NO. 28328

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

DASON UDAC and GWENDOLYN N. UDAC, Trustee for the Alfredo Udac Revocable Living Trust, Petitioners/Plaintiffs-Appellees/Cross-Appellants, vs. TAKATA CORPORATION, Respondent/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 (HILO) HONORABLE RIKI MAY AMANO HONORABLE TERENCE T. YOSHIOKA HONORABLE GLENN S. HARA HONORABLE GREG K. NAKAMURA Judges

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI, FILED ON DECEMBER 7, 2009

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OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

After a year of study and intensive scrutiny of a sizable record, the Intermediate Court of Appeals ("ICA") unanimously and correctly found that this case went badly off track in a number of respects. Admissible and potentially decisive evidence was erroneously excluded, irrelevant and prejudicial evidence was erroneously admitted, unsupported and confusing instructions were erroneously given, and Petitioners erroneously were allowed to seek punitive damages without any evidence, let alone clear and convincing evidence, that Respondent Takata Corporation ("Takata") either knew that the seatbelt buckle in question was defective or was indifferent to its safety. As the ICA's opinion repeatedly observes, it is ***undisputed*** that Takata's TK-821 buckle has been installed in millions of vehicles around the world for over two decades and yet this case—riddled with error—is the first time that any fact-finder of any kind has found that the TK-821 failed in an accident or was defective.

The first two issues in the Petition for Writ of Certiorari ("Petition") should be denied not only because they lack merit (as shown below), but also because they cannot change the outcome of this case. Those two issues challenge the ICA's holding that it was reversible error to exclude scientific evidence and expert testimony on the threshold question whether Petitioner Dason Udac ("Udac") was wearing his seatbelt at the time of the accident. Even if Petitioner were to prevail before this Court on both of those issues, however, it would not change the fact that the judgment below must be vacated and a new trial conducted. That is because the ICA also found other evidentiary and instructional errors (App. 21-28, 32-35), yet Petitioners present no questions challenging those holdings. As HRAP 40.1(d)(1) states: "Questions not presented according to this paragraph will be disregarded." The footnote in which Petitioners ask the Court to consider all issues in the case (Petition 2 n.2) is plainly inadequate to present the other trial errors identified in the ICA's opinion and, in any event, does not even attempt to show that those holdings were grave error or create an inconsistency with prior opinions. Accordingly, the first two issues in the Petition essentially ask this Court for an advisory opinion. Moreover, it is an advisory opinion that will not matter at the retrial because the grounds that Petitioners cite to support exclusion of the evidence related to Udac's seatbelt use during the first trial—even if those grounds had merit—involve technicalities that could be addressed at a retrial, thus allowing admission of the evidence regardless of Petitioners' present contentions.

Furthermore, all three issues in the Petition are purely fact-bound disputes about the interpretation of evidence, asking this Court to analyze the record at trial to decide whether the ICA's interpretation of the evidence was correct—for example, the third issue simply asks this Court to revisit the ICA's conclusion that the record does not support punitive damages. The Petition does not show any grave factual errors, merely Petitioners' dissatisfaction that the ICA rejected their (repeatedly and often egregiously misleading) proposed interpretations of the evidence. Nor does it identify any significant legal conflicts between the ICA's opinion and prior precedent. Accordingly, review of all three issues should be denied not only because the issues lack merit (as shown below), but also because they ask this Court to conduct a *sui generis* review of an extensive record with no purpose but to second-guess the ICA's (unanimous) judgment following its own extensive and comprehensive review.

RESPONSIVE QUESTIONS PRESENTED

1. Whether the ICA correctly found that it was error to exclude potentially decisive scientific evidence and expert testimony on the threshold question whether Udac was wearing his seatbelt at the time of the accident. The circuit court excluded a scientific study that would have affirmatively proved that Udac was not wearing his seatbelt at the time of the accident. The circuit court also prevented Takata's expert from rebutting a lay-witness's unanticipated testimony at trial that certain bruises and marks on Udac were caused by his seatbelt.

2. Whether the ICA correctly found that an error is prejudicial when it involves the exclusion of evidence that, if accepted by the jury, would require judgment for the appellant.

3. Whether the ICA correctly found that the evidence in this case does not support Takata's liability for punitive damages.

RESPONSIVE STATEMENT OF THE CASE

On October 8, 2000, between 12:30 and 4:00 a.m., Dason Udac fell asleep while driving his sister's 1987 Nissan Pathfinder, which then left the road at high speed, struck a lava outcropping on the right front corner, rotated clockwise a quarter turn, and then rolled over for approximately 185 feet, landing on the passenger side. Transcript of Proceedings ("TP"), 12/1/05 p.m. at 16, 20; 12/7/05 p.m. at 33–34; Exh. 5710. Both Udac and his passenger Ikaika Viernes were thrown from the vehicle (TP, 12/1/05 p.m. at 33–34; 12/7/05 p.m at 36–37), but neither has any memory of the events leading up to the accident (TP, 12/7/05 p.m. at 34–35).

The driver-side seatbelt in the Pathfinder was a Takata TK-821-G418, which includes a TK-821 buckle ("TK-821"). Kitamura Dep., V.I at 32, 35. Takata developed the TK-821 buckle, the focus of this lawsuit, in the late 1970s. Kitamura Dep., V.I at 36. Over the years, the TK-821 has been subjected to an extensive battery of industry-standard tests for safe operation. It was tested during development and production (by Takata), after installation in the 1987 Pathfinder (by Nissan), before sale in the United States (by an independent testing laboratory), and periodically over the years (by Takata). The TK-821 consistently has passed every test administered by every entity. Kitamura Dep., V.I at 29–32, 47–49, 56–58, 69–71, 78–79, 88, 93–94, 99–100; V.2 at 150–51; Exh. 1499.

During its production run, from the early 1980s until the late 1990s, the TK-821 was installed in millions of vehicles around the world, including the 1987 Nissan Pathfinder. Kitamura Dep., V.I at 40–41. Over the last two decades, those vehicles have been driven countless billions of miles and have been involved in innumerable accidents. It is remarkable, then, that Takata has never received even a single failure report from the field (*i.e.*, no driver or vehicle manufacturer has ever reported that the TK-821 failed to perform properly). *Id.*, V.III at 324–27. Indeed, the only evidence even suggesting that someone has previously claimed that a restraint system equipped with a TK-821 failed is a complaint, filed in Iowa state court in 1996, alleging that the "seat belt restraint system" in a 1987 Pathfinder "failed and did not restrain" the passenger during an accident (the "*Emmert* complaint"). *See* Record on Appeal ("RA"), V.10 at 204-216 at 2. As the ICA recognized, the uniqueness of the *Emmert* complaint and the absence of any other failure reports "is powerful evidence that the seatbelt is not defective." App. 43. Takata continues to manufacture the TK-821 as a replacement part for vehicles in which it originally was installed. Kitamura Dep., V.I at 40. Few automotive safety components can claim such a remarkable track record.

That history of consistent safe performance did not prevent Udac's seatbelt expert, Dr. Renfroe, from opining that the TK-821 is the most defective buckle he has ever encountered because "[e]very possible problem that can occur does occur in this buckle." TP, 11/30/05 a.m. at 58. In fact, Renfroe claimed that the TK-821—which never has failed in the real world—has three distinct defects (TP, 11/29/05 p.m. at 43–46) that have gone undetected by Takata, Nissan, regulators, attorneys, and consumers for over two decades. As shown in Takata's briefing before the ICA, the evidence that Petitioners submitted to support those alleged defects was irrelevant,

scientifically invalid, or pure speculation. In any event, these disputes over whether a buckle with such a remarkable safety record has been secretly defective for the last two decades would not matter if Udac was not ***wearing*** his seatbelt during the accident, as Takata alleged.

Petitioners create the impression that there was overwhelming evidence that Udac was wearing his seatbelt during the accident. Petition 3. The truth is that Udac's claim that he was wearing his seatbelt was hotly contested and that Udac's evidence on this threshold issue was remarkably thin:

Udac's habit. Several witnesses testified that it was Udac's habit to wear a seatbelt.

Udac's and Viernes's account. Both Udac (TP, 12/7/05 p.m. at 34) and his passenger Viernes (TP, 12/1/05 p.m. at 20, 32–33) testified to vivid recollections of Udac putting on his seatbelt before leaving Hilo, including memories of hearing the latch-plate click in the buckle. Both men remembered almost no other details of that early morning drive or the events leading up to the accident and Viernes admitted to having drunk four 40-ounce bottles of beer between 9 pm and midnight before falling asleep in the vehicle shortly after leaving Hilo. TP, 12/1/05 p.m. at 29–31. Even setting aside its credibility, this self-serving testimony cannot answer the question whether Udac still was wearing his seatbelt at the time of the accident.

Marks on the seatbelt. Renfroe examined Udac's seatbelt for signs that Udac had been wearing it during the accident. He opined that there were marks indicating that the seatbelt had been loaded by an occupant in a collision (*i.e.*, that the seatbelt had been engaged).[1] TP, 11/29/05 p.m. at 14–42. He also testified that the location of the marks he found on the webbing was consistent with the position of marks that would be caused by loading from a person of Udac's height and weight (TP, 11/29/05 p.m. at 14–15), although he admitted that, while he has conducted surrogate studies to confirm that fact in other cases, he had not done so here (TP, 11/30/05 p.m. at 17–18).[2] Based on these marks, Renfroe concluded that Udac was wearing his

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[1] "Loading" is the force exerted by an occupant onto the seatbelt during an accident and is measured by the occupant's body weight times the amount of g forces experienced by the occupant. For example, an occupant weighing 150 pounds experiencing 3 g's would exert a loading force equal to 450 pounds. Loading forces of only "a couple hundred pounds" will create loading marks on the seatbelt's components. TP, 11/29/05 p.m. at 48.

[2] In a "surrogate study," a human subject who matches the plaintiff's height and weight is placed in an exemplar vehicle to determine how the person's body would have interacted with components of the vehicle.

seatbelt during the accident.

Mr. Otto, Udac's accident-reconstruction expert, and Mr. Cooper, Takata's seatbelt expert, both disagreed with Renfroe. They both concluded that the marks Renfroe identified were not caused by loading during an accident, but were simply normal wear-and-tear marks for a 15-year old vehicle. *See* TP, 11/22/05 p.m. at 71; 12/13/05 p.m. at 14–33. Cooper also showed the jury that seatbelt components from a 1987 Pathfinder with mileage similar to Udac's vehicle, but which had not been in an accident, exhibited the same type of wear-and-tear markings as the components from Udac's vehicle. TP, 12/13/05 p.m. at 40–41.

Dr. Banks, Takata's biomechanical expert, unlike Renfroe, conducted a surrogate study which proved that the ***locations*** of the marks that Renfroe and the other experts identified were inconsistent with loading by someone of Udac's height and weight (*i.e.*, even if they were loading marks, they could not have been caused by ***Udac*** loading the seatbelt). If his testimony on the surrogate study had not been excluded, Banks would have opined—and the jury readily could see—that there were ***no marks of any kind*** on the webbing where there should have been if Udac had been wearing his seatbelt. *See* RA, V.9 at 11–16; Banks Dep. at 69–72, 75–78, 107–08. Because Banks's surrogate study would have shown that there were no loading marks from Udac, whatever the jury concluded about the cause of the marks discussed by the other experts, the excluded evidence (if believed) would have decisively proved that Udac was not wearing his seatbelt. As the ICA found, the erroneous exclusion of this study was a critical error.

Udac's bruising. Although Udac presented the testimony of five physicians who treated him after the accident, none of them testified to observing bruises or marks consistent with seatbelt use during the accident. Nevertheless, Udac was allowed to introduce photographs of bruising and scars on his body that were taken ***five weeks after the accident***. TP, 12/1/05 p.m. at 56–57. Renfroe, who is an engineer with no medical training and who had not reviewed Udac's medical records, opined that a bruise on Udac's left shoulder in these photographs indicated that Udac was wearing his seatbelt. TP, 11/30/05 a.m. at 6–7. Udac's brother, Paul Udac, who also has no medical training, said that black marks on Udac's left shoulder, left hip, and stomach were caused by the seatbelt. TP, 12/1/05 p.m. at 56–57.

Banks, who ***is*** a physician, reviewed Udac's medical records and testified that the marks on Udac's left shoulder were ***not*** a bruise from a seatbelt but were caused by the insertion of a subclavian catheter during Udac's hospitalization. TP, 12/15/05 at 110–11. He discussed

photographs showing suture marks from insertion of the catheter and produced an x-ray showing the catheter's insertion at that position. *See* TP, 12/15/05 at 112–16; Exhs. 5784, 5831. The circuit court prevented Banks from responding to Paul Udac's previously undisclosed testimony regarding bruises and marks on Udac's hip and stomach, however, because Banks's pre-trial report did not specifically address those marks. TP, 12/15/05 at 116–18. That was unsurprising, because there had been no pre-trial disclosure of Paul Udac's lay-witness opinions about the marks. Banks was allowed to testify, consistent with his report, that he did not find bruises or other injuries from a seatbelt around Udac's waist but was not allowed to discuss the specific marks identified during trial by Paul Udac. TP, 12/15/05 at 119. Banks was the only medical expert to testify on Udac's bruising.

The steering wheel. Udac argued that the absence of damage to the steering wheel indicated that he was wearing his seatbelt because he would have hit the steering wheel during the initial impact if he was not wearing his seatbelt. *See* TP, 12/20/05 p.m. at 19. Banks explained that if Udac was not belted he would have been slumped over the center console and not behind the steering wheel because he had fallen asleep at the time of the crash and so would not have hit the wheel before being ejected through the sunroof. TP, 12/15/05 at 183–84. Thus, the lack of damage to the steering wheel was consistent with Udac being either belted or unbelted at the time of the accident. *See id.*

ARGUMENT

I. THE ICA CORRECTLY HELD THAT IT WAS ERROR TO EXCLUDE BANKS'S SURROGATE STUDY AND REBUTTAL TESTIMONY.

The surrogate study. As they did before the ICA, Petitioners attempt to shift the Court's focus from whether Banks was qualified to conduct the surrogate study to whether Takata "retain[ed] Banks as its seatbelt expert." Petition 6. As the ICA held, however, "Dr. Banks was not required to be a seatbelt expert to testify about his surrogate-study results" because those results were well within his actual expertise and his designation as a biomechanical expert. App. 18. To the extent Petitioners imply that Banks was not ***retained*** to testify about the surrogate study, they blatantly misrepresent the record. The surrogate study was described in Banks's initial pre-trial report. RA, V.9 at 15. At his deposition, 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 Petitioners' counsel questioned Banks on "the purpose

of doing the exemplar surrogate inspection," 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 Banks stated (*id.* at 57), 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. As the ICA held, there is "no authority for the notion that a party may call only one expert at trial to testify as to the safety of a seatbelt." App 13-14.

Petitioners again distort the record—as the ICA correctly found—when they claim that Cooper offered testimony equivalent to the excluded surrogate study. The simple fact is that conducting a surrogate study is the only scientifically recognized method of precisely and verifiably determining the location at which marks should be found on a seatbelt if the occupant had been wearing it during an accident. As noted, Renfroe admitted that he used surrogate studies for this purpose in other cases, but he did not conduct one here. TP, 11/30/05 p.m. at 17–18. Banks was the *only* expert in this case who had conducted such a study. Cooper's testimony about the general area on a belt in which one "[t]ypically" expects to find marks—giving the jury a range of "70 to 80 inches" that does not definitively exclude the actual marks on Udac's seatbelt (TP, 12/13/05 p.m. at 42-43)—is not at all the same as a scientific study proving that there should have been a loading mark at 73.5 inches if Udac had been wearing his seatbelt and yet there is no such mark (Banks Dep., Exh. 6; TP, 12/15/05 at 123). As the ICA conservatively stated, Cooper's testimony "did not relate to the facts of this case as directly as the Udacs contend" and thus did not duplicate Banks's particularized surrogate study. App. 13.

Finally, Petitioners contend that "the ICA has imposed a new requirement on trial courts that they make on-the-record findings—to be reviewed on appeal—as to 'how long' the proffered testimony would take" before excluding the testimony as cumulative. Petition 8. But that is not what the ICA said. It stated that "when determining whether proffered evidence is cumulative, a trial court must weigh how much time it would take to present such evidence relative to the evidence's probative value." App. 14. In other words, the ICA held only that a

[3] 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.

trial court must ***consider*** the amount of time and balance that against other factors. That is perfectly consistent with the case law cited by the ICA (App. 10-11). It also is consistent with the common-sense notion that, because two pieces of evidence are never perfectly identical, before excluding evidence as cumulative, courts should balance the additional probative value of the evidence against any prejudice to the other party from the cumulative aspects of the evidence and the delay that would be caused if the evidence were allowed.

Rebuttal testimony on Udac's bruising. Udac's brother, Paul Udac, testified at his deposition that he did not remember seeing any bruises on Udac when he visited Udac at the hospital. *See* App. 18-19. At trial he offered a completely different story, introducing photographs of markings on Udac taken during Udac's hospital stay and opining, even though he had no medical expertise, that certain marks on Udac's left shoulder, left hip, and stomach were caused by the seatbelt. TP, 12/1/05 p.m. at 56–74. In response to this unexpected medical opinion from a lay witness, Takata sought to elicit rebuttal testimony from Banks, a physician and biomechanical expert, that, based on his expertise and an examination of Udac's medical records, these bruises and marks were ***not*** caused by a seatbelt but by Udac's ejection from the vehicle through the sunroof.

Notwithstanding that Paul Udac's in-court testimony was completely unexpected, the circuit court upheld Udac's objection to Banks's rebuttal testimony and excluded it on the ground that Banks had not addressed this issue in his pre-trial expert report. TP, 12/15/05 at 116–17. As the ICA found (App. 20-21), the premise of the circuit court's ruling is mistaken. Banks's pre-trial report opined: "[t]here is no objective evidence that Mr. Udac was wearing the available lap/shoulder restraint assembly during this crash," "Mr. Udac's thoracic injuries occurred during ejection through the sun roof opening and on contact with the terrain following ejection from the sun roof," and the "reported left-sided scrapes, abrasions, and other injuries likely related to contact with the sun roof frame during ejection." RA, V.9 at 15. Moreover, Banks testified at his deposition that Udac's medical records did not show any of the marks or injuries that would be present if he had been wearing his seatbelt, *e.g.*, marks on the clavicle, the right hip, "across the waist, the lap, across the two bony areas of the pelvis in front." Banks Dep. at 88–91; *see also id.* at 34–37; 82–84.[4] Accordingly, Petitioners' contention that, in his pre-trial

[4] The circuit court's pretrial order specified that "[t]he opinions of all experts shall be considered final at the conclusion of their respective depositions." RA, V.5 at 202.

opinions, "Banks did ***not*** opine that Dason was not wearing his seatbelt because there were no marks consistent with such use on his body" (Petition 9) is simply false. The proffered rebuttal was well within Banks's pre-trial disclosures and it was an abuse of discretion to exclude it.[5] Once again, Petitioners' efforts to entice this Court's review are based on a misrepresentation of the record—a misrepresentation that the ICA already has considered and rejected.

II. THE EXCLUSION OF BANKS'S SURROGATE STUDY AND REBUTTAL TESTIMONY WAS PLAINLY PREJUDICIAL.

Petitioners contend that "[i]f Dason was wearing his seatbelt but was nevertheless ejected, the only reasonable inference would be that the seatbelt failed to restrain him during the accident." Petition 3. Of course, the converse point is that, if Udac was ***not*** wearing his seatbelt when the vehicle went off the road, then Takata can have no liability for his injuries. Petitioners' suggestion that the ICA committed grave error by finding that Takata was prejudiced by the erroneous exclusion of potentially conclusive evidence on the question whether Udac was wearing his seatbelt is frivolous.

As the ICA recognized, Banks's surrogate study showed that there were no marks on Udac's seatbelt "where such marks should have been if [Udac] had been wearing the seatbelt at the time of the crash." App. 8. The study thus affirmatively and scientifically proved that Udac was not wearing his seatbelt. It also effectively rebutted Renfroe, who had identified marks at other locations (the wrong locations, according to the surrogate study) as having been caused by Udac during the crash. As noted, Renfroe admitted that he has conducted surrogate studies in other cases to confirm that the locations of marks on the seatbelt correspond with the occupant who allegedly was wearing the belt. But, without any explanation and quite suspiciously, he failed to conduct such a study here and instead simply hypothesized that the marks he found on the belt were in the right location based on his visual inspection. TP, 11/30/05 p.m. at 17–18. Banks would have exposed Renfroe's strategic decision not to conduct a surrogate study in this case by proving that an appropriate scientific measurement contradicted Renfroe's visual guesstimate. Petitioners focus on the number of marks that Renfroe identified, but Banks's surrogate study identified a mark that should have been found if Udac had been wearing his

[5] Furthermore, even if the proffered rebuttal were outside the scope of Banks's pre-trial disclosures, it nevertheless would have been an abuse of discretion to prevent him from responding to Paul Udac's unexpected testimony at trial. *See, e.g., Monlux v. Gen. Motors Corp.*, 68 Haw. 358, 362-64, 714 P.2d 930, 932-34 (1986).

seatbelt but simply did not exist—the presence of any number of other marks at other locations (with other potential causes) cannot "make up" for that missing mark. It is no exaggeration to say that the surrogate study alone could have resulted in a verdict for Takata.[6]

Udac also argues that Takata was not prejudiced by the exclusion of Banks's rebuttal testimony because Banks testified generally that he did not find any evidence of bruises caused by seatbelt use. Petition 10. But Banks's generalized testimony that there were no bruises from a seatbelt must have appeared to the jury to ignore Paul Udac's specific testimony about the individual marks that he pointed out to the jury in photographs of Udac's injuries. Contrary to Petitioners' misrepresentation, Banks did ***not*** "g[i]ve the testimony that the ICA held that he should have been allowed to offer." Petition 10. The jury unfairly was left with the impression that Banks could not back up his generalized claim with an analysis of Udac's particular injuries.

All of these same issues related to prejudice were fully briefed and argued before the ICA, which correctly found that the exclusion of the potentially decisive surrogate study and the rebuttal testimony on Udac's bruising "denied Takata a fair trial." App. 21. Petitioners complain that the ICA's analysis of prejudice was too brief (Petition 9 & n.5), but Takata submits that the prejudice is so plainly obvious from the ICA's discussion of the errors and the nature of the excluded evidence that nothing more was required.

III. THE ICA CORRECTLY FOUND THAT TAKATA IS ENTITLED TO JMOL ON PUNITIVE DAMAGES.

"[T]o justify an award of punitive damages, ***a positive element of conscious wrongdoing*** is always required." *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 7, 780 P.2d 566, 571 (1989) (emphasis added; internal quotation marks omitted). Moreover, that element must be proved "by

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[6] Udac contends that his own evidence would have overcome Banks's surrogate study. Petition 10. As show above (at 4-6), however, 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 inconclusive and speculative; Udac's and his passenger's recollections of that evening are dubious, cannot be verified, and are insufficient to show that he still was wearing the seatbelt at the time of the accident; Renfroe's testimony, at most, showed only that ***someone*** wore a seatbelt in an accident and thus created loading marks during the thirteen-year history of this vehicle, and the lack of damage to the steering wheel is equivocal. Banks's surrogate study, on the other hand, provided verifiable scientific proof that Udac was not wearing his seatbelt because the jury could see that there were no marks where there should have been.

clear and convincing evidence." *Id*. at 16-17, 780 P.2d at 575 (emphasis added). In order to establish Takata's liability for punitive damages here, Udac had to provide clear and convincing evidence that Takata either knew that the TK-821 was defective or was consciously indifferent to whether it was safe. As the ICA recognized, he did not come close to doing so.

Petitioners criticize the ICA for reviewing "only the evidence mentioned in the trial court's findings" on punitive damages rather than "***all*** the evidence presented at trial." Petition 11. But the ICA explicitly addressed those parts of the record that the parties identified as relevant to the issue of punitive damages. Indeed, Petitioners themselves authored the circuit court's "findings of fact"—which were adopted without modification (*compare* RA, V.24 at 72-78 *with* App. D)—and thus can hardly complain now that the ICA's review should have been broader than the opinion they wrote for the circuit court's signature. In any event, Petitioners did not raise any other evidence before the ICA. Nor do they identify any other evidence now. And, contrary to Petitioners' implied slander, the ICA obviously did conduct a full review of the extensive record here before ruling, as its comprehensive and detailed opinion repeatedly demonstrates.

Petitioners cite three pieces of evidence as justification for punitive damages, but their attempt to squeeze blood from these stones is based on the same distortions that the ICA rejected following extensive briefing and argument. Revisiting these factual disputes would not be a profitable use of this Court's time. In any event, Petitioners' contentions are easily debunked.

The 1992 NDS. Inadvertent release is the theory that a body part or an object in the vehicle can strike the release button during an accident, causing the buckle to unlatch. Petitioners contend that Takata should have known that the TK-821 is defectively prone to inadvertent release because it knew that the buckle can release if pressed by a 40-mm ball. Petition 10-11. But this argument is based on Petitioners' intentional confusion of two different uses of the "40-mm ball test."

First, the European Community uses this test to classify buckles as "enclosed" or "non-enclosed," but ***not*** as a safety standard—both types of buckles are installed in vehicles. *See Id.*, V.II at 210–11; 12/14/05 a.m. at 63. Thus, during development, Takata determined that the TK-821 is a "non-enclosed" buckle for purposes of its sales of the buckle in Europe, but had no reason to consider that fact to be evidence of a defect rather than a classification that made the buckle appropriate for certain vehicle cockpit configurations. Kitamura Dep., V.II at 211–17.

Second, the 1992 Nissan Design Specifications ("1992 NDS") for the Pathfinder—issued five years after the buckle in Petitioners' vehicle was installed—added a 40-mm ball requirement for that model-year vehicle. *See* Exh. 1490 at 4; TP, 12/20/05 p.m. at 9. But it was undisputed that the 1981 NDS—the NDS that applied to the vehicle here—did ***not*** include a ball-press test requirement. *See* Exh. 1587. Moreover, after issuing the 1992 NDS, Nissan did not conduct a recall of pre-1992 buckles or even ask Takata to begin designing replacement parts for prior model years according to the new 1992 NDS. And, as the ICA emphasized, by the time that Nissan added the 40-mm test, "the TK-821 had been in use in millions of vehicles around the world for almost ten years and in the Pathfinder for five years and Takata had not received a single report of its failure, including inadvertent release." App. 41-42. Thus, the addition of this specification to the design for a future model-year vehicle cannot provide clear and convincing evidence that Takata should have concluded that a buckle that had been performing safely for years in prior model-year vehicles nevertheless was defective.[7]

The ICA saw through Petitioners' effort to confuse Takata's knowledge that the TK-821 was a "non-enclosed" buckle for purposes of its sales in Europe, with Nissan's addition of a 40-mm test as a design standard for different model-year vehicles years later. Far from grave error, that was the correct result—there is no evidence of "a positive element of conscious wrongdoing" to be found here.

The patent. Inertial release is the theory that a buckle can come unlatched when struck with sufficient force on the side or back (*i.e.*, not the button). Petitioners' attempt to distill knowledge that the TK-821 was defectively prone to inertial release from the patent for another buckle, but they again have distorted the record. Petitioners use selective quotations to make it appear that the patent for the TK-52 buckle identified an inertial-release defect in ***all*** prior art buckles. Petition 12. That is false. As the ICA correctly observed, the patent's description of prior art states only that "'known mechanisms are complicated, and ***some*** do not positively retain the latch plate'" when struck with sufficient force. App. 27 (quoting TK-52 patent) (emphasis added). Moreover, the patent's discussion of prior art indicates that, in general, spring-release

[7] Furthermore, Petitioners' expert, Renfroe, admitted that no regulator imposes a 40-mm test and that there are no scientific studies or reports demonstrating a correlation between a 40-mm ball test and the propensity of buckles to release inadvertently in real-world crash situations. TP, 11/30/05 p.m. at 37–38; *see also* TP, 12/14/05 a.m. at 64 (similar testimony from Cooper).

buckles such as the TK-821 "prevent" inertial release because they use a strong spring, which "can cause difficulties and annoyance to the user" because it makes the buckle harder to open manually. App. 23. The ICA found—Takata believes incorrectly—that the patent's statement about "some" prior-art buckles was sufficient to make it admissible here (*id.*), but that vague statement plainly does not amount to ***clear and convincing*** evidence that Takata knew of a defect in the TK-821 (*id.* at 41), particularly given the patents' statements about prior-art buckles generally and the TK-821's unmarred real-world track record.

The drop test. Finally, Petitioners suggest that clear and convincing evidence of conscious wrongdoing can be found in a drop test that Takata conducted on the TK-821 in 1991, showing that the buckle will not release until impact forces exceed 400 g's. Petition 12. But, as the engineer who conducted the test testified (Kitamura Dep., V.I at 78-86, 91, 100), those results confirmed that the buckle is ***not*** susceptible to inertial release because ***the maximum force ever measured*** in rollover testing is at or below 400 g's (*see* TP, 11/29/05 p.m. at 78-79; 12/14/05 a.m. at 36). Petitioners conjecture that Takata should have designed the buckle to withstand forces up to 800 g's based on their expert's off-the-cuff speculation that an accident could involve such a force. Petition 12. But no one has ever measured such a force in an accident, and there was no evidence that anyone has ever considered or even proposed such outlandish forces to be a relevant safety standard. Indeed, the industry-standard shock table that is used to test for inertial release cannot even measure forces that high. *See* TP, 12/14/05 a.m. at 20–25. Furthermore, it was 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 a NHTSA study concluded that inertial release simply does not occur in the real world because of testing that the agency conducted on buckles that release at 140-150 g's (TP, 12/14/05 p.m. at 78). Contrary to Petitioners' misrepresentation, the result on Takata's drop test ***confirmed*** that the TK-821 is a safe buckle.

CONCLUSION

The Application for Writ of Certiorari should be denied.

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