is well known. The defendants actual subjective knowledge at the time of its conduct, that the conduct creates an extreme risk of serious injury. There is no evidence in this record of any unintended acceleration or stuck throttle incident attributed to the cable and boot assembly reported to Nissan before the sale of plaintiff's car. The plaintiffs rely on testimony at pages 252 and 253 of the record but we believe that they mischaracterized that testimony, and if the court examines it carefully will see that it does not support notice to Nissan before the sale of the vehicle of a throttle boot problem. Even if it did, it would show at most one incident out of 10's, if not hundreds of thousands of cars, not shown to result in any injury much less a serious injury. And so there is no basis for the jury to infer actual knowledge of an extreme risk of serious injury.

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RESPONDENT

KAISER: The question was asked, When was defendant's ex. 44 admitted? That was admitted pre-trial and it was actually admitted over our objection, which is noted in our motion in limine. In the motion of limine which includes the order Yes or no under each point there. And it was offered and admitted pre-trial according to the clerk's record at 346, which is a list of all the exhibits, when the objections were made and what the ruling was.

PHILLIPS: Is there a reporter's record on the pre-trial admissions?

KAISER: Yes.

PHILLIPS: You said clerk's record. Was there a court reporter there?

KAISER: No. This was off the record, pre-trial before the jury comes in.

BRISTER: How can you admit an exhibit off the record?

KAISER: There was a written record made of it.

BRISTER: The trial judge signed an order?

KAISER: This is from the defendants themselves.

BRISTER: But the trial judge has got to order it. The trial judge order has to be written or on the record. As far as I know that's all there is. Right?

KAISER: Yes.

BRISTER: So which one was it?

KAISER: This is not signed by the trial judge. It's signed by the defendants. Offered by the defendants. The fact that we objected to it in our motion in limine and in fact that it came in early supports the concept that I'm trying to make here.

WAINWRIGHT: Were you trial counsel?

KAISER: No. I was appellate counsel before the judgment was entered.

WAINWRIGHT: Mr. Young gave me his belief about what happened pre-trial. Were most of the exhibits or all of the exhibits pre-admitted before the trial started?

KAISER: Absolutely.

WAINWRIGHT: So in typical fashion did the judge go through the plaintiff's exhibits first and then the defendant's exhibits?

KAISER: Yes.

WAINWRIGHT: So the plaintiff's exhibits, including ex. 27 and 7 and the subparts to 7, were admitted before you got to 144 or not?

KAISER: 27 was not admitted until page 1200 of the record. It was admitted cross-examination of defendant's expert to rebut his testimony and Nissan's official position that all these incidents occurred because of pedal error, and that they had fully investigated everyone of them and there was no problem. Those were the precise purposes in which it was offered. If you read the testimony it comes right at sequence of that. Mr. Hughes is their expert. And that's why it was offered.

Nissan's opening statement. They talk about incidents and what they are going to prove. This is Nissan's lawyer: Let me visit with you about what Nissan did in response to other

incidents. Nissan investigated these incidents. Did a thorough investigation, thorough engineering analysis and determined that no defect existed. The incidents were primarily due to mistake, a pedal misapplication. And that was their position in opening statement. And that was their position all the way through trial. Mr. Hughes, their expert, record at 1164. He made it clear in their opinion there was no component failure. I testified there was no evidence of a component's failure on the vehicle in question. Sir. Isn't that Nissan's official position on all sudden acceleration claims? I believe that the most probable cause of sudden acceleration or unintended was pedal misapplication. I believe that every case that I am aware of has resulted from pedal misapplication.

Then we get in to plaintiff's ex. 27. How does 27 prove it's not pedal misapplication?

WAINWRIGHT: Let me go back to the pre-admission. Plaintiff's ex. 7, and the subparts, were they pre-admitted before trial?

KAISER: No. They were admitted during trial. They were admitted during Mr. Mizen, which is our expert's testimony. They were admitted on page 718 of the record.

WAINWRIGHT: The motion in limine brief in which Nissan argued that this other incident evidence should not come in. When was that considered and ruled on?

KAISER: There is no ruling in the record that I am aware of on that. I think what happened was, as judges do, let's take them as we get to them. I'm not going to make a blanket ruling right now. Let's see what the proof is.

WAINWRIGHT: So there was no ruling in the record was the word you used. There was no ruling during pre-trial on the motion in limine to exclude other evidence is what you are saying the record will show us?

KAISER: Right. There's no ruling on their motion. Now there are rulings on exhibits, which you can infer that he in part overruled their objections, motions, our motion in limine objections. What's the court going to do with these kind of things when you get there? The defense wants this in. The plaintiff wants this in. We didn't want defendant's 144 report in. But it got in. They didn't want our incidents in where we found throttle boot problem. We had live witnesses come to trial at their own expense to testify about the problem. They didn't want that in.

O'NEILL: Now they have argued that the reason that's in is because they were gutted during pre-trial and they had no choice. Can you respond to that?

KAISER: It's not supported by the evidence or the record. Again defendant's ex. 144 was what they wanted in from the outset. And it only makes sense. A reasonable trial lawyer defending a company would want to say the government has investigated this and found no defect. That is a critical, principal argument and the reason why there's no gross negligence here. To say

that that was just an afterthought, it came in after plaintiff's exhibits, is not supported by the record.

They also claim in their brief that they didn't have to make objection basically. They are using this shorthand to refer back to other objections, were it in writing or something else. If you look at what the record is, page 718, this is when most of the seven series came into evidence. They are all offered and the court says, your sole objections to these is relevance. And Nissan's lawyer says, on the grounds previously stated. The court said relevance. Nissan's lawyer - Time periods. And the court, the objection as stated is overruled. Now that was just on a couple of the seven issues. They had no objection to other of the 7 series incidents.

Were there any other seven exhibits here(this is the court) offered that no objection was made? Mr. Wilhelm: There was no objection I believe to 7D, L, M. Nissan: That is correct your honor.

So 1) we're not dealing with some shorthand code word about what these objections mean. The court at every instant when there was an objection made about other incidents says what is your objection. There's another incident when ex. 27 came in. The same thing. What is your objection? And it shows that they not only agreed to have these other incidents admitted. They had no objection to these. How could they object? The reason they didn't object is because they knew there were substantially similar. They knew that...

JEFFERSON: Was there a brief filed prior to trial on these evidentiary matters relating to the admission of what they consider to be not similar incident?

KAISER: There was a 2-3 page motion. I wouldn't call that a brief. But yes it is a written motion.

JEFFERSON: I thought they had a brief detailing why they thought this evidence should not come in. Is that not correct?

KAISER: I don't recall that.

BRISTER: And if there were a 3-page motion filed prior to trial that objected to this evidence coming in, how many times during trial did they have to renew that objection? Is it your contention that every time it's mentioned they've got to make another objection? Was it preserved by that motion?

KAISER: It was not preserved by the motion because there's no ruling on that motion. The court says let's take them as we come to them. I'm not going to make a blanket ruling right now. I don't have the time to let's go through each of these incidents right now. Let me hear what the evidence is and then I will make my ruling. There's no ruling that they can rely on.

PHILLIPS: What was the chronology of Nissan's attempts to get a limiting instruction to

the jury? Did that come much later or was it going along at the same time as this?

KAISER: Never. The record is totally void of any evidence whatsoever that a limiting instruction was requested at all, or that a ruling was obtained both of which are required for preservation of error. Now there is a limiting instruction in writing in the clerk's record. That according to Nissan's argument was filed on the day that plaintiff's ex. 27 was admitted. Okay. So that was plaintiff's ex. 27 was on page 1200 of the trial. And the record is totally silent at the time that the 7 series was entered, defendant's ex. 144 was entered. Plaintiff's ex 27 was admitted into evidence. Each time those things were admitted no request under rule 104 for limiting instruction.

HECHT: What would it had been limited to, I wonder?

KAISER: It could have been limited to a lot of things. They could have said, well, Judge. This evidence has not been shown substantially similar enough to this case as proof of the dangerousness of the defect presented by a stuck throttle.

HECHT: So we want it limited to what?

KAISER: For purposes only for notice.

HECHT: Notice of what?

KAISER: Notice that these types of incidents, these substantially similar incidents are occurring with 300 ZX, have the same throttle cable design...

HECHT: Does it have to be before sale?

KAISER: For notice purposes. Sure.

HECHT: They say they don't have any of those. They say there is no pre-manufactured notice of cable boot defect.

KAISER: Page 182 of the record. The question of Mr. Yakushi who is the top engineer at Nissan. He participated with the government. He was the guy that did all the technical stuff for the government in this investigation.

Question: When did you first learn that the protective cap may cause a throttle to stick in the wide open now that you have the benefit of reviewing the documents? In other words - this is his deposition being read into the record at trial. He wouldn't appear at trial. Interestingly. And that's another story. He's being presented with these other incidents in his deposition and basically we call it making him eat those. And as you know...

HECHT: Were any of them pre-manufactured?

KAISER: Answer: I don't recall when I would have been made aware of this. But it probably would have been sometime in 1984 based on the date of the document.

HECHT: I was wondering about that document.

KAISER: It's plaintiff's ex. 65.

HECHT: Plaintiff's ex. 65 is a premanufacturer indication of a cable boot defect.

KAISER: Absolutely. I understand the court wanting the most precise evidence it can get about presale actual knowledge.

HECHT: You do agree it needs to be pre-sale notice?

KAISER: For what purpose?

HECHT: Any purpose.

KAISER: If it's for notice yes.

BRISTER: What exactly does a limiting instruction do? Say 699 of the 700 incidents are not similar. What would your limiting instruction say? We want a limiting instruction saying those 699 are irrelevant? Limiting instruction is fine when you're saying, Jury only consider this for notice. But their objection is, these are not notice of this incident because they are different. How would your limiting instruction say, Jury don't consider the 699 because of course they are dissimilar?

KAISER: The problem is they didn't object on the basis that it wasn't similar. They are here saying it was hearsay.

BRISTER: So it's not a matter of limiting instruction? It doesn't matter about limiting instruction?

KAISER: If I had been on the other side, I would have ____ a limiting instruction every time one of these came in to try to limit the evidence and that's what we...

BRISTER: But Rule 105 says, limiting instructions when it's admitted for one purpose, but not admissible for another purpose or for another party. We're not talking about that. Their objection is, these aren't admissible for any purpose, for any party because they are after the sale. Now that really wouldn't be a limiting instruction question.

KAISER: Not if you're talking about a hearsay objection.

OWEN: If the hearsay objection was improperly overruled, you don't have to ask for limiting instruction do you? If it had been sustained then you would have to ask for limiting instruction to get it in. You don't have to preserve error. Once you say hearsay, overruled, you don't have to ask for a limiting instruction to preserve error do you?

KAISER: Right. And that relates only to plaintiff's ex 27 is they one they talked about hearsay on.

OWEN: Ex. 27 is where the 700 and some odd came in.

KAISER: Right. To rebut their position that all of these things are caused by pedal error. And the way plaintiff's ex. 27 does that is that it has all the data fields in it, and it shows that 66 of these incidents in 300 ZX's, with the same throttle design that caused sudden unintended acceleration occurred after Nissan installed the shift interlock system.

OWEN: But that was all hearsay.

KAISER: No. I disagree. And the reason is, that the evidence establishes how that data base was created. It was created by Nissan. The data was collected by a check list that was developed through the engineering mind of Mr. Yakushi, their principal engineer.

O'NEILL: Did it come in as a business records exception?

KAISER: The ruling was objection overruled.

O'NEILL: It came in under several exceptions?

KAISER: Absolutely.

OWEN: Why is it an admission? You're just reporting what your mail say and the objection is that's hearsay. How is that an admission?

KAISER: First, I don't think that they are just reporting what the mail says. That's why they say in their brief, but the record doesn't support that. They developed this data base themselves. They decided what data to collect. And they collected the data through technical service managers who were specially trained in sudden acceleration incidents.

BRISTER: So if somebody went out to stir up a claim and paid people $1,000 each to call in Nissan and make the following complaint, then if Nissan writes that down it's coming into evidence because they wrote it down. That's why we have the hearsay rule because those kind of things can happen. And we want that person there so we say, When did that actually happen?

KAISER: You're right. But that's not what happened here. You're exactly right in that

situation

WAINWRIGHT: The petitioners argue there's an analytical gap in the expert's testimony that a frayed cable line or a hardened boot, either one, may cause the engine acceleration to stick at a certain level, but won't cause it to race uncontrollably. Therefore, they argue that a light touch on the accelerator is not going to cause uncontrolled acceleration of the vehicle. Is there a gap there, and if not, why not?

KAISER: Absolutely not. There's not a gap there because 1) you didn't need an expert to find this. And how do we know this? Because customers are writing in to Nissan telling them, sending them pictures of the problem they had with their car. So my first response is, who cares about the expert? It's happening. They know it's happening. We can prove that.

WAINWRIGHT: Understandably you agree with the CA, that expert testimony is not required here?

KAISER: Absolutely. But we have it anyway. And what we know is that Mr. Mizen, our expert, used the same methodology of analyzing this sudden acceleration that Nissan did. There is a checklist. On Tab 3 there's a flowchart about how to do this. The first mechanical issue there is, check the throttle. The _____ thrust the throttle is somewhat of a misleading thing. Because if you look at the entire page in context, this is in cross examination: You barely press the pedal right, because you're in a tight space? Then the next question is: what I'm trying to get at is you wouldn't have pressed it half way down to the floor in this small situation here because it would have been overkill? What the testimony establishes is that she stepped on the gas, which is absolutely required for this defect to happen, and that it was somewhere between half and barely touching it. And that's what the purpose of the cross examination was there. And they want to harp on just the first part without looking at it in context.

WAINWRIGHT: Your contention is to say that she barely touched the accelerator pedal is a mischaracterization of her testimony in context? What she did was pressed it maybe as much as halfway down?

KAISER: Somewhere between half. And you know barely touching, you know means...

WAINWRIGHT: So maybe as much as halfway down?

KAISER: Absolutely.

O'NEILL: I'm confused about the pre-trial proceedings. They claim that their ex. 144 was offered at trial and it did it because they had been overruled during pre-trial. Is there any order that excludes or tells us what comes in or doesn't come in?

KAISER: The only thing that's going to - an order admitting or excluding evidence?

No.

O'NEILL: Or overruling or sustaining objections?

KAISER: The motion in limine.

O'NEILL: Is that the only motion we're talking about?

KAISER: They did file a motion to exclude some other things. But like I said there was never a ruling on it. And the judge says, let's take these as we get to them. I'm not going to make a blanket ruling right now that nothing comes or everything comes in.

O'NEILL: My understanding is they claim their objections were overruled. But we don't have any record of that. So I think their argument is that having the motion to exclude with no record ruling on it, the fact the TC then admitted it is an indication that it was then overruling the motion?

KAISER: Admitted their exhibit over our objection. He admitted defendant's ex. 144, which was the first evidence...

O'NEILL: Their premise is they admitted it because their motion to exclude had been overruled and since all of yours was coming in they were going to admit theirs is the way I understand their argument. I'm trying to get back to where that might have happened in the record.

KAISER: It didn't.

O'NEILL: Again, I think their argument is, although there is no ruling on the record on their motion to exclude, by then letting these exhibits come in the court implicitly overrules their objections.

KAISER: None of them came in until we laid our _____. The 7 series didn't come in pre-trial. They came in during Mr. Mizen's testimony. So that doesn't make any sense. It's not logical. They say 144 is admitted pre-trial. It was admitted pre-trial over our objection, our motion in limine. I know it doesn't preserve any error. We're not here claiming it does. But the point is, we objected to it because we didn't want them to get up there and say, Look there's no problem. That's what they did. We countered with it. But our evidence of other incidents was admitted during the trial. J. Davidson did not rule that our evidence was coming in pre-trial. He ruled that their's was. Defendant's 144, he overruled our limine and so it's in. And that's what their own records reflect, in the clerk's record.

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REBUTTAL

JUNG: J. Jefferson. Our other incidents brief appears at page 142 of the clerk's

record and it is 15 pages plus exhibits.

J. O'Neill. I checked and there is no antidotal evidence in either defendant's ex. 144, which is the NTSA closing report, or defendant's ex. 145, which is the Transport Canada report.

J. Hecht. The 1984 knowledge to which counsel referred as shown in plaintiff's ex. 65, is evidence of a different type of incident. That was an incident where a foreign object became lodged in the throttle manifold, which is the actual internal part with the butterfly valve that lets the air in. It is not the crank on the outside of the throttle that the cable lines around that is claimed to be the defect in this case.

O'NEILL: What was the foreign object?

LAWYER: The foreign object was a 35 mm diameter protective cap. The 35 mm diameter does not correspond to the throttle boot on this vehicle that the plaintiff claims is defective. So some kind of 35 mm diameter protective cap got inside the throttle mechanism, where the claim here is that a throttle boot differently shaped got in the outside of the throttle mechanism.

O'NEILL: Was ex. 144 admitted over Armstrong's objection? I mean did you want that in?

LAWYER: We did want that in.

O'NEILL: If you wanted it in, then you don't deny that it was admitted pre-trial or really care when it was admitted?

LAWYER: That's right. Because among other things it does not have other incidents evidence of the kind we're objecting to. So I don't even see why the timing of its admission and the circumstances of its admission make any difference to the alleged claim of waiver.

O'NEILL: For purposes of our argument then, it was admitted by Nissan without objection and we don't need to presume that it was overruled.

LAWYER: I think that's right. I think the sequence of events is both parties filed motions in limine. There is no ruling on those motions in the record that I can find. The plaintiff's motion has various checkmarks - granted and denied, but it is not signed by the judge. Then a lot of the exhibits are just...

O'NEILL: But the limine motion is never a ruling on evidence anyway. It just says approach the bench before you admit it.

LAWYER: That is correct. But you heard counsel argue his objection was preserved by

his motion in limine. What's sauce for the goose is sauce for the gander.

O'NEILL: I didn't hear him say that. I just heard him say that 144 came in and it was similar incidents evidence.

LAWYER: I believe it said he objected to it. Plaintiff's ex. 27 we heard was offered to rebut evidence that all these incidents were pedal error, and that they were thoroughly investigated. First of all, Nissan has never claimed that all the incidents are pedal error. Nissan's engineer, Yakushi, testified that there are many other potential causes. All of those that Nissan was able to determine a cause for were either pedal error or some other non-defect explanation, such as interference by floor mats and so forth.

As far as some incidents occurring after the shift interlock campaign, the Transport Canada report shows quite clearly that after the shift interlock campaign the number of incidents plummeted but did not go to zero because there were many instances where the shift interlock was not actually installed. The customer did not come into the dealership in response to the recall and have it installed. And there were also some cases where it was improperly installed. So the fact that they were continuing to be incidents after the shift interlock campaign really proves nothing.

Finally, with respect to the issue of causation. There is simply no evidence in this record that the hypothesized causal mechanism, the cable boot becoming detached and getting stuck in the belt crank actually happened in this case. If this were a toxic tort case, we would say there is general causation evidence. That kind of thing can happen and cause a stuck throttle. But there is no specific causation evidence either direct or circumstantial that that actually is what happened.

BRISTER: I'm intrigued by the TC's and CA's remittitur. You all didn't ask for it. Couldn't ask for it because you stipulated the $2 million was just fine.

LAWYER: We stipulated we wouldn't appeal it. That's right.

BRISTER: Even constitutional errors can be waived if nobody objects.

LAWYER: Right. But the parties cannot by its stipulations irrevocably bind the TC.

BRISTER: But also can - if no objection or argument is needed, I suppose we could cut the punitive damages or perhaps raise them to you all's great surprise while the case is here on appeal.

LAWYER: This court does not have remittitur jurisdiction, but the CA - I don't know if the CA can sua sponte order or reverse a remittitur.

BRISTER: The trial judge did.

LAWYER: The trial did and can.

BRISTER: Because?

LAWYER: We don't have in the record why he did. One has to assume that he followed the Pope v. Moore standards.

BRISTER: So even though there's no objection that it is either unconstitutional or factually insufficient, the trial judge can just spring it on you?

LAWYER: That's right. Subject to review on cross appeal as happened here. There was no preservation of this point by the plaintiffs in the TC.

BRISTER: Well it was surprise. You didn't ask for it and they didn't. But it just happened.

LAWYER: It happened during the TC's plenary power. And they never told the TC you can't do this.