ORAL ARGUMENT — 1/12/99
98-0442
GMC V. SANCHEZ

LANDAU: As the court is aware, this is an appeal from an $8.5 million judgment against GM - $4 million of them for compensatory damages - $4.5 million in punitive damages without any reduction despite a jury finding of 50% comparative fault based on negligent violation of state law duties that apply to drivers of all vehicles, whether they have defects, whether they don't have defects.

The judgment violates Texas law several times over. You can't under Texas law disregard a jury's comparative fault finding in this case, much less as a matter of law based on the rule of the *Keen* case that we would submit does not apply to this case and really ought not apply in any case. You also can't impose liability on a manufacturer much less punitive damages for risks that cannot from the nature of physical science be eliminated for a design that is as good as any on the road, and in fact, safer than one that the Federal Safety Agency has found not defective, and for warnings that if heeded would have avoided the accident. The judgment here violates the law and cannot stand.

I am going to talk first about the comparative fault finding and then about punitive damages.

ENOCH: Is your argument that the product is not defective, or is your argument that the 50% liability on Mr. Sanchez is what you're trying to uphold?

LANDAU: I think the answer to your question is, yes. And the reason is, I think we are contending both. Clearly the 50% finding must stand. It was error to disregard it. But also this court has required that plaintiffs bear the burden of proving a safer alternative design in order to prove a defect. And there is no evidence in the record of a safer alternative design.

Let me get to the comparative fault finding first. The jury found that Pookey Sanchez was 50% at fault in causing this injury. The courts below, however, overruled the jury, found GM 100% responsible despite that finding, because the court found as a matter of law the plaintiff's fault lay only in failing to discover a defect. And that can only stand if 3 things are true. The first thing is that the *Keen* rule is still the law in Texas. The second thing is that there is no evidence with all the evidence being viewed GM's way of any negligence apart from the failure to discover a defect. And the third thing is that the issue was not waived. Any one of those, if it's not true, requires that the judgment be reversed and rendered for GM on the issue of comparative fault. And we submit that none of those three are true.

First, as to the *Keen* rule. This court held in *Keen* that a failure to discover or guard against a product defect is not a defense against strict liability. Now that rule is a relic of a

bygone contributory negligence ____. The source was 402A of the Restatement of Torts from back in 1968, comment N.

ENOCH: The response of Sanchez is to this argument is, well if you look at the Restatement Third its comment says, that by eliminating the comment it's not intending to say that a plaintiff is somehow responsible for failing to have discovered the defect, which is...

LANDAU: With respect, that's not at all what Restatement Third says. What it says is, that all conduct by the plaintiff that violates a duty care is considered, including the negligent failure to discover a defect. Now the third Restatement says, and it's true, that probably in most cases the failure to discover a defect won't be found negligent. But the Third Restatement leaves it to the jury to decide. And that is just as clear as can be. It says, that the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care. And the Restatement makes it very clear that it's up to the jury to decide...

HANKINSON: If the legislature in adopting Ch. 33 of the Texas Civil Prac. & Rem. Code, in fact by putting that in Texas law changed the law, is there any need for this court then to go into any discussion of whether or not *Keen* still is the law?

LANDAU: Clearly not.

HANKINSON: Is your position that you're asking the court to change the common law, or that the legislature has already done it and we've just never had the opportunity to acknowledge that?

LANDAU: Well in a sense it's both. The legislature has said in very clear terms that any kind of conduct that violates a standard of care is to be considered to the extent that that supersedes *Keen*.

HANKINSON: Well does it or doesn't it?

LANDAU: We would submit that it does. The plaintiffs obviously dispute that.

HANKINSON: There's a 5th circuit case that acknowledged that.

LANDAU: That is correct.

HANKINSON: But none of the CA's and this court have not looked at the question?

LANDAU: That is right. And of course that relates to the question because it's up to the legislature to decide that. And that would trump the common law. But if there were a question about it, and it were a question that this court could consider under the common law, we would submit that the underpinnings for *Keen* that contributory negligence rule is gone. And the AIL has made it very

clear that the reason the Second Restatement that the court adopted did that is because the institute "was reluctant to borrow a plaintiff's product liability claim in tort based on conduct that was not egregious, thus §402a, comment N altered the general tort defenses by narrowing the applicability of contributory negligence."

Now what has happened since then? This court adopted — well contributory negligence is no longer the law. It's now comparative fault. In *Duncan* this court made clear that the comparative fault law applies to strict liability as well as to negligence and any other cause of action. And so therefore, the underpinning of *Keen* is just gone.

Now Justice Phillips recognized that even when *Keen* was adopted and said that the continued retention of a rule which allows a plaintiff to recover full damages even though conceivably at fault is inconsistent with comparative fault principles.

ENOCH: So in this case there is no way that this case would ever be submitted without a comparative fault question for Sanchez? I mean nobody was around, they just discovered him with the condition of the truck having backed up to him. Apparently the evidence is that it's because of this he didn't get it into Park, and they allege it's a defect, and that's all that's necessary to get on the part of the manufacturer an instruction to the jury or a question to the jury on whether or not the user of the product was negligent in failing to discover this defect?

LANDAU: I think that's not quite right because there was a lot more evidence than just his failure to discover a defect.

ENOCH: Well he didn't put it into Park.

LANDAU: But there's more. He didn't set the emergency brake. Texas law requires you to set the emergency brake when you leave a car. He didn't kill the engine. Texas law requires you to kill the engine.

ENOCH: That's what I am saying. In this case it's always - for all the reasons you say the fact that it moved it wouldn't have moved if the brake was set, it wouldn't have moved if the others were set, and because of that, then this case will always have a question on comparative negligence?

LANDAU: As well it should.

ENOCH: Just from the fact that the car rolled back against him and crushed him and it was in gear?

LANDAU: That's right. It rolled back against him and there was an emergency brake that would averted the accident. Even if he had misshifted there is an emergency brake that would have

worked. I think that if an emergency brake didn't work, the fact that he didn't pull it up wouldn't have mattered. But here there was clear testimony by the plaintiff's own experts that the emergency brake worked, it would have stopped this accident from happening, that killing the engine would have stopped this accident from happening.

So all of the things that Texas law requires under statute, that one of the plaintiff's witnesses, the police officer made clear any prudent person would have done - were not done, and that the warnings told them to do were not done. In that setting of course it should be an issue for the jury, but it is a jury question. And all we're as asking is that the jury's verdict on that question be respected. I think that the evidence in this case is ample that there is negligence, or at least a jury could find that _____ that is separate and apart from any failure to discovery a defect, because those duties apply whether the car's defective, whether it's not defective. Those duties would apply even if the plaintiff's own experts design if it existed, if it worked were in that car, those duties would still apply.

PHILLIPS: Even if everything you say is true isn't the most this court could do would be to remand to one of the two courts below for a sufficiency review?

LANDAU: I don't think that the court would need to remand for a sufficiency review, because the jury verdict was disregarded based on a finding of no evidence. If this court finds that there was evidence, then the remedy is to remand with instructions to enter judgment in accordance with the jury's verdict. There is no need for any further review beyond that. There's no cross appeal. There's no other issue.

PHILLIPS: We will deem a less favorable point that party could have made, but didn't make because they thought they had a very favorable legal point. And if we did that, this court could not have jurisdiction to enter the judgment that you request?

LANDAU: I think ultimately the judgment we request is a reversal and rendering on all points for GM. The court imposed punitive damages against GM, because it knew of a risk that couldn't be avoided. Even though it voided it better or as well as anyone else, any car on the road, and better than a design that the Federal Safety Agency said met the need for motor vehicle safety and was not defective. And we would submit that's a really monstrous result. If that's the law here, then the *Moriel* case and its limitations go out the window. If every misshift case there is necessarily a risk of punitive damages liability, because if you impose punitive damages for the best design, necessarily you're going to impose them for all designs. And even the plaintiff's own expert's design, which he admits can be misshifted, which he admits could roll on an incline like this, and therefore, cause injuries would subject him to punitive damages. That's crazy.

Let's talk about what *Moriel* requires. There is two components: the objective component, which is an extreme risk; and there is a subjective component, which is an actual subjective awareness of the risk with conscious disregard of safety.

What is the risk we are talking about? Necessarily it cannot be the general knowledge of physics, and the risk that there is of necessity as a matter of physics - a midpoint between Park and Reverse, and so therefore always in any automatic transmission design a risk omission(?). If that is the knowledge that matters, then every manufacturer is responsible every time that the inevitable happens and you can't be punished for knowing the inevitable and not being able to avoid it. So that fact alone cannot justify punitive damages. There has to also be a particular risk with this design.

ABBOTT: There's one thing that doesn't make sense here. You make it sound as though it's going to be inevitable, that there's going to be a misshift. I put my car in Park for decades. I've never had a misshift.

LANDAU: I think that that proves probably better than anything else, that the objective risk here is infinitesimal. I've done the same. Probably everybody else has done the same unless they use a standard transmission. The fact is, that there is a 1 in 19 billion risk in any particular shift that this could happen.

ABBOTT: And why did you say it's inevitable?

LANDAU: If you a shift a car for 19 billion shifts, one time maybe in 19 billion it can happen. The odds against it are huge, and the reason is because the manufacturers have designed a very good design. They have a point that's 10,000 of an inch or 30 thousandths of an inch. The likelihood of positioning it especially when you're not intending to, you're tending to get it to Park, there are springs that help you move it there. There is all this technical stuff that keeps you in all these years of shifting from every getting that midpoint. It kept Pookey Sanchez from doing it in 86,000 miles of driving.

HANKINSON: Your argument here as you did your overview on the sufficiency of the liability proof as well seems to ask us to do the weighing of the evidence and to consider the evidence that GM put on that was favorable to its position. And there's no question that there were disputed issues in this case, and that GM as well put on a case. But you're here on a legal sufficiency point on both liability and gross negligence that requires us to look at the evidence in a light most favorable to the verdict. So isn't the question, was their a failure of proof on the part of the plaintiffs on these issues as opposed to asking us to reweigh what case was presented to the jury by both parties?

LANDAU: I'm not asking for any reweighing. You're right. The question is whether there is any evidence? And the answer is, there is none.

HANKINSON: In what way then did the proof fail as opposed to what the countervailing proof was?

LANDAU: Let's start with the magnitude of the risk. This court in *Universal Services v. Ung* case, held that a remote possibility of an injury, even a serious injury, is not sufficient. There is no evidence that a misshift of a 700R4 transmission, the one at issue in this case, is _____. There is one case that has ever occurred in this record of misshift in all the history of this 700R4 transmission.

HANKINSON: Well their brief talks about several cases, right?

LANDAU: With respect, that's wrong. There was a question that was asked of GM's statistical witness: Do you know of this case, and this case, and this case? And his answer, No. There is no evidence those cases ever existed. There's no evidence those cases were similar, that it was this transmission. There is no evidence at all with respect to that. And the court is well aware that a question of the lawyer is not evidence. And so there is no evidence of any other case other than _____. So there is one case. It's undisputed that there are millions, tens of millions, hundreds of millions of these cars out there. *Universal Services v. Ung* case says: One other case does not prove a likelihood of injury. And we would submit that that's the case. So even if the risk is an _____, and we would agree that a misshifted car is dangerous. But the likelihood of a misshift is infinitesimal. It's never happened to anybody in this room. It doesn't happen to virtually anybody who has ever driven except Mr. Wagner, the one case, and the plaintiff in this case.

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RESPONDENT

HAMILTON: I represent Candy Sikes. Mr. McMains represents Pookey Sanchez. I am going to address the *Keen* issue and any liability issues and Mr. McMains will address the punitive damages issues.

I was going to begin by addressing *Keen*, and I do want to focus on that. I want to say very quickly at the beginning of her opening, Mrs. Landau said that there was no evidence of a safer alternative design, and that's not a correct statement in the record. And I wanted to give the court some record cites on that. They are very brief. Pages 720-21, which discuss how the alternative design prevents the general cause of the accident. I have noted in my brief, page 607, and 711 discussing how the design is safer for Pookey and for consumers. I also would note that in GM's reply brief, GM concedes that Mr. Tamny's proposed design every aspect of it is or has been used by the industry. And that this is not a complicated and exotic design. It's basically a modification of existing designs.

And finally I would note on pages 613-18, Mr. Tamny commented that when Ford made the design change that he recommends here, they had an 85% decrease in misshift complaints. And I think that addresses the issue of safer alternative design. I think it also brings to bear on the claim that misshifts never happen. An 85% decrease in complaints indicates that they do happen.

The expert testimony at trial about the chances of being killed as Pookey was in a misshift are 20 million to one is very misleading evidence, and would not be sufficient evidence under *Havner* or *Robinso*n(?). First of all, that was based on reported fatalities and the expert testified at trial that the very database he was using did not report either Pookey Sanchez's or Mr. Wagner's injuries. Furthermore, I noticed that counsel does not mention the *Masaki(?)* case out of Hawaii, which her co-counsel Mr. Heilbron argued and lost, which was a virtually identical case to this one. It is correct that these cases are rare, and that's certainly a good thing. But that doesn't mean that they are so rare as to be diminimous(?) and for us to just turn our face away from Pookey Sanchez and say, hey, luck of the draw.

HECHT: You do agree that there was only one other case mentioned in the record, Mr. Wagner?

LAWYER: I agree with that.

HECHT: Your co-counsel says that there were a number of other cases, but those were just in the questions to a witness?

HAMILTON: That's correct, and Mrs. Landau is correct that an attorney's question obviously does not constitute evidence, and we don't contend that it is. I also would add following up on what Justice Hankinson asked, I do mention in my most recent reply brief that there are several reported cases around the country of misshifts. Obviously they are not all GM's, they are not all 700R transmissions. I simply stated that, because GM has taken the position that a misshift in and of itself is an almost impossible occurrence. But GM admits the transmission designs are all remarkably similar and these misshifts occur. And this is not a plaintiff's boondoggle. These are real cases.

ABBOTT: What is the evidence concerning the probability of a misshift, and let me cast it this way and that is, an argument could be made that a product was manufactured so that only one out of every let's say 500 million shifts is there going to be a misshift. And if that's the case, why would this be a dangerous product?

HAMILTON: I appreciate that question, and it is something I did address in the reply brief. First of all, the plaintiffs did not put on any affirmative evidence of the frequency of these accidents. Now it is true that GM put on a statement by their expert, _____, but it's a 1 in 20 million chance that it is less likely than lightning. And what I commented on is that in a product's liability case the issue is the safety of the product and balanced against that, the cost in reducing the harm. A human being knows that to be hit by lightning is so rare, and yet if there's a storm, we will do things to avoid being hit by lightning. And it's not because we irrational. It's because what we need to do is so slight relative to the harm that we risk we do those things. And by the same token here, Mr. Tamny testified that for less than a penny, the angle on the detente on the rooster comb could be altered so that it could not shift into power.

And my final observation about that Justice Abbott, perhaps this is more of a lawyer's observation, is that if these accidents are so inconceivable why has GM spent so much time and so much money working on these issues, studying these issues? Why do they claim now they warned about it. GM has taken the position that they warned of this precise issue. Why would they warn to something as rare as lightning.

PHILLIPS: Assuming *Keen* is still good law, assuming it hasn't been changed by the legislature and shouldn't be changed in the common law, aren't some of the issues that they are saying comparative with something beyond *Keen*, that is just failing to discover the defect? Whatever we think about a law that says, You can't step foot out of the car without turning it off, is those kind of arguments are apart from failing to discover the defect aren't they?

HAMILTON: I understand your question. I think it also relates to Justice Enoch's question. At trial GM took a different position than it's taking now. GM took the position that Pookey Sanchez did not think he was in Park. It took the position that he intentionally put the vehicle in reverse and left out of the car - and this sounds ridiculous but I have the record cites here. I site the court to page 684, 1301 and 1614. And the idea behind GM's theory was that by putting the vehicle in reverse it would scare the cows back into the pen, and he could run back there shut the gate and run forward. Now the jury, whether we agree with it or not, rejected that theory. That goes to comparative thought. That theory if the jury had said, yeah, that's what he did. Pookey was known for that. That theory is outside of the *Keen*, the comment and the exception because there is intentionally putting himself behind a moving vehicle that he knows to be in reverse. That's not what happened here. Every single instance that GM talks about here, Pookey's failures and malfeasances, were acts that were failure to guard and fail to discover the steep _____. This is not a defect that anyone could find unless you took the vehicle apart, and you can't know not to do things if you don't know the defect is there.

The origin of product's liability and the comment N exception was that it's a buyer's market and consumers have the right to choose. But product manufacturers have a superior access to knowledge and skill. GM had access to this information and it did not tell Pookey about it. Had they told Pookey about it, he could have made an intentional decision to say, you know, there's this defect, these things leap into reverse sometimes, but I'm a busy man, I'm on my ranch, I'm not putting on the emergency brake, I'm not cutting the edge. But he never had that chance.

HANKINSON: Putting aside the legal questions relating to *Keen* though, Ms. Landau has said that if we look at the jury's verdict on the comparative causation in the light most favorable to the jury's finding, there is evidence that because he didn't put the Parking brake on, and he didn't turn the car off, and didn't do all those kinds of things, that that is evidence other than the kind of evidence that *Keen* says can't be considered. And that would be enough to support the jury's finding. What's your response to that argument?

HAMILTON: As an attorney, I got to do something I've never been able to do, and that was

cite Pauls(?) Craft(?), and I do cite the Pauls Craft decision in the case. It is true that things Pookey did may have constituted negligence in the abstract. But none of them relate to the harm that ensued because he did not know the vehicle had a chance to move into Reverse. I know that GM has characterized various examples of things Pookey failed to do, and they limit it to 5 specific things.

BAKER: Does he have to know of that exact defect?

HAMILTON: If you mean the sharpness of the detent, or the type of transmission, as a person, no.

BAKER: I will put it in the extreme. There is 1 chance in 20 million that if I do it the way he did it, it will be in a power position. Does he have to know that to make your argument worthwhile?

HAMILTON: I would say first of all, the 1 in 20 million claim is just made _____. But notwithstanding, I think he does need to know the distinction and the important one is one that both Justice Hardberger in his majority opinion and Justice Rickhoff in his dissent pointed out is, the issue is not that the vehicle may move. The issue is that it may move into powered gear. It's one thing for a vehicle to roll into neutral, but it is another thing for I think as Justice Rickhoff put it, to be off and running. And I think he was entitled to know that.

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McMAINS: I am co-counsel for the respondent, some of the Sanchez survivors. We would like to first deal with, again the order that basically was argued by the petitioner and the issue of *Keen*. Does it live? Was it killed by the 1987 tort reform statute? Should it be killed today from a policy standpoint? And my answer to all of those is that it does live, it did live, and it lives in this case. And it should not be killed as a matter of policy. It was not killed in the 1987 statute.

I think our position in briefing is very clear with regards to that point. But the argument in regards to the 1987 statute frankly there is no legislative history. We filed all of the legislative history there is in the 1987 tort reform statute. There is no legislative history to support the notion that the preservation of comment N in *Duncan* specifically in 1984 was in any way touched by the tort reform statute. The tort reform statute in 1987 was designed to deal with 3 specific aspects of *Duncan*. And it did that. And that's what the Montford and Barber article specifically attest to as well. It deals with creating a liability threshold for joint and several liability. It deals with the fact that they will elevate to a bar the comparative responsibility that was recognized as pure comparative responsibility in *Duncan*. It didn't change what they could consider as comparative responsibility and no discussion about that anywhere. But rather, that they merely elevated to a bar as opposed to where there was no bar under the *Duncan* rule.

And then third with regard to the restoration of the right to _____. And that

election on the part of the defendant. Those are the three modifications of *Duncan* that were accomplished.

HANKINSON: Where did the 5th circuit go wrong in *Bradshaw* then. In *Bradshaw* the 5th circuit looked at the language of the statute and noted the inclusiveness of the language in the statute on its face to determine that we would look at comparative causation as to all the players.

McMAINS: Where I think the 5th circuit went wrong in part was because there was no - they didn't have any analysis with regard to the legislative history. The fact of the matter is, that the "in any way" language that is relied upon was language borrowed from a 1983 proposal that was actually jointly submitted by the plaintiff and defense barred, but rejected by the legislature out of committee, so that it never got to a vote, which was designed to bring in mitigation defenses. That's what the purpose of the 'in any way' language was and that was what the source was. That's where it came from in the 1987 statute.

The 5th circuit simply looked at it in the abstract and said: Oh, well that must mean any kind of contributory negligence including failure to discover a defect.

HANKINSON: The language is pretty broad in the statute and very inclusive.

McMAINS: The language does say 'in any way'. The language, however, and interestingly enough this court in *Dresser v. Lee*, which in 1995 when this court revisited the issue to some extent, and basically said: okay, we're going to assume that comment N in *Keen* remain the law, and then the court provides prospective rulings with regards to how to handle that trial, and says that it's the plaintiff's burdens to make that request on an instruction which is what their argument is with regards to the *Weaver* issue, which does not apply. There was no such request in either that was reversed on the same grounds that we did at the TC.

But the point being, that prospectively the court in 1995 did say, this is viable, it's the plaintiff's burden. Why would this court do that if in fact the 1987 statute and done away with it? That makes no sense. This court considered that issue in 1995 and said, we're not going to touch that issue. And one of the reasons is, because you don't go around in a consumer oriented notion of product's liability law, be it Restatement Third or otherwise, or the Restatement Second and impose upon consumers the obligation to inspect for defects.

ENOCH: Let's follow-up on that. What is wrong with there being some evidence in the trial that the consumer was aware of the defect, and in the face of that defect chose to continue using it. You say a duty to inspect...

McMAINS: There you get close to the assumption of risk, which was basically wrapped into a notion of comparative responsibility as opposed to a complete bar.

ENOCH: But was is wrong with - it seems to me it's the defect of which the consumer doesn't know, the manufacturer knows, and so there's a duty to warn. But it's a defect that the consumer's aware of. And the consumer makes a considered decision to continue working with the product.

McMAINS: But the consumer is not aware in this case. The evidence really is overwhelming...

ENOCH: Well I don't think there's any dispute that the consumer was aware of this defect.

McMAINS: That he was not aware?

ENOCH: Yes. There's no argument that he was aware that it would jump out of Park or miss neutral and going to power

McMAINS: And it's the powered reverse movement that there was no warning about whatsoever. No identification of that as being a possibility. This case is very much similar to *Keen* in that regard.

ENOCH: But the argument here is, that you would have been entitled to an instruction if *Keen* applied, which would be to only consider negligence that's unrelated to knowledge of the defect.

McMAINS: But there is no negligence unrelated to the knowledge of the defect. And that was the entire point.

ENOCH: If the court concludes that there is evidence of negligence unrelated to the knowledge of the defect in the Park, then we don't even reach whether we have to reconsider *Keen* do we?

McMAINS: If the court can identify what there is evidence of of his conduct that constitutes some kind of independent evidence of negligence other than failing to guard against a defect that is unknown or _____.

PHILLIPS: If the legislature had passed these laws that you're - they only apply to the highway...

McMAINS: Despite their continued instance they apply they know absolutely completely that they do not operate ever on private property. These laws do not apply. There is no basis for a negligence per se argument or even a negligence argument in terms of the legislative standard apply. Clearly there is a greater capacity and propensity for vehicles to roll on pavement, which is where

the public roads are, than there is on dirt with very incline of which the evidence in this case is overwhelming, that there is very little incline and that it probably wouldn't have moved at all had it merely remained in neutral. It's powered reverse problem and phenomenon that was never warned about, never talked about...

PHILLIPS: So you're saying if you're on pavement at an incline there are bad things that can happen with an unparking braked running engine that simply wouldn't happen if you're on a level dirt road?

McMAINS: Yes.

PHILLIPS: If the record in this case were to show after careful review that there is nothing else that could go bad and cause that car to move other than this defect, if one left the car running with no paring brake?

McMAINS: There is no evidence that Mr. Sanchez knew anything about that. There is no evidence that they warned about it. There is absolute evidence that they consciously knew about it and chose not to warn about it, that GM knew about that risk. The evidence in this record is overwhelming contrary to your honor's experience, that this particular vehicle in fact was misshifted on a number of occasions. Every time the experts wanted to do it, tried to do it or even knew where to do it, it didn't have any problem at all. It could do it and did do it. It happened quite often.

HECHT: Let me ask you a procedural point before you continue. If the court concludes that the TC should have rendered judgment on the verdict, do we remand or reverse with respect to that?

McMAINS: Are you talking about regards to the *Keen* issue?

HECHT: Yes.

McMAINS: I think this court would have the power to render because they do not have a motion for new trial. They didn't have a factual sufficiency complaint one way or the other. They only had a no evidence point.

HECHT: The plaintiffs didn't have a factual sufficiency?

McMAINS: And we did not make a cross point at the either. In the CA that's correct.

PHILLIPS: Did you in the TC?

McMAINS: We did have motions in the TC.

PHILLIPS: Justice Mauzy wrote an opinion about 10 years ago, that if we don't buy your major point that would get you either all your money or a take nothing judgment, there is a lesser point, or the sufficiency point, you could have made that the court would presume that. That they would not force parties to make alternative less favorable arguments.

McMAINS: Yes, I believe in the case out of the San Antonio court.

HANKINSON: What evidence do you contend is in the record to satisfy *Ung*? The legal sufficiency on the punitives point.

McMAINS: The evidence in the record is that, and we've identified it in our brief, it's much more obviously laid out in there. GM's own engineers and own experts admitted that they knew that there was a risk of a powered reverse movement. They knew that that was dangerous. That's the unreasonable risk that they chose not to warn about. There is the example of Wagner's being one of the other deaths. There was interrogation about the fact that there was other cases, they actually had come from other cases, some of the experts had actually come from testifying from other cases in which they were involved, that had involved significant injury.

HANKINSON: Well the significant injury part doesn't seem to be the issue that's being focused on. It's the likelihood requirement of *Ung*.

McMAINS: But the likelihood is again is divorced in my judgment in the analysis of the petition. From the standpoint they're arguing that is unlikely that this will result in a fatality. That's really what their lightning strike evidence related to. As opposed to it's very likely that misshifts will occur. It is very likely. In fact inevitable that hydraulic neutral cannot be designed out of a transmission that bears this configuration. But that possibly it can be improved with regards and that's what our argument with regards to the alternative safety designs that we produced, that it could be approved and essentially designed out of a powered reverse movement, which is much more dangerous as indicated by the conclusions of the CJ in the San Antonio court in his opinion. And ultimately the product's third position on this issue is the same as basically what our position is, is that it is not a question of the manufacturer being entitled to the first bite or the first death, or the first injury. If they know of a significant risk, if they know of that risk and they choose not to do anything about it consciously in terms of warning or designing around it, they can be found to be grossly negligent.

PHILLIPS: That leads me to a third element - conscious indifference. There have been recalls on Park to Reverse, I believe from the briefing. I understand there was a lot of evidence in here about ongoing efforts to redesign.

McMAINS: In earlier Ford situations there were recalls relating to the Park and Reverse. This is a problem that has been around since the 70's.

PHILLIPS: There are people in all of these automobile companies that their job is to work on this and design, is it not? And on the state of that record, is there a conscious indifference?

McMAINS: I believe that there is because there is evidence that in terms of the warnings issue - you see the problem is they once again say that the inherency of the defect is in the design. And while they were working on alternative patents and other things to design if out of the system, the point is that during this period of time and while it's an inherent risk and an obviously dangerous inherent risk they consciously chose not to inform the user that this is a problem with powered reverse. There is nothing in their warning that says that there is a risk that it will shift to reverse if you don't do any of these things. There is nothing that identifies that risk. That's classic failure to warn or identify that risk, and that's the basis we believe that the jury made the determination that they were consciously indifferent. Their own expert specifically testified in cross-examination that presumably they know about the inherency of this risk, and presumably if they don't put that in their warnings, they did not do so consciously. And that's part of the thread that was argued with regards to the conscious indifference aspect.

ABBOTT: What does the record show concerning the probability of an improper shift in the event that your expert's design was implemented?

McMAINS: Our expert testified that he cannot design out the improper shift, but that with making the modifications that he had recommended, that he believes that that would prevent powered reverse movement.

ABBOTT: One hundred percent of the time and there's evidence saying it would...

McMAINS: That's what he says. That is his testimony, that he would prevent it. You can design that out of the system. Their response to that again was rebuttal testimony about: well, yes, but that's infeasible because if we make it that tough on the system to work that way, then the car may not last as long. There are other types of things they presented in rebuttal testimony all of which is an invitation as this court initially noted to weigh evidence.

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REBUTTAL

LANDAU: In fact, there's been no recall of the Ford. And if the court looks at the briefs, it will see that the federal safety agency said, the Ford which had a misshift problem, a multiple of GM or any other manufacturer, did not have a defective condition. In part because it warned to do things like: Kill the engine and pull the emergency brake. And in fact, the warning there was not nearly as good as the warning GM gave here. But notwithstanding that, the federal safety agency found that there was no defect. So even with respect to Fords, which had a multiple of the problem that any other manufacturer had, there is no defect. And likewise, the evidence that Ford then improved its design - ironically the evidence says it improved its design by _____. But

the fact that Ford improved on its own dismissal record by 85% doesn't say anything with respect to the GM design. So there is no recall.

Counsel with respect manufactures evidence by citing the *Masaki* case. The *Masaki* case wasn't before the jury, couldn't have been before the jury because it involved a 1976 Van with a 700R4 transmission, the one at issue here wasn't in cars until 1982. So the *Masaki* case didn't come in court, couldn't come in before this court certainly both because it's post-_____ and because it has nothing to do with this design. And in fact, if the citation of other cases with respect to other manufacturers proves anything, it proves exactly what we say, which is that if you can impose punitive damages liability here, then you can impose it in any case because there is this tiny misshift risk.

Now let's talk about the risk. Justice Abbott asked counsel directly: do you have any evidence, did you put on any evidence of the magnitude of the risk in the 700R4 transmission? And counsel said, no. That was counsel's burden. That was plaintiff's burden to prove that there was a likelihood and there was no evidence that in ordinary driving, not an expert trying, trying to get into a position like that, there was no evidence of the likelihood presented by the plaintiffs. All there was was GM's evidence and there is no dispute about the millions of cars out there. There is no dispute that there is only one case that is before the jury. And by the way it's not a death case as counsel represented. The *Wagner* case.

ABBOTT: But the likelihood of misshift is so improbable, such that there is 1 in 20 million occurring, why did you warn about it?

LANDAU: I think that that shows that GM, like all the manufacturers, wants to protect safety. It's not conscious disregard of safety. It's regard to safety. Yes, you can't design around it. You can try to warn to do things that will prevent injury from it. And that's what we did.

ABBOTT: If that's the case, then why did you not warn that it could shift into reverse?

LANDAU: If you look at the warnings that GM gave, it says: it can be dangerous to get out of your vehicle if your shift lever is not fully in Park your vehicle can roll; if you've left the engine running the vehicle can move suddenly. There is not a lot of evidence and why it's not in there I can speculate that if you start telling people that it's there, you're going to have teenagers trying to get it there. But certainly GM tried to warn.

GONZALEZ: How does the warnings that GM give compare to the warnings of other manufacturers?

LANDAU: It's certainly a far better warning than the warning that the safety agency said was okay in Fords. There is not, I don't believe, a lot of evidence about what other warnings are given by other manufacturers. I can tell you, and this is not in the record, that the warning in the

Wagner case was not this warning. It was the predecessor warning. And in *Wagner*, the jury found a failure to warn and the warning that the plaintiffs in that case said should have been in the car was this warning.

There certainly no evidence in the record of any warning that is better than this warning. There is evidence that there are warnings that are not as good.