

NO. _____

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

MARIAN ARMSTRONG

Petitioner,

V.

NISSAN MOTOR COMPANY LTD., d.b.a. NISSAN MOTOR COMPANY and
NISSAN MOTOR COMPANY IN U.S.A.,

Respondents.

CONDITIONAL PETITION FOR REVIEW

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STATEMENT OF THE CASE

- Nature of the Case:** This is a product liability personal injury suit. Plaintiff, Mrs. Marian Armstrong, was injured when her car, a 1986 Nissan 300ZX, experienced a sudden acceleration incident.
- Trial Court:** The Honorable Mark Davidson, 11th District Court, Harris County, Texas
- Trial Court Disposition:** The jury found that (1) Nissan was negligent, (2) Mrs. Armstrong was not negligent, (3) the 300ZX was defectively designed, manufactured and marketed, (4) Nissan negligently misrepresented material facts about the 300ZX, (5) Nissan engaged in fraud, (6) Mrs. Armstrong was a consumer under the DTPA, (7) Nissan violated the DTPA and did so knowingly, (8) Nissan breached an express warranty, (9) Nissan was grossly negligent and fair and (10) reasonable compensatory damages were \$900,000 (CR 258-283).
- Before the second trial phase to determine the amount of exemplary damages, the parties stipulated that the amount of \$2 million would be entered as exemplary damages and that Nissan would not in any manner contest that amount on appeal (RR 1569-1971). Nissan was still free to contest the jury's finding of gross negligence. *Id.* The court accepted the stipulation (RR 1570).
- The court entered judgment for the full amount of the jury's verdict and stipulated exemplary damages on April 8, 1998 (CR 309-311). The trial court thereafter, *sua sponte*, modified the stipulated agreement of the parties by ordering a remittitur of almost half of the stipulated exemplary damages (CR First Supp. 97¹).

1. Six pages are marked 000097 in the 1st Supplemental Transcript. The one referred to is the last.

Parties in the Court of Appeals:

Nissan Motor Company Ltd. and Nissan North America, Inc. (formerly known as Nissan Motor Corporation in U.S.A.) — appellants; Marian Armstrong — Appellee.

Court of Appeals:

The Fourteenth Court of Appeals.

Court of Appeals' Disposition:

The Court of Appeals unanimously affirmed the trial court's judgment in all respects and overruled Nissan's motions for rehearing and rehearing *en banc*. Nissan Motor Co., Ltd. v. Armstrong, 32 S.W.3d 701 (Tex. App. – Houston [14th Dist.] 2000) (attached as Appendix, Tab 3).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to TEX. GOV'T CODE § 22.001(a)(2) because the court of appeals decision conflicts with this Court's decisions on stipulations in Vickrey v. American Youth Camps, Inc., 532 S.W.2d 292 (Tex. 1976), Edward v. Gifford, 137 Tex. 559, 155 S.W.2d 786 (1941), and Wyss v. Bookman, 235 S.W. 567 (Tex. Comm'n App 1921) (holding approved), and the following courts of appeals' decisions: Patel v. Eagle Pass Pediatric Health Clinic, 985 S.W.2d 249, 252 (Tex. Ct. App. – Corpus Christi 1999, no writ); Clanin v. Clanin, 918 S.W.2d 673, 678 (Tex. Ct. App. – Fort Worth 1996, no writ); Tinney v. Willingham, 897 S.W.2d 543, 544-5 (Tex. App.—Fort Worth 1995, no writ); and Guynn v. Corpus Christi Bank & Trust, 580 S.W.2d 902, 906 (Tex. Ct. App. – Corpus Christi 1979, writ ref'd n.r.e.)

This Court has jurisdiction pursuant to TEX. GOV'T CODE § 22.001(a)(2) because the court of appeals decision conflicts with this Court's decision on remittitur in Larson v. Cactus Utility Co., 730 S.W.2d 640 (Tex. 1987).

This Court also has jurisdiction pursuant to TEX. GOV'T CODE § 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

STATEMENT OF ISSUES PRESENTED

Issue 1: The court of appeals committed an error of law in failing to require entry of judgment in accordance with the parties' uncontested Rule 11 agreement that exemplary damages would be \$2,000,000.

Point Not Considered by the Court of Appeals:

Issue 2: The court of appeals erred in failing to hold that facts contained within Nissan documents are privileged from discovery.

INTRODUCTORY STATEMENT

Petitioner, Marion Armstrong (“Mrs. Armstrong” or “Plaintiff”), files this Conditional Petition for Review pursuant to TEX. R. APP. 53.7(c) and asks the Court to consider it only if the Court grants Nissan’s Petition in Nissan Motor Company Ltd. v. Armstrong, No. 01-0030 (Tex. filed February 21, 2001). If the Court denies Nissan’s Petition for Review and motions for rehearing, Mrs. Armstrong will move to withdraw this Petition.

STATEMENT OF FACTS

The History of Plaintiff’s Car

Plaintiff’s mother bought a new 1986 Nissan 300ZX in 1986 (RR 1084; 664). Nissan Motor Co. Ltd. (“Nissan Japan”) designed and manufactured the car (RR 1073). Nissan Motor Corp. in U.S.A. (“Nissan USA”) marketed and distributed the car (RR 1073) (collectively “Nissan”).

Mrs. Armstrong took excellent care of the car since it was her first new car (RR. 1083). The car was “like a baby” to her, she would let no one else drive it, it was consistently garaged, and all maintenance called for in the service booklet was done (RR 1084).

Plaintiff received the car as compensation for the work she performed for the business (RR 608, 1081-1082). She never received any information or warnings about any risk of sudden acceleration in the ZX, much less the specific defects in the throttle cable (RR 644-645). If she had been warned, she would never have bought the car (RR 645).

Prior Incident of Stuck Throttle in Plaintiff's Car

On October 29, 1992, the day before Plaintiff's crash, the 1986 Nissan 300ZX suddenly accelerated. (RR 610, 689). The car "started accelerating" and "seemed to just kind of take off faster" while Plaintiff was driving on the freeway going to work (RR 610). She pulled to the side of the road and turned the engine off (RR 610). She restarted the car and had no further problems that day (RR 610).

The Crashes

The next day, on October 30, 1992, Plaintiff got into her car after work to drive home (RR 612-613). She started her car and put it into reverse. It accelerated out of control, despite her having her foot firmly on the brake pedal,² and crashed into her brick office building (RR 612; P. Ex. 1A (Police report) (App. 5)³; P. Ex. 1B (scene photographs) (App. 6)). Plaintiff then put the car into drive to pull away from the building and determine the extent of damage (RR 614). The car again accelerated out of control and crashed headlong into a telephone pole (RR 614-617, 1461, 1051).

The police investigation reported that sole cause of the accident was "mechanical failure, accelerator hung" (P. Ex. 1A at 2). The fire department investigation concurred, reporting there was a "stuck" accelerator. (RR 1461).

The car was damaged severely in the collision (P. Ex. 1B (damage photographs)) and was towed to a repair shop. The car was in for body and mechanical repairs for months at two different shops (RR 682).

2. Putting a foot on the brake pedal is required before shifting from park to reverse because of the shift interlock system ("SI") (RR 613; 642-643).

3. "App." refers to the appendices attached to this brief.

Discovery and Repair of Plaintiff's Throttle Cable Failure

After the car was “repaired,” the car’s engine again accelerated uncontrollably while a family friend tried to move the car out of the driveway (RR 528-29; 541; 543) (“The car tried to take off on them”).

After this third unintended acceleration, Plaintiff’s father, Leslie Armstrong, was referred to The Z Place, which specializes in repairing ZX’s (RR 530, 565). Armstrong spoke with manager Irwin Williams (RR 587). Williams said he knew the cause of the present sudden acceleration problem (RR 543) and the cause of Plaintiff’s crash (RR 544-545). Williams told Armstrong “to check the [throttle] cable” (RR 544) and cut the boot off the throttle cable “so it wouldn’t get caught in the bell crank” (RR 588).

Armstrong saw that the cable had several pieces of plastic and that one of them was hard and cracked (the boot), broken and loose, and “sliding back in forth” on the cable (RR 532, 556). He removed these pieces and threw them away (RR 532). Armstrong also saw a milky white colored piece underneath that was frayed (RR 533) and trimmed it (RR 538).

Armstrong then took the car to The Z Place (RR 591). Williams and another technician examined the car (RR 591-592). They saw that the boot was already cut off the cable but still replaced the cable with the new safer design (RR 592, P. Ex. 2, 6A). Williams discovered the cause of Plaintiff’s accident. In his words:

Based on my analysis of her engine, I believe that the unintended acceleration was caused by the throttle boot breaking away and becoming lodged within the accelerator system. I have seen this type of failure happen many times before and after her accident. . . . I replaced the accelerator cable and

boot and tested her vehicle and the problem with unintended acceleration was solved.

Affidavit of Irwin Williams (Ex. 1 to D. Ex. 4) (App. 8).

Williams showed Armstrong other ZX cars which had the same condition that Plaintiff's car had—a large black rubber piece broken, causing the same problem Plaintiff's car had (RR 540). Each time a 300ZX car came into The Z Place, boots dislodged from the accelerator cables were cut off and the customer was told “there was a problem” (RR 568). Approximately 40% of the Nissan ZX cars taken to The Z Place had fractured boots (RR 601).

Other Incidents of Unintended Acceleration⁴

Numerous other incidents were admitted, some years before Plaintiff's accident. This evidence included witnesses, Nissan's internal documents and database, and customer complaints filed with NHTSA.

1. Live Testimony

Four independent witnesses testified about how their ZX cars accelerated out of control. Gary Lysdale, age 58, is a retired airline pilot and former automobile and aircraft mechanic (RR 330-1). Mr. Lysdale testified about his 1986 300ZX (RR 331-332, 356):

[I] went out and started up the automobile. I put it in reverse and I don't know if it went full throttle, but it went backwards out on to the street [out of his driveway]. . . . I tried to stop the car with the brakes to no avail. I tried to push it into park. I could actually hear the clicking noise of trying to lock the car where it would not actually engage in the park position.

4. Nissan claims that the court of appeals erred in ruling that no reversible error was committed by the introduction of other incidents. Mrs. Armstrong's responses to that claim are presented in her Response to the Petition for Review filed March 23, 2001.

RR 332-333. Mr. Lysdale discovered the cause – a throttle cable boot failure:

I was able to look at the car and I actually looked over the cables and I found there was a small little rubber boot that actually is in front of the cable housing. That boot was lose [sic] at that point. . . . I physically moved the throttle body on the cam and I physically put the boot up onto the cam which it would stick onto that cam. The boot was loose.

RR 334-335, 338-339. The boot had split and was not attached at its base (RR 357). Mr.

Lysdale's daughter also owned a 300ZX that had a sticking throttle (RR 372).

The other live witnesses were:

1. Linda Faust, a 55 year old police officer trained in accident reconstruction and emergency driving. (RR 289-328; 374-378). The Fausts bought a new 300ZX in 1985 (RR 293). In May 1987, the Fausts had unintended acceleration (RR 293-298). The car was maintained according to Nissan's maintenance schedule and had only 21,000 miles on it (RR 300). Mr. Faust saw that both of his wife's feet were on the brake pedal (RR 297-298; P. Exs. 68A, 68B). Mrs. Faust had a spinal fusion to fuse three vertebral discs, ruptured two discs in her neck, had an ulnar nerve transplant in her arm and both ankles were sprained (RR 314). Nissan denied any problem. Mrs. Faust traveled from California to Houston for the trial at her own expense (RR 318).
2. Mrs. Martha Ham, from Mesquite, Texas, testified about her experience in a 300ZX with only 1,500 miles on it (RR 379-393; 383). She "bailed out" of her ZX before it ran into a ditch (RR 381-383).
3. Paul Roupinian, age 29, a stockbroker from California, also testified (RR 394-412). Roupinian maintained the car perfectly according to Nissan's maintenance schedule (RR 397). Roupinian testified about his December 1997 incident (RR 398-399). Mr. Roupinian personally reported the problem to Nissan's corporate headquarters (RR 401).

2. Documents

The following documents are included in the Appendix, Tab 7, for the Court's convenience.

- P.Ex. 7K: On March 1, 1986, Frederick Healing was killed in a 1985 ZX. Nissan received notice of this accident on June 20, 1986. Id. Nissan's records state that the owner had a prior problem of throttle sticking. The owner forgot to tell Mr. Healing, her fiancé, about the problem. The car crashed, caught fire, and burned Mr. Healing to death (P. Ex. 7K at 1, 6).
- P.Ex. 7H: On April 28, 1986, Nissan's internal records show that one of its dealer service directors had two, back to back, wide-open throttle sudden accelerations on a brand new 1986 300ZX.
- P.Ex. 7L: On February 11, 1989, a 1984 300 ZX suddenly accelerated and crashed into two parked cars, injuring two. Nissan's internal report states that even after the accident, the throttle cable was still stuck & the driver pulled it out. A witness stated he had placed his foot under the throttle pedal prior to accident because it had been sticking. A Nissan employee noted that the "throttle cable" was the part allegedly defective and notified Nissan's national headquarters. Id.
- P.Ex. 7N: On April 26, 1991, a 1984 300ZX suddenly accelerated. Nissan's report showed it was notified on April 29, 1991. Nissan's internal report showed a sudden acceleration that caused the driver to swerve into the wrong side of road, "sending veh. up embankment, roll over 3X, hit telephone pole, landed on roof – skid 100 feet." (P. Ex. 7N at 4).
- P.Ex. 7M: On December 13, 1991, a 1986 ZX was involved in an accident that had a sticking accelerator (P. Ex. 7M). Nissan's internal report states that accident was a "result of accelerator sticking – C stated to Ins that veh had been recalled for accel sticking." Notice was sent to Nissan's "Legal – Breach of Warranty" section. Id.
- P.Ex. 7D: On April 27, 1992, Nissan received notice from one of its dealer's service managers of another incident of stuck throttle in a 1985 ZX. Nissan's internal record reported the cause: "CS stated piece had broken off of throttle cable & became lodged. SM [service manager] thought NMC [Nissan Motor Corp.] should know if [sic] incident." This incident was also reported to Nissan headquarters.

Nissan's report also reported the same problem with another car at the same dealership. The service manager "ck'd to see if dust boot for throttle cable was deteriorating on that veh too. Upon inspection, DLR

[dealer] found part was deteriorating. SM called Region [Nissan's regional headquarters] and advised CAA [Nissan's Consumer Affairs Department]." Id.

CAA then contacted a Nissan TSM (technical service manager, RR 1166) who stated he wanted to inspect vehicle. Id. The report then states: "CAA advised by TSM that he inspected both vehs & found both veh had throttle cable dust boot deteriorating & that part of the component had become lodged in cable causing veh to continue to accel." Id. CAA authorized the dealer to replace the throttle free even though the car had over 82,000 miles on it. Id.

- P.Ex. 7B: A "Nissan TSM Technical Report" was prepared on the incident reported in P. Ex. 7D. The report states: "The owner said when inspecting the vehicle he found the dust boot for the throttle cable had separated from the base, slid forward, and jammed itself between the throttle cable and accelerator drum, thus preventing the throttle returning to neutral."

The Nissan TSM concluded, based on his personal inspection: "Dust boot for throttle cable, engine compartment side, deteriorates. The boot deteriorates at the point where it is mounted to the flange that attaches it to the mounting bracket on the air intake. The dust boot now can slide freely on the throttle cable – forward direction only – towards the accelerator drum/throttle shaft." The Nissan technical inspector even drew a detailed drawing of his defects findings, clearly illustrating a separated throttle cable boot, jammed into the accelerator drum, causing a stuck open throttle. Id.

- P.Ex. 7I: July 1992 notice from customer who had sudden acceleration to 4000 RPM while driving on highway and found a stuck throttle cable. Nissan's report states: "C clms when driving down highway veh accelerated up to 4K RPM and stayed. C clms when pulled over noticed the grommet on end of throttle cable broke [sic] and lodged throttle all the way open. C wanted to let NMC know about prob in case it should happen to other people in the future." The car had 63,000 miles on it; the dealer replaced the throttle cable for free (P. Ex. 7I at 1).
- P.Ex. 7G: On August 18, 1994, Nissan was placed on notice of another cable boot failure causing sticking throttle from Michael Oruna (P. Ex. 7G). The report states: "C states that on 2 seperate [sic] occasions the gas pedal "locked" and the veh revs to about 4000 RPM. C states that on the second occasion he determined what the problem was

and what is causing the gas pedal to lock. ... Cust finally told us that a piece of plastic on end of throttle cable had come loose & become stuck on thottle [sic] itself. He cut the plastic off hisself [sic].” Nissan’s Consumer Affairs reported the incident to its regional office. Id.

- P.Ex. 7A: This is an August 1994 incident from Gary Larson (P. Ex. 7A at 2; RR 1171-1172). He reported to Nissan numerous sudden acceleration incidents in his 1985 300ZX. (P. Ex. 7A at 1-3; RR 1171-1172) before August 4, 1994 (P. Ex. 7a at 1-2). He wrote: I am the owner of a 85 300 zx [sic] and my car has a problem with unwanted acceleration. I have had at least 6 occasions of throttle sticking and I had the car examaned [sic] by nissans [sic] regional mechanic and he could not find the problem. I have identified the cause, it is a defective cable design. A plastic tip on the cable has broken and rides forward on the accelerator cable and gets caught btween [sic] the cam and the cable causing the throttle to stick open when driving. . . . I request that nissan [sic] repair this defect at once.”

Mr. Larson identified the specific defect and wrote: “The problem has continued, and I stopped the car by putting it in neutral which made the engine rev at 2,500 RPMs+ , open the hood I saw that the plastic end cap of the accelerator by the throttle was broken off and stuck under the throttle cam and cable preventing the throttle from closing.” Mr. Larson even sent a photograph showing the throttle cable boot dislocated, jamming the throttle and causing sudden acceleration (P. Ex. 7A at 5).

- P.Ex. 7F: Nissan produced an engineering report dated September 30, 1996, from Anderson Engineering Group (RR 1174) related to a 1987 300ZX (RR 1174). The professional engineer stated in his report: “When I examined the accelerator cable I noticed that certain plastic portions were broken and were still around the actuating cable. On my first examination I noted that this broken plastic caused the accelerator cable to bind. Further, the harder it was pulled the tighter the wedging action of the broken part became. Further examinations of the cable indicated that this was a reoccurring event.” Id.

3. Nissan’s Database

Nissan created and maintained a “confidential” database of 757 unintended acceleration incidents showing a variety of relevant information. (P. Ex. 27) (App. 9); (RR 1074; RR 1198-1200; 1227). The manager of Nissan’s Engineering Analysis Department

determined what information Nissan would collect (P. Ex. 23; RR 1221-1222) and thus created the database.

4. Nissan's Offer of Other Incidents

Nissan offered hundreds of ZX acceleration incidents, some involving fatalities. (D. Ex. 144 at #N09466). Nissan's manager of engineering testified that NHTSA noted "79 accidents, 38 injuries and three fatalities" of sudden acceleration of the 300ZX within 313 days. (RR 205 – 207).

5. Expert Testimony

Plaintiff called Neil Mizen to testify.⁵ Mr. Mizen has a master's degree in mechanical engineering.⁶ He is a mechanical engineer and former member of the Society of Automotive Engineers ("SAE") where he presented papers (RR 711-12). Mizen worked as an automotive engineer and spent a significant part of his career in this specialty (RR 703-13). In addition, he has experience in (1) vehicle dynamics, design, and performance from his work at Cornell Aeronautical Laboratory, (2) applying computers to control machinery, (3) accident reconstruction, and (4) body dynamics working through his work for the insurance industry (RR 703-13). He is a registered engineer (New York and Illinois) and a member of ASME (American Society of Mechanical Engineers) (RR 703-13).

Mr. Mizen investigated Mrs. Armstrong's incident⁷ and found that Mrs. Arm-

5. Nissan claims error in the admission of Mizen's testimony. The court of appeals disagreed. Mrs. Armstrong's response to Nissan's argument is in her Response to Petition for Review.

6. Mr. Mizen was at least as qualified as the Nissan expert called at trial to testify on these matters. Nissan's expert, Hughes, is not a design engineer, has never designed any car part, and did not even visit the scene of the accident (RR 1159-1164).

7. Mr. Mizen inspected the accident site, examined Plaintiff's ZX twice, tested throttle components, test drove

strong's accident was caused by a throttle cable failure. He identified the specific defect:

[T]his larger boot got off and perhaps with the stiff plastic inside it, it got bound to the bell crank. When the driver depresses the gas, this cable retracts. This T-handle is attached to what I'd like to call a bell crank. That's open against the spring. And that opening causes the engine to receive air. When that happens, the engine speeds up. When this part breaks loose, it does not allow that bell crank to go back to its idle position and thus causes the engine to continue to run fast.

RR 724. Mr. Mizen concluded that (1) the 300 ZX defects caused Plaintiff's accident. (RR 761-63), (2) Plaintiff's ZX was defective in design, manufacturing and marketing, and (3) was unreasonably dangerous and caused damage to Plaintiff. (RR 761-771, 867-868, 904-5; 1035-7; 1049-51).

6. Alternative Safer Design

Nissan Japan designed a new cable in December 1995 to replace the defectively designed cable (P. Ex. 4B (new cable), 4A (schematic); RR 176-177). It cost \$10.66 (RR 752-3), eliminated the defects (RR 727), and was a safer alternative design, technologically and economically feasible when Mrs. Armstrong's car was made (RR 752-53, 763).

7. NHTSA

NHTSA received an unusually large number of consumer complaints of unintended acceleration in ZX's (even more than the infamous Audi 5000) and began to investigate (P. Ex. 24). Importantly, NHTSA could not identify a *single* cause common to *all* of the reported incidents (P. Ex. 24 at 5). But, NHTSA still knew there was something

Plaintiff's ZX for stuck throttle characteristics, reviewed pertinent Nissan documents, depositions, photographs, videotapes, associate tests, incident reports, Nissan's expert's stuck throttle tests, analyzed throttle cables (old and new safer alternative), cruise control (ASCD) and Engine Control Unit (ECU), Nissan's warning letter, and dumping valve (installed on other cars). (RR 714, 719-761, 736, 806-7, 819-20, 824-5).

wrong with the car and that a recall was needed (RR 1215). NHTSA also knew that there could be a defect even though it could not identify a single defective part (RR 1214). NHTSA knew that the complaint rate alone could establish defect Id. Nissan's employee responsible for interacting with NHTSA recorded this information (RR 1213-1218).⁸

Nissan was concerned that NHTSA would upgrade its "engineering analysis" to a formal investigation (RR 1217) and that it would order a recall (RR 1215-1216). Nissan's attorney proposed to NHTSA that if Nissan agreed to recall the 280 and 300 ZX's with automatic transmissions to install a shift interlock system, NHTSA would not upgrade the investigation to a formal defect investigation (RR 1218; 1239). The shift interlock system would require that drivers place their foot on the brake before being able to shift out of park into reverse or into a drive gear (RR 1218).

NHTSA agreed to Nissan's proposal (RR 1218). With this understanding, Nissan "voluntarily" recalled the 1979-1987 models of the Nissan ZX (with automatic transmissions) to install a shift interlock system (RR 1218) on June 29, 1987 (P. Ex. 12B at 2). Mrs. Armstrong's ZX had the interlock installed in September 1987 (RR 688; D. Ex. 3).

The shift interlock did nothing to prevent unintended acceleration caused by the throttle cable or electrical component failures. Even after Nissan's shift interlock "recall" campaign for the ZX, sudden acceleration incidents, accidents and injuries continued (RR 151; D. Ex. 4). Nissan even admitted that its shift interlock did not stop all stuck throttle

8. Slaveter's notes were identified as P. Ex. 28. Even though the notes were accompanied by Slaveter's memo on Nissan letterhead, Nissan's counsel asserted an unfounded authentication objection, but it was sustained (RR 1212). The notes themselves were not admitted but Ray Hughes was allowed to testify about their contents and to base his opinions on them (RR 1211-1220).

incidents in the ZX (RR 151). Moreover, Nissan's "fix" did not even pretend to "fix" unintended accelerations in the ZX's with standard transmissions – just automatics.

Although Nissan knew NHTSA was investigating unintended acceleration in its ZX models, Nissan (1) never told NHTSA that it had documented incidents of throttle cable boot failure causing unintended acceleration (RR 1203, 1204), (2) never told their dealers to inspect for the problem, and (3) never told their own customers about *any* of the causes of sudden acceleration in the ZX models, much less a specific throttle cable failure (RR 261-262; 1206-1207).

Finally, the allegedly privileged documents before the court through Plaintiff's motion (CR First Supp. 1-40) (App. 10) establish Nissan's internal acknowledgement of the defect and its state of mind. Documents related to the Payne and Hart incidents prove Nissan's knowledge of the throttle cable defect, on-going fraud, and cover-up.

ARGUMENT

Issue 1: The court of appeals committed an error of law in failing to require entry of judgment in accordance with the parties' uncontested Rule 11 agreement that exemplary damages would be \$2,000,000.

Before the second phase of the trial, Nissan and Mrs. Armstrong agreed on the record in open court that (1) "[t]he amount [of exemplary damages] that will be entered is two million dollars" (RR 1569-70) and (2) "[t]he amount itself will not be appealed." *Id.* This agreement was in full compliance with TEX. R. CIV. P. 11; no party has ever contended otherwise.

The trial court immediately "approved" the agreement and dismissed the jury (RR 1570-1). Judgment for the full amount stipulated was signed on April 8, 1998 (CR 309-

311). Nonetheless, the trial court *sua sponte* refused to honor the parties' agreement and ordered a remittitur of almost half of the stipulated exemplary damages (CR First Supp. 97⁹). The court of appeals refused to order entry of judgment in accordance with the parties' agreement under the theory that the court had a "constitutional duty to independently scrutinize punitive damage awards for excessiveness." 32 S.W.3d at 212. But, the trial court never made a finding that the agreed exemplary damages were "excessive."

The agreed stipulation of exemplary damages was in full compliance with Rule 11 – no one has *ever* contended otherwise. When parties enter Rule 11 agreements disposing of some or all of a dispute, the court has no authority to enter judgment except in strict compliance with the agreement. Vickrey v. American Youth Camps, Inc., 532 S.W.2d 292 (Tex. 1976) (reversing court of appeals' refusal to require entry of judgment in accordance with parties' agreement), citing Wyss v. Bookman, 235 S.W. 567 (Tex. Comm'n App 1921)(holding approved) (reversing judgment where stipulation requiring release of 55 acres not in judgment), and Edwards v. Gifford, 137 Tex. 559, 155 S.W.2d 155, (Tex. 1941) (affirming and refusing to alter judgment to change agreement).

As this Court held in Vickrey:

A final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement.

532 S.W.2d at 292. This Court approved the following holding in Wyss:

The court would be entirely without authority to render any judgment other than that falling strictly within the terms of the stipulations. . . . The powers of the judgment, exercised by virtue of agreement of the parties, extend, we

9. Six pages are marked 000097 in the 1st Supplemental Transcript. The one referred to is the last.

think, to entering only such judgment as was a literal compliance with the agreement.

Wyss, 235 S.W. at 569. As additional authorities, see Patel v. Eagle Pass Pediatric Health Clinic, 985 S.W.2d 249, 252 (Tex. Ct. App. – Corpus Christi 1999, no writ) (reversing judgment not in conformance with parties’ agreement), Clanin v. Clanin, 918 S.W.2d 673, 678 (Tex. Ct. App. – Fort Worth 1996, no writ) (reversing judgment not in accordance with agreement), Tinney v. Willingham, 897 S.W.2d 543, 544-5 (Tex. App.— Fort Worth 1995, no writ) (reversing judgment that did not comply with agreement), and Guynn v. Corpus Christi Bank & Trust, 580 S.W.2d 902, 906 (Tex. Ct. App. – Corpus Christi 1979, writ ref’d n.r.e.) (reversing judgment, holding: “Once the requisites of Rule 11, Texas Rules of Civil Procedure, have been satisfied, it is the ministerial duty of the trial court to then render judgment in strict accordance with the parties’ agreement.”)

Not only does Rule 11 preclude the order of remittitur, this Court’s decision in Larson v. Cactus Utility Co., 730 S.W.2d 640 (Tex. 1987), forbids it. Larson holds that a remittitur must be based on insufficiency of evidence standard. Id. at 641. The order to remit in this case violates Larson because it cannot be based on the evidence; it ordered a remittitur of a stipulated amount. The stipulation *eliminated the need for evidence*.¹⁰

The court of appeals cited BMW v. Gore, 517 U.S. 559, 574 (1966), Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), and Alamo National Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981). They are irrelevant, as they do not involve *stipulated* damages.

10. Mrs. Armstrong *waived* her right to introduce evidence on what an appropriate amount of exemplary damages would be and *waived* her right to have the jury find that amount in reliance on the stipulation and the Court’s acceptance of it. She would not have done so otherwise.

Issue 2: The court of appeals erred in failing to hold that facts contained within Nissan documents are privileged from discovery.

Nissan produced documents to Petitioner and later claimed they were privileged and inadvertently produced. Petitioner returned the documents upon request. The documents clearly show that unintended accelerations were caused by throttle cable boot failures and Nissan's failure to adequately design and warn of the problem. Certain of the documents relate to the Payne and Hart accidents. These documents establish Nissan's knowledge that sudden acceleration incidents involving the ZX are caused by throttle defect.

The lower court erred in not considering Petitioner's point that the trial court erred in finding that the *facts* contained within the documents are privileged. Facts are discoverable and unprivileged. Granada Corp v. Honorable First Court of Appeals, 844 S.W.2d 223, 228 (Tex. 1992).

PRAYER

Petitioner, Marian Armstrong, prays that this Court grant her Petition, reverse the court of appeals' judgment to the extent it denied recovery of the agreed damages, rule that the documents' facts are not privileged, and render judgment that Petitioner recover the jury verdict and stipulated damages. Petitioner prays for costs and such other relief to which she is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify compliance with Texas Rules of Appellate Procedure in that a true and correct copy of the foregoing has been served on the following counsel by overnight hand delivery service on Thursday, March 22, 2001.

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