Affirmed in Part, Reversed and Rendered in Part; Opinion Filed June 3, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00075-CV

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

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

OPINION

Before Justices Schenck, Partida-Kipness, and Nowell
Opinion by Justice Nowell

Toyota Motor Corporation (Toyota Motor) and Toyota Motor Sales, U.S.A., Inc. (Toyota Sales) appeal from a judgment for actual and punitive damages in this products liability lawsuit. Appellants contend the design defect claim is barred by the statutory presumption of non-liability for products complying with federal safety standards; the evidence is insufficient to support the jury's findings on the design and marketing defect claims; the jury charge erroneously commingled valid and invalid theories in a single broad-form question; the trial court abused its discretion by admitting several pieces of evidence; the evidence is insufficient to support the

findings on actual damages, gross negligence, and punitive damages; and the award of punitive damages does not meet constitutional and evidentiary standards.

After submission, appellees filed a motion for rendition of a take-nothing judgment as to Toyota Sales. Appellants agree we should render a take-nothing judgment in favor of Toyota Sales. We grant the motion, and, without regard to the merits, we reverse the judgment against Toyota Sales and render judgment that appellees take nothing against Toyota Sales. In all other respects, we affirm the trial court's judgment.

Background

Ben and Kristi Reavis were traveling south on Central Expressway in their 2002 Lexus ES300. Their two children, 5-year-old E.R. and 3-year-old O.R., were buckled in their car seats in the backseat behind Ben and Kristi. Ben was driving. Traffic stalled near downtown, and Ben stopped his car a short distance behind a Nissan Altima. Michael Mummaw was driving in Dallas for the first time in a borrowed Honda SUV. He looked down for a second, then looked ahead and saw the cars in front of him were stopped. He was unable to stop and rear-ended the Reavises' ES300 at between 45 and 48 mph. The collision pushed the ES300 forward into the Nissan, causing a second collision. The Honda then collided again with the rear of the Lexus at a much slower speed.

Ben and Kristi suffered minor injuries to the tops of their heads. Their children, however, suffered significant head and brain injuries. After the collision,

Kristi saw O.R. slumped forward, bleeding, and comatose. She felt a hole in his head and both parents thought O.R. would die. Ben saw E.R.'s right eye was swollen, and she was comatose and bleeding. E.R. and O.R. sustained skull fractures and traumatic brain injuries among other severe and permanent injuries.

The Reavises sued Toyota Motor, Toyota Sales, and Mummaw to recover damages for the injuries to O.R. and E.R. They alleged design and marketing defect claims against Toyota Motor and Toyota Sales, negligence against Mummaw, and gross negligence against all defendants. The Reavises' design defect theory was that the defectively designed front seats, seatbacks, and occupant restraint system failed to prevent the adults from sliding backwards in their seats, intruding into the rear passenger compartment, and colliding with the children's heads resulting in severe brain injuries to the children. This phenomenon is known in the industry as ramping. The Reavises also alleged that Toyota Motor and Toyota Sales failed to adequately warn of the dangers to back seat passengers resulting from ramping.

After a three-week trial, the jury found Toyota Motor liable on the design and marketing defect claims, Toyota Sales liable on a marketing defect claim, Mummaw liable on a negligence claim, and actual damages of more than $98 million. The jury apportioned responsibility 90% to Toyota Motor, 5% to Toyota Sales, and 5% to Mummaw. The jury unanimously found both Toyota Motor and Toyota Sales were grossly negligent and awarded punitive damages against both. During jury deliberations, the Reavises reached a settlement with Mummaw. The trial court

rendered judgment on the jury verdict for actual damages, after settlement credits, in the amounts of $98.7 million against Toyota Motor and $4.96 million against Toyota Sales, and punitive damages, after applying statutory caps, in the amounts of $95.2 million against Toyota Motor and $14.4 million against Toyota Sales. The trial court overruled Toyota Motor's and Toyota Sales's motions for directed verdict, judgment notwithstanding the verdict, and new trial.

Discussion

A. Standard of Review

When reviewing the legal sufficiency of the evidence, we determine "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.* at 807. Evidence is legally insufficient when (a) evidence of a vital fact is completely absent; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810. Evidence is more than a scintilla if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). However, evidence does not exceed a scintilla if

it is so weak as to do no more than create a mere surmise or suspicion that the fact exists. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011).

When reviewing the factual sufficiency of the evidence, we consider all the evidence and will set aside the verdict only if the evidence supporting the jury finding is so weak or so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016). This Court, however, is not a fact finder, and we may not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if a different answer could be reached upon review of the evidence. *See Clancy v. Zale Corp.*, 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). "[T]he jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). It is up to the jury "to resolve conflicts and inconsistencies in the testimony of any one witness as well as in the testimony of different witnesses." *Ford v. Panhandle & Santa Fe Ry. Co.*, 252 S.W.2d 561, 563 (Tex. 1952).

B. Design Defect Claim

To recover on a product liability claim based on an alleged design defect, "a plaintiff must prove that (1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery." *Genie Indus.*,

Inc. v. Matak, 462 S.W.3d 1, 6 (Tex. 2015) (quoting *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009)); *see also* TEX. CIV. PRAC. & REM. CODE § 82.005(a). A "producing cause" is "a substantial factor in bringing about an injury, and without which the injury would not have occurred." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

Toyota Motor contends the Reavises cannot recover on their design defect claim because (1) the ES300 met or exceeded all federal safety standards, which raised a statutory presumption of non-liability that was not rebutted; (2) there is no evidence the front-seat design of the ES300 was unreasonably dangerous; and (3) there is no evidence of a safer alternative design that would have prevented the injuries in this crash without increasing the risk of injury to other passengers. Toyota Motor also asserts the evidence is factually insufficient on the unreasonably dangerous and safer alternative design elements.

1. Presumption of Non-liability

Section 82.008(a) of the civil practice and remedies code provides:

> In a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product's formula, labeling, or design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.

TEX. CIV. PRAC. & REM. CODE § 82.008(a). The claimant may rebut the presumption by establishing that:

> (1) the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage; or
>
> (2) the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

Id. § 82.008(b).

On appeal, Toyota Motor argues that section 82.008(b) is preempted by federal law. It contends section 82.008(b) allows a jury to reject a federal agency's determination of safety standards, frustrating the goal of creating uniform safety standards. The Reavises respond that Toyota Motor never raised this argument in its pleadings or during trial and has not preserved it for appeal. We agree.

Where preemption by federal law would result only in a change of the applicable law, rather than the subject matter jurisdiction of the trial court, preemption is an affirmative defense that must be raised in the defendant's answer or it is waived. *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–46 (Tex. 1991) (op. on reh'g); *Great N. Am. Stationers, Inc. v. Ball*, 770 S.W.2d 631, 632–33 (Tex. App.—Dallas 1989, writ dism'd). The preemption theory here would not deprive the trial court of subject matter jurisdiction. The National Traffic and Motor Vehicle Safety Act expressly preserves common law liability even when a manufacturer complies with motor vehicle safety standards. *See* 49 U.S.C.

§ 30103(e) ("Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (holding that the National Traffic and Motor Vehicle Safety Act's express preemption clause does not apply to common law tort actions). Therefore, Toyota Motor was required to plead preemption as an affirmative defense.

Toyota Motor did not plead preemption as a defense, did not raise the argument at trial or in its post-trial motions, and did not object to the jury charge on this ground. We conclude that Toyota Motor failed to preserve the preemption[1] argument for appeal.

Next, Toyota Motor argues there is insufficient evidence supporting rebuttal of the presumption under subsection (b) of section 82.008(b).

The mandatory federal safety standards at issue are the Federal Motor Vehicle Safety Standards (FMVSS). *See generally* 49 C.F.R. §§ 571.101–.500. These standards were prescribed under the National Traffic and Motor Vehicle Safety Act of 1966, as amended. Pub. L. 89–563, § 1, 80 Stat. 718 (1966) (current version at 49

[1] We note that federal preemption in these types of cases is not automatic as Toyota Motor seems to suggest. Rather, a detailed comprehensive analysis of whether state law is an obstacle to accomplishment of a significant federal regulatory objective is required. *See Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330–36 (2011) (holding state tort action was not preempted by FMVSS 208 after examining the regulation, its history, the agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's preemptive effect); *see also* 49 U.S.C. § 30103(e) ("Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."); *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 495 (Tex. 2010) (recognizing federal motor vehicle safety standards are minimum standards and "state regulation of vehicle safety through common-law tort actions is expressly allowed").

U.S.C. §§ 30101–30170). Specifically, Toyota Motor contends it complied with standards 201 (energy absorption), 202 (head restraints), 207 (seat requirements), 208 (occupant crash protection), 209 (seat belt assemblies), and 210 (seat belt anchoring) in designing and manufacturing the 2002 ES300. Toyota Motor describes these as integrated standards that work together to protect occupants in all types of collisions. Toyota Motor witness Motoki Shibata testified that the 2002 ES300 met or exceeded all these standards. The Reavises do not dispute that these are mandatory standards applicable to the vehicle at the time of manufacture or that they govern the product risk that allegedly caused harm. *See* CIV. PRAC. & REM. § 82.008(a).

FMVSS 207 requires a seatback strength of 3,300 inch-pounds. There was evidence that a lawn chair is strong enough to pass this standard. The Reavises' expert, Gary Whitman, testified his company has tested chairs to see if they would meet the requirements of FMVSS 207. Video recordings of two tests were shown to the jury and Whitman testified both a lawn chair and a banquet chair passed the test for FMVSS 207. All automakers greatly exceed the FMVSS 207 standard; Toyota Motor exceeded the standard by over 600% in the ES300. This supports a reasonable inference that manufacturers consider the 3,300 inch-pound standard insufficient for their vehicles. Toyota Motor's expert, William Van Arsdell, agreed that the 3,300 inch-pound standard, in isolation, has proven inadequate to protect the public. He also testified there have been no significant or substantive changes to FMVSS 207 since 1967.

Toyota Motor responds that the presumption was not rebutted because the Reavises never challenged the adequacy of the seatbelt and other standards. Toyota Motor essentially argues that every applicable standard must be inadequate before the presumption is rebutted. We cannot agree.

For example, if ten standards are applicable and govern the alleged risk, Toyota Motor asserts that the presumption is irrebuttable if any one of those standards is adequate to protect the public from unreasonable risks of injury or damage. But here, as Toyota Motor acknowledges, the seat-back strength and seatbelt systems are interrelated. Toyota Motor argues it met or exceeded the applicable federal safety standards. But there was evidence that even with complying with those standards, the seat-back and restraint system was inadequate to protect the public.

The Reavises presented evidence that Toyota Motor's seatbelt design, which complied with FMVSS 209 and 210, was defective because it failed to keep the front-seat passengers in their seats when the seats yielded backwards in a rear-end collision. Thus, the jury could reasonably conclude that the seatbelt standards in connection with the seat-back strength standard are inadequate to protect the public from unreasonable risks of injury.

Because there is evidence that at least one of the applicable standards is inadequate, the presumption is rebutted and it was the role of the jury to determine whether the design was unreasonably dangerous.

Turning to the second part of subsection (b), the Reavises presented evidence that after marketing the vehicle, Toyota Motor withheld or misrepresented information about the sufficiency of FMVSS 207.

In 2016, U.S. Senators Markey and Blumenthal sent a letter to Toyota Motor and several other automobile manufacturers requesting information about front seatback failures and the concern that FMVSS 207 "is not sufficient to mitigate injury or death of a rear seat occupant due to seatback collapse in a rear-end collision." They requested several categories of information regarding the issue.

Toyota Motor and an industry trade association responded to the Senators. Toyota Motor's group vice president for government affairs, Steven Ciccone, testified Toyota Motor did not respond to the specific questions asked by the Senators, but responded to the spirit of the letter. While explaining that Toyota Motor has designed energy absorbing seatbacks which yield or deform enough to minimize injury exposure in both frontal and rear-impact crashes, the response urged that "[a]s with all motor vehicle safety regulation, it is imperative that new or enhanced requirements not create more harmful, unintended results." The letter stated that Toyota Motor "has a long and robust safety culture" and explained the company's efforts to design, develop, and apply new technology to the benefit of its customers.

In contrast to Toyota Motor's 2016 response to the Senators, the Reavises presented evidence that from 2002 to 2014 Toyota Motor was involved in a

nationwide scandal regarding sudden unintended acceleration (SUA) in some of its vehicles. In 2014, Toyota Motor entered into a deferred prosecution agreement (DPA) in which it admitted it misled U.S. consumers by concealing and making deceptive statements about two safety related issues affecting its vehicles, each of which caused a type of unintended acceleration. Toyota Motor agreed to pay a $1.2 billion financial penalty to the United States. Toyota Motor stipulated it made these misleading statements and undertook acts of concealment as part of efforts to "defend its brand image in the wake of the fatal San Diego accident and the ensuing onslaught of critical press." The Reavises' counsel questioned Ciccone about the inconsistency between his statement that Toyota Motor has a long and robust safety culture and the admissions in the DPA. While Ciccone did not admit to any inconsistency, the jury was free to reject his testimony and rationally conclude that Toyota Motor's response to the Senators' letter was misleading.

Toyota Motor incorporated the trade association's response to the Senators in its letter. The trade association noted that NHTSA weighs the potential benefits and the potential harms of simply increasing the strength requirements of FMVSS 207 and determined that the question of seat performance is more complex than simply increasing the strength of the seatback. However, the Reavises argue that Toyota Motor's extensive lobbying efforts undermine the NHTSA's effectiveness as a regulator. There is evidence that Toyota Motor had a larger lobbying force than any other foreign automobile company, including its lobbying expenditures from 1998

to 2018, the size of its lobbying force, and the dues it paid to the trade association that responded to the letter from the Senators. An internal document listed the delay of NHTSA safety regulations as a "win" for Toyota Motor's safety and regulatory group. From the evidence in the record, the jury could rationally conclude that the representation that NHTSA is an effective regulator is incorrect.

Based on this evidence, we conclude the record contains evidence that Toyota Motor, "before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action." CIV. PRAC. & REM. § 82.008(b)(2).[2]

2. Unreasonably Dangerous

A product is unreasonably dangerous when its risk outweighs its utility. *Matak*, 462 S.W.3d at 6. Determining whether a defective design renders a product unreasonably dangerous requires an evaluation of the risks and utilities of the product at the time it was released. *See id*. at 9 (quoting *Timpte Indus., Inc.*, 286 S.W.3d at 311). This balancing is for the jury unless the evidence allows but one reasonable conclusion. *Id*. at 10.

[2] At oral argument, Toyota Motor claimed that the Reavises did not raise section 82.008(b)(2) at trial. However, Toyota Motor did not raise this complaint in its opening or reply brief. Further, the charge instructed the jury on this rebuttal category and Toyota Motor did not object to the charge on the ground that section 82.008(b)(2) was never raised. Absent a timely and specific objection to the jury charge, we review the sufficiency of the evidence in light of the charge as given. *Romero v. KPH Consol. Inc.*, 166 S.W.3d 212, 220–21 (Tex. 2005); *Wal–Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001).

The Reavises' design expert, Whitman, summarized his opinion about how the injuries occurred:

> A. Well, as a result of the rear impact, the front seats of the Lexus deformed and deflected rearward to a sufficient level to allow the front seat occupants, Mr. and Mrs. Reavis, to slide up the seatback. Because of their restraint system being less than optimal, it did not resist that ramping up the seatback and their heads moved far enough rearward to not only reach the children, but to reach them with sufficient velocity to cause the serious head injuries that they both sustained.

Paul Lewis, a biomechanical engineer, agreed that the children's injuries were caused by head-to-head contact when the adults ramped up their seatbacks and intruded into the rear-seat area.

Whitman explained that during a rear-end collision, the vehicle moves forward, while the occupants move backwards relative to the vehicle. The primary restraint for the occupant in a rear impact is the seat and the seatback. If the seat is too weak, the force of the occupant will deform the seatback rearward, which impacts the effectiveness of the restraint system. The farther the seatback goes down, the more the body's inertial mass causes it to slide up the seatback rather than going into the seatback. As the seatback deforms farther and farther, it is less effective at restraining the occupant from rearward movement. This process is referred to as ramping. The occupant ramps up the seatback, increasing the load higher up on the seat, causing it to deform even more, creating a domino effect.

This image from a video recording of a sled test replicating the forces of this collision using an exemplar ES300 illustrates the ramping:

This test was conducted by S.A.F.E. and Steven Meyer, experts retained by the Reavises.

Toyota Motor designed the whiplash-injury-lessening (WIL) seat used in the ES300. Shibata testified the seat was developed in order to reasonably reduce the risks of whiplash injuries in low and high-speed collisions. Compared to a conventional seat, the seat back is larger, and the headrest is larger and taller. The seat is designed to allow the occupant to sink deeper into the seatback and reduce the angle between the head and upper torso. The WIL seat was also designed to yield or deform rearward in rear-end collisions as a means of absorbing some of the energy from the collision. Shibata testified that Toyota Motor set a target for dynamic maximum rearward deflection of 25 degrees or less in 35 mph rear impacts. However, Shibata admitted this was merely an aspiration; Toyota Motor hopes it can meet the target, but it is not a requirement.

Meyer testified that Toyota Motor's target of 25 degrees of maximum dynamic deformation was not effective at the speeds of a crash like the Reavises'.

He criticized Toyota Motor's testing for this target with a dummy representing a 50th percentile American male rather than a 95th percentile dummy and limiting their test to 20 mph delta-v.[3] He also testified that the design does not limit or prevent dynamic deformation beyond 25 degrees. He explained there is no limitation on the deformation so that if there is more energy in the collision there will be more deformation. Toyota Motor's expert William Van Arsdell agreed there was no physical limitation to prevent seatbacks from deflecting beyond 25 degrees.

Based on his testing and the S.A.F.E. sled test, Whitman testified that Toyota Motor's yielding seat design was "too extreme." His investigation showed that the front seats of the ES300 were permanently deformed at an angle of 42.5 degrees for the driver and 34.1 degrees for the passenger. Based on a sled test performed by Toyota Motor's experts, he determined that the seat deflected an additional 14 degrees beyond the point of permanent deformation before rebounding to the permanent-deformation point, resulting in a maximum seat-back angle of 56.5 degrees for the driver and 48.1 degrees for the passenger. He then determined using quasi-static testing that at a 45-degree angle, the ES300's seat belt restraint system had "almost no effectiveness in restraining the dummy from rearward movement,

[3] Delta-v is the change in velocity of a vehicle during a collision. Plaintiffs' expert Phillips calculated that the delta-v of the rear-end collision in this case was 25 mph with a crash pulse of 200 milliseconds. This indicates that the ES300 experienced acceleration from 0 mph to 25 mph in 200 milliseconds and a peak acceleration of 16 to 17 Gs.

which is consistent with what I found in the fit check."[4] The S.A.F.E. sled test was also consistent with this finding. In the video, as the dummy moves rearward, the dummy slides such that the lap belt is on the thigh towards the knee area rather than the pelvis.

Whitman relied on additional evidence to support his opinion that Toyota Motor's seat and restraint system allowed the ramping which caused the injuries to the children. He cited the severity of seatback deformation; the deformation of the head restraints;[5] the head injuries to parents and corresponding injuries to the children's heads; the quasi-static testing showed that at a 45 degree seatback angle the restraint system is inadequate to stop ramping; the fit check test that showed the surrogates sliding out of their seat belts and into a position consistent with ramping and striking the heads of the children in the rear seats; the amount of seatback elastic deflection combined with the deformation of the actual seatbacks showed that the children would be struck by the adults' heads; and the S.A.F.E. sled testing.

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[4] This is consistent with a fit check test with human surrogates. The surrogates were placed in an exemplar vehicle and the seats adjusted to the angles found in the ES300 after the crash plus ten degrees to account for the elastic deflection. With child seats and a child dummy in the rear seats and the seat belts locked, the surrogates were able to slide their bodies rearward to the point their heads contacted the child dummy's head. Whitman determined from this test:

> That the restraint system does not provide sufficient restraint of the lower torso legs, which is the area that can only be restrained by a lap/shoulder belt in a rear impact to prevent the ramping required for the head-to-head contact to occur.

[5] After the accident, the posts of the headrests were bent in the rearward direction. Whitman's testing established that approximately 500 pounds of force were necessary to bend the headrest posts rearward. A person's head, which weighs approximately ten pounds, would not produce that much force even at the accelerations of this crash. According to Whitman, the bending could only have been caused by the occupant sliding up the seatback and loading their upper torso onto the headrest.

The evidence in this case supports more than one reasonable conclusion on whether the product is unreasonably dangerous; therefore the balancing was for the jury and we may not second guess their conclusion. *See Matak*, 462 S.W.3d at 10.

3. Safer Alternative Design

A safer alternative design means a product design other than the one actually used that in reasonable probability:

> (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
>
> (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

CIV. PRAC. & REM. § 82.005(b).

Whitman and Lewis, a biomechanical expert, both testified that if the front-seat occupants remained in their seats during the collision, they would not have intruded into the rear-seat compartment and collided with the children's heads. Whitman proposed two alternative designs to prevent ramping in rear-end collisions: strengthen the seatback to 30,000 inch-pounds or more; or improve the seatbelt restraint system.

Whitman calculated a seatback strength of 30,000 inch-pounds or more would be sufficient to prevent the ramping in this collision. Such a seat would weigh about seven pounds more than the seats in the ES300 and require more material, but other manufacturers use such seats in their vehicles. Whitman estimated it would cost less than $5.00 to increase the strength of the seat. The jury could infer that it was

technologically and economically feasible to use this alternative design from the fact that other manufactures had designed vehicles with stronger seats. Based on testing of a proposed seat for Army ground vehicles, Whitman concluded that the seat with 65,000 inch-pounds of strength had little deformation and testing showed the neck loads were very low. There were no indications of an increased risk of whiplash injury.

Whitman's other alternative design was a better restraint system. He explained that if a manufacturer determines that some yielding of the seat is necessary, if it is limited to no more than 45 or 50 degrees, "then the seat belt system, if it's well designed, will prevent the ramping." This alternative would not involve strengthening the seat:

> Q. All right. So you could have the same seat, same occupant, same collision, but you could have two completely different outcomes, depending on how well the restraint system works?
>
> A. And by restraint system, the seat belt system, because I consider the seat part of the restraint. So if the seat belt system, if it functions properly and doesn't allow him to slide up the seatback before the seat gets significantly reclined, yes, then you would stop that domino effect.

Whitman calculated that if Ben were properly restrained in his seat, he would only have exerted 18,000 inch-pounds of force against the seat back, within the seat's strength of 23,000 or 26,000 inch-pounds.[6] As a result, the seatback would not have

[6] Kristi, lighter than Ben, would have exerted less force against the seat, about 11,000 inch-pounds.

deflected as much, and Ben would not have ramped rearward as far into the rear-seat area.

Whitman proposed three changes to the restraint system to prevent ramping in a rear-end collision even if the seatback deformed to 45 degrees: (1) firing the pretensioner during a rear impact; (2) use a locking or cinching latch plate on the seatbelt; and (3) anchor the outboard lap belt to the seat rather than the floor of the vehicle.

According to Whitman, a pretensioner is a device in the seatbelt retractor or buckle that is controlled by the vehicle's computer system to fire when a crash begins in order to tighten the seatbelt around the body. It removes any slack in the seatbelt and locks the retractor so that no additional slack is fed out. The ES300 was equipped with pretensioners on the front seatbelts. However, the pretensioner was programed to fire only in frontal collisions.

Whitman proposed firing the pretensioner at the beginning of a rear-end collision. The pretensioner would fire before there was significant movement of the body, tightening the lap belt so that the occupant is restrained when they begin to ramp up the seat back. Anchoring the lap belt to the seat on both sides would improve the ability of the lap belt to restrain the occupant's rearward movement. And as the occupant moves away from the shoulder belt, the locking or cinching lock plate prevents excess shoulder belt webbing from feeding into and loosening the lap belt improving its ability to restrain the rearward movement of the occupant.

Whitman repeated the quasi-static test with all three modifications to the seatbelt system in place and a 45-degree seatback angle. The test showed the alternative seatbelt design was effective and would prevent ramping up the seatback. As the force reached the limits of the test fixture, the dummy stopped moving rearward well before the dummy in the test without the seatbelt modifications. Video recordings of both tests illustrated the difference.

Whitman explained that firing the pretensioner in a rear-end collision merely required reprogramming the existing accelerometers and computer system to detect the collision and send a signal to fire the pretensioner at the beginning of a rear impact. Toyota Motor's expert Van Arsdell agreed that it was technologically feasible to trigger a pretensioner in a rear-end impact at the time of the development of the ES300. Whitman presented evidence that his other changes were also feasible. Cinching latch plates, costing $.75 to $1.50 per plate, were in use before 2002. Other manufacturers mounted seatbelt anchors to the seat rather than the floor in 2002. Doing so would simply require mounting an additional bracket to the side of the seat and possibly a strengthening plate under the seat. The bracket would cost approximately $1.00. In total, the seatbelt modifications would cost less than $100.

Toyota Motor argues strengthening the seatback would increase the risk of injury to front-seat passengers. However, Whitman explained that testing of a 65,000 inch-pound seat in developmental testing for the Army did not show a significant increase in the risk of neck injury to occupants. There was also evidence that other

manufacturers at the time designed vehicles with seats stronger than the ES300. Even so, Whitman's alternative seat belt design did not require strengthening of the seat back in the ES300.

While Toyota Motor and its experts presented conflicting evidence and questioned Whitman's testing, this evidence simply created a fact question for the jury to resolve. *See Jackson*, 116 S.W.3d at 761 (jury is sole judge of credibility of witnesses and weight of their testimony); *Ford*, 252 S.W.2d at 563 (jury to resolve conflicts and inconsistencies in testimony).

4. Summary

At the heart of this case, like many product liability cases, was a battle of the experts. Plaintiffs' experts examined physical evidence, performed tests, reviewed data, performed calculations, criticized Toyota Motor's experts, and concluded the vehicle was defective. Toyota Motor's experts did the same and concluded the vehicle was not defective. The jury properly exercised its prerogative to resolve this conflicting evidence and believed the plaintiffs' experts. This Court may not second guess the jury's decision.

Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we conclude the evidence is legally sufficient to support the jury's verdict. After reviewing all the evidence, we cannot say the evidence is so weak that the jury

finding is clearly wrong and unjust. Thus, the evidence is factually sufficient to support the verdict. We overrule Toyota Motor's first issue.

C. Marketing Defect Claims

1. Toyota Motor

Toyota Motor argues in its second issue that the Reavises cannot prevail on a marketing defect claim for three reasons: (1) the marketing claim merely restates the design defect claim; (2) there was no evidence of what an adequate warning would have said; and (3) the Reavises would not have read a warning if it had been given.

A marketing defect occurs when a defendant knows or should know of a potential risk of harm presented by the product but markets it without adequately warning of the danger or providing instructions for safe use. *Jobe v. Penske Truck Leasing Corp.*, 882 S.W.2d 447, 450 (Tex. App.—Dallas 1994, no writ). The jury charge asked the jury:

> Was there a defect in the warnings at the time the Automobile left the possession of Toyota Motor Corporation that was a producing cause of the Plaintiffs' injuries?
>
> A "defect in the warnings" means the failure to give adequate warnings of the product's dangers that were known or should have been known by the application of reasonably developed human skill and foresight, and which rendered the product unreasonably dangerous as marketed.
>
> An "adequate warning" means a warning given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it in the mind of a reasonably prudent person.

> When a manufacturer fails to give adequate warnings or instructions, a rebuttable presumption arises that the user would have read and heeded such warnings or instructions.
>
> An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Toyota Motor complains that the Reavises did not claim the ES300 was adequate as designed but defective because of a failure to warn. Toyota Motor misunderstands the marketing defect claim as submitted in the charge. The charge did not ask if Toyota Motor failed to warn of a *design defect* in the vehicle; the charge asked whether there was a failure to warn of the *product's dangers* that were known or should have been known and which made the product unreasonably dangerous. Thus, if the jury failed to find a design defect, they could still conclude there was a marketing defect based on the lack of an adequate warning of the product's known dangers. The marketing defect claim is an alternative claim to the design defect claim, not a restatement. A party is generally entitled to pursue damages through alternative theories of recovery. *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998) (per curiam).

Because this marketing defect claim does not depend on a finding of a design defect, Toyota Motor's cases are inapposite. *See Lujan v. Tampo Mfg. Co., Inc.*, 825 S.W.2d 505, 510 (Tex. App.—El Paso 1992, no writ) (noting, after quoting plaintiff's petition, "She does not allege in her petition a cause of action of strict liability for a marketing defect."); *Am. Motors Corp. v. Ellis*, 403 So. 2d 459, 466–

67 (Fla. Dist. Ct. App. 1981) (discussing claim for negligent failure to "warn of the alleged defect" in the automobile).

Toyota Motor next argues there is no evidence of what an "adequate warning" would have said. It contends no witness opined what an adequate warning would have said or in what form it should have been given. By this argument, Toyota Motor essentially contends that an adequate warning may only be proved by direct evidence. But both direct and circumstantial evidence may be used to establish any material fact. *Ridgway*, 135 S.W.3d at 601.

The jury was required to decide whether there was a failure to give an adequate warning of the dangers of the product that were known or should have been known. An adequate warning under the charge definition is a warning in a form that catches the attention, is comprehensible to the average user, and conveys a fair indication of the nature and extent of the danger and how to avoid it.

The Reavises presented evidence of the dangers to rear-seat passengers when front seats yield in rear-end collisions and the restraint system fails to prevent the front seat occupant from ramping up the seat and into the rear seat area. There was evidence that Toyota Motor failed to give any warning of this danger even though Shibata and Toyota Motor's experts agreed that Toyota Motor knew of the danger of ramping before the design of the ES300. And even though Toyota Motor included a red "CAUTION" box in the owner's manual "strongly recommending" that children be placed in the rear seat, it did not warn of the danger to children placed

behind occupied front seats from ramping in rear-end collisions. The owner's manual also contains a warning about sliding under the lap belt in a frontal collision but does not contain a warning about sliding backwards in a rear-end collision.

The jury could reasonably infer that an adequate warning would warn of the danger to rear seat passengers in rear-end collisions when the front seats yield and allow front seat occupants to ramp up and into the back seat compartment. They could conclude that its form would at least match the "CAUTION" box recommending that children be placed in back seat, and that it would be worded in plain language. Or that the warning would be similar to the warning about sliding under the lap belt in frontal collisions. The warning could also caution against placing children behind occupied front seats to avoid the danger of ramping.

Regarding causation, "When a manufacturer fails to give adequate warnings or instructions, a rebuttable presumption arises that the user would have read and heeded such warnings or instructions." *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986). The trial court included an instruction on this presumption in the charge. Ben, an architect, and Kristi, a CPA, are well educated and capable of understanding a warning if one had been given. They read reviews of the vehicle and had it inspected before they purchased it. They also contacted the dealership about maintenance records and whether the warranty would transfer in a third-party sale.

Toyota Motor cites evidence that Ben only looked at the owner's manual for information on service lights and how to use the spare tire. But evidence rebutting

the presumption merely creates a fact issue "which can be resolved only by the finder of fact." *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 753–54 (Tex. 1993). Here the jury resolved that fact issue in favor of the Reavises and we cannot substitute our judgment for that of the jury.

We overrule Toyota Motor's second issue.

2. Toyota Sales

The third issue attacks the sufficiency of the evidence on the marketing defect claim against Toyota Sales. Because the Reavises have requested the rendition of a take-nothing judgment as to Toyota Sales and appellants have agreed, we need not address this issue.

D. Jury Charge Issues

Toyota Motor argues in the fourth issue that the jury charge commingles valid and invalid theories in a single broad form submission and a new trial is required. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). "When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id*. Under *Casteel*, the error of including an invalid theory in a broad-form submission is presumed harmful when the appellate court cannot determine whether the jury relied on an invalid theory. *Id*. As always, we do not reach a harm analysis unless we first find error. *See id*. at 388 (concluding there was error before considering whether that error was harmful); *see also* TEX. R. APP.

P. 44.1(a). However, even if the court finds error, the record may be such that the court can determine that the verdict was based on a valid theory and the error is harmless. *See Casteel*, 22 S.W.3d at 389.

The jury charge is structured as follows:

- Question 1: Design defect claim against Toyota Motor
- Question 2: Marketing defect claim against Toyota Motor
- Question 3: Marketing defect claim against Toyota Sales
- Question 4: Negligence claim against Mummaw
- Questions 5 and 6: Actual damages for each child conditioned on an affirmative answer as to that child on questions 1, 2, 3, or 4, and requiring separate answers for each element of damage
- Questions 7 and 8: Actual damages for Ben and Kristi Reavis conditioned on an affirmative answer on questions 1, 2, 3, or 4
- Question 9: apportionment of percentage of responsibility also conditioned on an affirmative answer on questions 1, 2, 3, or 4
- Question 10: gross negligence claims against Toyota Motor and Toyota Sales conditioned on unanimous affirmative answers to questions 1 or 2 for Toyota Motor or question 3 for Toyota Sales
- Question 11: exemplary damages against Toyota Motor and Toyota Sales conditioned on a unanimous affirmative answer to question 10 for each defendant

Toyota Motor's fourth issue states:

> Does the jury charge require a new trial because presumptively harmful error resulted from (a) commingling one or more invalid theories in broad-form liability questions or (b) funneling all liability questions into single apportionment and damages questions?

Toyota Motor's argument under this issue asserts there were *Casteel* problems in questions one, three, five through eight, nine, ten, and eleven. The Reavises contend Toyota Motor's objections to the charge were not sufficiently specific to

preserve error for appeal. *See Burbage v. Burbage*, 447 S.W.3d 249, 256 (Tex. 2014) ("[I]n situations where a party does not raise a *Casteel*-type objection, that party surely cannot raise a *Casteel* issue when it failed to preserve a claim of an invalid theory of liability that forms the basis of a *Casteel*-type error.").

1. Question One: Design Defect

Question one asked: "Was there a design defect in the Automobile at the time it left the possession of Toyota Motor Corporation that was a producing cause of the Plaintiffs' injuries?" The question included instructions defining design defect, safer alternative design, and an instruction on the presumption of non-liability and the statutory grounds for rebutting the presumption:

> It is presumed that the Defendants are not liable if the Defendants establish that the Automobile's design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.
>
> The Plaintiffs may rebut any such presumption by establishing that:
>
> (1) the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage;
>
> or
>
> (2) Toyota Motor Corporation, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

An answer blank was provided for each child at the end of the instructions.

Toyota Motor objected to the last part of this instruction on the basis there was no evidence Toyota Motor withheld or misrepresented information to the federal government. On appeal, Toyota Motor argues this objection preserved its *Casteel* complaint about question one.[7]

As discussed above there is some evidence Toyota Motor made misrepresentations to the federal government in its response to the letter from Senators Blumenthal and Markey. Therefore, the trial court did not abuse its discretion by overruling Toyota Motor's objection. We conclude there is no *Casteel* problem in question one.[8]

2. Questions Five to Eight: Actual Damages

As to questions five and six, the actual damages questions for each child, Toyota Motor objected that the questions were based on three separate theories of liability and a new trial may be required if any one of the theories of liability is held invalid. Specifically, Toyota Motor objected that the damages questions were "fed by three separate theories of liabilit[y], and by structuring the jury charge in this manner a new trial may be required if any one of the theories of liability is held to

[7] We note, however, that *Casteel*'s presumed harm analysis does not apply to defensive theories submitted through inferential rebuttal instructions to proper jury questions. *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 756–57 (Tex. 2006) ("[W]e are not persuaded that harm must likewise be presumed when proper jury questions are submitted along with improper inferential rebuttal instructions.").

[8] Question three asked the jury to determine whether Toyota Sales was liable as a nonmanufacturing seller. *See* CIV. PRAC. & REM. § 82.003(a). Because we have granted the motion for rendition of a take-nothing judgment as to Toyota Sales, we need not address the complaint about the form of question three. *See* TEX. R. APP. P. 47.1.

be invalid." Toyota Motor did not make these same objections as to questions seven and eight and its complaint is not preserved for those questions.

However, assuming error was preserved, *Casteel* does not apply when the "damages from two causes of action, one valid, the other arguably invalid, are the same." *Durban v. Guajardo*, 79 S.W.3d 198, 207 (Tex. App.—Dallas 2002, no pet.); *see also Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 282–83 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd). Here, the measure of damages for the personal injuries suffered by the children in the collision is the same for each theory of liability and Toyota Motor does not contend otherwise. Thus, there is no *Casteel* problem with questions five and six.

3. Question Nine: Apportionment

As to question nine, apportionment, Toyota Motor objected to the single apportionment question because it was based on three separate theories of liability and "if any of the other theories of liabilities [sic] fail making it impossible to determine which theory of liability may [be] supported by the apportionment" question. Toyota Motor also cited *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212, 228 (Tex. 2005), in support of its objection.

The Reavises maintain that Toyota Motor did not preserve a *Casteel* complaint regarding the apportionment question. *See Emerson Elec. Co. v. Johnson*, No. 18-1181, 2021 WL 1432226, at *10 (Tex. Apr. 16, 2021) (holding *Casteel* complaint was not preserved where defendant did not object that apportionment

question was predicated on invalid ground and insisted that design defect and marketing defect claims be combined in single apportionment question). They argue that Toyota Motor's objection did not inform the trial court of the reason any of the theories of liability were invalid. We agree Toyota Motor's objection to question nine did not explain which of the theories was invalid and why it was invalid. *See id*. at *10 & n.42 (citing *Casteel* and quoting TEX. R. CIV. P. 274 ("No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.")). However, Toyota Motor did not insist on a single apportionment question, objected that the apportionment question was conditioned on three theories of liability, and cited *Romero* in support of its objection. This objection arguably informed the trial court of Toyota Motor's *Casteel* complaint. Therefore, we will assume without deciding that Toyota Motor preserved a *Casteel* complaint.

In order for the *Casteel* presumed-harm analysis to apply, an appellant must show that one of the theories of liability included in a broad-form question is invalid. *See Casteel*, 22 S.W.3d at 389. The apportionment question was conditioned on an affirmative finding on one of three theories: design defect as to Toyota Motor; marketing defect as to Toyota Motor; and marketing defect as to Toyota Sales. We have determined there was no error in either of the liability findings against Toyota Motor. Therefore, the trial court did not err by conditioning the apportionment question on a finding of one or both theories against Toyota Motor.

The only remaining theory of liability is the marketing claim against Toyota Sales. However, the Reavises have voluntarily moved for rendition of a take-nothing judgment as to Toyota Sales, effectively releasing their judgment against Toyota Sales. The Reavises maintain that their motion is not a concession of the merits of Toyota Sales's appeal and is made only to streamline the appeal. Appellants do not object to the rendition of a take-nothing judgment in Toyota Sales's favor and agree that the motion is unilateral and not the result of a settlement.

The unconditional release of a judgment operates as a total relinquishment of all the creditor's rights in the judgment and a complete discharge of the debt created by the judgment. *See Rapp v. Mandell & Wright, P.C.*, 123 S.W.3d 431, 435–36 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). As a result of the Reavises' unconditional release of the judgment against Toyota Sales, Toyota Sales's appeal of that judgment is moot. *See Lee v. Dykes*, 312 S.W.3d 191, 194 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that appellee's release of judgment related to portion of damages award mooted appellant's issues challenging that portion of award and affirming judgment relative to that portion of award). Thus, there is nothing for us to review regarding the validity of the claim against Toyota Sales and we do not decide the merits of the liability finding against Toyota Sales.

In response to the Reavises' motion for rendition of judgment, Toyota Motor asserts that the liability finding against Toyota Sales is invalid and thus *Casteel* requires a new trial. However, Toyota Motor does not have standing to assert that

the liability theory against Toyota Sales is invalid. An appellant "may not complain of errors that do not injuriously affect it or that merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000).

But even if there were error in including Toyota Sales in the apportionment question, we conclude that error does not require reversal of the judgment against Toyota Motor. Under the harmless error rule, an appellate court must determine whether error probably caused the rendition of an improper judgment or probably prevented the appellant from presenting the case to the court. *See* TEX. R. APP. P. 44.1(a); *In re Commitment of Jones*, 602 S.W.3d 908, 913–14 (Tex. 2020) (per curiam). If the error prevents the appellate court from reviewing the record to determine whether the error probably caused rendition of an improper judgment, the error is harmful, unless "the appellate court is 'reasonably certain that the jury was not significantly influenced by' the error." *Id*. at 914 (quoting *Romero*, 166 S.W.3d at 227–28).

In *Romero*, the plaintiffs sued a hospital and others for injuries Romero suffered during surgery. *Romero,* 166 S.W.3d at 219. The jury found the hospital liable for negligence in delaying a blood transfusion and for malicious credentialing of a surgeon. *Id*. at 214. Malicious credentialing, as submitted in the jury charge, required clear and convincing evidence of malice. *Id*. at 221. The supreme court concluded there was no such evidence. *Id*. at 215. The question then became whether the judgment could stand on the negligence finding against the hospital. Although

the jury found the hospital was negligent, the apportionment question allowed the jury to consider both the negligence and malicious credentialing claims against the hospital in apportioning responsibility. The jury apportioned responsibility for the injury 40% to the hospital, 40% to the surgeon, and 20% to the other doctor. *Id*. at 219. Because there was no evidence of malicious credentialing, the supreme court concluded the jury should not have been allowed to consider that claim in assessing the hospital's percentage of responsibility. *Id.* at 225. This error was harmful under the facts of that case because "[h]aving found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility." *Id.* at 227.

However, the court made clear that it was "not hold[ing] that the error of including a factually unsupported claim in a broad-form jury question is always reversible." *Id.* The error is reversible "unless the appellate court is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.'" *Id*. at 227–28 (citations omitted)); *see Casteel*, 22 S.W.3d at 389. Thus, the presumed harm analysis is not automatic. *Thota v. Young*, 366 S.W.3d 678, 693 (Tex. 2012).

There are several meaningful distinctions between this case and *Romero* that allow us to be reasonably certain that the jury was not significantly influenced by the submission of Toyota Sales's liability in the apportionment question. In *Romero*, because the malicious credentialing claim involved a high standard of culpability, malice, and degree of proof, clear and convincing evidence, the jury could logically

have assessed greater responsibility to the hospital in the apportionment question. *See Romero*, 166 S.W.3d at 227. In this case, however, the invalid theory was based on the same culpability standard and burden of proof. More importantly, the invalid theory in this case applied to a different party, Toyota Sales, than the party complaining on appeal, Toyota Motor. Toyota Motor has not shown there was error in submitting the liability theories against it to the jury.

In *Romero*, the jury apportioned only 40% responsibility to the hospital. The jury in this case assessed Toyota Motor's responsibility at 90%, even without considering an invalid liability theory against Toyota Motor. And the jury assessed only 5% of the responsibility to Toyota Sales. The jury's liability findings against Toyota Motor remain undisturbed by our reversal as to Toyota Sales. Thus, those same liability theories against Toyota Motor would have been before the jury without the theory against Toyota Sales.

Further, the invalid theory in *Romero* was an important focus of the evidence. Extensive evidence was presented about the surgeon's drug abuse, marital problems, discipline proceedings, and malpractice lawsuits. *Romero,* 166 S.W.3d at 215–19. Here, little emphasis was placed on the nonmanufacturing seller claim against Toyota Sales; the main focus in this case was the design defect claim against Toyota Motor, with multiple expert opinions, video recordings, and other evidence presented regarding the design defect.

The jury in this case apportioned only 5% of the responsibility to Toyota Sales, whereas the jury found Toyota Motor 90% responsible. Because the finding as to Toyota Motor exceeds 50%, Toyota Motor is jointly and severally liable for the recoverable damages. *See* CIV. PRAC. & REM. § 33.013(b)(1). It is not plausible based on this record that the jury would have apportioned less than 50% responsibility to Toyota Motor had it not considered the liability finding against Toyota Sales. Thus, Toyota Motor would remain jointly and severally liable.

Toyota Motor cites *Heritage Housing Development, Inc. v. Carr*, 199 S.W.3d 560, 571 (Tex. App.—Houston [1st Dist.] 2006, no pet.), in support of its argument. In *Heritage*, the jury found a parent company vicariously liable for acts of its subsidiary's employees. The jury allocated responsibility 45% to the parent, 40% to the subsidiary, and the remainder to other defendants. *Id*. at 564. On appeal, the court concluded there was no evidence to support the liability finding against the parent company and reversed the judgment against it. *Id*. at 570. However, the evidence was sufficient to support the negligence finding against the subsidiary. *Id*. at 572. The appellate court concluded that a new trial was required as to the subsidiary because the jury could have apportioned responsibility differently between the remaining defendants if the parent had not been included in the negligence charge. *Id*. at 571. Two reasons are apparent for why the court was unable to conclude the error did not affect the jury's apportionment of responsibility: the allocation between the parent and subsidiary was very close, 45% and 40%, and the parent was held

vicariously liable for the acts of the subsidiary and its employees. *See id.* at 570–71. Because the apportionment was less than 50%, no defendant was jointly and severally liable for all the damages. Therefore, a change in allocation of responsibility would make a difference. Here, the allocations are significantly different, 90% and 5%, and the liability findings were not based on vicarious liability. As discussed above, in this case we are reasonably certain that the jury was not significantly influenced by any error in including Toyota Sales in the apportionment question. *Heritage* does not persuade us otherwise.

Toyota Motor also cites *Schrock v. Sisco*, 229 S.W.3d 392, 394 (Tex. App.—Eastland 2007, no pet.), for the proposition that a plaintiff's concession after verdict that a claim should not have been submitted to the jury triggered a harm analysis under *Casteel*. In *Schrock*, an employee sued her employer for assault and intentional infliction of emotional distress (IIED). The jury found the employer liable on both claims and awarded actual damages of $40,000 for IIED and $25,000 for assault. *Id.* at 393. The jury also awarded punitive damages based on a jury question that was conditioned on an affirmative finding on either theory of liability. *Id.* at 394. In response to the defendant's motion for judgment notwithstanding the verdict, the plaintiff offered to remit the actual damages for IIED for the reason that the liability and damages questions on that theory "should not have been submitted." *Id.* The court of appeals concluded the error of conditioning the exemplary damage question on a finding of IIED was harmful under *Casteel* because the jury found liability on

that theory and awarded $40,000 in damages, closely matching the award of $50,000 in exemplary damages. *Id*. In this case, however, the Reavises have not conceded that Toyota Sales's liability should not have been submitted to the jury. They moved for rendition of a take-nothing judgment in order to "streamline" the appeal without admitting the merits of Toyota Sales's appeal of the judgment. *Schrock* is distinguishable.

In summary, even if we assume it was error to include Toyota Sales in question nine, the record enables us to determine that the error did not probably cause the rendition of an improper judgment as to Toyota Motor. *See* TEX. R. APP. P. 44.1(a). We are reasonably certain that the jury was not significantly influenced by any error in including Toyota Sales in the apportionment question. Accordingly, any error was harmless.

4. Questions Ten and Eleven: Gross Negligence and Exemplary Damages

Toyota Motor objected to question ten on the ground that it did not include an instruction that a vice principal finding was required to impose liability on a corporation for gross negligence of its agents. It objected to questions ten and eleven for insufficient evidence. Nowhere did Toyota Motor's objections or requested instructions inform the trial court of its complaint regarding *Casteel* error in these questions. Accordingly, we conclude Toyota Motor has not preserved its complaint for appeal as to these questions. *See* TEX. R. APP. P. 33.1(a); *Burbage*, 447 S.W.3d at 256.

5. Summary

We conclude there is no reversible error under the *Casteel* presumed-harm analysis on the complaints made by Toyota Motor. We overrule Toyota Motor's fourth issue.

E. Evidentiary Issues

Toyota Motor's fifth issue challenges the trial court's evidentiary rulings in four areas: (1) admitting evidence about Toyota Motor's correspondence with Senators and its lobbying and government-relations activities; (2) admitting evidence of Toyota Motor's 2014 deferred prosecution agreement related to unintended acceleration; (3) admitting clips from a 1992 *60 Minutes* video discussing seatback failures; and (4) allowing an unfounded insinuation of spoliation.

We review a trial court's evidentiary rulings for an abuse of discretion. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). A trial court abuses its discretion when it acts without regard to guiding rules or principles. *Id*. Even if the trial court abused its discretion in admitting certain evidence, reversal is only appropriate if the error was harmful, i.e., it probably resulted in an improper judgment. *Id*.

1. Lobbying Efforts

Toyota Motor argues evidence about its correspondence with Senators Markey and Blumenthal and its lobbying efforts should have been excluded as

irrelevant or for causing undue prejudice. In addition, it argues the correspondence was inadmissible hearsay.

Toyota Motor requested a limiting instruction regarding this evidence but did not suggest the language of such an instruction even after the court requested it. *See* TEX. R. EVID. 105 (on request, court must instruct jury if evidence is admitted for one purpose but not another). The trial court instructed the jury not to consider evidence of Toyota Motor's lobbying or governmental relations conduct as evidence of any defect at issue in the trial, but it could consider such evidence on the adequacy of the regulations pertaining to seat backs. The court also instructed the jury not to consider the correspondence with the Senators as evidence of any defect at issue in the case, but it could consider that evidence for the weight and credibility of the evidence.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401. Here, the fact of consequence at issue is rebuttal of Toyota Motor's statutory presumption defense. *See* CIV. PRAC. & REM. § 82.008(b). To rebut the presumption of non-liability, the Reavises could show that the federal safety standards were inadequate to protect the public or that "before or after marketing the product" the manufacturer withheld or misrepresented information relevant to the federal government's determination of the adequacy of the safety standards at issue. *Id*. The lobbying evidence and correspondence with the Senators had some tendency to make this fact

more probable. Therefore, the trial court did not abuse its discretion by overruling the relevance objection.

Toyota Motor also objected to this evidence under evidence rule 403. A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. It is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. *In re J.D.*, No. 03-14-00075-CV, 2016 WL 462734, at *2 (Tex. App.—Austin Feb. 3, 2016, no pet.) (mem. op.). Thus, the objecting party has the burden to show that the probative value is *substantially outweighed* by the danger of unfair prejudice. *Starwood Mgmt., LLC by & through Gonzalez v. Swaim*, No. 05-14-01218-CV, 2018 WL 1391376, at *8 (Tex. App.—Dallas Mar. 20, 2018, no pet.) (mem. op.). A trial court may not exclude otherwise relevant evidence merely because it is "prejudicial." *Bay Area Healthcare Grp. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam) ("[T]estimony is not inadmissible on the sole ground that it is 'prejudicial' because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent.").

In support of its rule 403 complaint, Toyota Motor merely restates its relevance arguments, contending the lobbying evidence was not relevant to the adequacy of the regulations to protect the public. But this evidence was relevant to rebutting the presumption of non-liability under section 82.008(b)(2). Toyota Motor

does not describe how any prejudice from this evidence is unfair or how that prejudice substantially outweighs the probative value of the evidence. Further, the trial court's instruction to the jury mitigated any unfair prejudice from the evidence. We conclude Toyota Motor has not shown the trial court abused its discretion by overruling the rule 403 objection.

We also conclude the trial court did not abuse its discretion by overruling the hearsay objection. The evidence was offered to show the fact of the Senators' inquiry to Toyota Motor, a necessary context for Toyota Motor's response. *See* TEX. R. EVID. 801(d); *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 782 (Tex. App.—Dallas 2005, pet. denied) (if mere making of statement has legal significance apart from its truthfulness, statement is not hearsay because not offered for truth of matter asserted); *Kimball v. State*, 24 S.W.3d 555, 564 (Tex. App.—Waco 2000, no pet.) (officer's testimony offered as background evidence or to show the context in which defendant made his "nursing a beer" statement was not hearsay).

2. Deferred Prosecution Agreement

Toyota Motor raises several complaints about the DPA and SUA evidence. The Reavises offered this evidence for the purpose of proving section 82.008(b)'s second rebuttal category: that before or after marketing the product Toyota Motor misrepresented or withheld information relevant to the federal government's or agency's determination of the adequacy of the safety standards. Toyota Motor

objected on several grounds and requested the court to give a limiting instruction under rule 105. TEX. R. EVID. 105. After extensive argument and briefing by the parties, the trial court overruled the objections and instructed the jury not to consider evidence of sudden acceleration or the deferred prosecution agreement as evidence of any defect at issue in the case. The court instructed the jury that it may consider such evidence when judging the weight and credibility of witnesses and any testimony regarding a robust safety program or attitude towards safety.

On appeal, Toyota Motor argues the DPA evidence was irrelevant under rules 401 and 402. However, as discussed above, the evidence had some tendency to make a fact of consequence more probable than without it. TEX. R. EVID. 401. Further, the court instructed the jury on the limited admissibility of the evidence and precluded their consideration of this evidence as evidence of the defect at issue in the case. The trial court therefore did not abuse its discretion by overruling the relevancy objection.

Next, Toyota Motor challenges admissibility of the DPA and SUA evidence as improper character evidence under rules 404(b) and 608. TEX. R. EVID. 404(b), 608. However, the purpose of this evidence was not to prove Toyota Motor's character, but as evidence to rebut the non-liability presumption of section 82.008. Further, the court's limiting instruction precluded the jury from considering the evidence as evidence of the product defect at issue. Thus, rule 404(b) does not preclude admission. TEX. R. EVID. 404(b) (character evidence not admissible to

show person acted in conformity with that character trait but may be admissible for other purposes).

While the court's instruction referred to the weight and credibility of testimony, this was in the context of Toyota Motor's history of safety, an issue directly related to the section 82.008 presumption and its rebuttal. The instruction was given just before Ciccone's deposition testimony where he discussed Toyota Motor's response to the Senators' letter and was questioned about whether the SUA and DPA evidence was inconsistent with his statement that Toyota "has a long and robust safety culture." It was up to the jury to assess Ciccone's credibility and his representation to the Senators. The purpose of the evidence was not to show Toyota Motor's general character for truthfulness, but to show Toyota Motor misrepresented its robust safety culture.

In support of its rule 403 objection, Toyota Motor argues SUA evidence was used as emotional proxy for liability. However, the court specifically instructed the jury not to consider this evidence as evidence of the defect at issue in the case. And because there is some evidence of a product defect apart from the SUA and DPA evidence, Toyota Motor has not shown the jury disregarded the trial court's instruction. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009) ("The jury is presumed to have followed the court's instructions."); *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005) ("[A]ppellant must rebut the presumption by pointing to evidence that the jury failed to follow the trial

court's instructions."). Later in the trial, the Reavises used the SUA evidence to impeach Toyota Motor's experts, Shibata and James, for bias. Both experts gave no-defect opinions in this case and agreed they had never found a defect in Toyota Motor's vehicles even in the SUA cases. Such evidence was admissible to show bias under rule 613(b).[9]

Unlike attacks on a witness's general character for truthfulness, governed by rule 608, a witness's bias or interest may be shown by specific instances of conduct under rule 613(b). *See* TEX. R. EVID. 608, 613(b); *Dixon v. State*, 2 S.W.3d 263, 271–72 (Tex. Crim. App. 1998) (op. on reh'g) (noting rules 608 and 613 are distinct rules which serve different purposes, and rule 608 does not control over rule 613 when party seeks to impeach witness with specific instances of conduct to show bias or interest). Rule 608 is limited in scope and excludes evidence of specific acts only when offered to establish a witness's character for truthfulness. Evidence of specific acts may be admissible for other purposes, such as bias. Goode, 1 Tex. Prac., Texas Rules of Evidence §§ 608.1, 613.6.

A party may not impeach a witness on a collateral matter or inquire into specific instances of conduct to attack or support a witness's character for truthfulness. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241–42 (Tex. 2010). In

[9] Toyota Motor argues in its reply brief that extrinsic evidence is admissible under rule 613(b) only if the witness is first examined about the bias and fails to unequivocally admit it. TEX. R. EVID. 613(b)(4). However, Toyota Motor did not raise this objection in the trial court and has not preserved error regarding rule 613. *See* TEX. R. APP. P. 33.1.

TXI, the court held it was error to admit evidence of the defendant's illegal immigration status because it was collateral and not admissible to impugn the witness's character for truthfulness. *Id*. This case is different. In *TXI*, the court did not consider whether the evidence was admissible under rule 613(b) for the obvious reason that the defendant's immigration status had no tendency to show bias or interest. *See id*. Here, evidence that experts never found a defect even in the SUA cases had a logical tendency to show the experts were biased in favor of Toyota Motor. *See* TEX. R. EVID. 613(b); Goode, 1 Tex. Prac., Texas Rules of Evidence § 613.6.

Under the record in this case, we cannot conclude the trial court abused its discretion by overruling Toyota Motor's objections to this evidence.

3. Clips from *60 Minutes*

Whitman testified that a 1992 *60 Minutes* episode discussed problems with seatback collapse in rear-end collisions. The video discussed various vehicles where seatbacks in actual crashes failed rearward and front or rear seat occupants were seriously injured. He explained the broadcast raised public awareness of the seatback issue. The Reavises then offered seven clips from the broadcast in evidence. After overruling Toyota Motor's objections, the trial court instructed the jury not to consider the evidence as proof of the defect at issue, but only for knowledge to the public in 1992.

The clips were then played for the jury. The shortest clip was ten seconds and the longest was one minute, eighteen seconds. In total, the clips lasted four minutes, forty-five seconds. Whitman testified that later in 1992, the NHTSA requested comments on a proposed upgrade to FMVSS 207 and he discussed Toyota Motor's response to the request. The clips were also shown during Shibata's video deposition where he was questioned about the clips.

Several days later, the *60 Minutes* clips were mentioned during direct examination of Toyota Motor's expert Stephens. On cross-examination, Stephens agreed the industry and researchers were discussing the ramping issue in 1992 after the *60 Minutes* broadcast. The Reavises' rebuttal expert, Meyer, testified that after the *60 Minutes* episode, the industry has generally known that rearward ramping poses an extreme degree of risk to back seat passengers.[10]

On appeal, Toyota Motor argues the clips were irrelevant under rules 401, and 402, and unfairly prejudicial under rule 403. In addition, Toyota Motor argues the clips were hearsay under rule 803.

Toyota Motor contends the clips showed accidents that were not substantially similar to the accident in this case and not relevant. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004). In *Armstrong*, the supreme court

[10] In closing argument, in reference to the gross negligence claim, one of the video clips was played again and counsel for the Reavises referred to the statement in the video by the former administrator of NHTSA that the seat-back test was totally inadequate. But this was immediately followed by his argument that "Toyota knew that." In any event, Toyota Motor did not object to the use of the video during closing argument and does not complain of improper jury argument on appeal.

discussed when evidence of other accidents is admissible to show a product is unreasonably dangerous. *Id*. Evidence of other incidents "must have occurred under reasonably similar (though not necessarily identical) conditions." *Id*. Such evidence is inadmissible if it creates undue prejudice, confusion, or delay under rule 403. *Id*.

But *Armstrong* also recognized that the relevance of other accidents depends on the purpose for which they are offered. *Id*. Other incidents may be admissible for some purposes but not for others. *Id*. As examples where such evidence is admissible, the court listed whether a warning should have been given and whether a manufacturer was consciously indifferent toward accidents in a claim for exemplary damages. *Id*. at 139. Here, the Reavises did not offer the *60 Minutes* clips as proof of a defect in the 2002 ES300, but as evidence of the knowledge within the industry and the public of the ramping risk in rear-end collisions. The trial court confirmed this limited purpose in its instruction to the jury. For gross negligence, the defendant need not have anticipated the precise manner of harm or to whom the injury would befall to have had awareness of the extreme risk. *See Waldrip*, 380 S.W.3d at 139; *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987) (holding evidence of other incidents admissible to show defendant's conscious indifference to peril).

Toyota Motor cites cases from other jurisdictions where this *60 Minutes* segment was excluded from evidence for unfair prejudice. But the exercise of a court's discretion in other cases does little to show how the trial court abused its

discretion in this case. Here, the trial court limited the video to less than five minutes and instructed the jury to consider it only for knowledge in the public, not as proof of the defect in the case. The record does not show that the jury disregarded this instruction. *See Columbia Rio Grande Healthcare, L.P.*, 284 S.W.3d at 862. The jury was presented with several other videos prepared by the experts for the parties in this case. Thus, the short video reconstructions from the *60 Minutes* episode were not the only visual evidence and unlikely to unduly influence the jury. Nor has Toyota Motor shown how the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Toyota Motor also complains that the *60 Minutes* clips were inadmissible because they contain hearsay. The Reavises respond that the clips were not offered to prove the truth of the matters asserted, but as evidence of knowledge in the industry and the public about the ramping risk in rear-end collisions. The trial court admitted the clips for this purpose and instructed the jury to consider them only for that purpose. *See City of Austin v. Houston Lighting & Power Co.*, 844 S.W.2d 773, 791–92 (Tex. App.—Dallas 1992, writ denied) (news articles offered to show notice or public perceptions were not hearsay). Unlike the plaintiffs in *Armstrong*, 145 S.W.3d at 141–42, the Reavises did not offer the clips as evidence of a defect in the 2002 ES300, but as support for their contention that Toyota Motor knew of an unreasonable risk of extreme harm to rear-seat passengers from the ramping risk and was consciously indifferent to that risk.

We conclude on this record that the trial court did not abuse its discretion by admitting the evidence with the limiting instruction.

4. Insinuation of Spoliation

In subpart (d) of its fifth issue, Toyota Motor argues the trial court erred by permitting the jury to hear about its destruction of crash-test footage pursuant to its document retention policy and compounded the error by refusing Toyota Motor's requested jury instruction on spoliation.

Shibata testified in his deposition that during testing of the model ES300, Toyota Motor determined that the front seat did not deform more than 25 degrees, which was their target, in sled testing equivalent to a 35-mph rear impact. He explained that film was made of this testing to confirm that the rearward deflection angle would not exceed 25 degrees. He testified during 35-mph rear impact testing of the ES300, there was rearward deformation of the front seats, but there was no contact between the front seated dummy into the back seat. He could not recall how close the front seat or headrest came to the rear seat and that measurement was not included in the reports. He stated that once Toyota Motor confirmed the vehicle performed as designed, there was no need to retain specific measurements. He also testified that, under Toyota Motor's document retention policy, videos of tests are retained for seven years after recording unless there is a business or engineering need to retain them longer.

Toyota Motor did not object based on spoliation when plaintiffs offered Shibata's deposition at trial. We conclude that Toyota Motor's evidentiary complaint about evidence of destruction of records is not preserved for appeal. TEX. R. APP. P. 33.1(a).

Toyota Motor complains about the refusal of its requested jury instruction that the jury not consider any evidence, questions, or arguments regarding improper destruction of records and that the "Court—not the jury—is responsible for deciding whether a party improperly destroyed records of files, and I have not found that any party acted improperly."

The trial court has considerable discretion to determine proper jury instructions and we review the court's decision to submit or refuse a particular instruction under an abuse of discretion standard. *Thota*, 366 S.W.3d at 687. The trial court, not the jury, determines whether spoliation has occurred and, if so, imposes the appropriate remedy. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014). Only in limited circumstances may the court instruct the jury regarding a spoliation finding. *Id*. at 23–26. In general, evidence bearing solely on whether a party spoliated evidence or the party's degree of culpability does not relate to a fact of consequence to the determination of the action. *Id*. at 26. The court in *Aldridge* recognized, however, that "all references to missing evidence, whether lost due to a party's spoliation or missing for some other reason, cannot and should not be foreclosed." *Id*. Parties may present indirect evidence of the contents of the

missing evidence if it is otherwise relevant to a claim or defense. *Id*. But evidence unrelated to the merits of the case should not be admitted. *Id*.

Here, Shibata's testimony about early research and development testing raised an inference that those tests supported Toyota Motor's design decisions. The Reavises challenged Shibata's credibility and attempted to rebut that inference with evidence that Toyota Motor did not preserve the test results and relied only on Shibata's recollection of tests performed over a decade before trial. Toyota Motor responded with evidence that the test results were not maintained due to a legitimate record retention policy requiring retention of videos for seven years unless there is an ongoing business or engineering need for the records. On this record, we cannot conclude the trial court abused its discretion by overruling the objections to the evidence or refusing the requested jury instruction.

5. Summary

We conclude the trial court did not abuse its discretion by overruling Toyota Motor's objections on these evidentiary matters or by refusing its instruction regarding spoliation. We overrule Toyota Motor's fifth issue.

F. Actual Damages

In its sixth issue, Toyota Motor argues the evidence is legally and factually insufficient to support the jury's findings of actual damages, future physical impairment, future medical expenses, and future lost earning capacity.

The jury has considerable discretion in considering evidence on the issue of damages. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Physical

impairment encompasses the loss of the injured party's former lifestyle, including the loss of enjoyment of life. *Jackson*, 116 S.W.3d at 764–65, 772. "[T]he effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity . . ." *Id*. at 772. In reviewing the evidence we must minimize the risk of substituting our judgment for that of the jury in evaluating which category, if any, plaintiffs should be compensated. *Id*. at 773. Therefore, we focus on "whether the injuries have impeded a plaintiff's ability to engage in specific non-work related activities, such as sports, hobbies, or recreational activities." *Patlyek v. Brittain*, 149 S.W.3d 781, 787 (Tex. App.—Austin 2004, pet. denied). By doing so, courts can distinguish physical impairment from pain and suffering, mental anguish, and lost wages or earning capacity damages. *Id*. Reviewing courts look to whether impediments to the plaintiff's non-work related activities are obvious from the injury itself; or the plaintiff produces some evidence of specific non-work related tasks or activities he can no longer perform. *Id*.

Regarding future physical impairment, Toyota Motor argues there is no evidence of a distinct injury beyond injuries compensable through other damage elements.

The trial court instructed the jury on several elements of damages with blanks for each element. It further instructed:

> Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on

> any element if you have, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

No definition of physical impairment was given in the charge. The jury found damages for each child for pain and mental anguish in the past and future, loss of earning capacity in the future, disfigurement in the past and future, physical impairment in the past and future, and medical expenses in the future. We presume the jury followed the court's instruction and did not award damages twice for the same loss because there is no indication in the record otherwise. *Jackson*, 116 S.W.3d at 771.

There was medical evidence that parts of both children's brains died; they suffered severe, permanent brain damage, leaving fewer neurons, fewer cognitive resources, and resulting in significantly slower brain processing. Dr. Weprin, the children's neurosurgeon, testified there was no treatment or medication to fix the brain damage. The children have no recollection of their lives before the collision, never inquiring about home, friends, or family.

Weprin explained that E.R.'s axonal shearing injury to her brain affected her motor functions as well as thought processes. For example, she can move but she does not move normally, she does not have good speed or fluidity of function. Similarly, thought processes, responses to questions, do not work normally. The shearing injury is permanent. O.R. had an acute subdural hematoma and depressed skull fracture. He required surgery to remove the blood clot and correct the skull

fracture. O.R.'s brain injury could affect the entire visual apparatus. Both children suffered diffuse shearing in the brain, that is, the injury affected the entire brain. They have fewer neurons, less processing capacity, resulting in fewer cognitive resources. Both children have visual impairments.

Ben said E.R. before the accident "loved to play" and was "always smiling." She began walking early. O.R. was a sweet kid, more laid back than his sister. He was sharp and had a good sense of humor. He was active, but not as much as his sister.

At the time of trial, the children were able to walk and talk. E.R. can play on the playground and dance. Ben testified that she can "sort of" play basketball. He said the children do not have specific physical limitations, but they have been advised to avoid contact sports for the rest of their lives. E.R. loved gymnastics before the accident, but she cannot do gymnastics now. She was able to take a ballet class in the fall, but she wanted to go back to gymnastics. She tried to play basketball, but her skills did not improve, and she never grasped the game.

Before the accident E.R. enjoyed playing at a large indoor playground. Just before trial, her father took her to the playground and she had difficulty understanding how to play on the equipment. Ben explained that she wanted to go down a slide, but she asked, "how do I get up there?" She was ready to leave after a short time, where before she would never want to leave. E.R. is no longer able to sing a song-in-the-round with her family like they would do before the accident. E.R.

was social and engaging before the accident, but now is socially awkward and impressionable.

O.R. has a lower attention span now. He has difficulty focusing on things for more than three or four minutes, even things he likes to do. He has great problems with things he does not like to do, for example therapy or schoolwork. It requires one-on-one interaction with a teacher or parent for him to accomplish difficult tasks. Before the accident he was sharp, quiet, and unassuming. He enjoyed school. Now he is more reluctant about school. He does not like being pushed to do things he is not good at and, at this point, most things are difficult for him.

O.R. has taken swimming lessons and can almost swim independently. He can ride a tricycle and climb a small rock climb but cannot climb down. His peers enjoy sports, but O.R. cannot understand sports. After the accident, O.R. has grown angry and aggressive. He struggles socially, hitting and biting his peers. As O.R. grows older, Ben is concerned that he may be unable to control him.

The impediments to the children's non-work related activities are obvious from their injuries and there is evidence of specific activities they will not be able to engage in, including social activities, sports, and recreational activities. In other words, their enjoyment of life will be impaired. We conclude some evidence supports the jury's finding of future physical impairment. *See Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 555 (Tex. App.—Fort Worth 2006, pet. denied). And the

evidence supporting the jury's finding is not so weak that the finding is clearly wrong and unjust. *Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 615.

Toyota Motor attacks the findings for future medical expenses and future lost earning capacity by arguing the Reavises' expert on life care planning was not qualified and his opinions are unreliable.

Toyota Motor argues Gonzales is not board certified in the subspecialties of brain injury medicine or pediatric physical and rehabilitation medicine. He is not aware of any professional literature or scientific research supporting his conclusions and never performed any research in the relevant area. He did not consult with the specialists who actually treated the children.

An expert may be qualified by "knowledge, skill, experience, training, or education." TEX. R. EVID. 702. Gonzales testified to life care plans for each of the children. He testified about the children's diagnostic conditions and disabilities and the projected cost of their future medical care.

Gonzales is a physician who is board certified in three areas, physical medicine and rehabilitation, pain medicine, and occupational and environmental medicine. He is also a life-care planner. A life-care planner evaluates a case to determine what residual medical conditions and disabilities a person has and provides the best opinion of how that person should be taken care of now and in the future depending on the duration or permanence of the illness or disability. A life-care planner also calculates the cost of the care necessary for a patient. Gonzales has

been trained in life-care planning and is a certified life-care planner and a certified physician-life-care planner. He has practiced physical medicine for almost thirty years and treated both children and adults. He has treated hundreds of children, a third to a half of which had traumatic brain damage. During that time, he has prepared life-care plans for hundreds of children, including those he did not treat.

Gonzales agreed he is not board certified in the subspecialties of brain injury medicine and pediatric physical medicine and rehabilitation, but explained that the basic certification in physical medicine covers children and pediatrics. Gonzales reviewed the medical records of the children and the reports of their treating physicians and consultants. He testified the reports were clear and detailed and he did not need to consult with them further.

Based on his training and experience, we conclude the trial court did not abuse its discretion by determining that Gonzales was qualified as an expert. *See Roberts v. Williamson*, 111 S.W.3d 113, 120–22 (Tex. 2003) (although not a neurologist, pediatrician was qualified to testify about nature and effect of child's neurological injuries, as he had experience and expertise regarding specific causes and effects of particular injuries in issue); *Harnett v. State*, 38 S.W.3d 650, 659 (Tex. App.—Austin 2000, pet. ref'd) ("licensure, or certification in the particular discipline is not a per se requirement").

Toyota Motor argues Gonzales's opinions are internally inconsistent and inconsistent with the facts. First, it contends Gonzales used the Glasgow Coma

Scale, measured during initial treatment of the children, to project the long-term prognosis of the children. Second, Gonzales based his life-care plans on the assumption the children would plateau after two years, but later said the children could continue to improve up through adulthood. Third, Gonzales's preferred option was to place the children in a residential facility at some point because other options would be too expensive, but he admitted that a residential facility is the most expensive option.

Toyota Motor argues Gonzales's use of the Glasgow Coma Scale is inconsistent with a statement by Weprin, one of the children's neurosurgeons. Weprin explained that the Glasgow Coma Scale is used to classify the severity of a patient's brain injury at a particular moment of time. Weprin uses the scale to evaluate the patient at a particular moment in time and to determine his treatment at that point.

Weprin also testified some people use the scale to equate it with the long-term prognosis. They might suggest that a patient with a moderate score will be fine long-term, but that is a very crude and elementary perspective.

Gonzales described different tools used in assessing a patient and determining a prognosis. Weprin used the Glasgow Coma Scale during the acute phase to determine his treatment of E.R. and to monitor her recovery. Gonzales considered the scale, among many other things, to arrive at a prognosis after the patient is stable. Gonzales stated that the Glasgow Coma Scale results in the children's history

showed how they progressed. Gonzales used those results as well as the duration of loss of consciousness and posttraumatic amnesia in determining a prognosis. He explained these tests all have certain predictive qualities, but ultimately, he relies on the images (x-rays, CT and MRI scans) and neuropsychological evaluation, as well as clinical observations in arriving at a long-term prognosis. A patient with a Glasgow Coma Scale of 8 or less, a period of unconsciousness of 24 hours or more, and a period of traumatic amnesia is classified as having severe traumatic brain injury.

The record indicates that Gonzales considered much more than a single test to reach his conclusions. The Glasgow Coma Scale for the children was merely one data point in the facts relied on by Gonzales. Weprin expressed a different opinion on the long-term use of the scale data, but differences of opinion among experts are for the jury to resolve. *See McGalliard*, 722 S.W.2d at 697 (fact finder's role is to resolve conflicts and inconsistencies in testimony).

Gonzales explained that central nervous system tissue in general has a two-year window for improvement. After that, what can change with rehabilitation and medical treatment is continued functional improvement through repetition and the right kind of therapy. He explained that between childhood and adulthood there is an opportunity to make the most out of the brain tissue that is not damaged in order to reach the optimal level of function, both physically and cognitively. Therapies will continue to be helpful in assisting the patient to have the highest level of function

possible. Read in context, Gonzales's testimony about a two-year period for improvement is not inconsistent.

Gonzales gave several reasons for recommending the residential facility option. He stated his recommendation was based on the quality of care and quality of life for the children in a specialized facility. He recommended the facility to relieve the parents of the cost of outside help and the physical and emotional toll of caring for adult children with brain injuries. The record does not support Toyota Motor's contention that Gonzales recommended the residential facility because other options would be too expensive in terms of money. Thus, Gonzales's recommendation of a residential facility is not irreconcilably self-conflicting or inconsistent with actual evidence. We reject Toyota Motor's arguments that Gonzales's opinions are unreliable.

Gonzales gave detailed evidence of the medical treatment the children will need in the future in reasonable medical probability and the reasonable cost of those treatments. There was also evidence of the cost of the care the children received before trial. The jury awarded approximately 20% less than Gonzales's most expensive option.

"To recover future medical expenses, a plaintiff must show there is a 'reasonable probability' that such expenses will be incurred in the future." *Sanmina–SCI Corp. v. Ogburn*, 153 S.W.3d 639, 642 (Tex. App.—Dallas 2004, pet. denied). This includes evidence proving that, in all reasonable probability, future medical

care will be required and the reasonable cost of that care. *Id.*; *see also Pustejovsky v. Rapid–Am. Corp.*, 35 S.W.3d 643, 652 (Tex. 2000) (noting courts have interpreted reasonable medical "probability" to mean greater than fifty percent chance). "Often a jury must extrapolate an award of future damages from proof of other matters, for example, an award of future medical damages based upon a finding of past medical treatment." *Pipgras v. Hart*, 832 S.W.2d 360, 365 (Tex. App.—Fort Worth 1992, writ denied). With regard to future medical expenses, "[n]o precise evidence is required," and "[t]he jury may make its award based upon the nature of the injuries, the medical care rendered before trial, and the condition of the injured party at the time of trial." *City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex. App.—San Antonio 1988, writ denied).

We conclude the evidence is legally and factually sufficient to support the jury's findings on actual damages. We overrule Toyota Motor's sixth issue.

G. Punitive Damages

Toyota Motor challenges the award of punitive damages in its seventh issue. It argues there was no underlying negligence finding to support the gross negligence finding; no finding Toyota Motor acted through a vice-principal; and insufficient evidence of an extreme degree of risk, actual subjective knowledge of the danger, or

conscious indifference. In addition, Toyota Motor argues the award violates due process as a double punishment and was grossly excessive.[11]

The trial court submitted the exemplary damages question under a gross negligence theory. Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm results from fraud, malice, or gross negligence. CIV. PRAC. & REM. § 41.003(a)(3). "'Clear and convincing' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2).

In a legal sufficiency review of findings requiring proof by clear and convincing evidence, an appellate court must "look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). We presume that the trier of fact resolved disputed facts in favor of its findings if a reasonable factfinder could do so. *In re J.F.C.*, 96 S.W.3d at 266. We disregard any contrary evidence if a reasonable factfinder could do so, but we do not disregard undisputed facts. *Id.*

[11] Toyota Motor also contends the trial court erred by failing to apply the statutory cap on exemplary damages to Toyota Sales. We have reversed the judgment against Toyota Sales and need not address this argument. *See* TEX. R. APP. P. 47.1.

In a factual sufficiency review, an appellate court must give due consideration to evidence the factfinder could reasonably have found to be clear and convincing. *Id*. We must consider the disputed evidence and determine whether a reasonable factfinder could have resolved that evidence in favor of the finding. *Id*. "If in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id*.

> Gross negligence means an act or omission:
>
> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Id. § 41.001(11). Gross negligence consists of both objective and subjective elements. *Waldrip*, 380 S.W.3d at 137. Under the objective element, extreme risk is not a remote possibility or high probability of minor harm, "but rather the likelihood of the plaintiff's serious injury." *Id*. The subjective element requires that the defendant knew about the risk, but its acts or omissions demonstrate indifference to the consequences of its acts. *Id*.

Subject to the statutory cap on the amount of exemplary damages, "the determination of whether to award exemplary damages and the amount of exemplary

damages to be awarded is within the discretion of the trier of fact." CIV. PRAC. & REM. § 41.010(b). "In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant." *Id.* § 41.011(a). In our review of an exemplary damages award, we must state our reasons for upholding or disturbing the award and "address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages," in light of the statutory requirements. *Id.* § 41.013(a).

Toyota Motor argues the gross negligence finding should be reversed because there was no finding of ordinary negligence. *See Arana v. Figueroa*, 559 S.W.3d 623, 634 (Tex. App.—Dallas 2018, no pet.) (trial court properly granted summary judgment on gross negligence claim where summary judgment was proper on negligence claim). We agree that gross negligence requires liability for some underlying tort and actual damages. *See Fed. Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (per curiam) ("Recovery of punitive damages requires a finding of an independent tort with accompanying actual damages."). Here, the underlying tort is products liability, for which the jury awarded actual compensatory damages. "The standard for awarding punitive damages in products liability cases in

Texas is based on the traditional standard for such damages; that is, a finding of at least gross negligence; of reckless indifference or wanton behavior." *Int'l Armament Corp. v. King*, 674 S.W.2d 413, 416–17 (Tex. App.—Corpus Christi–Edinburg 1984), *aff'd*, 686 S.W.2d 595 (Tex. 1985).[12]

Next, Toyota Motor argues it cannot be liable for gross negligence because there was no finding supporting corporate liability for acts or omissions of its agents.

"A corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998). A corporation is liable for punitive damages if it authorizes or ratifies an agent's gross negligence, is grossly negligent in hiring an unfit agent, or commits gross negligence through the acts or omissions of a vice principal. *Id*. "In determining whether acts are directly attributable to the corporation, the reviewing court does not simply judge individual elements or facts. Instead, the court should review all the surrounding facts and circumstances to determine whether the corporation itself is grossly negligent. Whether the corporation's acts can be attributed to the corporation itself, and thereby constitute corporate gross negligence, is determined by reasonable inferences the factfinder can draw from what the corporation did or failed to do and the facts existing at relevant times that contributed to a plaintiff's alleged damages." *Id*. at 922 (citations omitted).

[12] Under section 41.003, exemplary damages may only be awarded based on clear and convincing evidence that the harm resulted from fraud, malice, or gross negligence. CIV. PRAC. & REM. § 41.003(a).

Considering all the surrounding facts and circumstances, the design decision here was a corporate decision to adopt a particular design and release the product for manufacturing and sale. Shibata gave a detailed description of the design, components, and intended functioning of the WIL seat used in the ES300. He explained the process of designing, testing, and approving the vehicle by various departments during the development phase. We conclude that when Toyota Motor designed, built, and sold the 2002 ES300 it necessarily ratified and approved the design decisions of its employees. Further, there was no fact question about whether Toyota Motor's acts and omissions in designing, manufacturing, and marketing the ES300 were authorized or ratified by the corporation itself. Therefore, the trial court did not abuse its discretion in refusing Toyota Motor's vice-principal instruction.

Regarding the extreme degree of risk requirement, Toyota Motor concedes the harm suffered by the Reavis children was extremely serious. It contends that the risk of that harm, however, was not extremely likely. One of Toyota Motor's experts described this collision as more severe than 95% of all rear-impact collisions. Toyota Motor calculates that only 0.4% of all crashes severe enough that the vehicle is towed away are as serious or more serious as this crash. However, there was evidence that over 77,000 of the 1,547,000 rear-end tow-away collisions each year are as severe as or more severe than this crash. In other words, a crash as severe as this case occurs every 6 minutes and 48 seconds. Considering the magnitude and frequency of the

potential harm, the jury could reasonably conclude that Toyota Motor's design posed an extreme degree of risk to back-seat passengers in high-speed rear-end collisions.

Toyota Motor argues there is no evidence that it had detailed knowledge the front seats of the ES300 posed a specific and extreme risk to its customers. However, Shibata admitted that Toyota Motor was aware for at least thirty years that front seats in a rear impact collision can deform backwards and threaten back seat passengers. The Reavises' experts, as well as Toyota Motor's experts, agreed that knowledge of this ramping risk has existed at least since the early 1990s throughout the industry and is well-documented in automotive literature. "[A]wareness of an extreme risk does not require proof that the defendant anticipated the precise manner in which the injury would occur or be able to identify to whom the injury would befall." *Waldrip*, 380 S.W.3d at 139; *see Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) (holding that it is enough that the "general danger" was foreseeable). We conclude the jury could form a firm belief or conviction that Toyota Motor was subjectively aware of the extreme risk to rear-seat passengers when front seats yield and restraint systems fail to prevent front-seat occupants from ramping in high-speed rear-end collisions.

Regarding conscious indifference, Toyota Motor contends it spent three years developing the ES300, crash tested over 50 vehicles, performed component tests, studied other vehicles, and analyzed real-world accidents. The front seats of the ES300 met or exceeded applicable federal safety standards, sometimes by a large

margin. Toyota Motor also performed the 30-mph federal fuel-system integrity test at 35 mph because of the wide variety of accidents. A chart comparing the seatback rigidity of several vehicles from 1998 to 2017 shows that the ES300 falls close to the middle of the 27 vehicles tested. Toyota Motor points to evidence that ramping did not occur in its testing and its design decisions were reasonable in light of the ongoing debate about seatback strength.

The jury heard evidence supporting the conclusion that Toyota Motor does not test for collisions like this one, one of the most severe rear-end collisions. Shibata testified:

> [Q.] Do you acknowledge that it's possible that a rear-end collision at about 45 to 48 miles per hour, front seat passengers, their seats could deform back, allowing the front seat passengers to ramp up and hit their kids in the back? Is that a possibility the way that you've designed the ES300?
>
> A. In our testing our test would represent 95 to 97 percent of real world accidents. So our tests would represent majority of the accidents in the real world. In our testing that kind of phenomenon did not happen. So when the accident -- the severity exceed the reasonable level, then something may happen in such a severe accident. That is our understanding.

There was evidence that rear-impact collisions as serious or more than this one occur frequently, every 6 minutes, 48 seconds, yet Toyota Motor does not test for them. Such high-impact collisions are also the most dangerous. The jury could conclude that Toyota Motor did not see the phenomenon of ramping because it did not test for it in high-speed collisions even though it was aware of the extreme risk to rear-seat passengers.

The jury also heard evidence that Toyota Motor's testing accounts for even fewer serious rear-impacts. While Shibata testified that Toyota Motor's testing represented 95 to 97% of real-world accidents, Toyota Motor expert Stephens agreed that the energies at which Toyota Motor tested actually represent only 91 to 92% of tow-away rear-impact collisions. There was evidence that collisions in the top 8 to 9% of rear-impact collisions occur as often as every 4 minutes, 17 seconds.

Shibata testified that the front seat dummies remained in their seats in Toyota Motor's testing, including the 50-mph car-to-car tests. The purpose of the 50 mph tests was to evaluate the prevention of fuel leakage. He testified that the front seat dummies were not instrumented in the 50 mph fuel integrity tests on the ES300. Back seat dummies were not used in these tests. Shibata stated Toyota Motor knew the dummies remained in their seats in the tests by checking the vehicle after the test and analyzing the film. However, he admitted on cross-examination that because the doors were in place during the 50 mph tests, it was not possible to measure the seat deformation using high-speed film. Toyota Motor's reports of these tests make no mention of the performance of the seats or measurement of the maximum dynamic rearward deflection of the front seats.

These tests were conducted with test-dummies representing 50th percentile American males in the front seats. Ben Reavis was closer in weight and height (6'1" and 195 lbs.) to a 95th percentile dummy weighing 225 pounds. None of Toyota Motor's tests used dummies in the back seat and all but a sled test were performed

with the doors closed, so engineers could not observe or measure the deflection of the front seats during the test. Toyota Motor did not use back-seat dummies because they might "interfere with the deformation of the front seat" according to Shibata.

During development, Toyota Motor performed a 30-mph sled test without the doors attached. Shibata claimed this test confirmed the maximum dynamic rearward deflection angle was within Toyota Motor's target of less than 25 degrees. But that was tested in a 30-mph sled test with a delta-v of 20 mph and a maximum G of only 11, while this crash was 45 to 48 mph, had delta-v of 25 mph and a maximum G of 16 to 17. The S.A.F.E. sled test showed that in conditions similar to the Reavises' collision, a 45-mph rear-impact, with a delta-v of 25 mph, the ES300 front seats and restraint system failed to prevent front seat dummies from ramping up the seat back and colliding with child safety seats in the rear seat.

Toyota Motor argues it complied with industry standards and safety regulations. In other words, it contends it cannot be grossly negligent because it exercised some care. But as the supreme court has long recognized, "the fact that a defendant exercises some care does not insulate the defendant from gross negligence liability." *Ellender*, 968 S.W.2d at 923–24; *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921–922 (Tex. 1981).

Toyota Motor set a target for maximum dynamic rearward deflection of 25 degrees or less. Meyer testified that there was nothing in the design to limit rearward

deflection beyond Toyota Motor's target of 25 degrees. Shibata agreed. He also agreed Toyota Motor's target is merely a hope or aspiration. Van Arsdell, Toyota Motor's expert, agreed there is no physical limitation in Toyota Motor's design to prevent front seats from deflecting beyond the 25-degree dynamic deflection target. He also agreed that accidents such as this one are real world accidents, but suggested it was reasonable not to test or design for such accidents because they are at the top of the distribution, very severe, and a relatively small percentage of the number of rear-impact collisions. However, there was evidence that more than 77,000 rear-end collisions at 45 mph or more happen each year, every 6 minutes, 48 seconds, and the record supports that these are some of the most dangerous collisions.

In contrast to the Reavises' experts' tests, the jury had little more than Shibata's repeated assurances that front seat occupants remained in their seats during rear-end collision testing and Toyota Motor met its target of no more than 25 degrees of maximum dynamic rearward deflection in its early developmental testing. The jury could reasonably believe from the evidence that Toyota Motor was consciously indifferent to collisions of the magnitude of and harm resulting from this collision even though rear-end collisions of this magnitude occur every 6 minutes, 48 seconds, and despite its knowledge of the extreme risk to rear-seat passengers from ramping in such collisions. While Shibata suggested it was reasonable not to test for such severe collisions, there was evidence the jury could reasonably believe that protecting rear seat passengers in these severe accidents would have cost no more

than $100 per seat. Without testing for these collisions, Toyota Motor did not know whether it could prevent or reduce injuries in such collisions and was indifferent to the risks in the most severe accidents. Toyota Motor's conscious decision not to test for these collisions and hope that its 25-degree target would be met in real world collisions is evidence of conscious indifference to a known extreme degree of risk of potential harm to others.

Toyota Motor next argues the punitive damages award violated due process because the SUA and DPA evidence allowed Toyota Motor to be punished twice for entirely unrelated conduct. It cites to comments during closing argument in support of this argument.

Twice during 24 pages of final summation, counsel for the Reavises mentioned the unintended acceleration evidence. Both times were to argue that Toyota Motor and its witnesses were not credible. Reading the argument in context and as a whole, there was no improper appeal to the jury to punish Toyota Motor for the unintended acceleration situation. Instead, there was evidence Toyota Motor had subjective knowledge of this risk and was consciously indifferent to that risk. We conclude that Toyota Motor has not shown the punitive damage award violated due process.

Finally, Toyota Motor argues the punitive damage award is excessive. It contends that its design decisions met or exceeded federal safety standards and were

made in the context of an ongoing debate about how to balance competing safety considerations.

In reviewing the amount of punitive damages, we consider the factors set out in *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1984), which include the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which such conduct offends a public sense of justice and propriety. *Id*.; *see also* CIV. PRAC. & REM. § 41.011. We also consider the defendant's net worth. CIV. PRAC. & REM. § 41.011(a)(6).

We have detailed the evidence for and against the gross negligence finding above. Applying the *Kraus* factors to the evidence, we conclude the jury's award is not excessive. The nature of the wrong in this case is the permanent severe traumatic brain injury to two young children. The character of the conduct and culpability of the wrongdoer support the award of punitive damages. Toyota Motor admitted the seriousness of the harm here, but argued the probability was low. Yet the jury heard evidence that collisions as severe as this one occur every 6 minutes 48 seconds. Shibata admitted that Toyota Motor was aware of the risk to rear-seat passengers from ramping in rear-impact collisions. Indeed, Toyota Motor never denied knowledge of this extreme risk of harm. It set a target for the maximum dynamic rearward deflection of its seats. But despite its knowledge of the extreme risk of harm from ramping, there was evidence Toyota Motor did nothing to ensure it met

this target in serious collisions; there was evidence Toyota Motor was consciously indifferent to the most serious rear-end collisions.

The situation and sensibilities of the parties indicate that Toyota Motor is a multi-billion dollar international company with operating income of $20 billion a year, while the Reavises are individuals trying to raise a family. Rather than accept responsibility, the jury could reasonably conclude that Toyota Motor rationalized its conduct and argued it was reasonable not to test the performance of its seats and restraint system in the most serious rear-end collisions; collisions which occur more than 77,000 times in a year. Toyota Motor does not warn its customers of this known risk. Nor does Toyota Motor intend to change its practice of not using rear-seat dummies in its testing.

Courts are particularly reluctant to substitute their own sense of justice for that of a jury selected from a cross section of the community. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 686–88 (Tex. App.—Dallas 2004), *aff'd in part, rev'd in part*, 271 S.W.3d 238 (Tex. 2008). The jury heard evidence that Kristi felt betrayed as a parent, she was shocked by the evidence Toyota Motor knew of danger and could have avoided it. The jury reasonably could have agreed with her.

Finally, we note that the amount of punitive damages awarded after applying the statutory cap was less than the amount of actual damages awarded.

After reviewing all the evidence in the light most favorable to the gross negligence finding, we conclude a reasonable trier of fact could have formed a firm

belief or conviction that its finding was true. We also conclude, in light of the entire record, that the disputed evidence a reasonable factfinder could not have credited in favor of the finding is not so significant that the factfinder could not reasonably have formed a firm belief or conviction that the finding was true.

In summary, we conclude the evidence is sufficient to support the jury's finding of gross negligence and award of punitive damages against Toyota Motor. We also conclude the award does not violate due process and is not excessive. We overrule Toyota Motor's seventh issue.

Conclusion

Having rejected Toyota Motor's issues on appeal and granted the Reavises' motion for rendition of a take-nothing judgment as to Toyota Sales, we reverse the trial court's judgment against Toyota Sales without regard to the merits and render judgment that the Reavises take nothing against Toyota Sales. In all other respects, we affirm the trial court's judgment.

/Erin A. Nowell//
ERIN A. NOWELL
JUSTICE

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Schenck, J., dissenting.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TOYOTA MOTOR SALES, U.S.A., INC. AND TOYOTA MOTOR CORPORATION, Appellants

No. 05-19-00075-CV V.

BENJAMIN THOMAS REAVIS AND KRISTI CAROL REAVIS, INDIVIDUALLY AND AS NEXT FRIENDS OF E.R. AND O.R., MINOR CHILDREN, Appellees

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-15296.
Opinion delivered by Justice Nowell.
Justices Schenck and Partida-Kipness participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** the trial court's judgment against Toyota Motor Sales, U.S.A., Inc. and **RENDER** judgment that Benjamin Thomas Reavis and Kristi Carol Reavis, individually and as next friends of E.R. and O.R., minor children, take nothing against Toyota Motor Sales, U.S.A., Inc. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that appellees Benjamin Thomas Reavis and Kristi Carol Reavis, individually and as next friends of E.R. and O.R., minor children, recover their costs of this appeal and the full amount of the trial court's judgment from appellant Toyota Motor Corporation and from the surety on its supersedeas bond.

It is **ORDERED** that the surety on the supersedeas bond posted by appellant Toyota Motor Sales, U.S.A., Inc. is discharged.

Judgment entered this 3rd day of June, 2021.