Case No. 05-19-00075-CV

IN THE COURT OF APPEALS FOR THE
FIFTH DISTRICT OF TEXAS IN DALLAS

TOYOTA MOTOR SALES, ET AL.

Appellants,

v.

BENJAMIN REAVIS, ET AL.,

Appellees.

Direct Appeal from Cause No. DC-16-15296 in the
G-134th Judicial District Court of Dallas County

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN TORT REFORM ASSOCIATION

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INTEREST OF AMICUS CURIAE

This brief is submitted by *amicus curiae*, National Association of Manufacturers (NAM) and American Tort Reform Association (ATRA), which are paying all costs associated with its preparation and filing.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than two-thirds of all private sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Founded in 1986, ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

INTRODUCTION AND BACKGROUND

This case presents issues that arise frequently in product liability cases and that are governed by longstanding and well-settled Texas law. In this case, the district court did not apply common-law restrictions that traditionally limit admission of "other-incident evidence." This allowed the jury to decide whether front seats in the 2002 Lexus sedan involved in the underlying accident were defective based on inflammatory evidence including hearsay TV videos and a deferred prosecution agreement, most related to different alleged defects, in different vehicles, causing different injuries, multiple years before or after the 2002 model Lexus ES300 was designed. *Amici* provide an extended review of applicable law to guide the Court in deciding evidentiary issues presented by appellants.

In addition, this case implicates the Texas Legislature's decision to afford a presumption of nonliability to defendants whose product designs comply with federally mandated safety standards. The front seats in question undisputedly complied with federal standards that resulted from thorough public proceedings conducted by the National Highway Traffic Safety Administration (NHTSA). This case presents issues regarding the threshhold for allowing the jury to consider whether the statutory presumption was rebutted because the applicable standards were "inadequate to protect the public from unreasonable risks of injury or damage" or becauase "the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government or agency's

determination of adequacy of the safety standards or regulations at issue in the action." TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(b).

This case has far-reaching implications in products-liability law, and *Amici* wish to assist the court in analyzing the complicated concepts implicated by Appellees' arguments regarding rebuttal of the statutory presumption of nonliability. The statutory context and fundamental principles of product liability law mandate that, at a minimum, before a jury may be instructed regarding rebuttal of the presumption under the first exception—*establishing the applicable standard's inadequacy*—a plaintiff must present competent expert testimony, must rely on information available when the product in question was manufactured, and must link the alleged inadequacy of the federal standard to a safer alternative design or requirement. To rebut the standard under the second exception—*showing a relevant misrepresentation*—a plaintiff must prove that factually inaccurate information was provided, to a government entity responsible for evaluating the specific standard at issue, with the intent or effect of impacting the standard itself. Vague assertions and statements of mere opinion cannot suffice to invoke this exception, much less when they do not address the specific standard at issue.

Texas law expressly guards against admission of other-incident evidence, and it affords a meaningful presumption of non-liability for manufacturers who comply with federal safety standards. But in this case, Appellees expressly attempt to justify errors on the first issue through post-hoc justifications about the second. Indeed, their

position is as dangerous as it is far-fetched: that opinion statements made by Toyota, out of court, years after the manufacture of the car at issue, made in response to informal inquiries from legislators, not only constitute misstatements sufficient to rebut the statutory presumption, but can be used to introduce irrelevant, inflammatory other-incident evidence—clearly inadmissible to prove their affirmative claims—in order to prove the "falsity" of those opinions.

The $242 million verdict here exemplifies the harm to the manufacturing community that would result if this Court provides its blessing for the Plaintiffs' use of improper evidence under the guise of "rebuttal." This Court should safeguard and enforce important principles of product-liability law and limitations on other-incident evidence.

ARGUMENT

I. Long-settled Texas law limits admission of evidence of unrelated accidents in product liability cases.

"Evidence about different products and dissimilar accidents has long been inadmissible, as it generally proves nothing while distracting attention from the accident at hand." *In re Graco Children's Prods., Inc.,* 210 S.W.3d 598, 601 (Tex. 2006). In two landmark decisions, the Texas Supreme Court reiterated clear boundaries limiting admissibility of "other incident" evidence in product liability cases. *See Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004); *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 882 (Tex. 2014). To be admissible, this evidence must pass several tests to

demonstrate that the other incidents relate to the "specific defect" that the plaintiffs seek to establish.

A. Evidence of prior accidents is admissible only if the accident occurred under reasonably similar conditions, relates to the time of the product's manufacture, and is not otherwise unduly prejudicial.

In *Armstrong*, a unanimous Supreme Court agreed that proof of other accidents to show a product is unreasonably dangerous or defective is subject to important restrictions. 145 S.W.3d. at 138. *Armstrong* arose from products-liability and negligence claims related to injuries sustained when a 1986 Nissan 300ZX accelerated unintentionally. *Id.* at 136. To support her claim that a defective throttle cable caused the unintended acceleration, Armstrong offered evidence including Nissan's database of more than 700 complaints of unintended acceleration in ZX cars, which the district court admitted. The jury found for Armstrong, and the court of appeals affirmed. *Id.* The Supreme Court reversed, concluding that the Nissan database, similar reports from federal agency files, and witness testimony regarding unintended acceleration in other 300ZX cars was erroneously admitted. *Id.*

"[T]rial courts must carefully consider the bounds of similarity, prejudice, confusion, and sequence before admitting evidence of other accidents involving a product." *Id.* at 139. In particular, "the other incidents must have occurred under reasonably similar (though not necessarily identical) conditions." *Id.* at 138. Additionally, there are temporal limitations, particularly if other incidents are offered to

show a defective design or exemplary damages: "whether a product was defective must be judged against the technological context existing at the time of its manufacture" and "exemplary damages [cannot be] based on hindsight." *Id.* at 139; *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994) (When "the behavior which caused [injury], viewed prospectively and without the benefit of hindsight, created no danger[, p]unitive damages are not appropriate."), *superseded by statute on other grounds,* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003. In cases involving an alleged design defect or inadequate warning, evidence of reasonably similar accidents that occurred *prior* to production and sale of the product at issue may be admissible if probative regarding what the manufacturer knew or could have changed prior to the event at issue. But evidence of unforeseeable subsequent accidents is not relevant to the manufacturer's knowledge, notice, or fault at the time of the accident and is therefore inadmissible. *Armstrong*, 145 S.W.3d at 139.

Other-incident evidence also must be excluded if "it creates undue prejudice, confusion, or delay." *Columbia Med. Ctr. Subsidiary, L.P. v. Meier*, 198 S.W.3d 408, 412 (Tex. App.—Dallas 2006, pet. denied) (citing TEX. R. EVID. 403). Courts must "go[] to some length to avoid the spurious inference that defendants are either guilty or liable if they have been found guilty or liable of anything before." *In re AllState County Mut. Ins. Co.*, 227 S.W.3d 667, 669 (Tex. 2007).

Applying these rules, the *Armstrong* Court determined that Nissan's database of unintended acceleration complaints, which reflected "out-of-court complaints from

unknown third parties," was erroneously admitted. *Armstrong*, 145 S.W.3d at 141. The Court reiterated the requirement of "competent evidence of a specific defect," and although the complaints referenced unintended acceleration generally, "nothing in the database [suggested] that the defect, if any, causing those [] incidents was similar to any of the defects alleged [by Armstrong]." *Id.* The Court also was concerned that the jury was misled by emphasis on "the sheer number and nature of reported incidents," and the hearsay nature of the evidence. *Id.* "To sum up, product defects must be proved; they cannot simply be inferred from a large number of complaints." *Id.* at 142.

Ten years later, in *Kia Motors*, the Court again emphasized the rigor with which courts must apply the "sufficiently similar circumstances" requirement and limit other-incident evidence to those involving the same "specific defect." *See* 432 S.W.3d at 878-83. That case arose from a head-on collision in which the driver's-side air bag in a 2002 Kia Spectra failed to deploy, and the driver died at the scene. *Id.* at 868. The driver's family alleged that defective wiring connectors in the air-bag system created an open circuit that prevented the air bag from deploying. *Id.* at 869. The jury found for the Plaintiffs, and the court of appeals affirmed the judgment in their favor. *Id.*

The Supreme Court reversed and remanded for a new trial based on the improper admission of a spreadsheet listing more than 400 warranty claims that Kia had paid. *Id.* at 878-79. All 400 claims involved a short or open circuit in a frontal air

bag in the same or similar vehicles, but almost 85% of the claims on the spreadsheet did not involve the "cause code 56" that was at issue in the case at hand. *Id.* The Court held that most of the warranty claims, though involving open circuits in frontal air bags, were irrelevant. *Id.* But it went further: it also held that even code-56 incidents were irrelevant if they did not at least implicate the specific connectors in question as the source of an open circuit. *Id.* at 881. In other words, to be admissible, the other incidents must involve the "specific defect" that the plaintiffs seek to establish. *Id.*

Armstrong and *Kia*—both automobile-product-liability cases—applied law developed under TEXAS RULES OF EVIDENCE 401, 403, and 404 that has long set boundaries for admissible evidence in other contexts. "The general rule in Texas is that prior acts or transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial and in violation of the rule that *res inter alios* acts are incompetent evidence, particularly in a civil case." *Texas Farm Bureau Mut. Ins. Co. v. Baker*, 596 S.W.2d 639, 642 (Tex. App.—Tyler 1980, writ ref'd n.r.e.). Evidence of a party's other bad acts is rarely admissible. *Id*; *see also Smith v. State Farm Lloyd's, Inc.*, 05-90-00704-CV, 1991 WL 110032, at *2 (Tex. App.—Dallas June 20, 1991, writ denied) (evidence admitted in violation of the doctrine of *res inter alios acta* is incompetent) (citing *Dallas Ry. & Terminal Co. v. Farnsworth*, 227 S.W.2d 1017, 1020 (Tex. 1950) ("[W]hen the question is whether or not a person has been negligent in doing, or failing to do, a particular act, evidence is not admissible to show that he has been

guilty of a similar act of negligence, or even habitually negligent upon a similar occasion.") (internal quotation marks omitted)). Evidence of a defendant's character or separate crime, wrong, or act is not admissible to prove that the defendant acted in accordance with that character or acts on a particular occasion. TEX. R. EVID. 404(a)(1), 404(b)(1). The policy underlying these rules is simple: evidence of dissimilar prior acts creates a risk of a jury verdict based on issues other than those meant to be decided. *Graco*, 210 S.W.3d at 600.

B. Even when offered for a limited purpose, other-incident evidence must have probative value—it cannot be used to trigger the jury's punitive impulses.

Armstrong and *Kia* illustrate that the Supreme Court consistently has rebuffed attempts to erode restrictions on other-incident evidence based on contentions that the defendants have opened the door to proof on an issue other than a defect, such as notice. *Armstrong*, 145 S.W.3d at 141-42; *Kia*, 432 S.W.3d at 882. As the Fifth Circuit recently noted, the Rules of Evidence "do not simply evaporate when one party opens the door on an issue." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784 (5th Cir. 2018). Were the law otherwise, the exceptions would swallow the rules.

In *Armstrong*, the Court held that Nissan had not opened the door to admission of its database of customer complaints by its reliance on the NHTSA's investigative findings (the NHTSA could not determine the cause of acceleration or identify a defect in Nissan ZX cars). Even though the NHTSA report listed the number of

incidents in the Nissan database, the Court noted that the "two kinds of proof … were not the same," because data, findings, and reports from government agencies are generally not excludable as hearsay—while out-of-court complaints from unknown third parties generally are. *Armstrong*, 145 S.W.3d at 141. Rather, a plaintiff offering evidence of other acts for impeachment or another purpose must establish that the evidence pertains to "reasonably similar" acts or conditions that are connected "in some special way," and that "the incidents occurred by means of the same instrumentality." *Klorer v. Block*, 717 S.W.2d 754, 760 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (quoting *Henry v. Mrs. Baird's Bakeries, Inc.*, 475 S.W.2d 288, 294 (Tex. App.—Fort Worth 1971, writ ref'd n.r.e.)).

Temporal limitations also apply when a plaintiff seeks to admit evidence for a "narrow" purpose. *Armstrong,* 145 S.W.3d at 142. The Court rejected Armstrong's contention that reports made to NHTSA of other unintended acceleration incidents were admissible to show notice, because the reports postdated Armstrong's purchase of her car by eight to ten years. *Id.* at 142.

Likewise, if the other-incident evidence is not sufficiently similar to the alleged defect, it cannot provide notice of that defect because it fails in the first place to establish the defect's existence: "[t]he reasonable-similarity requirement does not disappear simply because other incidents are being offered to show notice." *Kia,* 432 S.W.3d at 882; *see also Armstrong*, 145 S.W.3d at 141-42 (evidence inadmissible for the truth cannot be admitted to show *knowledge* of the truth either: "[t]he hearsay rules

cannot be avoided by this kind of circular reasoning").

The Court in *Kia* thus rejected the argument that the spreadsheet of Kia warranty claims was relevant for the purpose of "showing Kia's notice of" and "conscious indifference to" the problem of open circuits. 432 S.W.3d at 882. The Court concluded that because these claims were "not tied to the alleged defect" and "not reasonably similar to the incident in question," they were relevant to neither "notice" nor to show negligence. *Id.*

DePuy also illustrates the threshold requirements for admissibility when plaintiffs argue other-incidents are relevant to credibility. That case involved product-liability claims against Johnson & Johnson ("J&J") and its subsidiary DePuy, which manufactured allegedly defective hip implants. *DePuy*, 888 F.3d at 763. The plaintiffs claimed that J&J, by eliciting testimony regarding its corporate culture and marketing practices, had opened the door to evidence of a deferred prosecution agreement in which J&J admitted violations of the Foreign Corrupt Practices Act, including bribes to the Iraqi government. *Id.* at 784.

The Fifth Circuit reversed a judgment for the plaintiffs and remanded their product claims for new trial, concluding that the DPA-related testimony and repeated references to it during trial constituted an "egregious" error. *Id.* This evidence was not admissible to show "intent, knowledge, motive, and opportunity," but rather was "wafted before the jury to trigger their punitive instinct" and "invited the jury to infer" guilt based on no more than prior bad acts, in direct contravention of Rule

404(b)(1). *Id.* at 785

In each of these landmark precedents, errors in admission of improper other-accident evidence constituted harmful error requiring correction. In *Armstrong*, the court recognized the "crucial nature of this evidence," holding that its admission "violated the long-standing rule in Texas that proof of unintended acceleration is *not* proof of a defect." 145 S.W.3d at 146, 148 (emphasis in original). "Proof of *many* instances . . . cannot prove a defect either," so "a lot of no evidence is still no evidence." *Id.* at 148. *Kia* emphasized that even where the improper evidence is "not the only evidence of a defect," that "does not end the discussion." *Kia,* 432 S.W.3d at 884. Instead, a high volume of "irrelevant yet prejudicial information presented to the jury" makes it "very difficult to overlook the likely [prejudicial] effect." *Id.* And in *DePuy*, the court found that even a general limiting instruction was "grossly inadequate" to cure the highly prejudicial effect of the improper evidence. 888 F.3d at 786. In each case, courts held that admission of other-accident evidence that did not meet the "specific defect," temporal, and undue prejudice tests probably resulted in an improper judgment and required reversal.

C. The district court allowed unduly prejudicial evidence unrelated to the alleged front-seat defect at issue.

This case requires this Court to enforce the Supreme Court's unequivocal limits on admissibility of other-acts evidence. The trial court admitted evidence—including hearsay—of other incidents that were not reasonably similar to the one in question,

did not involve the specific vehicle or defect alleged in this case, or were temporally unconnected to the period preceding the manufacture and sale of the car involved in the accident giving rise to this lawsuit. That kind of evidence has no place before the jury, particularly in a case as serious as this one.

1. Plaintiffs submitted evidence regarding multiple unrelated accidents and issues.

According to the record, the accident in this case involved a Lexus ES300, manufactured in 2002, which Plaintiffs allege suffered from front-seat design failures that contributed to their injuries. At trial, Plaintiffs' presentation to the jury relied on multiple categories of evidence that should have been barred. *Amici* focus on two of these.

First, the district court admitted evidence involving allegations of "unintended acceleration" incidents and a resulting 2014 Deferred Prosecution Agreement that included a $1.2 billion payment to the federal government to resolve a criminal investigation into the company's public statements related to unintended acceleration. Plaintiffs here did not allege unintended acceleration, and unintended acceleration was in no way at issue in this case. Second, the jury viewed hearsay evidence in the form of video clips from a 1992 "60 Minutes" episode discussing seatback failures in entirely different vehicles. The 60 Minutes clips included sensationalized, pseudo-scientific testimony, including hearsay statements from a former NHTSA official, that

Plaintiffs utilized as expert testimony (thus denying Toyota the benefit of usual expert witness vetting, discovery, or cross examination).

Notably, neither of these categories of evidence purported to show that any Toyota vehicle involved here exhibited the front-seat design flaw that Plaintiffs sought to prove, nor notice regarding the sufficiency of the 2002 Lexus's design. In short, Plaintiffs were allowed to introduce evidence

- of different defects,
- in different vehicles,
- causing a different kind of injury,
- some of which arose years *after* the design of Plaintiffs' vehicle.

This "other-incident" evidence comprised significant portions of Plaintiffs' counsel's statements, were a focus of witness questioning, and repeatedly were referenced in closing arguments. Admission of improper other-accident evidence is particularly harmful where counsel's emphasis on the erroneously admitted evidence demonstrates a belief that the "case turned on the evidence of other incidents." *Armstrong*, 145 S.W.3d at 144-146. In *Armstrong*, the Court disapproved of the plaintiff's "emphasizing the large number of general complaints of unintended acceleration rather than the small number of those involving a similar defect," *id.* at 144; here, the record indicates that Plaintiffs emphasized a large number of general complaints of unintended acceleration, as well as evidence of insufficiently similar front-seat defects. This does not suffice.

2. Plaintiffs' evidence fell well outside the established restrictions for admissibility of other-acts evidence.

It appears that the district court admitted this evidence of other incidents despite the lack of a specific defect identical to that alleged by the Plaintiffs here, occurring under reasonably similar conditions at a relevant time. *Kia*, 432 S.W.3d at 882; *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 921 (Tex. 1993); *Armstrong*, 145 S.W.3d at 138.

The unintended acceleration incidents, the Deferred Prosecution Agreement, and the media clips did not involve "reasonably similar conditions" to the one at issue. The first two instead related to unintended acceleration—which has no bearing on this case—and the latter included inflammatory discussion of seatbacks in completely different vehicles. Evidence regarding unintended acceleration and seatbacks in other vehicles was irrelevant to whether the 2002 ES300 did or did not have a front seat design failure, or to whether Toyota knew of such potential problems or should have warned of them. Some other-accident evidence also lacked a proper temporal connection to the accident in question. Evidence of a different alleged defect years *after* the design of the Plaintiffs' car is generally inadmissible. *Armstrong*, 145 S.W.3d at 139 (evidence of unforeseeable subsequent accidents inadmissible, including for exemplary damages); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003. Here, the unintended acceleration issues resulted in the DPA signed

in 2014, more than a decade after the 2002 Lexus here was manufactured. Given the dates of each, they were not relevant to either the existence of a defect or the notice or knowledge attributable to Toyota in the relevant timeframe.

Moreover, the Supreme Court requires that other incidents involve the same "specific defect." *Kia*, 432 S.W.3d at 881. The 60 Minutes segments purport to discuss seatback defects generally—but they referred to different cars with different designs. These hearsay videos do not address the specific defect that the jury was asked to consider here and therefore fail the established test for admissibility. Under settled law, the probative value of Plaintiffs' other-accident evidence—both unintended acceleration and media segments discussing seatbacks in other cars—was non-existent, but this information was highly likely to inflame and confuse the jury. This court has previously stated that evidence of this nature is inadmissible "even if relevant." *Columbia Med. Ctr. Subsidiary, L.P.*, 198 S.W.3d at 412 (affirming trial court's refusal to admit expert testimony with "great potential to confuse and mislead the jury").

3. Before the trial court, Plaintiffs made invalid arguments for admission of the irrelevant and prejudicial evidence.

In the court below, Plaintiffs tried to justify admission of the improper evidence on two—equally invalid—grounds. In responding to a motion for new trial, Plaintiffs argued that the evidence offered "relating to the unintended acceleration

scandal was *only admitted* because it reflected on Toyota's *credibility*."[1] CR7062 (emphasis added).[2] To justify admission of the 60 Minutes segments, Plaintiffs argued they "were offered to prove 'notice,' not the truth of any matters asserted." CR7064.

Plaintiffs' "notice" argument fails because *nowhere* in the 60 Minutes segments was the ES300—or even any Lexus vehicle—discussed, so it does not meet the reasonable-similarity requirement, which "does not disappear simply because other incidents are being offered to show notice." *Kia,* 432 S.W.3d at 882; *see also Armstrong*, 145 S.W.3d at 141-42 (evidence inadmissible for the truth cannot be admitted to show *knowledge* of the truth either: "[t]he hearsay rules cannot be avoided by this kind of circular reasoning"). Just as in *Kia*, the hearsay 60 Minutes content about other manufacturers' vehicles was "not tied to the alleged defect" and "not reasonably similar to the incident in question" as to be admissible.

To the extent Appellees rely on "credibility" as a basis for admitting evidence—as the trial court expressly did (RR21:41)—that purported justification should fare no better than invoking "notice": "[t]he Rules of Evidence do not simply evaporate" in those circumstances. *DePuy,* 888 F.3d at 784 (rejecting arguments of

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[1] Indeed, Plaintiffs made a near-explicit "character for truthfulness" argument, justifying jury arguments that Toyota had "lied to America" by saying that "this attack on Toyota's credibility was not unsubstantiated. Toyota has clearly lied to America about [non-front-seat-related] safety issues." CR7058.

[2] Notably, Appellees' justifications for admission of this evidence have now changed in their briefing before this Court. As discussed in Section II, *infra*, the evidence was also not properly admitted to prove an exception to the statutory presumption of non-liability—but the Court should certainly not entertain a post-hoc justification raised for the first time on appeal.

relevance based on an open door, or "intent, knowledge, plan, motive, and opportunity"); *Kia*, 432 S.W.3d at 881 (refusing to allow for purposes of showing notice); *see also Armstrong*, 145 S.W.3d at 142 ("[t]he hearsay rules cannot be avoided by this kind of circular reasoning"). "For over 150 years, Texas civil courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness." *TXI Transp. Co v. Hughes*, 306 S.W.3d 230, 242 (Tex. 2010) (quotation omitted).

Even evidence that comes in for a narrow purpose must satisfy the threshold level of relevance. *Armstrong*, 145 S.W.3d at 141-42. In this case, satisfying the relevance requirement would mean offering evidence related to the same specific alleged defect, which occurred under reasonably similar conditions at a relevant time. *Id* at 138-39. Evidence of unintended acceleration in an entirely different vehicle years after the design of the Plaintiffs' car was decidedly not "competent," nor was it related to the specific defect alleged here. *See Texas Farm Bureau Mut. Ins. Co.*, 596 S.W.2d at 642. Similarly, evidence regarding sufficiency of other seatback designs, from hearsay news segments discussing different cars' seatback designs, is also not relevant to the specific alleged defect being evaluated.

More importantly, even when offered for impeachment, notice, or another "narrow" purpose, prior-act evidence must have probative value that is not substantially outweighed by its undue prejudice. *See DePuy*, 888 F.3d at 784 (applying FED. R. EVID. 403 and 404(b), which are substantively identical to the Texas rules);

TEX. R. EVID. 403, 404(b). It cannot be used merely to trigger the jury's punitive impulses, or if it would create undue prejudice or confusion. *Columbia Med. Ctr. Subsidiary, L.P.*, 198 S.W.3d at 412.

Not only was the irrelevant evidence unduly prejudicial and confusing, but Plaintiffs' counsel went to great lengths to *establish* the "spurious inference," forbidden by *AllState*, "that defendants are either guilty or liable if they have been found guilty or liable of anything before." 227 S.W.3d at 669. Indeed, counsel referenced the unintended acceleration incidents and the DPA in closing, arguing: Toyota "lied to all of us about unintended acceleration," so it should not be trusted now—expressly urging the jury to consider it as character evidence, a nonprobative and impermissible use. RR45:120. As in *DePuy*, Plaintiffs' use of the unintended acceleration and news media evidence in this case appears to be egregious and to have likely caused the rendition of an improper verdict. *See* 888 F.3d at 784.

II. The Texas statutory presumption of non-liability for manufacturers meeting federal safety standards serves important purposes. To invoke the exceptions to the presumption of non-liability, a party should be required to present specific types of relevant evidence.

Since 2003, Texas law has embodied a statutory presumption of nonliability for manufacturers for any design that complies with federal safety standards. TEX. CIV. PRAC. & REM. CODE ANN. § 82.008 ("Section 82.008"). A plaintiff may rebut this presumption only by establishing one of two clear exceptions. *Id.* The plain language, legislative history, and judicial interpretation surrounding Section 82.008 demonstrate

that the protections of the section are important and intentional, and that courts must require specific, relevant evidence to support an instruction allowing the jury to consider rebuttal of the presumption. Furthermore, Texas law's strict treatment of other-incident evidence should inform how the Court approaches Plaintiffs' feeble attempt, on appeal, to justify admission of such evidence to rebut the Section 82.008 presumption.

A. The statutory text unambiguously creates a presumption of non-liability except in specific defined circumstances.

Section 82.008 lays out a clear general rule: where a manufacturer's design meets a specific federal standard for safety, that manufacturer is entitled to a presumption of nonliability on claims that the design was, instead, not sufficiently safe. TEX. CIV. PRAC. & REM. CODE ANN. § 82.008; *Kia*, 432 S.W.3d at 870.

Against this clear rule, a plaintiff can rebut the presumption only in two clearly-delineated circumstances: by establishing that "the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage," TEX. CIV. PRAC. & REM. CODE ANN. Section 82.008(b)(1), or that "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.* Section 82.008(b)(2).

B. The statutory history makes clear the legislature's intent to defer to federal agency expertise on matters of safety.

Section 82.008 was enacted in 2003 as part of House Bill 4, a comprehensive tort-reform bill. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 5.02, 2003 Tex. Gen. Laws 847, 861–62. Federal agencies are tasked with evaluating and implementing safety standards in a host of industries, including for automobiles. Not only do these agencies have the expertise to make such evaluations, but they serve a unique and important public-welfare role as a neutral actor that can weigh competing safety risks, production costs, and technological feasibility, and determine what constitutes the appropriate safety standards.

"The impetus for enacting section 82.008 was a finding that manufacturers and sellers were being held liable in product liability cases even though the products at issue complied with all applicable federal safety standards." *Kia*, 432 S.W.3d at 869. The Texas Legislature therefore created the presumption of nonliability, and tied it to compliance with federal safety standards, reflecting a conscious legislative decision to rely on federal agency expertise. It is neither justified nor prudent to have the adequacy of a design feature tried in every case, which would be incredibly inefficient and create significant uncertainty in the market by allowing for conflicting decisions—one declaring a vehicle's safety and design element sufficient with another finding liability based on the very same design. The Legislature's decision to defer to the reasoned and uniform standards set by federal agencies makes particular sense

because adequacy and best practices is often a weighing and balancing of competing protections and risks.

C. It is undisputed that the presumption of non-liability applied in this case.

To receive a jury instruction that a manufacturer is presumptively not liable for a particular injury, the defendant must show that it complied with a federal safety standard or regulation that governs the risk that allegedly caused the harm in the case. *Kia,* 432 S.W.3d at 869.

Importantly, in this case, it is undisputed that multiple federal safety standards governed the specific risks at issue, and that the vehicle complied with all of those federal standards—and the Plaintiffs challenged the adequacy of only one at trial:[3] Federal Motor Vehicle Safety Standards ("FMVSS") 207, which addresses risks related to seat strength and rigidity requirements. 49 C.F.R. § 571.207. FMVSS 207 exemplifies federal expertise and process used to evaluate and set a national safety standard. The National Highway Traffic Safety Administration (NHTSA) established FMVSS 207 in 1974. Since then, the agency has several times considered increasing the seatback rigidity standard, including through a period of public comments on a draft plan, and later granting four different petitions related to seating system performance in rear impacts. RR60:PX-657 (Fed. Reg. 220 at 67069) (Nov. 16, 2004).

[3] *Amici* focus on the federal standard challenged in the trial court—FMVSS 207. FMVSS 209 and 210, which deal with seatbelts, receive considerable treatment in Appellees' brief in this Court, but Appellees did not make an express adequacy challenge at trial to either of them. For those standards, the presumption of non-liability should stand unrebutted as a matter of law.

Over many years, the agency "has conducted extensive physical testing of seat backs, computer modeling of seated occupants in rear impacts and dynamic testing of instrumented test dummies in vehicle seats." *Id.* Ultimately, however, NHTSA recognizes that "a proper balance in seat back strength and compatible interaction with head restraints and seat belts must be obtained to optimize injury mitigation," and concluded, even by 2004 (after manufacture of Plaintiffs' vehicle) that it would not make changes to FMVSS 207 because "further study is needed to make a definitive determination of the relative merits of different potential rulemaking approaches" regarding seatback standards. *Id.* In other words, despite initiation and funding of extensive testing and analysis, the agency could not determine that FMVSS 207's standards were deficient or justify revising the standard based on overall safety performance.

In this case, it is undisputed that the vehicle at issue complied with all relevant safety standards and that the jury properly received an instruction on the presumption of nonliability. *See Trenado v. Cooper Tire & Rubber Co.*, 465 Fed. Appx. 375, 379-82 (5th Cir. 2012) (per curiam); *Wright v. Ford Motor Co.*, 508 F.3d 263, 274 (5th Cir. 2007). The narrow issue here is simply when, and how, plaintiffs present sufficient competent evidence establishing either of the narrow statutory exceptions, such that the jury is further instructed and allowed to decide whether that statutory presumption was "rebutted."

The rebuttal provisions of Section 82.008 are so rarely invoked that few Texas

cases analyze them. But the statutory language sets a high bar: the presumption of nonliability applies unless and until a plaintiff "establishes" that federal regulations are inadequate or that the manufacturer withheld or misrepresented information relevant to the government's determination of adequacy for the particular standard at issue. TEX. CIV. PRAC. & REM. CODE ANN. § 82.008. "Establish" generally means something *more* than introducing *some* evidence from which a factfinder might reach a conclusion. *Wright*, 508 F.3d at 274.

D. Texas courts' jurisprudence on the inadequacy exception, while infrequent, indicates a high bar. To further underlying policy goals, the jury should not be allowed to apply the exception absent particular evidence.

As explained above, Section 82.008 provides that manufacturers are presumptively not liable for harms resulting from risks addressed by a federal safety standard where the manufacturer met that standard. It also reflects a clear legislative mandate to defer to the expertise and conclusions of federal agencies in making safety and sufficiency determinations. To adhere to the text and further the underlying goals of Section 82.008, trial courts must serve as the legal and evidentiary gatekeepers regarding what evidence plaintiffs may to present under the guise of "rebuttal," and when plaintiffs may ask a jury to override the statutory presumption. Before a jury is instructed that the presumption may be rebutted, the evidence should, at a minimum: (1) include competent expert testimony, (2) based on data temporally linked to when the product at issue was manufactured or sold, (3) which demonstrates a link between

the alleged insufficiency and the availability of safer alternative design. And the adequacy challenge should be expressly made, at the trial court level, against the federal standards at issue.

First, any attempt to prove that a federal safety standard is insufficient must be based on **competent expert testimony**. In Texas, establishing a design defect requires a party to show that a particular defect existed that caused harm and that a safer alternative design was available. TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(a)-(b). Proof on these issues "necessitate[s] competent expert testimony and objective proof that a defect caused the injury." *Bailey v. Respironics, Inc.,* 05-11-01057-CV, 2014 WL 3698828, at *10 (Tex. App.—Dallas July 23, 2014, no pet.); *Champion v. Great Dane Ltd. P'ship*, 286 S.W.3d 533, 538 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *see Armstrong,* 145 S.W.3d at 137 (noting that the requirement of expert testimony was not peculiar to unintended acceleration cases); *DeGrate v. Executive Imprints, Inc.,* 261 S.W.3d 402, 410–11 (Tex. App.—Tyler 2008, no pet.) (providing that an expert's conclusory statements as to design defect are not competent evidence and are insufficient to defeat or support summary judgment for design defect).

If proof of a design defect requires expert testimony to explain and evaluate design elements, relevant risks, and associated costs, the same is necessarily required where a plaintiff seeks not only to assert defective design in a vacuum, but to actually contradict a federal agency's prior conclusion that a particular design element is sufficiently safe. Importantly, "an expert's bare opinion will not suffice." *Merrell Dow*

Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997). Instead, "subjective belief or unsupported speculation" are unreliable, and where "there is simply too great an analytical gap between the data and the opinion proffered," an expert's testimony is, legally, no evidence. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800-01 (Tex. 2006) (internal citations omitted). A claim cannot stand on such *ipse dixit*, even of a credentialed witness. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009).

Second, evidence presented to rebut the presumption should be considered only if it was available at or before the time when the product at issue was manufactured or sold. Sufficiency of the standard must be judged as of the relevant date—the date of manufacture. Evidence dated after the product's manufacture can tell neither the court nor the jury whether the federal safety standard in place at the time of manufacture—but before the new evidence was available—was sufficient, because the issue of defectiveness "must be judged against the technological context existing at the time." *Armstrong*, 145 S.W.3d at 139. Just as the existence of a defect requires showing that an alternative design was both "technologically and economically feasible at the time the product left the control of the manufacturer," TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(b), a federal safety standard cannot be deemed insufficient at one point in time based on defects only later realized by the industry or by technological advances not available at the time a product was manufactured to meet the standards of its day. In short, Monday-morning quarterbacking should have no place in analyzing the sufficiency of federal standards

for purposes of applying Section 82.008.

Third, reflecting Texas standards for design defects generally, a plaintiff should be required to demonstrate a link between the alleged insufficiency of the relevant federal safety standard and the availability of a safer alternative design or requirement. Establishing a defect under Texas law requires a showing of both a defect and an available safer alternative design. TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(a). Similarly, a plaintiff should be required to make that showing when attacking the sufficiency of a federal standard—to present evidence showing what the standard reasonably and possibly should have been.

Cases applying Section 82.008 demonstrate the necessity of the above-stated requirements, and how they may be met. *See, e.g., Jones v. Harley-Davidson, Inc.*, 2:14-CV-694-RWS-RSP, 2016 WL 3386925 (E.D. Tex. Apr. 5, 2016), report and recommendation adopted, 2:14-CV-694-RWS-RSP, 2016 WL 4730410 (E.D. Tex. Sept. 12, 2016) (plaintiff rebutted the presumption by offering qualified expert testimony based on competent data available before the date of the car's manufacture, which was relevant to the adequacy of the standard and presented a specific design change (anti-lock brakes) that would allegedly be safer); *Cartwright v. Am. Honda Motor Co., Inc.*, No. 9:09-CV-205, 2012 WL 506730 at *1 (E.D. Tex. Jan. 18, 2012), report and recommendation adopted, No. 9:09CV205, 2012 WL 510614 (E.D. Tex. Feb. 14, 2012) (plaintiff presented evidence creating an issue of material fact regarding whether FMVSS 205 was inadequate by providing pre-accident NHTSA study showing that

tempered glass, as opposed to laminate, does not minimize injury risk because it shatters). In this case, the Plaintiffs' evidence does not appear to have satisfied the logical prerequisites to show the inadequacy of FMVSS 207.

And to the extent that Plaintiffs assert, on appeal, the inadequacy of FMVSS 209 and 210, it is worth noting that in both *Jones* and *Cartwright*, the plaintiffs expressly challenged the standards asserted by the defendants. *Jones*, 2016 WL 3386925 at *3 (plaintiffs expressly contended that the product was unreasonably dangerous, "even if it complied with federal regulations"); *Cartwright*, 2012 WL 506730 at *3 ("Plaintiff contends that there is a genuine issue of material fact concerning whether FMVSS 205 is inadequate."). Here, however, Appellees did not expressly challenge FMVSS 209 and 210 head-on at trial and instead now rely on the spurious assumption that the jury *could have* found that the Plaintiffs *established* their inadequacy simply because Plaintiffs contended that their vehicle was inadequate to prevent injury. Br. App's 51. This is problematic for two reasons. First, this circular argument erases the presumption, because it focuses on the product in the litigation rather than the standard writ large. And second, without Plaintiffs' directly challenging those federal standards, Defendants could not possibly have been on notice to defend their adequacy. Despite extensive treatment in Appellees' brief, the presumptions based on these standards are precluded as a matter of law from being rebutted. The Court should not sanction such arguments for the first time on appeal.

E. Plaintiffs failed to show an actionable misrepresentation or withholding made by Toyota to the federal government.

Plaintiffs additionally invoke Section 82.008(b)(2), claiming that they rebutted the presumption of liability by establishing that Toyota, "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." But what are the misstatements that Plaintiffs assert they "established"? Two opinion statements that Toyota allegedly made—in 2016—in a letter to two U.S. Senators in response to an informal request for information related to their assessment of FMVSS 207. The statements—at least as Appellees describe them[4]—are:

- Toyota "has a lengthy and robust safety culture," and
- NHTSA is an effective regulator.

Br. App's at 52. That's it. To contradict these "misrepresentations," Plaintiffs contend that they were entitled to present extrinsic evidence that Toyota does *not* have a robust safety culture and that the NHTSA is *not* an effective regulator. Plaintiffs also contend

[4] While the first statement appears in PX17, Toyota's June 23, 2016 letter, *Amici* could not find anywhere that Toyota made a statement to lawmakers that "NHTSA is an effective regulator" despite the distinct impression left by Appellees' brief. Instead, Appellees apparently argue the "misrepresentation" exception was met through statements made by another entity, the Association of Global Automakers (AGA), in PX16, which were "incorporate[d]" in Toyota's letter. The AGA letter includes comments that NHTSA "has carefully weighed the potential benefits and the potential harms" of amending FMVSS 207 and conducted "extensive physical testing" of seatbacks—the second of which is a direct quote from 69 Fed. Reg. 67,068 (November 16, 2004). If anything, it is these statements that Appellees must challenge, but none of the evidence presented bears on the "truth" of either (vague) statement.

that the letter constituted a withholding, inasmuch as Toyota did not provide the full litany of information informally requested by the senators. These arguments fail for (at least) three reasons: (1) The Plaintiffs do not allege the statements were made with the intent or effect of impacting the safety standard at issue in this case; (2) Opinion statements or puffery cannot be actionable misrepresentations; and (3) Neither the statements, nor the extrinsic evidence offered to prove their "falsity," had any bearing on the sufficiency of the challenged standard (and therefore no relevance to the presumption or to this case).

1. The "misrepresentation" exception under Section 82.008 requires a showing that the defendant has the intent or effect of impacting the standard at issue, which did not occur here.

Section 82.008 shows a clear legislative intent to defer to a federal agency's expertise. The first exception contains a common-sense carve-out for the narrow circumstance where the agency's process failed, for a particular provision, to produce an adequate standard. The second exception—where a defendant "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" (Section 82.008(b)(2))—reflects related reasoning: if a party to the case took actions with the intent or impact of altering the reliability of the agency's standard-setting process for a particular standard, it should lose the benefit of the presumption.

This should, however, require a high bar of proof regarding the defendants' intentions or impact. While few Texas cases have had occasion to apply Section

82.008(b)(2), *Friske v. ALZA Corporation* provides substantial substantive interpretation of "misrepresentation." 3:11-CV-00130-F, 2011 WL 13233327, at *14 (N.D. Tex. Apr. 29, 2011). In that case, the court noted that the similarly-worded presumption in Section 82.008(c) "can be rebutted by a showing similar to the 'fraud-on-the-FDA' provision," which the Court held required meeting the heightened pleading standards associated with fraud: "the plaintiff [must] allege the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation *and what that person obtained thereby*, otherwise referred to as the who, what, where, when, and how of the alleged fraud." *Id.* at *8, *14 (emphasis added). These are, of course, longstanding requirements for pleading fraud.

Here, Plaintiffs do not allege that Toyota had any intention to mislead the recipients with its statements, much less that it intended its statements to cause a particular standard to be implemented or altered. They also did not allege or submit evidence that Toyota obtained any benefit by making these statements or that they actually impacted the standard at issue in this action. Where the obvious intent of the statutory exception is to remove protection from parties who dishonestly harm the standard-setting process, it cannot be applied where there is no evidence that was the case.

2. Toyota's challenged statements cannot be deemed "misrepresentations" because they are classic opinion statements.[5]

Appellees' position is particularly untenable in this case because the "misrepresentations" they cling to aren't "representations" at all. Appellees complain about Toyota's claim of a "robust safety culture" and portrayal of the federal agency as an effective regulator. These statements are classic "expression[s] of opinion by a seller not made as a representation of fact," traditionally referred to in the law as "puffery." *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982). These subjective descriptions cannot be established as true or untrue, and as a matter of law, cannot be misrepresentations. *Prudential Ins. Co. of Am. v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995) (statement that building was "superb," "super fine," and "one of the finest little properties in the City of Austin" were "not misrepresentations of material fact but merely 'puffing' or opinion, and thus could not constitute fraud); *cf. Schoenfeld v. State*, 56 Tex. Crim. 103, 108, 119 S.W. 101, 103-04 (1909) (opinion testimony cannot be perjury).

Appellees' argument on the first statement is not supported in law, because

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[5] Appellees also stretch in asserting that Toyota committed a "withholding" by failing to respond to the Senators' litany of questions. Such a reading of Section 82.008 would give legal force to any federal actor's request for information regarding federal safety standards, regardless of the requestor or the formality of the request. The only sensible construction of the section would be to recognize there must be a duty to provide information in the first place (such as pursuant to a subpoena, statutory requirement, or condition for license) before a party can be found to have "withheld" information in an actionable sense.

multiple courts have found that general statements about a company's focus on safety are not actionable. For example, in *Howard v. Arconic Inc.*, 395 F. Supp.2d 516, 577 (W.D. Pa. 2019), plaintiffs sought to hold Arconic liable for alleged misstatements that it was "building a system and culture that is more robust in its ability to . . . address. . . safety," and had a "culture of . . . compliance, prevention and risk identification and mitigation." *Id.* at 577, 581. The court held that while "a reasonable investor might fairly conclude that Arconic took safety, compliance, and ethics seriously," these were "the kind of hazy statement of optimism that has been found to be inactionable puffery." *Id.* at 549-50. Other courts have reached similar conclusions. *See, e.g., Irwin v. Country Coach Inc.,* 4:05-CV-145, 2006 WL 278267, at *7-8 (E.D. Tex. Feb. 3, 2006), disapproved on other grounds by *Nghiem v. Sajib*, 567 S.W.3d 718 (Tex. 2019) (statement that motor-coach brand stood for "ultimate lifestyle, comfort, safety and reliability" was "mere puffing" and not an actionable misrepresentation); *Ong v. Chipotle Mexican Grill, Inc.*, 294 F. Supp. 3d 199, 232 (S.D.N.Y. 2018) (statement that a food service company was "committed to serving safe, high quality food to customers" was inactionable puffery); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) ("statements about reputation, integrity, and compliance with ethical norms are inactionable"). Appellees' assertion that they were entitled to "disprove" general statements about safety has particularly far-reaching implications—for it would be rare indeed to find a manufacturer who has not represented, at some point, that it places high value on safety. Indeed, as a community, we want and expect

companies to do so. Such statements should not create a free-for-all for plaintiffs to present any negative information they can find.

The challenge to the second idea—that the NHTSA is an effective regulator—is also bizarre, particularly because one of the statements Appellees cite as a misstatement is a direct quote from the Federal Register (*see* Br. App's at 52; 69 Fed. Reg. 67068) so is attributable to the government itself. Moreover, Appellees' assertion that NHTSA is *not* an effective regulator contradicts the Texas Legislature's own conclusions—Texas presumes as a matter of law *in Section 82.008* that federal regulators are effective.

3. The challenged statements were not relevant to the federal government's determination of adequacy of the safety standard at issue.

Even if the statements were capable of being misrepresentations, they would not be actionable under the statute. Section 82.008(b)(2) concerns only misstatements of "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." First, it seems highly unlikely that Senators Markey and Blumenthal would find Toyota's subjective assessment of their safety culture and the NHTSA's effectiveness to be relevant to their determination of adequacy of a particular standard. But more importantly, the statements here were *not about FMVSS 207*. They contain no "information or material" that could be used to select or define a particular standard for vehicle-seatback rigidity or establish a threshold as adequate or inadequate. The statute specifically delineates what will constitute an actionable misrepresentation—these simply don't fit the bill.

4. Allowing use of other-accident evidence to disprove "misstatements" that are broader than the exception allows would swallow the rule.

Appellees' arguments regarding the scope of the second Section 82.008 exception are problematic, but the real danger lurks in their proposed evidentiary effects: before this Court, Appellees assert that to "rebut the presumption," they could prove that Toyota's out-of-court opinion statements were false—and therefore were entitled to parade before the jury the extensive, irrelevant, and horribly prejudicial evidence of completely unrelated accidents.

As extensively discussed in the first section of this brief, Texas law does not permit gratuitous admission of other-incident evidence. Yet Plaintiffs were allowed to introduce voluminous evidence of (1) alleged prior bad acts by Toyota (which they now argue was admissible to "rebut" a culture of safety), and (2) Toyota's lobbying of the NHTSA (on the basis that Toyota poisoned that agency, making it an ineffective regulator). The problem, of course, is that none of this evidence has anything to do with the vehicle or alleged defects in this case.

If the Section 82.008(b)(2) exception is applied narrowly—as written—then the only "misstatements" that are relevant are ones made "*relevant to . . . the adequacy of*" *the safety standard at issue in the action.* TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(b)(2). It follows, then, that the evidence offered to prove the falsity of such misstatements would also be *relevant to the adequacy of the safety standard at issue*, and therefore, be relevant to the key issues of design defect or reasonable alternative design.

In this case, Appellees ask this Court to approve the opposite result—to read the exception to apply to broad (opinion) statements and, in turn, deem such statements to "open the door" to any purported bad acts or other accidents that a plaintiff can uncover, essentially to challenge Toyota's credibility in general. But "Texas civil courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness." *TXI Transp. Co.,* 306 S.W.3d at 242.

Appellees' proposal would create a rule-swallowing exception to the Supreme Court's clear holdings that foreclose this result. *See Armstrong*, 145 S.W.3d 131, and *Kia*, 432 S.W.3d 865. If the manufacturer's statement itself does not directly relate to the "specific defect" alleged (1) to have caused the accident and (2) to be governed by the federal standard at issue, then it cannot serve as a basis for the exception. In that case, the statement—like the evidence to contradict it—is collateral and inadmissible. This conclusion is especially true where the proposed evidence, as here, has "great potential to confuse and mislead the jury," which is inadmissible "even if relevant." *Columbia Med. Ctr. Subsidiary, L.P.*, 198 S.W.3d at 412.

To allow general and vague statements to serve as a trigger for the second statutory exception would be nonsensical. It would create a disincentive for companies to publicly commit to safety priorities and unfairly punish those who do. And of course, allowing evidence of unrelated accidents under the guise of "rebutting the presumption" (or, as argued below, as "credibility" evidence) is essentially a

general attack on character and warrants a classic application of the rule against admission of "bad acts" evidence.

PRAYER

For the reasons stated above, *Amicus Curiae* respectfully request that the Court apply longstanding Texas law to correct erroneous admission of "other incident" evidence that did not meet the specific-defect, relevant-timeframe, and other longstanding evidentiary requirements. Failure to follow Texas law on these issues provides a basis to reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that, according to the word count of the computer program used to prepare this document, this amicus brief contains 9,186 words. This brief also complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because this brief was prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font for text and 12-point font for footnotes.

/s/ Kristin C. Cope
Kristin C. Cope

CERTIFICATE OF SERVICE

I certify that a that a true and correct copy of this amicus brief was served on counsel of record for Petitioner and Respondent electronically and/or by electronic mail, on February 28, 2020.

/s/ Kristin C. Cope
Kristin C. Cope