

latches, does not govern the product risk Barahona alleges, which is inadvertent actuation of such latches. Moreover, there is more than a scintilla of evidence that the standard is inadequate to protect the public. Accordingly, the Court should not grant summary judgment on this ground.

Finally, Toyota argues that there is insufficient evidence entitling Barahona to exemplary damages. In fact, Barahona has adduced enough such evidence, and a jury could find facts necessary to support an award of exemplary damages.

BACKGROUND

I. The Allegations Against Toyota

Barahona's Sixth Amended Petition alleges that the family's 2001 Toyota Echo was involved in a collision with a truck on September 21, 2003 and that six year old Alex Barahona ("Alex") – who was sitting, belted, in the rear middle seat – was rendered a vent-dependent quadriplegic when his seat back became unlatched and collapsed forward into his back. See Wilfredo Barahona Sixth Amended Petition ("Petition") at 3-5. Barahona alleges that the Echo was defectively designed in that (i) the mechanism for retaining the spare tire in the trunks wheel well was not adequately designed to retain the tire following a collision of foreseeable severity, causing the tire to strike the seat back, and (ii) the rear seat latch mechanism was inadequately designed to prevent the latch from inadvertently actuating when struck by free objects in the trunk, in this case the tire, causing the seat to fold in on passengers riding in the back. See Exhibit A (Affidavit of Hunter Craft), Attachment 1 (Elwell Expert Report) at 10-11. Barahona asserts claims of strict product liability and negligence. See Petition at 4-6.

Toyota makes much of the fact that Plaintiffs did not initially sue it, and that the design defect theories contained in the Fifth Amended Petition differ from those set forth in earlier petitions. See Motion at 3-5. But it is hardly unusual or somehow suspect for parties to amend pleadings or add new claims or parties as complex litigation proceeds and as experts are retained and analyze the facts. Toyota does not claim that Barahona's allegations were asserted beyond the statute of limitations, were added in violation of applicable scheduling deadlines or are otherwise legally untimely.

11. **Ronald Elwell's Expert Testimony**

Barahona's design defect expert is Ronald Elwell. Elwell was employed by General Motors as a design engineer for forty years, from 1959 to 1989, and in that capacity amassed vast experience in several areas, including latching and/or locking mechanisms and structural failure. See Exhibit A, Attachment 2 (Elwell C.V.). His career at GM included responsibility for the design, testing and reliability analysis of all GM car and **truck** latch and striker systems. See *id.* at 3. Since 1989, he has consulted in various matters relating to product integrity analysis and litigation, including in several cases involving latches and locking mechanisms. See *id.* at 5-7. Toyota does not challenge Elwell's qualifications or expertise.

In forming his opinions about the defectiveness of the Echo's design in this case, Elwell examined the trunk, the wheel well in the trunk that houses the spare tire, the rear seat back, and the latch mechanism on the rear seat. He determined that, in the collision between the Echo and the Freightliner, the Echo's "spare tire retention mechanism broke, allowing the spare tire to become an unauthorized flying object of great potential harm in an otherwise survivable

frontal collision.” Exhibit A, Attachment 1 (Elwell Report) at 10. The spare tire was contained in the wheel well in the trunk by a plastic cap with an embedded bolt. See Exhibit B (Elwell Deposition Transcript) at 113. As Elwell opines, “[h]ad the hold-down feature been a steel wing-nut attaching a jack base for the car, a metal (steel) enlarged cap screw threaded into the anchor nut bracket, or a steel spare tire anchor system locating the tire in a pocket underneath the trunk, then any of those systems would have easily prevented Alex Barahona’s life-altering injuries.” Exhibit A, Attachment 1 (Elwell Report) at 10. Elwell was able to discern how the plastic cap came off during the collision by examining the cap’s plastic ribs or fins. See Exhibit B (Elwell Depo.) at 115-23. These fins bent, and the cap ultimately came off, as the spare tire moved upward and outward in the collision:

A. Well, the fins are low indicators that go into the hole as you tighten it. But as the thing becomes loose and damaged during the accident, then those fins become bent over. And **that’s** why this one, I can **tell**, came loose in the accident.. ,

Q: Okay. And in its nominal orientation in the trunk of a 2001 Toyota Echo, when the spare tire tie-down is affixed to the spare tire wheel, the fins, do they have engagement with the wheel itself or do they not have engagement with the wheel?

A. They are the centering feature of the wheel itself. So they touch the inside whole diameter of the wheel itself, but they do not rest on the wheel. It’s only when the vehicle is in an accident, where the spare tire moves forward, now those fins are bent and touch the wheel.. .

Q Okay. And you believe [the plastic cap] was finger tight because, in part, you recall seeing some damage to the fins of the Barahona’s spare tire tie down?

A. Yes.

Id. at 118-20. Photographs showing scuff marks evidence the spare tire’s progression out of the wheel well during the collision. See *id.* at 123-25, Depo.

Exhibits 496, 507, 508. As Elwell further testified, describing damage he observed in five other Echos that experienced the same spare tire retention failures:

Q. And how do you know, though, sir, the breakage of the cap is associated with whatever real world accident occurred as opposed to some post accident cannibalization or alteration of the vehicle?

A: The condition of the plastic retainer and the condition of the bolt, and the condition of the bracket – basket, just as importantly the bracket that underlines where the bolt and its nut meet, are consistent with every direction of principal impact or principal direction of force, PDOFs of these accidents, and every one of them had the same result.. , So these are all rubber stamps of the Barahona experience.

Id. at 138-39.

After the plastic cap came off and the spare tire was freed to act as a projectile, the tire struck the rear left seat back: “The free flying spare tire was directed by the accelerations of impact to strike forward and towards the left hand ‘A’ pillar. I believe the spare tire hit twice in a staccato impact first at the bottom of Alex’s seat back and then at its top. The spare tire rotated in mid-air.” Exhibit A, Attachment 1 (Elwell Report) at 10. Elwell reached this conclusion after studying a concave mark corresponding to a tire imprint that is visible on the rear seat back:

Q. . . .[W]hy is it that you believe that a spare tire, that weighs considerably less than the ECE loads would cause the latch to give and the seat back to come forward in this accident.

A. Because the seat is concave the way it is because of a spare tirestrike. And whether or not we want to argue about what caused that concavity, I think the jury will see that when you put the spare tire against the back of that seat, that there is no question about what put that mark.. .

See Exhibit B (Elwell Depo.) at 94.

As a result of the spare tire striking the left seat back during the collision, the latch holding the seat in the locked, upright position actuated, causing the seat back to fold down and strike Alex. “Well, it didn’t come forward by accident, but it was released through its release mechanism and the attachment of that rod to the pawl. That caused, when the seat got hit by that spare tire, it energized the pawl, and the pawl released the fork bolt. And the fork bolt, it’s demonstrably shown on the striker that the fork bolt released while it was over on the left side of the striker. And indelibly printed there.” *Id.* at 95. As Elwell further explained, speaking of the movement of the left rear seat caused by the blow from the spare tire: “But then, as the load builds up and the rear seat moves to the left, the rear seat back, moves to the left, the fork bolt started digging in further and further until it got to the left corner, where it just completely sloughed off the metal [of the latch striker].” *Id.* at 106. In an exchange with Toyota’s counsel, Elwell summarized:

Q: All right. Well, let me see if I have the sequencing correct, Mr. Elwell. And I’m sure you’ll correct me if I don’t, but let me try.

The accident happens. The spare tire comes loose out of its well, it moves forward and engages the base of the 60 portion of the 60/40 fold down seat causing *the deformation, which we see*. At that point, the latch is engaged with the striker?

A: Yes.

Q: The spare tire then rotates up so that it’s in a somewhat vertical or flat orientation now against the seat back, causing *the damage we see* to the seat back, both low and high, or now higher on the seat back?

A: Higher is a good choice of words.

Q: On the seat back. At which point then the seat begins to twist. And when that twisting action occurs, now the fork

bolt and the detent lever pawl are both going to start sliding down, or at least the fork bolt is going to start sliding down the striker. And the release rod is being excited by the load being applied to the seat, it results in engagement being lost between the detent pawl and the fork bolt, which has slid now to the far end of the striker, *leaving the scarfing marks or the scrape marks that we see*. At which point then you believe the latch is either pulled across the top of the striker, or the latch actually rotates into its open position, and the seat comes forward?

A: It's rotating in a partial opened position. By the time latch slid to the far left, the fork bolt had already started to disengage, but the fork bolt was slammed into the striker. *And that's what caused those deep metallurgical gouges.*

But then the fork bolt continued losing purchase with the striker. Those are *the road tracks*, if you will, of how the fork bolt was jammed into the striker, the striker was cold-worked by the detent, the fork bolt lever, and the loss itself of purchase.

Id. at 109-10 (emphases added).

As the italicized portions of the above exchange make clear, Elwell's opinion about how the latch actuated during the accident is based on his inspection of the physical evidence in the Echo. Specifically, scrape marks on the latch's striker and fork bolt and white paint on the fork bolt demonstrate the disengagement the latch underwent as a result of the blow from the spare tire. See *id.* at 104-05, 112-13. Photographs of the latch mechanism document the physical changes that occurred during the collision. See *id.* at 102-06, Deposition Exhibits 595, 596, 597, 701, 705, 706. Elwell opines that a hardened striker on the seat back latch, of the kind used in other vehicles and on door, hood and trunk latches, would have prevented the inadvertent actuation of the latch that caused Alex's injury. See Exhibit A, Attachment 1 (Elwell Report) at 10.

III. Inspection and Condition of the Echo After the Collision

Contrary to Toyota's claim that there is no evidence of the condition of the Echo shortly after the accident, Wiana Smith, a witness, testified that existing photos fairly and accurately depict how the rear seatbacks looked when she was present at the scene of the accident. See Exhibit C (Smith Deposition Transcript). Co-defendant Jerrold Young testified identically. See Exhibit D (Young Deposition Transcript). Shane Robinson, the wrecker driver who arrived at the accident scene, testified that existing photos fairly and accurately depict how the rear seatbacks looked when the car arrived at his wrecker yard, and that no one moved or altered the seats or opened the trunk at the accident scene. See Exhibit E (Robinson Deposition Transcript). John Sweatt, an investigator hired by co-defendant Levinge Transportation, also viewed the Echo two days after the accident and videotaped and photographed the car, including its seatbacks. See Exhibit F (Sweatt Deposition Transcript) at 7-10, 27-30. All of the photographs these witnesses testified about have been available to all parties during the litigation of this case.

At some point after the Echo arrived at the wrecker yard, Barahona returned to the car and removed personal items - books, a tool box and toys - from the interior of the car and the glove compartment. See Exhibit G (Wilfredo Barahona Deposition Transcript) at 37-40. When Barahona saw the car on that occasion, the rear seat back was pushed forward at something akin to a 45 degree angle with the seat bottom. See *id.* at 39. Barahona moved the seat back in order to reach and retrieve some of the personal items underneath it. See *id.* at 39-40. In its motion, Toyota asserts that Barahona disengaged the rear seat's security lock while removing the personal items near the seat, see Motion at 4, but

Barahona did not testify to doing so and, in fact, testified that the seat was unlocked when he first encountered it. See *id.* at 39.’ Nor is it apparent how the seat back could be locked if it was already slanting forward at a 45 degree angle to the seat bottom. See, e.g., Motion at 6 (“The 60/40 split rear seat can be folded down when the seatback security lock lever is. . . unlocked. .”).

Toyota asserts in its motion that, “[w]hen Toyota was allowed to inspect the vehicle’s trunk area, the tire, ‘resin cap,’ plastic wheel well cover and carpet were all removed from the vehicle. See Ex. ‘J.’ As a result, the Toyota Defendants never had an opportunity to inspect these items inside the vehicle in their true post-accident condition.” Motion at 6. To be clear, however, there is no dispute that these items were available for Toyota to inspect and that Toyota’s design expert, Gary Fowler, did so in the course of forming and rendering his opinions. See Exhibit H (Fowler Deposition Transcript) at 36 (examined spare tire retention system), 44-45 (examined plastic nut holding tire in wheel well), 50 (staff weighed spare tire). Toyota’s complaint seems to be simply that they were not inside the vehicle lying in exactly the same position they occupied immediately following the collision.

¹ During Barahona’s deposition, the following exchange occurred: “Q: Was [the rear seat] locked – A: No. Q: a – in that position? A: Huh-uh. Q: Did you – were you able to move it if you wanted to? A: It was moveable. We had to, because some of the stuff had flown underneath there that we had to take out, clear out.” See Exhibit G (Wilfredo Barahona Depo.) at 39. Toyota apparently relies on this testimony in claiming Barahona unlocked the seat, see Motion at 4 (citing Deposition at p. 39), but it actually indicates the opposite: the seat was unlocked and moveable, and Barahona did not unlock it because he did not need to in order to retrieve the personal items.

SUMMARY JUDGMENT EVIDENCE

Pursuant to Tex. R. Civ. P.166a(d), Plaintiff hereby incorporates by reference and for all purposes relies on the following summary judgment evidence:

- All evidence filed by Toyota in support of its motion
- Exhibit A: Affidavit of Hunter Craft and Attachments
- Exhibit B: Deposition Transcript of Ronald Elwell and attached Deposition Exhibits
- Exhibit C: Deposition Transcript of Wiana Smith and attached Deposition Exhibits
- Exhibit D: Deposition Transcript of Jerrold Young and attached Deposition Exhibits
- Exhibit E: Deposition Transcript of Shane Robinson and attached Deposition Exhibits
- Exhibit F: Deposition Transcript of John Sweatt and attached Deposition Exhibits
- Exhibit G: Deposition Transcript of Wilfredo Barahona
- Exhibit H: Deposition Transcript of Gary Fowler
- Exhibit I: Passenger Car Safety Dynamics – An Engineering Pilot Study to Determine Comparative Human Injury Potentials in Vehicle Accidents, Research Center of Motor Vehicle Research of New Hampshire 1965
- Exhibit J: Deposition Transcript of Norio Yasuda
- Exhibit K: Deposition Transcript of Alan Dorris
- Exhibit L: House and Senate Journal Excerpts

ARGUMENT

I. Toyota's Spoliation Argument is Meritless

Toyota first claims that Barahona has no evidence to prove his claims because, shortly after the accident, Barahona moved the seat back in the Echo

and removed a handful of personal items. Toyota also claims – without providing evidence the Court could consider in deciding a summary judgment motion – that Plaintiff’s counsel also altered the car. Toyota’s claim of spoliation is baseless and should be rejected.

The fatal weakness in Toyota’s spoliation argument is its nearly complete disregard of the physical evidence Barahona actually relies on to establish design defects. Although ignored in Toyota’s motion, that evidence is described at length in Elwell’s expert report and deposition. Based on his inspections of the Echo, Elwell identified several telltale signs confirming how and why the defective seat back latch failed. Specifically, he described the bending and deformation of the plastic ribs or fins present in the plastic cap that secured the spare tire in the wheel well. See pp. 3-8, *supra*. He also cited the bent spare tire bolt, scuff marks indicating the spare tire’s progress out of the wheel well, and the condition of the spare tire bracket. See *id.* Elwell further testified that a concave impression in the left rear seat back exactly matched the spare tire – supporting his conclusion that the spare tire struck the seat back once it was freed to become a projectile in the trunk by the failure of the defective plastic cap. See *id.* Finally, Elwell rests his conclusions about how and why the seat back latch actuated after the seat was struck by the spare tire on scrape marks on the latch’s striker and fork bolt and white paint on the fork bolt. See *id.*

In other words, the Echo contains ample physical evidence supporting Barahona’s claims. Yet Toyota completely fails to explain why this evidence is somehow deficient or does not constitute more than a scintilla of probative evidence from which a jury could conclude that Elwell’s opinions are correct and that, therefore, defects have been proven. Instead, Toyota virtually ignores this

evidence, on which Barahona's liability case is based, and asserts without support that, because Barahona moved the seat back, no defect can be proved. No reason is given as to why one or more movements of the seat back after the accident necessarily means that "any evidence the seatback failed would necessarily be nothing more than mere speculation." Motion at 11. The proposition is simply asserted.

Not only does Toyota fail to give reasons why a movement of the seat back makes the physical evidence Elwell relies on nonprobative, it also neglects to provide expert testimony in support of that claim, though the matter is hardly one laypeople could be expected to deduce on their own. In fact, Toyota's own expert does not seem to endorse its theory that the alleged **spoliation** makes the case impossible to analyze or understand – a fact that should dispose of Toyota's motion. Toyota's expert Fowler inspected the Echo earlier this year, at approximately the same time as **Elwell**.² He examined the same physical evidence as did **Elwell**. He did not come away from his review and analysis of the car with the view Toyota presses in this motion – that the car has been spoliated and that it is now therefore impossible to determine what happened in the collision. Rather, after inspecting the Echo and considering other evidence, Fowler renders a variety of opinions about how the back rests and latches functioned during the collision. See Exhibit A, Attachment 3 (Fowler Expert Report) at 3. These opinions may differ from **Elwell's**, but they illustrate that it is quite possible to draw reliable conclusions from the existing physical evidence.

² Elwell first inspected the Echo on January 18, 2006. See Exhibit A, Attachment 1 (Elwell Report) at 3. In its motion, Toyota claims its "representative" first inspected the car on December 20, 2005. See Motion at 11. In his deposition, Fowler reports inspecting the car on March 21, 2006. See Exhibit H (Fowler Depo.) at 10.

If, as Toyota now claims, post-accident movement of the seatback made analyzing the events of the accident impossible and thereby deprived Barahona of any way to prove a defect, Fowler would presumably have said so and declined to render opinions himself. Indeed, at the same time Toyota claims summary judgment is required because Barahona moved the seat, it amazingly criticizes his counsel for refusing to allow Fowler to perform the same maneuver: “The Toyota representative requested permission *to fold down the rear seats.. .*” Motion at 11 (emphasis added). If moving the rear seats spoliates the car, one wonders why Toyota’s expert wanted to do it.

In addition to complaining about post-accident movement of the seats, Toyota asserts that the “contents of the trunk” have been discarded. Motion at 10. In fact, the spare tire and a tool box, in the trunk at the time of the accident, were available for inspection and were inspected by Toyota’s expert. See Exhibit H (Fowler Depo.) at 20 (tool box), 50 (spare tire). Toyota does not explain why it is important that these or other items mentioned as being in the trunk or car, such as a laundry basket and school books, have been moved from their original position after the accident, and Toyota’s own expert does not appear to care about the matter either:

Q. What is your understanding.. . **as to what was in the trunk** of the vehicle at the time of the accident?

A. My understanding is there was a laundry detergent bottle, some tools, perhaps a laundry basket or some laundry. It’s not real clear to my mind. I haven’t *focused on that.. .*

See *id.* at 18 (emphasis added).

Toyota also **alleges** that Barahona’s counsel “continued to alter the vehicle even though this lawsuit was pending,” and makes various claims about what

happened during its agents' inspections of the vehicle. Motion at 11. Occasionally in this discussion, Toyota puzzlingly cites to Exhibit J of its motion, which is a four page summary of the content of the petitions in this case from Toyota's point of view, and which actually contains no information about the inspections. See *id.*, Exhibit J. Because Toyota has not provided the Court with sworn testimony about the inspections or other claimed actions of Barahona's counsel, Toyota's allegations cannot be considered by the Court in deciding this motion. See Tex. R. Civ. P. 166a(c) (listing competent summary judgment evidence).

More important, for the reasons discussed above, Toyota does not explain how these alleged actions – moving the seat back again and taking some items out of trunk – require summary judgment or render the physical evidence painstakingly laid out by **Elwell** insufficient to establish Plaintiffs' claims. For example, Toyota claims in this discussion that “[p]hysical evidence regarding what was in the trunk and where it ended up after the accident is critical to determining if the rear **seatback** and latch were defective and whether that alleged defect caused Plaintiffs' injuries,” Motion at 12, but, again, it neither explains why this is “critical” nor establishes the inadequacy of the physical evidence that is available to and was cited by both **Elwell** and **Fowler**.³ Nor does Toyota explain the deficiency of photographs available to it that witnesses have testified accurately depict the seatbacks immediately after the collision.

³ Similarly, Toyota asserts that “mishandling and damage around the vehicle's spare tire well after the accident permanently altered the vehicle.” Motion at 14. There is no summary judgment evidence supporting this claim of mishandling or damage, and Toyota fails to explain what damage it is referring to or why it is important.

In the same vein, Toyota asserts that “Plaintiffs did not identify which items were ‘exemplars,’ which items were actually in the vehicle, or where the items were found in the trunk after the accident” and “never produced any information establishing or documenting the dimensions and weight of all of the items in the trunk at the time of the accident, or where each item was found after the accident.” Motion at 12. Toyota again cites its Exhibit J “litigation timeline,” for support here, see *id.*, though that document is unsworn and simply summarizes the pleadings from Toyota’s viewpoint. See *id.* Toyota was free to explore these subjects during discovery, and its motion does not contain competent summary judgment evidence on these topics, such as discovery responses or deposition testimony. Additionally, Toyota nowhere explains why these issues – exemplars vs. actual items, dimensions and weight of objects in the trunk, or location of each item after the accident – matter, much less require summary judgment.

In its only stab at addressing the physical evidence that *is* present in the Echo, and on which Barahona and his expert base their case, Toyota claims that there is no way to know whether the markings, scrapes and paint transfer Elwell cites were present before the accident or resulted from post-accident handling. See Motion at 14. But Toyota has adduced no evidence whatever that these markings existed before the collision or were added afterwards, nor does it offer expert testimony or other evidence suggesting Elwell’s interpretation of the markings is incorrect. At a minimum, when these markings arose and what they signify are ordinary and subsidiary factual matters to be considered by the jury when deciding on liability, nothing more.

In support of its spoliation argument, Toyota cites numerous decisions, all but one from other jurisdictions, wherein the destruction of evidence either precluded defense of the claims or required summary judgment. See Motion at 12-13. Barahona does not take issue with the basic legal principle that destruction of the product at issue will, on occasion, make litigation of product liability claims impossible, but that is not remotely what has occurred here. In all but one of the decisions cited by Toyota, the entire car or other allegedly defective product or part was destroyed or sold by the plaintiff, making any physical inspection or analysis of the claimed defect impossible.⁴ The only Texas decision Toyota cites, *Glover v. Ford Motor Co.*, 1997 WL 106110 (W.D. Tex. 1997), is typical in that the Ford Bronco II at issue was sold and completely unavailable to the defense, and plaintiff's expert, who had also never seen the vehicle, based his testimony of defect entirely on the general rollover propensities of the Bronco II and other accidents. See *id.* at * 3-5. Here, of course, not only has the Echo not been destroyed or sold, but the physical evidence Barahona relies on to prove the

⁴ See *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005) (car sold for salvage, totally unavailable to defense); *Glover v. Ford Motor Co.*, 1997 WL 106110 (W.D. Tex. 1997) (vehicle sold, totally unavailable to defense); *Am. Family Ins. Co. v. Village Pontiac GMC, Inc.*, 585 N.E.2d 1115 (Ill. App. 1992) (car destroyed, totally unavailable to defense); *Roseli v. G.E.*, 599 A.2d 685 (Pa. Super. 1991) (fragments of glass carafe that exploded lost, totally unavailable to defense); *Graves v. Daley*, 526 N.E.2d 679 (Ill. App. 1988) (furnace destroyed, totally unavailable to defense); *Powe v. Wagner Elec. Sales Cop.*, 589 F. Supp. 657 (S.D. Miss. 1984) (allegedly defective master cylinder not retained, totally unavailable to defense); *Casetta v. US. Rubber Co.*, 260 Cal. App. 2d 792 (Cal. App. 1968) (tire absent, totally unavailable to defense).

In one case Toyota cites, *Ralston v. Casanova*, 473 N.E.2d 444 (Ill. App. 1984), the allegedly defective seatbelt assembly had not be totally destroyed but disassembled by plaintiff's expert, and an independent court-appointed expert determined that the disassembly rendered any future inspection or testing unreliable. Moreover, the disassembly violated a specific preservation order of the court. See *id.* at 44647.

alleged defects is available for inspection by Toyota and has actually been seen and considered by Toyota's expert.

Moreover, there is no per se requirement that vehicles at the center of lawsuits be maintained in exactly the same condition that exists seconds after an accident, as Toyota's motion necessarily implies. For example, in *In re Ford Motor Co.*, 988 S.W.2d 714 (Tex. 1998), the Texas Supreme Court rejected Ford's argument that it could not defend against a product liability suit arising from a collision involving a Ford vehicle because the condition of the car had changed since the accident: "The record-demonstrates that the car is not now in the same condition as it was soon after the accident when [the insurer's expert] examined it and prepared his report. However, Ford has not clearly established the impossibility of now determining the condition of the brakes or cruise control system when the accident occurred." *Id.* at 721. Although it is unnecessary here because of the existence of the physical evidence underlying Elwell's opinions, product liability cases can also be proved on the basis of circumstantial evidence alone, such as photographs and eyewitness testimony, without the direct physical evidence available in this case. See *Parsons v. Ford Motor Co.*, 85 S.W.3d 323,329 (Tex. App. – Austin 2002) ("Direct evidence is not required to establish the existence of a defect; often it can be proven by circumstantial evidence, particularly where a latent defect is involved"); accord *Fulgham v. FFE Transportation Serv., Inc.*, 2005 WL 1621425 at *2 (Tex. App. – Dallas 2005) (circumstantial evidence, including photos and eyewitness testimony, sufficient to prove plaintiff's case, such that plaintiff may not rely on spoliation presumption alone).

In this case, as in *In re Ford Motor Co.*, Toyota has not established the impossibility of rebutting Barahona's claims of defect simply because the seat back was moved and items allegedly removed from the trunk. Nor has Toyota addressed the circumstantial evidence bearing on the seat back before it was moved, such as the photos verified by various witnesses who saw the car at the accident scene and the wrecker yard. In addition, it would be impossible to maintain vehicles after accidents in the sort of exact condition Toyota implicitly suggests is legally required. In order to move cars that have been in accidents off roadways, extract injured people from seats and seatbelts, and retrieve personal belongings, it is necessary and reasonable to effect changes in the scene of an accident, including the vehicles involved. No vehicle could be maintained following an accident as Toyota appears to demand – with each object (presumably including people) in exactly the same spot as at the precise moment when the accident ends. The preservation requirement Toyota essentially advocates would make product liability claims involving vehicles nearly impossible. Instead, the question is simply whether the claims alleged can be proved with the evidence that does exist.

Finally, to the degree Toyota **also** casts its spoliation argument as an attack on the reliability of Elwell's testimony, see Motion at 15-16, the argument is without merit. As discussed above, Toyota is simply willfully ignoring the physical evidence underlying Elwell's opinions. Toyota asserts that, "[w]ithout examining the Echo's trunk contents as they were immediately after the accident, Plaintiff's experts would have no way of showing which items struck the rear seat back and caused Alex Barahona's injuries as alleged by Plaintiffs, or whether the 'tie down bolt' failed before or after the accident." Motion at 16. But this

overlooks the facts that Elwell has examined (i) the concave impression in the seat back and concluded that it was caused by the tire because its shape matches the tire, which he has also inspected; (ii) the bolt and plastic cap, and formed his impressions based on their physical appearance; and (iii) the latch, and concluded that scuff marks and paint loss indicate how and why it failed during the collision. Toyota is not required to agree with Elwell's conclusions, of course, but it cannot reasonably claim they are not based on physical evidence or that they do not constitute more than a scintilla of evidence of defect.

In sum, Toyota asserts that Barahona cannot recover because he lacks "direct physical evidence to support the required defect or causation elements" of his claims, Motion at 14, but it is precisely because Barahona and his expert do rely on such physical evidence - evidence that was equally available to and examined by Toyota's expert - that Toyota's argument based on spoliation should be rejected.

II. **Toyota is Not Entitled to Summary Judgment Based on Compliance with Federal Regulations**

Toyota also seeks summary judgment on the basis of **TEX. CIV. PRAC & REM. CODE § 82.008**. See Motion at 16-19. The Court should deny Toyota's motion because the federal standard Toyota relies on, Federal Motor Vehicle Safety Standard ("FMVSSN) No. 207, does not govern the product risk at issue in this case and is inadequate to protect the public from unreasonable risk of the injury Alex suffered.

TEX. CIV. PRAC & REM. CODE § 82.008(a) establishes a rebuttable presumption of manufacturer non-liability for injury caused by defective product design if the product conforms to federal safety standards "that governed the

product risk that allegedly caused harm.” A plaintiff can rebut the presumption by establishing, *inter alia*, 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 § 82.008(b)**. In both the Texas House and Senate, in identical remarks inserted into the House and Senate Journals as Statements of Legislative Intent, the sponsors of the bill containing § 82.008 explained the requirement that the regulatory standard invoked by the manufacturer govern the alleged product risk:

HB 4 - STATEMENT OF LEGISLATIVE INTENT

* * * *

REPRESENTATIVE NIXON: . . .The bill provides that the presumption comes into play only when there is a mandatory federal standard that “governed the product risk that allegedly caused harm”. ~~The intent of this language is to have the presumption apply only when there is a federal standard that is designed to regulate the aspect of the manufacture or design of the product that the plaintiff claims is defective. The intent of the bill is to ensure that there is a relationship between the federal standard in question and the defect being alleged by the plaintiff. If there is not a relationship, the presumption will not apply.~~

Exhibit L (House Journal, 78th Legislature, Reg. Sess., June 1, 2003 at 6038); accord *id.* (Senate Journal, 78th Legislature, Reg. Sess., June 1, 2003 at 5006).

In this case, while Barahona does not contest that the Echo may comply with FMVSS 207, Toyota is not entitled to claim the rebuttable presumption because that standard does not govern the product risk at issue. Initially, there is no dispute that the standard does not apply to securing spare tires or other contents in a vehicle’s wheel well or trunk. Rather, Toyota claims the standard is applicable because, “[w]hatever happened in the trunk. . . it only had an effect on

Alex if the seat back collapsed forward as alleged by Plaintiffs.” Motion at 17. Barahona alleges, however, that the Echo’s latch is prone to inadvertent actuation and is defective because the rear seat latch is unable to resist inadvertent actuation during dynamic impacts to the seat. See Petition at 4. FMVSS 207 does not address actuation of the **seatback** latches during impacts with cargo located in a vehicle during collisions. It merely addresses a vehicle’s **seatback** strength and, theoretically, a **seatback** latch’s ability to withstand forcible *release*, not actuation, during a collision event. Toyota has wrongly lumped two entirely different defective latch conditions – inadvertent actuation and forcible release – under one “product risk” umbrella. When the product risk actually alleged in this case is considered, it is clear FMVSS 207, and thus § 82.008, does not apply.

Moreover, § 82.008(b) provides that, even if a federal standard addresses the specific product risk at issue, a plaintiff may rebut the presumption by establishing that the subject standard was “inadequate to protect the public from unreasonable risks of injury or damage.” For the same reasons that FMVSS 207 is inapplicable to the “product risk” of actuation at issue here, it cannot protect consumers like Alex from the unreasonable risk of inadvertent actuation of the latch because: (1) the standard provides for a static pull test, seeking to replicate the inertial forces experienced by vehicle seatbacks during collisions, and does nothing whatsoever to replicate a dynamic impact with the **seatback** of the sort likely to cause inadvertent actuation; and (2) it seeks to test latch failure via forcible latch release, and does nothing to replicate a situation in which a latch may fail via inadvertent actuation. Thus, even if Toyota could show that FMVSS 207 actually governs the product risk at issue in this case, there is more than a *scintilla* of evidence that Barahona has rebutted the “no defect” presumption by

demonstrating that the standard is inadequate to protect the public from inadvertent latch failures, especially those caused by vibrations generated by dynamic impacts to the seatback.

III. The Court Should Deny Toyota's Motion Regarding Barahona's Claim for Exemplary Damages

Finally, Toyota argues that the Court should dismiss Barahona's claim for exemplary damages because Barahona is unable to produce a scintilla of evidence establishing malice or gross negligence. The Court should deny Toyota's motion in this regard.

Exemplary damages may be awarded upon proof of gross negligence, which is defined as an act or omission:

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

TEX. CIV. PRAC & REM. CODE § 41.001(11). Gross negligence may be found from reasonable inference drawn from the available evidence. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 596 (Tex. 1999). It may be proved by circumstantial evidence, *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998), and factfinders should consider all surrounding facts and circumstances. *Id.* at 922. Importantly, “the fact that a defendant exercises some care does not insulate the defendant from gross negligence liability.” *Id.* at 923-24.

The “conscious indifference” element of gross negligence calls for an analysis of the defendant's subjective knowledge and state of mind. See, e.g., *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 380 (Tex. 1998) (Gonzalez, J., concurring)

(referring to conscious indifference component of gross negligence as trial on “defendant’s state of mind”). As the Fifth Circuit commented in *Maxey v. Freightliner Corp.*, 722 F.2d 1238 (5th Cir. 1984), a decision Toyota cites as an example of the proper application of exemplary damages: “What lifts ordinary negligence into gross negligence is the mental attitude of the defendant.” *Id.* at 1240; Motion at 25. And it has long been the rule that disputes over a party’s state of mind should generally be left to the jury. See *Fenley v. Mrs. Baird’s Bakeries, Inc.*, 59 S.W.3d 314,320 (Tex. App. – Texarkana 2001).

The Court should reject Toyota’s attempt to preclude Barahona from seeking exemplary damages. The evidence developed in this case demonstrates that Toyota had both objective and subjective knowledge of the hazards presented by the Echo. It is well established that, for decades prior to the design and manufacture of the Barahona vehicle, the automobile industry had knowledge of the importance of the danger that trunk cargo presents to vehicle passengers. In 1965, Andrew J. White of the Motor Vehicle Research Institute published an industry-available publication that highlighted the danger of “‘payload’ items stored in the trunk area of vehicles,” the duty of automakers to give “serious consideration” to “spare tire and wheel fastening,” and the importance of “the structural strength of trunk barriers and their resistance to forces involved [in collisions].” See Exhibit I (Passenger Car Safety Dynamics – An Engineering Pilot Study to Determine Comparative Human Injury Potentials in Vehicle Accidents, Research Center of Motor Vehicle Research of New Hampshire, 1965) at 184.

Additionally, Toyota itself has, for decades, understood the likelihood of accident modes such as that which occurred here. See Exhibit J (Deposition

Transcript of Norio Yasuda) at 48-49. Specifically, with regard to the necessity to retain the spare tire during collision events, Toyota's witness Norio Yasuda testified:

- Q: Toyota has known for decades the necessity of adequately securing spare tires in collision events, has it not?
- A: Yes, we understand that.
- Q: All right. And, in fact, not only does Toyota understand now but has understood that concept for decades, correct?
- A: Correct.
- Q: Why is it important to secure a spare tire during collision events?
- A: In accidents, if the spare tire is retained in the original location where it was mounted within reasons, then various safety performance can be assured, and there are several safety performances.
- Q: Why is it important that safety performance be assured in these crash events?
- A: With that you can avoid serious injuries to the occupant.
- Q: Injuries such as those sustained by Alex Barahona in the subject accident, correct, sir?
- A: It is my understanding that he has received severe injuries. It is preferable if the spare tire is retained in original position in order to reduce the risks of various injuries.

Id. at 136-137.

Additionally, Alan Dorris, Toyota's expert witness with respect to warnings, agreed that Toyota must have had actual knowledge of the hazard of Alex's restraint being rendered useless in events in which the rear seat latch fails:

- Q: All right. And whoever warns [consumers] of a certain hazard, *i.e.* Toyota, they have to have knowledge that that hazard exists; is that correct?
- A: Or a potential hazard, sure.

Q: Sure. But you have to have a subjective knowledge of the potential for that hazard to occur, correct?

A: I would think so, yes.

See Exhibit K (Deposition Transcript of Alan Dorris) at 22. Speaking of the Echo's Owner's Manual, Dorris continued:

Q: You would agree with me there is a box on there that has a triangle with an exclamation point in the middle that says, "Caution," correct?

A: Correct.

Q: And the reason that Toyota puts that in there is because any time we see this triangle with the exclamation point and the word "Caution," it indicates that this is a warning against something which may cause injury to people if the warning is ignored. "You are informed about what you must or must not do in order to avoid or reduce the risk to yourself and other people"; is that correct?

A: You read that correctly, yes.

Id. at 24-25. Dorris further testified:

Q: If we look on page 27 [of the owner's manual] we're going to find that caution symbol that we talked about earlier . . . ; is that right?

A: Yes.

Q: In other words, if the seat back is not securely locked, what Toyota is telling us, that if that seat moves forward, it will prevent the seat belt from operating properly; is that correct?

A: That's what it says, yes.

Q: That is a known hazard that Toyota, when they printed this owner's manual, told owners of the Toyota Echo; is that correct?

A: Well, again, if by known we mean either they had actual knowledge or they had determined that that could happen, sure.

Id. at 26-27.

Yet even with the benefit of this actual knowledge, Toyota chose to use a plastic retention device in the Echo, at the same time it placed the sturdier metal system in its other vehicle lines. As Yasuda testified:

Q: Has Toyota at any time ever utilized an all-metal tie-down system for mounting its spare tire in the trunks of its vehicles?

A: Yes.

Q: All right. Dating back to when, sir?

A: It has been used since long ago, and it is my understanding that it is in use as well in some vehicles.

Q: Today?

A: Yes, that is my recollection.

Exhibit J (Yasuda Depo.) at 151-152. Thus, despite both objective and subjective knowledge of the risks that manifested themselves in the Barahona accident, Toyota acted with gross negligence in failing to use devices it has utilized “for decades” in its other vehicles. Protecting some persons in some situations from a hazard while leaving others exposed is classic evidence of conscious indifference. See, e.g., *Ellender*, 968 S.W.2d at 92425 (failure to protect contract workers while protecting employees shows conscious indifference). Contrary to Toyota’s claim, the evidence indicates that it did “**ma[ke]** a conscious decision to knowingly implement a design [it] knew to be less safe than an alternative design,” Motion at 24, namely, metal tie-down systems.

Toyota argues that a jury could not find it was consciously indifferent to the risks posed by its design because it was attempting to develop improvements to the Echo and because it complied with safety standards. See *id.* at 23. But Sanchez does not establish a per se rule that any level of compliance of any sort

with regulations immunizes a product manufacturer from exemplary damages, regardless of how inapplicable the regulation or ineffective the rule. In this case, FMVSS 207 does not govern the product risk this case focuses on, inadvertent latch actuation, and, as discussed above, the rule is inadequate to protect the public in any case. ECE 17, a standard inapplicable to vehicles sold in the United States which Toyota also stresses, does not evaluate the performance of vehicles' spare-tire mounting systems. In fact, the ECE 17 test requires that test blocks actually be placed on top of the spare tire well, thus providing false assurance that the tire will not escape the well though this test environment is not duplicated in real world accidents like Alex's. See Motion, Exhibit C at 006310 (Annex 9, Test Procedure). Toyota claims it was "adopting and exceeding the best practices in the world related to **seatback** strength and resistance of cargo intrusion," but these practices simply do not adequately address the harm that befell Alex.

By the same token, while Toyota claims it was "working on the problem" by "attempting to develop improvements to their vehicles," Motion at 23-24, it offers no evidence it was doing anything at the time it manufactured the Barahonas' vehicle to correct the dangerous deficiencies in the spare tire retention system and latch. Nor is it persuasive that Toyota supposedly boasts of "entire departments devoted to vehicle design and safety," and conducted some testing of some sort on the Echo. See Motion at 26. Again, exercising "some care does not insulate the defendant from gross negligence liability." *Ellender*, **968 S.W.2d** at 923-24. The question is whether Toyota exhibited conscious indifference to the specific danger suffered by Alex, and more than a scintilla of evidence establishes this point. As with most factual inquiries involving state of

mind, the jury should be permitted to pass on Toyota's conscious indifference in this case.

CONCLUSION

For the foregoing reasons, the Court should deny Toyota's motion.

Respectfully submitted,

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BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa*.

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno*, 179 F.3d 29 (2d Cir. 1999).

In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a \$60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for \$150 million, winning a \$43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of *Litigation*, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas*. The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).
- *City of New York and Rudolph Giuliani v. United States and Janet Reno*. New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.
- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for \$150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him \$43 million in compensation. Case No. AAA 70 180 00648 02.
- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

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Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert*, summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).
- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).
- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala.* Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).