

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

DASON UDAC and GWENDOLYN N. UDAC, Trustee for the Alfredo Udac Revocable Living Trust,

Plaintiffs-Appellees/
Cross-Appellants,

vs.

TAKATA CORPORATION,

Defendant-Appellant/
Cross-Appellee,

HAWAII MOTORS, INC.; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; ROE "NON-PROFIT" CORPORATIONS; and DOE GOVERNMENTAL AGENCIES 1-10,

Defendants.

) CIVIL NO. 02-1-0260
)
) DEFENDANT TAKATA CORPORATION'S
) APPEAL FROM 1) JUDGMENT *FILED ON*
) *APRIL 19, 2006*; 2) FIRST AMENDED
) JUDGMENT *FILED ON MAY 31, 2006*; 3)
) ORDER DENYING DEFENDANT TAKATA
) CORPORATION'S RENEWED MOTION FOR
) JUDGMENT AS A MATTER OF LAW
) AND/OR FOR NEW TRIAL AND/OR FOR
) REMITTITUR, FILED APRIL 28, 2006, *FILED*
) *ON JUNE 8, 2006*; 4) COURT'S FINDINGS
) ON DEFENDANT TAKATA
) CORPORATION'S CLAIM THAT THE JURY
) VERDICT ON PUNITIVE DAMAGES IS
) UNCONSTITUTIONALLY EXCESSIVE,
) *FILED ON JULY 20, 2006*; AND 5) SECOND
) AMENDED JUDGMENT *FILED ON*
) *NOVEMBER 28, 2006*
)
) PLAINTIFFS DASON UDAC and
) GWENDOLYN N. UDAC, Trustee for the
) Alfredo Udac Revocable Living Trust's CROSS-
) APPEAL FROM 1) ORDER GRANTING IN
) PART AND DENYING IN PART
) PLAINTIFFS' MOTION FOR AWARD OF
) COSTS AND PREJUDGMENT INTEREST
) AND FOR FORM OF JUDGMENT FILED ON
) JANUARY 27, 2006, *FILED ON APRIL 19,*
) *2006*; AND 2) SECOND AMENDED
) JUDGMENT *FILED ON NOVEMBER 28, 2006*
)
) THIRD CIRCUIT COURT
)
) HONORABLE RIKI MAY AMANO
) HONORABLE TERENCE T. YOSHIOKA
) HONORABLE GLENN S. HARA
) HONORABLE GREG K. NAKAMURA
)
) Judges

**AMENDED REPLY BRIEF OF DEFENDANT-APPELLANT/
CROSS-APPELLEE TAKATA CORPORATION**

APPENDICES “T-1” THROUGH “Y”

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TAKATA CORPORATION

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SERIOUS EVIDENTIARY ERRORS NECESSITATE A NEW TRIAL.....	1
A. The circuit court erroneously excluded Dr. Banks’s surrogate study.....	1
B. The circuit court erroneously prevented Dr. Banks from responding to Paul Udac’s unexpected testimony on the cause of Udac’s bruises.	4
C. The circuit court erroneously admitted irrelevant patents for other seatbelt buckles.	6
D. The circuit court erroneously admitted irrelevant Nissan Design Specifications for a later model year vehicle.....	9
II. THE CIRCUIT COURT ERRONEOUSLY INSTRUCTED THE JURY ON UDAC’S WARNING CLAIMS.	12
A. Takata preserved this issue.	12
B. The instructions were given in error and require reversal.	13
III. THE CIRCUIT COURT ERRONEOUSLY ALLOWED UDAC’S “FALSE LATCH” THEORY TO GO TO THE JURY.....	15
IV. TAKATA IS ENTITLED TO JMOL ON PUNITIVE DAMAGES.	16
A. Takata did not “know” about an alleged inadvertent-release defect.....	16
B. Takata did not “know” about an alleged inertial-release defect.	17
C. The TK-821’s remarkable safety record in millions of vehicles over the last two decades confirms that Takata had no reason to think that it was defective.....	18
D. The punitive verdict violates due process.....	19
V. THE PUNITIVE AWARD IS EXCESSIVE.	19
A. The punitive award is excessive under Hawai’i law.....	19
B. The punitive award is unconstitutionally excessive.....	20
1. Reprehensibility	21
2. Ratio.....	23
3. Civil penalties for comparable misconduct.....	23

TABLE OF AUTHORITIES

Page(s)

CASES

<i>American Motors Corp. v. Ellis</i> , 403 So. 2d 459 (Fla. Dist. Ct. App. 1981).....	14
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1994).....	19, 20, 23
<i>Bonacon v. Wax</i> , 37 Haw. 57 (1945)	4
<i>Broussard v. Houdaille Industries, Inc.</i> , 539 N.E.2d 360 (Ill. App. Ct. 1989).....	14
<i>Conti v. Ford Motor Co.</i> , 743 F.2d 195 (3d Cir. 1984)	14
<i>Greiner v. Volkswagen of America, Inc.</i> , 429 F. Supp. 495 (E.D. Pa. 1977).....	14
<i>Hawai`i v. Nichols</i> , 111 Hawai`i 327, 141 P.3d 974 (2006).....	13
<i>Hirahara v. Tanaka</i> , 87 Hawai`i 460, 959 P.2d 830 (1998).....	13
<i>Larsen v. State Sav. & Loan Association</i> , 64 Haw. 302, 640 P.2d 286 (1982)	1
<i>Monlux v. General Motors Corp.</i> , 68 Haw. 358, 714 P.2d 930 (1986)	6
<i>Philip Morris USA v. Williams</i> , 127 S. Ct. 1057 (2007).....	21, 23
<i>Roxas v. Marcos</i> , 89 Hawai`i 91, 969 P.2d 1209 (1998)	13
<i>Sprague v. California Pacific Bankers & Insurance Ltd.</i> , 102 Haw. 189, 74 P.3d 12 (2003)	12
<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i> , 538 U.S. 408 (2003).....	20, 22, 23
<i>State v. Wakisaka</i> , 102 Hawai`i 504, 78 P.3d 317 (2003)	5
<i>Tabieros v. Clark Equipment Co.</i> , 85 Hawai`i 336, 944 P.2d 1279 (1997).....	8, 13

STATUTES, REGULATIONS, AND RULES

Hawai`i Rule of Civil Procedure 50.....	15
Hawai`i Rule of Evidence 401	8
Hawai`i Rule of Evidence 403.....	12
Hawai`i Rule of Evidence 702.....	1, 5

TABLE OF AUTHORITIES
(continued)

Page(s)

MISCELLANEOUS

57 Fed. Reg. 55298 (Nov. 24, 1992)..... 8

I. SERIOUS EVIDENTIARY ERRORS NECESSITATE A NEW TRIAL.

A. The circuit court erroneously excluded Dr. Banks's surrogate study.

Udac does not dispute that Dr. Banks was qualified to conduct a surrogate study. Nevertheless, he argues that Dr. Banks's testimony about the study was inadmissible because Takata designated Dr. Banks as an "expert on biomechanics" rather than a "safety belt expert." AB 14.¹ But Udac cites no authority to support his contention that expert testimony is limited by the name used to designate an expert. That is unsurprising—neither Hawai'i, nor any other jurisdiction of which we are aware, focuses on an expert's "designated" expertise or allows the exclusion of expert testimony based on the name used to describe the expert. On the contrary, the admissibility of expert testimony depends on an expert's actual established qualifications—his or her "knowledge, skill, experience, training, or education"—not his or her title. *See* HRE 702; *Larsen v. State Sav. & Loan Ass'n*, 64 Haw. 302, 305, 640 P.2d 286, 289 (1982). Here, it is *undisputed* that Dr. Banks had the actual qualifications to conduct a surrogate study. Accordingly, it was clear error to exclude that testimony.

Moreover, even if the law did limit an expert's testimony to his "designated expertise," the testimony that the circuit court excluded falls squarely within Dr. Banks's designation as a biomechanical engineer. Udac's overly narrow definition of biomechanical engineering as "the study of what happens to the body as a result of an accident" (AB 14) demonstrates a misunderstanding of that field. As Dr. Banks explained, biomechanical engineering involves all aspects of the interaction between a body and a vehicle during an accident.² *See* OB 23 & n.15. Indeed, as explained in our Opening Brief (*id.*), the standard five-step analytical procedure used by biomechanical engineers requires them to analyze damage to the interior of the vehicle in order to learn about the interaction between the occupant and the vehicle during the accident. Obviously, the field of biomechanical engineering is broad enough to encompass a study of whether there were loading marks on the seatbelt webbing (a particular type of damage) at the right location to have been caused by the hypothetical interaction between Udac and the seatbelt.

¹ "AB ___" refers to Plaintiffs' First Amended Answering Brief and "OB ___" refers to Defendant's Revised Opening Brief.

² In its pre-trial disclosure, Takata stated that Dr. Banks would testify on "the relative movement of the subject vehicle and occupants, occupant kinematics, injury causation and biomechanics" and "design and performance of the subject seat belt including testing; liability issues." RA, V.5 at 280; *id.* at 303.

Udac's contention that Dr. Banks admitted that he was not retained to opine on the expected location of loading marks (AB 14-15) is patently false. The surrogate study was described in Dr. Banks's initial report. RA, V.9 at 15. At his deposition, Dr. Banks testified that it was "part of [his] assignment to be conducting a test as to the effects of an accident on the webbing." Banks Dep., at 71. And, when Udac's counsel questioned Dr. Banks on "the purpose of doing the exemplar surrogate inspection," Dr. Banks explained: "We wanted to understand the belt geometry, how the webbing would relate to the hardware in a person like Dason Udac, and where we would expect to find marks if there were marks laid down by webbing hardware."³ *Id.*

The fact that, as Dr. Banks stated (*id.* at 57), Mr. Cooper had been retained to testify more generally about Udac's seatbelt system (including whether the actual marks on Udac's seatbelt were made by loading or wear and tear), is irrelevant. Contrary to Udac's unsupported contention (AB 15), the circuit court in this case never limited the parties to "one expert per topic" (however a "topic" might be defined). Udac goes so far as to suggest that Takata "should have had Mr. Cooper" conduct the surrogate study. AB 16. But it would be a clear abuse of discretion to exclude a potentially decisive scientific study conducted by a qualified expert just because the circuit court arbitrarily decides, long after the study has been completed, that it would have preferred Takata to have chosen a different expert to conduct the study.⁴

Udac also contends that Dr. Banks's surrogate study was appropriately excluded because it would have been cumulative of Mr. Cooper's testimony. AB 15-16. That argument grossly mischaracterizes the record. Dr. Banks's testimony addressed the following hypothetical question: *Where* would loading marks be found on the webbing if Udac had been wearing his seatbelt during the accident? Dr. Banks would have testified, *inter alia*, that if Udac had been wearing his seatbelt during the accident, the D-ring would have caused a loading mark at exactly 73.5-inches. Banks Dep., Exh. 6; TP, 12/15/05 at 123. He also would have testified—and the jury easily could have seen for itself—that there is *no mark* at that location.

Mr. Cooper, on the other hand, identified the marks that actually were found on Udac's

³ Dr. Banks defined "marks" as "[a]brasions or lacerations to the webbing" and explained that "[t]he exemplar surrogate inspection related to both [the marks on the webbing and on Udac] because [it] helped [him] understand that if there were marks on the body, where would they be, and also if there were marks on the webbing, where would they be." Banks Dep., at 71-72.

⁴ Udac filed four pre-trial motions attempting to exclude testimony from Takata's experts but did not object to Dr. Banks's surrogate study until trial.

seatbelt and opined, based on the characteristics of those marks, whether they were caused by loading or wear and tear. *See* TP, 12/13/05 p.m. at 11, 13, 16-33. He not only explained the physical differences between a mark caused by wear and tear and one caused by loading, but also the differences between loading marks caused by various seatbelt components (*e.g.*, those caused by the D-ring, the emergency locking retractor, and the latch-plate). TP, 12/13/05 p.m. at 8-43. As part of this testimony, he mentioned the general location where loading marks from each of those components typically occur. *See* Appendix (“App.”) W (TP, 12/13/05 p.m. at 42-43) (“Typically when you sit in one of these vehicles, the D ring itself is 70 to 80 inches from the outboard anchorage point. It’s about 30 or so inches from the D ring down to the bottom of the retractor. So you’d expect to see them in the one hundred plus inch range on the webbing.”). Obviously, this generalized testimony about the rough location of various types of loading marks in a generic accident did not duplicate Dr. Banks’s excluded testimony about the *exact* location of expected loading marks *from Udac* in *this accident* (*e.g.*, 73.5 inches).⁵ Because Udac’s expert inexplicably failed to conduct a surrogate study, Dr. Banks would have been the only expert in the case who could opine on the exact location where loading marks should have been found if Udac had been wearing his seatbelt. When his testimony was excluded, this critical issue was essentially taken out of the case.⁶

Udac’s attempts to show that Takata was not prejudiced by the exclusion of the surrogate study also fail. As just demonstrated, there is no merit to his suggestion (AB 17) that Mr. Cooper gave the same testimony that Dr. Banks would have given: Dr. Banks’s testimony would have been unique and very possibly decisive.

Udac also argues that there was no prejudice because Dr. Renfroe identified multiple “loading marks” and Dr. Banks would have addressed only one mark. *Id.* But, as Dr. Banks would have testified, if Udac had been wearing his seatbelt, then there would have been a loading mark at the location identified by his surrogate study. The presence of other marks—whatever their locations and claimed causes—cannot “make up” for the absence of this loading

⁵ The other portions of Mr. Cooper’s testimony cited by plaintiffs (AB 16-17) discuss the physical characteristics of loading marks, how loading marks are formed, or general testing Mr. Cooper has performed outside the context of this case. *See* App. V-X.

⁶ Dr. Renfroe’s opinion, like Mr. Cooper’s, was based on his “general experience, in that 60- to 70-inch range is where the webbing ends up in that area in the D-ring.” 5/13/05 Renfroe Dep., at 126.

mark. Moreover, because he did not conduct a surrogate study, none of the marks identified by Dr. Renfroe can be tied to Udac or this accident (even if they are from loading as opposed to wear and tear). Even with Dr. Renfroe's testimony on other marks, the surrogate study provided verifiable proof that Udac was not wearing his seatbelt in this accident.

Finally, Udac contends that his own evidence on the question whether he was wearing his seatbelt would have "dwarfed" Dr. Banks's surrogate study. AB 17. As discussed in our Opening Brief (at 11-14), Udac's evidence on this issue is very thin and there is good reason to doubt each of the pieces of evidence he cites. Moreover, none of that evidence provides verifiable proof that Udac was or was not wearing his seatbelt: The testimony that it is Udac's "habit" to wear a seatbelt is purely speculative; Udac's and his passenger's recollections of that evening cannot be verified; and Dr. Renfroe's testimony, at most, would show only that *someone* wore a seatbelt in an accident during the thirteen-year history of this vehicle. Dr. Banks's surrogate study, on the other hand, provided verifiable proof that Udac was not wearing his seatbelt because the jury readily could see that there was no mark where one should have been found. The excluded evidence easily could have caused the jury to conclude that Udac was not wearing his seatbelt and hence to return a verdict for Takata on all issues. The exclusion of such critical evidence is obviously prejudicial. *See, e.g., Bonacon v. Wax*, 37 Haw. 57, 63 (1945) (where "the result of the trial might have been different" if erroneously excluded evidence had been admitted, "[t]he error is * * * prejudicial, warranting a second trial").

B. The circuit court erroneously prevented Dr. Banks from responding to Paul Udac's unexpected testimony on the cause of Udac's bruises.

Udac asserts that the only basis for Dr. Banks's opinion that Udac was not wearing his seatbelt was the fact that Udac was thrown from the vehicle and that it was therefore appropriate to prevent Dr. Banks from rebutting Paul Udac's unexpected testimony on the cause of Udac's injuries. AB 18-19. He is mistaken. Dr. Banks's expert report stated that his opinion was based on the surrogate study, the fact that "the driver's restraint assembly did not reveal evidence of belt loading or use during the crash," and a review of Udac's medical records (including photographs of his injuries) that led Dr. Banks to conclude that Udac's injuries would have been *avoided* if he had been wearing his safety belt—*i.e.*, none of his injuries were caused by a safety belt. *See* RA, V.9 at 11-16. At his deposition, Dr. Banks elaborated on his opinion that Udac did

not have any injuries consistent with seatbelt use.⁷ *See, e.g.*, Banks Dep., at 34 (explaining that a mark on Udac’s left shoulder, which Dr. Renfroe had identified as evidence of seatbelt use, was caused by a subclavian catheter inserted in the hospital); *id.* at 35-36 (testifying that bruises consistent with seatbelt use “would be noted in the medical records” but there “was no record of such a bruise in [Udac’s] records”).

Udac also contends that Takata cannot claim to have been surprised by Paul Udac’s testimony because Takata knew that bruising was “a relevant issue” in the case. AB 19. Although Takata knew that bruising evidence was important, Udac disclosed almost no evidence on that issue before trial. None of Udac’s treating physicians saw bruising consistent with seatbelt use, and the emergency room doctor who treated Udac after the accident testified that he could not recall any marks or bruises that would indicate seatbelt use (*see* Budde Dep., at 11). Dr. Renfroe, at his deposition, admitted that the only injury he could find suggesting seatbelt use was the mark on Udac’s left shoulder (which Dr. Banks later explained was from a subclavian catheter).⁸ *See* 5/13/05 Renfroe Dep., at 17. And Paul Udac gave no indication at his deposition that he had an opinion on the cause of any of Udac’s injuries.⁹ In other words, before trial, it was undisputed that there were no injuries suggesting seatbelt use on Udac’s hips and waist and that the only injury “at issue” was the subclavian mark on Udac’s left shoulder. Accordingly, that is the mark that Dr. Banks specifically addressed, and it was completely unexpected when Paul Udac claimed, at trial, that certain marks on Udac’s hip and stomach were caused by the seatbelt.

The Hawai`i Supreme Court has held that a new trial is required when the circuit court prevents a party from responding to unexpected testimony revealed for the first time at trial.

⁷ As we noted in our Opening Brief (at 25 n.17), “[t]he opinions of all experts [were] considered final at the conclusion of their respective depositions” (RA, V.5 at 202).

⁸ It was undisputed that the markings observed on Udac’s left side immediately after the accident (*see* AB 20 n.8) were caused by his ejection through the sunroof. *See* Banks Dep., at 82-83; TP, 12/15/05 at 88-89, 102, 106-109. No one testified otherwise and, contrary to Udac’s insinuation (AB 20), these injuries were different from the subclavian bruise later identified by Dr. Renfroe as evidence of seatbelt use.

⁹ Although Udac now argues that Takata should have questioned Paul Udac in more depth on this issue, there was no reason for Takata to expect such opinion testimony from a man with no medical expertise. Testimony on injury causation, including the cause of bruising, is precisely the type of information that only “a witness qualified as an expert by knowledge, skill, experience, training, or education may testify []to in the form of an opinion.” HRE 702; *see also* *State v. Wakisaka*, 102 Hawai`i 504, 509, 78 P.3d 317, 322 (2003).

Monlux v. Gen. Motors Corp., 68 Haw. 358, 362-64, 714 P.2d 930, 932-34 (1986). Udac tries to distinguish *Monlux* because the unexpected testimony in that case came from an expert (AB 21), but it is not clear why that should matter. In any event, although Paul Udac is not an expert, his unexpected testimony on the cause of Udac’s injuries amounted to an “expert” medical opinion. Just as in *Monlux*, it was reversible error to prevent Takata from responding to highly material and previously undisclosed testimony.

Udac argues that Takata was not prejudiced by the exclusion of Dr. Banks’s rebuttal testimony because Dr. Banks testified generally that he did not find any evidence of bruises caused by seatbelt use. AB 20-21. But Dr. Banks’s generalized testimony on the absence of any bruising from a seatbelt must have appeared to the jury to ignore Paul Udac’s specific testimony about the cause of individual marks displayed to the jury in photographs of Udac’s injuries. The jury was left with the impression that Dr. Banks could not back up his claim with an analysis of Udac’s actual injuries. By silencing Dr. Banks on this issue, the circuit court allowed Udac to benefit from the strategic decision to disclose almost no evidence regarding bruising before trial—appearing to concede that there were no marks consistent with seatbelt use (excepting the subclavian mark)—and then sandbag Takata with opinions from an unqualified witness at the last minute, effectively insulating Paul Udac’s opinions from rebuttal.¹⁰

Finally, the prejudice from this ruling was compounded by the circuit court’s exclusion of Dr. Banks’s surrogate study. Both of these rulings prevented the jury from hearing important evidence on the critical question whether Udac was wearing his seatbelt. The result was a skewed evidentiary picture that deprived the jury of the ability to make an informed decision on that threshold issue.

C. The circuit court erroneously admitted irrelevant patents for other seatbelt buckles.

As at trial, Udac takes snippets of language from the TK-52 and A-95 patents out of context in a futile attempt to locate an “admission” that the TK-821 contained an inertial-release defect. But the patents simply do not say what Udac claims. Even a cursory examination reveals that *none* of the passages quoted by Udac can support his purported interpretation.

¹⁰ Udac also argues that Takata could not have been prejudiced by Paul Udac’s testimony because Dr. Banks said that it was not his practice to rely on family members’ recollections when forming an opinion regarding injury causation. AB 19. But Dr. Banks would not have *relied* on Paul Udac’s testimony, he would have *rebutted* it.

For example, Udac contends that a passage from the TK-52 patent “describe[s] the problems with prior buckles that were designed to be opened easily” and that “[t]he TK-821 was one of the problematic buckles that the [TK-52] patent application described.” AB 23. But the passage that Udac quotes does *not* state that prior-art buckles had problems with inertial release (let alone that the TK-821 had such problems). On the contrary, the passage explicitly says that prior-art buckles use a spring that is “very strong” in order to “*eliminate* such inertial release.” App. T-1 (Exh. 1481), at 5 (emphasis added). The passage notes that the side-effect of using a “very strong” spring is “an increase in the force required to release the latch plate from the tongue,” which causes inconvenience for users.¹¹ *Id.* Indeed, as Takata explained in its Opening Brief (at 7), the paragraph immediately following this passage states that the “problem” with prior-art spring-based buckles was one of “difficulties and annoyance to the user,” not safety. App. T-2 (RA, V.7 at 290), at 4; App. T-1, at 5. Udac ignores that part of the patent, omitting it from his selective quotation and failing to respond to our Opening Brief.

Similarly, the passage that Udac quotes from the A-95 patent (AB 25) describes only the *hypothetical* situation that would result “*if* the force of the spring urging the latch member is reduced in order to reduce the force of operation at the time of release.” App. U (Exh. 1482), at 5 (emphasis added). The passage never states that there actually are spring-based buckles that use a “reduced force” spring (let alone that the TK-821 is one of them). On the contrary, the patent immediately proceeds to explain that “the problem[] of the prior art seat belt buckles” is *not* that they chose to use dangerously weak springs, but that they used a strong spring that “requir[ed] a high releasing force *to prevent inertial fall-out* at the time of collision.” *Id.* (emphasis added). It is in this context that the patent praises the locking mechanism introduced in the TK-52 patent as being “a very good solution to the inertia fall-out problem *and* allow[ing] the release force to be kept low.” *Id.* (emphasis added).

Despite Udac’s deceptive presentation to this Court, nothing in these passages even implies that prior-art buckles are unsafe. Instead, the patents first describe the *hypothetical*

¹¹ The TK-821 tried to address that problem of convenience by “utilizing both a wedge action of the inclined surface of the slide button and a lever action of the actuating plate transmitted by way of the link plate” to decrease the force required for a manual release. Exh. 1585, at T00318. But it did *not* employ a weaker spring. Accordingly, even if the TK-52 or A-95 patents said that there actually are prior-art buckles with weak springs (they did not), the TK-821 would not be one of them.

dilemma faced by spring-based buckles—they must use either a weak spring that is subject to inertial release or a strong spring that prevents inertial release but can cause annoyance during manual release—and then state that the *actual* problem with spring-based buckles was annoyance (*i.e.*, manufacturers such as Takata, unsurprisingly, chose to use stronger springs).¹²

Mr. Kitamura (a co-inventor of the TK-821, TK-52, and A-95 buckles) corroborated that the two later patents address a problem of consumer convenience, not safety. *See* Kitamura Dep., V.III at 252-54, 262, 331-32. Udac presented no witness to rebut Mr. Kitamura or to offer the “interpretation” of the patents that he now espouses. Even Dr. Renfroe simply observed that the patents identify the internal spring as the primary feature of the buckle that prevents inertial release (*see* AB 24 (quoting TP, 11/29/05 p.m. at 85-86))—a fact that was undisputed and could be discerned from the face of the TK-821 patent.

Because the TK-52 and A-95 patents do not tend to prove any fact at issue in this case—but were readily misrepresented in a highly prejudicial manner—it was reversible error to admit them. *See* HRE 401; *Tabieros v. Clark Equip. Co.*, 85 Hawai`i 336, 383, 944 P.2d 1279, 1326 (1997). As misconstrued by plaintiffs, the patents were one of only two pieces of evidence allegedly supporting the inertial-release theory of defect (the other being Dr. Renfroe’s thoroughly discredited bench test).¹³ And they were one of only three pieces of evidence allegedly justifying punitive damages (and the only piece of evidence allegedly showing that Takata knew of a “defect” at the time that the TK-821 was installed in Udac’s vehicle).¹⁴ The

¹² The patents thus are consistent with NHTSA’s study of spring-based buckles which concluded that inertial release does not occur in the real world. *See* OB 5 & n.3; Exh. 5811 (57 Fed. Reg. 55298 (Nov. 24, 1992)).

¹³ Udac tries to resuscitate Dr. Renfroe’s bench test (AB 26-27), but cannot deny what even Dr. Renfroe was forced to admit: The shock-table is the industry-standard testing methodology and has been proved to be perfectly reliable whereas Dr. Renfroe’s bench test is a completely idiosyncratic procedure that he personally invented for purposes of litigation and that has never been proved reliable or accurate (*see* OB 8-9, 30). Udac’s contention that the bench test was “almost identical to” the shock table test (AB 27) is simply unbelievable. As noted in our Opening Brief (at 7-8, 30), the shock table showed that the TK-821 can withstand **5 times** the force suggested by Dr. Renfroe’s unproven bench test (a difference of over 400 times the gravitational force of the earth). These obviously are not “almost identical” methodologies, and it is a reflection of the bankruptcy of Udac’s arguments that he is forced to assert that they are.

¹⁴ In an attempt to manufacture other evidence of an inertial release defect, Udac argues that the drop test conducted by Mr. Kitamura “supported the fact that the TK-821 was susceptible to inertial release, and that Takata knew such a risk existed.” AB 27. But the drop test showed that

exclusion of these patents obviously could have changed the outcome of this trial.

Udac makes the specious argument that if the patents do not concede that the TK-821 was defective—as they clearly do not—“then their admission could not have prejudiced [Takata].” AB 26. As Udac’s own arguments amply demonstrate, however, the technical language in these patents is easily manipulated to create the false impression that they are conceding a defect in prior-art buckles rather than discussing a hypothetical choice between safety and convenience. To be clear, there is no question what the patents actually say, and this is not a jury issue (*contra* AB 26). This is a situation that demands the exercise of the circuit court’s authority to exclude evidence that is irrelevant or more prejudicial than probative, thus preventing deception and confusion of the jury.

D. The circuit court erroneously admitted irrelevant Nissan Design Specifications for a later model year vehicle.

Udac makes no effort to defend the circuit court’s rationale for admitting the 1992 NDS and admits that “Takata’s argument has merit * * * if the existence of the 40-millimeter ball test

the TK-821 would not release unless it experienced over 400 g’s of force. Kitamura Dep., V.I at 78-86, 100. Mr. Cooper testified that the largest forces ever measured in rollover testing—during tests that were intended to maximize forces—were in the range of 300-400 g’s. TP, 12/14/05 a.m. at 36. Although Dr. Renfro testified that the largest forces ever recorded in those tests was 450 g’s (TP, 11/29/05 p.m. at 78-79), he admitted that actual accidents involve only up to 150 g’s (*id.* at 78). It is undisputed that the applicable Nissan Design Specifications required the TK-821 to withstand only 200 g’s of force (*see* Exh. 1587 at T00435-36; Kitamura Dep., V.I at 94-100) and that NHTSA reached the conclusion that inertial release does not occur in the real world because of testing it conducted on buckles that release at 140-150 g’s (TP, 12/14/05 p.m. at 78). Accordingly, it is unsurprising that Mr. Kitamura believed that the drop test, in fact, proved that the TK-821 is *not* susceptible to inertial release. Kitamura Dep., V.I at 91. At the very least, the drop test does not prove that Takata *knew* of a defect in the TK-821 because there is no evidence that Takata—or anyone else—believes that actual accidents involve forces over 400 g’s. Accordingly, the patents still are the only evidence allegedly supporting an award of punitive damages with respect to inertial release.

Udac also invokes his accident reconstruction expert, Mr. Otto, who speculated that “if the TK-821 buckle hit the center console of [Udac’s] Pathfinder in the accident, it could have experienced 800 Gs of force.” AB 27. But Mr. Otto was simply performing a back-of-the-envelope calculation based on a number of unsubstantiated assumptions. TP, 11/22/05 p.m. at 88-90. As noted, the largest force ever actually measured in laboratory testing was in the range of 300-400 g’s, or possibly as much as 450 g’s. Indeed, the industry-standard shock-table cannot even measure forces over 700 g’s. Dr. Otto’s off-the-cuff mention of this figure was a complete red herring that further tainted this case: There is no evidence that such forces have ever been experienced in a real world crash or that anyone believes that such forces occur in actual crashes.

in the 1992 NDS is irrelevant to [plaintiffs'] claims.” AB 30. Moreover, Udac does not deny that the 1992 NDS *do not apply* to the TK-821 installed in Udac’s 1987 Pathfinder. He also does not deny that the 1981 NDS that *do* apply to the TK-821 have *no* ball-press requirement. Nor does he deny that the risk of inadvertent release is vehicle-specific and that Nissan has made no effort to apply the 1992 ball-press requirement retroactively, even to replacement parts. Finally, Udac does not deny that there are *no* studies demonstrating a connection between ball-press testing and a propensity for inadvertent release.¹⁵

Udac’s attempt to show that the ball-press requirement in the 1992 NDS is relevant to the TK-821—notwithstanding all of these concessions—rests on three misrepresentations.

First, Udac improperly juxtaposes Mr. Kitamura’s testimony about Europe’s enclosed/non-enclosed dichotomy with his testimony on Nissan’s 1992 NDS. For decades, Europe has distinguished between “non-enclosed” buckles, which release when pressed with a 40-mm ball, and “enclosed” buckles, which do not. That test, however, has *nothing* to do with safety because “non-enclosed” buckles are installed in many vehicles with full knowledge that they release if pressed with a 40-mm ball.¹⁶ See App. Y (Kitamura Dep., V.II at 210-12, V.III at 323-24); TP, 12/14/05 a.m. at 63-64 (Mr. Cooper). It is this enclosed/non-enclosed classification that Takata performed during development of the TK-821.

Thus, when he asserts that Mr. Kitamura testified that “Takata conducted the 40-millimeter ball test to test for ‘button operability and inadvertent release’” (AB 28), Udac invalidly conflates these distinct issues. Mr. Kitamura testified that Takata conducted the European enclosed/non-enclosed classification but that this is *not* a measure of safety. App. Y (Kitamura Dep., V.II at 210-14). And when he later discussed the 40-mm ball-press test in the 1992 NDS, which is intended to be a measure of “button operability and inadvertent release,” he was very clear that the test “was not applicable to [the TK-821] model” because “[a]n older version of Nissan specification applied to that model.” *Id.* (Kitamura Dep., V.I at 107-08).

¹⁵ Although Udac disputes that NHTSA has explicitly rejected tests like this (AB 30 n.12), he ignores NHTSA’s letter specifying that compliance with FMVSS 209’s requirement that a “Buckle Release Mechanism shall be designed to minimize the possibility of accidental release” must be assessed using *only* those measures set out in FMVSS 209, which do not include a ball-press test (see OB 34 n.24).

¹⁶ More accurately, the European dichotomy is a vehicle-specific test because enclosed buckles are installed in some vehicles and non-enclosed buckles are installed in others. The fact remains that non-enclosed buckles are perfectly safe when installed in appropriate vehicles.

Takata has never considered, and never had reason to consider, the 40-mm ball-press test to be a measure of safety for the TK-821 as installed in the 1987 Pathfinder.

Second, Udac misunderstands the method by which vehicle manufacturers change their design specifications. Faced with the undisputable fact that, after the 1992 NDS, Nissan did not (i) apply the 40-mm ball-press requirement retroactively to its pre-1991 model vehicles, (ii) recall buckles installed in its older vehicles, or even (iii) require replacement parts for older vehicles to meet this requirement, Udac suggests that this was Takata's fault because it "did nothing to alert * * * Nissan." AB 29. That puts the cart before the horse. In 1992, Nissan decided that buckles in future model-year vehicles should meet the 40-mm ball-press requirement, but it did not think that this standard was important for past models (perhaps because the buckle was installed in a different vehicle environment or the past models had a proven safety record (*see* OB 11, 33-34)). If Nissan had indicated that this was an important standard for all vehicles, or even just for the 1987 Pathfinder, *then* Takata would have "alerted" Nissan.¹⁷ Given the complete lack of evidence demonstrating that the 40-mm ball-press test correlates with a risk of inadvertent release—not to mention the spotless track record of the TK-821 in older vehicles—it is unsurprising that Nissan never reached that conclusion.

Third, Udac misconstrues the relevance of industry variation on this issue. Both Mr. Cooper and Mr. Kitamura gave unchallenged testimony that the risk of inadvertent release depends not only on the buckle, but also on various aspects of the vehicle in which the buckle is installed. Kitamura Dep., V.I at 71; TP, 12/14/05 a.m. at 69-70 (Mr. Cooper). Accordingly—and especially in light of the fact that there are no studies showing a connection between ball-press testing and a propensity for inadvertent release—the only "fair inference" that can be drawn from the variety of manufacturer design specifications is that they represent nothing more than the design choices for particular vehicles. Because Nissan did not think that this was an important specification for the 1987 Pathfinder, it does not matter whether Nissan adopted that standard for other vehicles.

Udac also argues that the 1992 NDS were relevant to this case because they specify that buckles "shall be free from pseudo-latching (false latching)." AB 28 n.10. But the 1981 NDS contained a similar specification, consistent with FMVSS 208 and 209. *See* Exh. 1587, at

¹⁷ In any event, because Nissan vehicles are sold in Europe, Nissan undoubtedly knew that the TK-821 is a "non-enclosed" buckle that releases when pressed with a 40-mm ball.

T00428. Accordingly, because the 1981 NDS already were in evidence, the 1992 NDS had no independent relevance and should have been excluded under HRE 403.¹⁸

Because the 1992 NDS are simply design choices for specific vehicles, they do not tend to prove either that the TK-821, as installed in the 1987 Pathfinder, has an inadvertent release defect or that Takata “learned” that the TK-821 was defective when Nissan issued the 1992 NDS. The 1992 NDS are entirely irrelevant to this case and should have been excluded.

Udac does not really dispute that the admission of the 1992 NDS, if erroneous, was extremely prejudicial to Takata. This was the linchpin of Udac’s inadvertent-release theory of defect and served as one of only three pieces of evidence that supposedly justified the punitive damages award. *See* RA, V.24 at 282-83; OB 32-33, 36-37. As Udac’s own arguments demonstrate, the 1992 NDS had “an undue tendency to suggest decision on an improper basis” (AB 31 (quoting *Sprague v. Cal. Pac. Bankers & Ins. Ltd.*, 102 Haw. 189, 197, 74 P.3d 12, 20 (2003))), by inviting confusion over whether the TK-821 installed in Udac’s 1987 Pathfinder complied with the applicable Nissan design specifications.

II. THE CIRCUIT COURT ERRONEOUSLY INSTRUCTED THE JURY ON UDAC’S WARNING CLAIMS.

A. Takata preserved this issue.

Contrary to Udac’s representation (AB 31-32), Takata *did* “argue[] in the trial court that its [alleged] failure to warn could not have proximately caused [Udac’s] injuries.” Before trial, Takata moved for partial summary judgment on plaintiffs’ warning claims because they “lack any factual support in the record.” RA, V.8 at 274; *see also id.* at 275 (“Plaintiffs have not presented any specific facts concerning their warning claims, thus there are no genuine issues of fact for trial.”). As Takata observed, Udac had made no effort to demonstrate “a causal connection between the [alleged failure to warn] and [his] injuries.” *Id.* at 278. Indeed, during discovery Takata asked Udac to “[d]escribe how [he] would have changed [his] behavior if [he] had been given the warning(s)” that he contended should have been given, but Udac never gave an adequate response. *See* RA, V.7 at 5 (citing RA, V.7 at 12-13). Accordingly, the circuit court granted Takata’s motion for summary judgment on all warning claims. RA, V.20 at 169.

¹⁸ Udac contends that Takata has forfeited any argument based on HRE 403 (*e.g.*, cumulativeness or unfair prejudice). AB 30. But Takata raised a Rule 403 argument in its motion *in limine* to exclude the 1992 NDS (*see* RA, V.10 at 191-239), and the circuit court categorically denied Takata’s motion (*see* RA, V.20 at 195-96).

At trial, Udac put on no evidence that an alleged failure to warn caused his injury. Nevertheless, the circuit court indicated that it would give both a negligent-failure-to-warn and a latent-danger instruction. Takata objected—reminding the circuit court that it had granted Takata’s motion for summary judgment on the warning claims, pointing out that “there’s no evidence introduced to the jury” to establish a warning claim (TP, 12/20/05 a.m. at 39), and observing that giving the warning instructions would violate *Tabieros* (*id.* at 10), which requires proof that a warning could have prevented the plaintiff’s injuries (*i.e.*, proof of causation). Takata’s consistent position on the warning claims was more than adequate to preserve this issue.¹⁹

Regardless, as we show below, even if Takata had not preserved this objection, the total lack of an evidentiary basis for a warning claim would make the circuit court’s instructional error more than “plain” (*Roxas v. Marcos*, 89 Hawai’i 91, 140 n.32, 969 P.2d 1209, 1258 n.32 (1998)).

B. The instructions were given in error and require reversal.

Udac does not deny that if he failed to put on evidence that a warning could have prevented his injuries then it was reversible error to give the latent-danger and negligent-failure-to-warn instructions. *See* AB 32-33. And he does not dispute that a warning about either inertial- or inadvertent-release would have been futile because he could not have done anything to avoid such releases, assuming for present purposes that they can occur at all.²⁰ *See id.*; *see also* OB 38-40. Instead, he argues that a warning could have prevented his injuries because, if he had seen it, he “could have had the safety belt replaced or decided to drive a different car altogether.” AB 33. That *post hoc* attempt to salvage the circuit court’s instructional error fails, however, because it is pure speculation.

Udac did *not* testify that he would have replaced the buckle in his sister’s 13-year-old

¹⁹ The Supreme Court has emphasized that “HRCP Rule 51([f]) may be construed in a liberal manner.” *Hirahara v. Tanaka*, 87 Hawai’i 460, 463, 959 P.2d 830, 833 (1998) (internal quotation marks omitted); *cf. Hawai’i v. Nichols*, 111 Hawai’i 327, 337, 141 P.3d 974, 984 (2006) (under the rules of criminal procedure, “once instructional error is demonstrated, we will vacate, without regard to whether timely objection was made” “because it is the duty of the trial court to properly instruct the jury”).

²⁰ Udac concedes that there is no failure-to-warn claim with respect to the false-latch theory of defect. *See* AB 33 n.14.

Pathfinder or that he would have refused to drive the vehicle if he had seen a warning.²¹ Accordingly, there is simply no evidentiary basis for his present attempt to resuscitate the unsupported warning claims. Recognizing the absence of an evidentiary basis for his argument, Udac contends that the lack of evidence is “of no moment.” AB 33. On the contrary, it is decisive on this issue—as many courts have held.

For example, in *Greiner v. Volkswagen of America, Inc.*, 429 F. Supp. 495 (E.D. Pa. 1977), the plaintiff alleged that Volkswagen should have warned her about the risk that her vehicle could overturn during extreme handling. *Id.* at 497-99. The court granted Volkswagen a directed judgment on that claim, rejecting the plaintiff’s argument that “had the warning been given [she] might not have bought the car.” *Id.* at 498. Because there was no testimony on that issue the court held that “it would have been totally improper to permit the jury to guess what [the plaintiff] would have said if asked about the effect of the presence of a warning.” *Id.* at 498-99. So too here. Because Udac failed to put on any evidence that he would have replaced the buckle or refused to drive the vehicle if he had seen a warning, it was “totally improper to permit the jury to guess what [he] would have said if asked about the effect of the presence of a warning.”²²

²¹ The absence of such testimony is not surprising because it would have been patently unbelievable. If Udac had seen a warning stating that the TK-821 can release if pressed with a 40-mm ball and had researched that fact to learn whether it was cause for concern, he would have discovered that there is *no evidence* of a correlation between the 40-mm ball test and an increased risk of inadvertent release. And if he had seen a warning stating that the TK-821 can release if exposed to over 400 g’s of force, he would have discovered that actual accidents involve only up to 150 g’s (TP, 11/29/05 p.m. at 78) and that the federal government concluded that inertial release *does not occur in the real world* after testing buckles that can release when exposed to only 140 to 150 g’s (TP, 12/14/05 p.m. at 78).

²² See also *Am. Motors Corp. v. Ellis*, 403 So. 2d 459, 466 (Fla. Dist. Ct. App. 1981) (reversing judgment against automobile manufacturer because trial court erroneously instructed the jury on failure-to-warn: “a causal relationship between breach of a duty to warn and the instant injury” could be found only “in the speculation that [the plaintiff], properly warned, would not have purchased the car, or would not have allowed it to be driven”); *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3d Cir. 1984) (“the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury”); *Broussard v. Houdaille Ind., Inc.*, 539 N.E.2d 360, 363 (Ill. App. Ct. 1989) (vacating judgment because “[t]here is no evidence that [the plaintiffs] would have acted any differently if they had [the warning]” and “to permit the jury to draw such an inference allows it impermissibly to base its verdict on mere speculation”).

III. THE CIRCUIT COURT ERRONEOUSLY ALLOWED UDAC'S "FALSE LATCH" THEORY TO GO TO THE JURY.

Because there was no legally sufficient evidentiary basis for the jury to find that a false latch caused Udac's injuries (OB 41-44), the circuit court should have decided that issue against Udac and granted judgment for Takata on Udac's false-latch defect claim. *See* HRCP 50.

The fact that Udac had raised alternative theories of liability (AB 34-35) is beside the point: Takata has not argued that the absence of evidence on the false-latch theory entitled it to judgment on all of Udac's different product-liability claims. But Udac had no right to continue urging the false-latch theory of defect (making it the first theory in his closing argument), after his own expert testified that there was no false latch in this accident.

Allowing the false-latch theory to remain in the case created the possibility of a verdict based on an alleged defect that everyone agreed had not caused Udac's injuries. Udac suggests that the jury could have "inferred" that a false latch occurred in this accident based on a chain of reasoning from the *absence* of loading marks on the seatbelt. AB 36-37. But, again, there was no testimony to this effect at trial. Accordingly, it would have been pure speculation for the jury to follow the "inference" that Udac now proposes.

Udac does not deny that the false-latch theory could have been the basis for the jury's verdict (*i.e.*, it does not affirmatively appear from the record that the jury did not rely on that theory). Nor can he dispute that allowing an unsupported theory to go to the jury in such circumstances is grounds for a new trial. *See* OB 43 (citing cases). Instead, he invents a distinction between "legal theories" and "factual theories" and claims that the circuit court can allow unsupported "factual theories" to go to the jury. AB 35-36. That distinction is not found in the cases. In any event, it would do Udac no good. Udac's theory of this case was *not* that there must be some unspecified defect in the TK-821 that caused his injuries. (Such a claim, by its very nature, could not have supported a punitive damages award.)²³ On the contrary, Udac

²³ Udac implies that he can support this verdict simply by claiming that he was wearing his seatbelt. AB 34-35. But each of the cases he cites involved undisputed testimony or evidence that could be explained only by some kind of defect (*e.g.*, a relatively new vehicle veering suddenly while being driven, lurching forward while in neutral, or bursting into flames while parked in a garage). Here, on the other hand, there was compelling evidence that Udac was not wearing his seatbelt (*see* OB 12-14, 23-24). In any event, Udac's testimony alone could not have supported the punitive verdict and Takata was entitled to have the false-latch theory removed from the case, so that it did not improperly taint the jury's deliberations on punitive liability and amount.

raised three different alternative theories of how the TK-821 allegedly was defective and how that defect caused his injuries, effectively making three distinct product-liability claims. Takata was entitled to judgment on the false-latch product-liability claim, and because it is impossible to know whether the verdict is based on that unsupported theory, a new trial is required.

IV. TAKATA IS ENTITLED TO JMOL ON PUNITIVE DAMAGES.

Udac's answering brief confirms that the award of punitive damages is inappropriate and that Takata is entitled to judgment on that issue. As Udac admits, an award of punitive damages requires clear and convincing proof that Takata either knew that the TK-821 was defective or was recklessly indifferent to whether the buckle was defective. AB 37. None of the evidence that Udac identifies comes close to meeting that standard.

A. Takata did not "know" about an alleged inadvertent-release defect.

According to Udac, Takata knew that the TK-821 was subject to inadvertent-release because it knew that the buckle would release if pressed with a 40-mm ball. AB 38-39. But it is undisputed that Takata has never considered the 40-mm ball-press test to indicate a defect or a risk of inadvertent release in the TK-821 as installed in the 1987 Pathfinder. *See* OB 33-35.

Moreover, Takata's "view" of the 40-mm ball-press test is completely reasonable and is shared by regulators, Nissan, and the general scientific community. NHTSA has rejected the use of ball-press testing as a measure of inadvertent release. OB 34 n.24. Meanwhile, European regulators consider "non-enclosed" buckles that release when pressed with a 40-mm ball to be perfectly safe. *See* page 10, *supra*. These regulatory positions are to be expected because there is not a single piece of evidence showing that a buckle is prone to inadvertent release if it "fails" the 40-mm ball-press test. With respect to the 1987 Pathfinder in particular, the applicable NDS allow buckles that release if pressed with a 40-mm ball. Nissan has never changed that specification or even required replacement buckles for the 1987 Pathfinder to meet the 40-mm ball-press requirement. *Id.*; OB 33. Finally, during decades in which the TK-821 has been installed in millions of vehicles around the world (including the 1987 Pathfinder), there has not been a single substantiated complaint of inadvertent release. *Kitamura Dep.*, V.II at 217, V.III at 324-26. In sum, Takata has never had any reason to interpret ball-press testing as evidence of a problem with the TK-821. Accordingly, its knowledge that the buckle will release if pressed with a 40-mm ball does *not* equate to knowledge that the buckle is defective.

Udac relies on false statements in an attempt to overcome these facts. AB 38. Contrary

to Udac’s claim (*id.*), Mr. Kitamura did *not* testify that the TK-821 “failed” the 40-mm ball-press test. Instead, he explained that the buckle was categorized as “non-enclosed” under European standards. Kitamura Dep., V.II at 210-12. And, contrary to Udac’s claim (AB 38), Mr. Kitamura did *not* testify that the purpose of the 40-mm ball-press test in the 1992 NDS is to “evaluate button operability and inadvertent release” in the 1987 Pathfinder. *Id.* Instead, he explained that the purpose of the test is to “evaluate button operability and inadvertent release” *in the 1992 Pathfinder*, but *not* in the 1987 Pathfinder (Kitamura Dep., V.I at 107-08)—a critical distinction in light of the undisputed evidence that the risk of inadvertent release is vehicle-specific (*see* OB 11, 34). The fact that Nissan used a different standard for a different model vehicle did not tell Takata that the TK-821 installed in the 1987 Pathfinder was therefore defective, especially in light of its years of safe operation and the lack of any empirical evidence of a correlation between the new criteria and inadvertent release.

B. Takata did not “know” about an alleged inertial-release defect.

Once again, Udac blatantly misrepresents the TK-52 and A-95 patents in an attempt to show that they demonstrate “Takata’s knowledge of, and conscious indifference to, the danger of inertial release in the TK-821.” AB 39. He quotes a sentence saying that an impact can cause “the latch plate [to] displace[] by an inertial force” (*id.* (quoting Exh. 1481, at 1)), but omits the fact that this is a *hypothetical* statement about what would happen *if* a buckle used a weak spring, not a statement about any actual buckle, let alone the TK-821. He also claims that “[t]he intent of the new design” in these patents was to avoid relying on a spring to resist inertial release (AB 39), but omits the fact that the “problem” with relying on a spring was that the buckle was difficult to release manually because the spring had to be strong enough to “*eliminate* such inertial release” (App. T-1, at 5 (emphasis added)) and “*prevent inertial fall-out* at the time of collision” (App. U, at 5 (emphasis added)). *See generally* pages 7-8, *supra*.

Udac also cites the drop test that Mr. Kitamura conducted in 1991 as evidence that Takata knew about an inertial-release defect. AB 39. But, as Mr. Kitamura testified (Kitamura Dep., V.I at 78-86, 91, 100), Takata interpreted the TK-821’s results on that test to prove that the buckle is *not* susceptible to inertial release because the buckle did not release until exposed to over 400 g’s of force, which matches or exceeds the maximum force ever measured in rollover

testing (*see* TP, 11/29/05 p.m. at 78-79; 12/14/05 a.m. at 36).²⁴ *See* page 8 n.14, *supra*.

C. The TK-821’s remarkable safety record in millions of vehicles over the last two decades confirms that Takata had no reason to think that it was defective.

Udac attempts to cast doubt on the remarkable fact that there are *no* other failure reports for the TK-821 buckle (AB 42-43) but, yet again, his arguments misrepresent the record. During discovery, Udac asked questions about “seat belt Model # TK-821-G418,” and Takata informed him that that number refers to a “seat belt system [that] is unique to the 1987 Nissan Pathfinder.” *See* Exh. 1590, at 7-8 (Takata’s Supp. Response to Udac’s Interrogatory No. 7). At his deposition, Mr. Kitamura explained that “TK-821-G418” refers to the entire seatbelt assembly and is unique to the 1987 Pathfinder (Kitamura Dep., V.I at 32-33), but that “TK-821” refers to the buckle used in that assembly and is not specific to any particular vehicle (*id.* at 35). Mr. Kitamura then testified that, not only has Takata never received a failure report for the TK-821-G418 seatbelt assembly, but it has never received a failure report for the TK-821 buckle for any vehicle in which it is used around the world (Kitamura Dep., V.III at 324-25 (no failure reports from “Australia or Europe or Japan”)). That testimony remains undisputed.

Similarly, Udac claims that Takata refused to disclose failure reports based on the privacy of complainants. AB 42. He supports this assertion with a superseded discovery response that later was amended to *withdraw* the very privacy objection about which he complains. *Compare* Exh. 1592, at 11-12 (amended response) with ROA, V.8, at 32-242 (original response).²⁵ In other words, Takata did *not* withhold failure reports for privacy (or any other) reasons. Its discovery responses and the testimony of its representative (over the course of three deposition sessions, two of which occurred after Takata amended its discovery response) confirmed that ***there are no failure reports***. After a full and fair discovery process, that fact was undisputed at trial. Indeed, Udac never raised any of these discovery issues with the circuit court, which is unsurprising given their baselessness, and thus has forfeited them.

²⁴ Mr. Otto’s “800 Gs” speculation (AB 39) is irrelevant. There is no evidence that Takata—or anyone else—has ever considered that to be a relevant standard for resisting inertial release (as noted, the industry-standard shock table cannot even measure forces that high). *See* page 8 n.14, *supra*. Thus, it can play no role in an attempt to prove that Takata knew of a defect.

²⁵ Udac himself submitted Takata’s amended discovery response as an exhibit at trial (*see* Exh. 1592, at 1), but now misleadingly makes no mention of it, making his attack on the integrity of Takata’s counsel (*see* AB at 42 n.22) ironic to say the least.

Finally, Udac complains that “[v]ictims of failed safety belts” are more likely to die or suffer severe head injuries, suppressing the number of reported failures. AB 43. Whatever the merit of that unsupported conjecture, it obviously cannot explain the absence of *any* failure reports for millions of vehicles over the last two decades.

Although Udac claims that there are “two other lawsuits arising from failures of the TK-821” (AB 41), one of the lawsuits to which he refers involved a different model buckle (*see* Kitamura Dep., V.I at 11-12), and Udac does not deny that there is no evidence on the merits of the *Emmert* complaint. He contends that other evidence in the case can salvage the punitive award (AB 43-44), but does not deny that the *Emmert* complaint—or, more accurately, its uniqueness—is actually affirmative evidence that the TK-821 is safe (*see* OB 47-49).

In sum, the TK-821’s remarkable track record has confirmed the industry-standard testing and regulatory compliance evaluations performed on the buckle and reinforced Takata’s confidence that it is perfectly safe. Takata has had no reason to doubt the TK-821 buckle.

D. The punitive verdict violates due process.

Udac faults Takata for relying on “criminal-law cases invalidating statutes on vagueness grounds” to support its due process claim (AB 45). But *BMW*, a civil case, held that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to” punitive damages (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1994) (citing criminal cases)).

Here, Takata did not have fair notice that selling the TK-821 would subject it to punishment. The buckle excelled at every test Takata or Nissan administered, exceeded Nissan’s design standards, was certified by an independent laboratory as meeting or exceeding all federal regulations, and has *never* been reported to have failed during the more than 20 years it has been installed in millions of vehicles around the world. Technical language in patents for *other* buckles and design specifications for *other* vehicles, even if “relevant,” are not enough to have put Takata on notice that it could be punished for selling this remarkably safe buckle.

V. THE PUNITIVE AWARD IS EXCESSIVE.

A. The punitive award is excessive under Hawai`i law.

Udac does not dispute that this is a record-setting award in reported Hawai`i cases and, if upheld, will be one of only two awards ever to exceed one million dollars. He claims that such an exaction is justified, however, because “the harm inflicted on [him] was enormous.” AB 45-

46. But a punitive award does not compensate Udac for his injuries; it punishes Takata for its conduct. Udac cannot plausibly claim that Takata's sale of a buckle that has operated safely for over two decades without incident is the most reprehensible act ever perpetrated in Hawai'i. Even supposing that Udac's "interpretations" of the patents and 1992 NDS are correct, this award punishes Takata for acting based on extensive testing, compliance with government regulations, and years of real-world experience (all of which show that the TK-821 is safe) rather than technical language in two unrelated patents and design specifications for another vehicle (neither of which is backed up by any reports of buckles actually failing or studies proving a risk of failure). This \$12.5 million punitive award should shock the Court's conscience.

B. The punitive award is unconstitutionally excessive.

The punitive award in this case exemplifies many of the abuses that the United States Supreme Court has set out to curtail in its due process jurisprudence over the last decade. Although this trial provided Takata none of the procedural protections afforded to a criminal defendant, the jury imposed a punitive award that far outstrips any criminal fine that could be imposed for this conduct (even on the preposterous assumption that Takata would be prosecuted for the sale of this remarkably safe product). *See, e.g., BMW*, 517 U.S. at 585 (\$2 million punitive award was "tantamount to a severe criminal penalty" but underlying conduct could not support such a high punishment); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("Although [punitive] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered."); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007) (observing that a "risk[] of arbitrariness" "accompan[ies] [punitive] awards that, today, may be many times the size of such awards in the 18th and 19th centuries"). And although this jury lacked NHTSA's expertise, broad understanding of the issues, ability to conduct independent investigations, ability to test, ability to solicit public comment, and ability to place Takata's conduct into a broader perspective, this punitive award far exceeds the largest fine that NHTSA could impose and abrogates the regulator's role by essentially telling Takata that it should recall the TK-821 buckle (even though no one has even petitioned NHTSA for such a remedy). *See, e.g., BMW*, 517 U.S. at 585 (no state "may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation"); *Philip Morris*, 127 S. Ct. at

1062 (“where the amounts are sufficiently large, [a punitive award] may impose * * * one jury’s * * * policy choice, say as to the conditions under which (or even whether) certain products can be sold, upon neighboring States”) (internal quotation marks omitted). Even if the finding of punitive liability were sustainable under Hawaii law, the amount of the punishment would be egregiously excessive and should be greatly reduced.

1. Reprehensibility

Physical harm. Although he acknowledges that all product-liability claims involve physical injury, Udac argues that Takata’s conduct should be singled out because “knowingly distributing a defective safety belt” involves “a particularly high risk of physical harm.” AB 47. This argument is relevant to the second reprehensibility factor, not the first. In any event, it would have merit only if Takata continued to sell the TK-821 after learning that the buckle had failed in real-world use. But here the *most* that Udac has shown is that Takata distributed the TK-821 despite knowing that it would release if pressed with a 40-mm ball (a fact that has never been correlated with increased risk of injury) and that spring-based buckles can release in an accident if they use too weak a spring (which Takata knew was not true of the TK-821).

Indifference to health and safety. Udac claims that he was not required to prove that an alternative buckle would have prevented his injuries (AB 48), but he has confused the elements of his liability claim with the requirement for establishing this reprehensibility factor (*see* OB 53). Udac correctly notes that it is “obvious that properly functioning safety belts exist.” AB 48. Indeed, it is undisputed that the *TK-821* is a properly functioning buckle with the alleged exception of this one instance, and Udac has *not* shown that any other buckle has a better track record than the TK-821 or performs better with respect to any of the defects he has alleged. Finally, contrary to Udac’s contention (AB 49), Takata *has* challenged the circuit court’s finding that Takata believed the TK-52 buckle to be safer than the TK-821 (*see* OB 27-32, 45).²⁶

Targeting the financially vulnerable. This factor is intended to single out conduct that seeks to exploit financially vulnerable victims. *See* OB 53 (citing Supreme Court and Circuit Court opinions). The two California Court of Appeal cases cited by Udac (one of which was vacated by the United States Supreme Court) cannot change that fact. Here—where Takata provided Nissan with a part that Takata believed was safe and that exceeded all federal regulations and Nissan specifications—Takata did not target anyone, let alone the vulnerable.

²⁶ Ironically, it is a recall of the TK-52 that Udac continually cites and attaches to his brief.

Repeat misconduct. Contrary to Udac’s contention (AB 51), Takata has “admitted” to only one prior lawsuit involving the TK-821 and has adduced uncontradicted testimony that there are no other complaints of failure for the TK-821. This factor cannot be satisfied by speculation that other people might be injured by a product (*see* OB 54)—especially when the undisputed evidence is directly to the contrary. The cases Udac cites (AB 50-51) all involve products that had a proven track record of injuring many people and thus are inapposite. Finally, contrary to Udac’s suggestion (AB 51), Takata cannot be punished in this case for the unrelated recall of the TK-52 buckle both because it was not a part of the record in this case and because that recall involved a cracking issue with a plastic component, not “repeated misconduct of the sort that [allegedly] injured [Udac].” *State Farm*, 538 U.S. at 423.

Intentional malice. Udac contends that this factor is satisfied because Takata “intend[ed] to distribute and leave in circulation safety belts that it knew were defective” and “fail[ed] to notify Nissan that the TK-821 failed the 40-millimeter ball test.” AB 51-52. Given the *de novo* and exacting standards for excessiveness review (OB 17), Udac’s misrepresentations of the patents and NDS fail to prove that Takata was acting maliciously by selling a buckle that passed every industry-standard test administered, exceeds all government regulations and Nissan specifications, and never has been shown to have failed in over 20 years.

Other factors. Takata’s seatbelt has saved countless lives and prevented countless injuries over the last 20 years. And we already have explained that, contrary to Udac’s contention (AB 52), the TK-821 exceeds all government regulations—a fact that was certified by an independent laboratory. *See* page 19, *supra*; OB 2, 4, 9. We also have shown that, contrary to Udac’s misleading claims (AB 52), it is undisputed that there have been no failure reports for the TK-821 over the last two decades. *See* pages 18-19, *supra*. Each of these factors undermines any suggestion that the conduct here was highly reprehensible.

Udac suggests that Takata was guilty of spoliation with respect to the drop test that Mr. Kitamura conducted in 1991 after seeing such a test on a television show (AB 53), but Udac never raised spoliation at trial (for good reason, given that this test was conducted approximately 15 years before this litigation and was not part of Takata’s industry-standard testing regime). Udac also criticizes Takata for failing to present a live company witness at trial, but it goes without saying that a party cannot be punished more severely merely because it opted not to have an overseas witness who was deposed on three separate occasions and who must speak through

an interpreter testify live at trial.

2. Ratio

Udac gets the holding of *State Farm* exactly backwards. It did not hold that “single-digit ratios are presumptively permissible” (AB 54) but that double-digit ratios are presumptively impermissible and that single-digit ratios are “*more likely* to comport with due process.” *State Farm*, 538 U.S. at 425 (emphasis added). Within the range of single-digit awards, the maximum permissible ratio will depend on the size of the compensatory award and the degree of reprehensibility of the conduct. *See* OB 55-56. And, importantly, when the compensatory award is substantial, a ratio of 1:1 may be the highest allowed by due process. *Id.* The fact that some cases, with more reprehensible conduct or smaller compensatory damages, have allowed ratios between 1:1 and 9:1 (AB 54-55) is beside the point. Here, the compensatory award is very substantial and Takata’s reprehensibility, if any, is very low, placing this case squarely within the holding of *State Farm* and the other cases cited in our Opening Brief (at 56-58), many of which involved far more reprehensible conduct and far smaller compensatory damages than in this case. Moreover, almost half of Udac’s compensatory award consists of non-economic damages, and Udac cannot deny the well-established principle that in such cases a smaller punitive award is warranted—here, smaller than the otherwise highest permissible ratio of 1:1. *See id.* at 58-59.

3. Civil penalties for comparable misconduct

Contrary to Udac’s contention (AB 58), the Safety Act’s maximum fine of \$800,000 is not authorized “in comparable cases” to this one (*BMW*, 517 U.S. at 575). Such a fine would be authorized only in a class action raising at least 800 separate claims. Accordingly, using that figure to justify the punitive award in this case would violate due process. *See Philip Morris*, 127 S. Ct. at 1064 (the jury may consider harm to others when assessing reprehensibility but “may not go further than this”). By the same token, the treble damages statutes relied on by Udac are irrelevant because they are not fines for “comparable cases”; the legislature has not authorized such fines for product-liability cases.

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