CAUSE NO. 03-22,254

WILFRED0 BARAHONA, INDIVIDUALLY AND AS NEXT FRIEND OF FABIAN ALEXANDER BARAHONA, A MINOR;	§	IN THE DISTRICT COURT OF
vs.	§	WALKER COUNTY, TEXAS
JERROLD WILLIAM YOUNG, LEVINGE TRANSPORTATION, LLC, TOYOTA MOTOR CORPORATION, & TOYOTA MOTOR SALES, U.S.A., INC.	§	12th JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO TOYOTA MOTOR CORPORATION'S AND TOYOTA MOTOR SALES, U.S.A., INC.'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Wilfredo Barahona, individually and as next friend of Alexander Barahona, a minor, ("Barahona") respectfully submits this Response to Toyota Motor Corporation's and Toyota Motor Sales, U.S.A., Inc.'s (collectively "Toyota's") Motion for Summary Judgment.

The Court should deny Toyota's motion. Initially, Toyota argues that the car involved in the collision at issue here has been spoliated, such that Barahona cannot now prove his claims. In reality, the car has not been spoliated. Rather, Toyota has simply elected to ignore the plentiful physical evidence that exists in the car and on which Barahona's design defect expert bases his opinions of defectiveness. This evidence is more than sufficient to meet the low "scintilla" threshold, requiring denial of Toyota's motion.

Second, Toyota argues that Barahona lacks evidence to rebut the presumption embodied in TEX. CIV. PRAC & REM. CODE § 82.008. However, the federal standard Toyota invokes, which regulates forcible release of seatback

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 trunk's 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.

II. 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 comer, 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 paw1 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.[1] 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. Tovota'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.

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[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

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[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 Corp., 589* F. Supp. 657 (S.D. Miss. 1984) (allegedly defective master cylinder not retained, totally unavailable to defense); *Caseffa* v. U.S. 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 (111. 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 446-47.

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* Ca., 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 cl-early 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. Tovota is Not Entitled to Summarv Tudament 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 ("FMVSS") 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 negligencemaybe 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* Coup., 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 it 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 924-25 (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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No. 06-0449

IN THE
SUPREME COURT OF TEXAS

IN RE TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR SALES, U.S.A., INC.,

Relators.

Response To Petition For Writ Of Mandamus And Relators' Emergency Motion For Temporary 'Relief

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

RULES

RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF

INTRODUCTION

Real Parties in Interest/ Plaintiffs Yolanda Barahona and Wilfredo Barahona, individually and as next friends of Mark Anthony Barahona and Fabian Alexander Barahona, and Manuel Rivera and Norma Castro, individually and as next friends of Samuel Rivera (collectively "the Barahonas") respectfully file this Response to the Petition for Writ of Mandamus and Emergency Motion for Temporary Relief filed by Relators/ Defendants Toyota Motor Corporation and Toyota Motor Sales U.S.A., Inc. (collectively "Toyota").

The Court should deny Toyota's petition and motion for temporary relief. The trial court did not abuse the wide discretion it enjoys to manage discovery by ordering a deposition on written questions, rather than an oral deposition, of two minors involved in the accident at issue in this case. The trial court was rightly concerned with the effect of oral depositions on the boys, who not surprisingly are traumatized by the accident in which their brother and cousin was left a quadriplegic, and testimony from a psychiatrist supported the trial court's conclusion that a deposition on written questions would be far better for the boys while enabling Toyota to obtain necessary discovery. The trial court's conclusion is especially sound in light of the fact that there is ample other evidence in the case bearing on the subject Toyota wants to explore in the depositions – whether the

primary victim of the accident was properly wearing his seatbelt – including testimony from other witnesses, expert testimony, an interrogatory 'answer from one of the boys to be deposed, and whatever testimony the boys give in their deposition on written questions. Moreover, Toyota has an adequate appellate remedy even if the trial court's conclusion is deemed to be incorrect.

Toyota also seeks mandamus and emergency relief because the psychiatrist who testified at the hearing at which the trial court denied Toyota's request for an oral deposition was not designated by the Barahonas in advance. But Tex. R. Civ. P. 193.6 does not require advance designation for ancillary discovery matters, and the Barahonas had good cause for non-designation, namely, the fact that only two and a half weeks elapsed between Toyota's service of deposition notices and the trial court's hearing – a compressed schedule required by the then-imminent trial setting. Moreover, Toyota was not prejudiced by the non-designation because it was able to and did cross-examine the psychiatrist at length during the discovery hearing.

Finally, Toyota seeks mandamus to pursue discovery from the psychiatrist that the trial court denied when the Barahonas asserted the medical provider privilege. In light of the additional time afforded by trial court's decision to continue the trial in this matter for an additional thirty days, as requested by Toyota, the Barahonas do not oppose this additional discovery and will waive the privilege.

STATEMENT OF FACTS

This lawsuit was instituted in 2003, and Toyota was added as a defendant a year ago. See Petition at 1. Toyota makes much of the fact that it was not originally included in the suit, claiming the Barahonas "belatedly" sued it, amended their complaint twice to refine their theories of defect, and in the process "changed their litigation strategy." See id. 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 it was added after the statute of limitations or in violation of applicable scheduling deadlines.

Despite being sued in June 2005, and despite now claiming that facts known by Mark Anthony Barahona ("Tony") and Samuel Rivera ("Samuel") are critical to its defense, Toyota did nothing to obtain testimony from the boys for several months, until February 2006. See id. at 2.[1] For their part, the Barahonas have made clear they will not call the boys as witnesses at trial. See Transcript of Hearing, March 13, 2006, Relators' Appendix, Tab J, at 20-21 ("We've also agreed that the plaintiffs are agreeing not to call Sam Rivera and Anthony Barahona as witnesses").

Toyota claims that the Barahonas' counsel represented at a March 13, 2006 hearing that the boys did not remember anything about the

[1] Toyota did not move to compel deposition testimony from the boys until February 28, 2006. See Toyota Motion to Compel Depositions, Relators' Appendix, Tab H. In that motion, Toyota states that it "requested" the depositions beforehand. See *id.* at 1-2.

accident, leading Toyota to forgo its request for deposition testimony in lieu of interrogatories; but the transcript of that hearing does not reflect that the Barahonas' counsel made such a representation. See *id.* at 3 n. 30 (citing Transcript of Hearing, March 13, 2006, Relators' Appendix, Tab J, at 20-21). In any event, Toyota served interrogatories seeking answers from Tony and ignored Samuel, despite now claiming his testimony is also essential. See *id.* In his interrogatory answers, Tony was asked to "state [his] recollection of the events that occurred on September 21, 2003," to which he replied:

> We went to my dad's office. Then we were going to my grandmothers. I was in the back seat on the passenger side, Alex was in the middle seat and Sam was in the front seat. Mother told us to put on our seat belts. We did. The last time I saw Alex he was in his seat belt with the shoulder strap across his chest. He was asleep. I went to sleep. I didn't notice anything else about how he was' sitting and I don't remember anything else about the accident.

Answers to First set of Interrogatories and Request for Admissions of Yolanda Barahona, as Next Friend of Mark Anthony Barahona, Relators' Appendix, Tab K, at 3.

Following its receipt of Tony's interrogatory answers, Toyota claims it wanted to "further explore" the subject in depositions. Consequently, it noticed Tony's and Samuel's depositions on May 4, 2006, see Petition at 3, which the Barahonas moved to quash because Toyota had done nothing to confer with them regarding the place and time of the depositions. See

Plaintiffs' Motion to Quash, Relators' Appendix, Tab N. The matter was taken up at a hearing on May 22, 2006.

At the May 22 hearing, the Court heard testimony from Dr. Sherry Gaines, a psychiatrist whose practice includes treatment of children and 'adolescents, and whose work includes heading the Huntsville hospital's resident treatment center for children and adolescents with emotional disturbances. See Transcript of Hearing, May 22, 2006, Relators' 'Appendix, Tab T, at 4-5. Dr. Gaines first examined Will and Yolanda Barahona, the parents of Tony and Alex, the boy rendered a quadriplegic: "I interviewed them the longest because I felt like they had information so probably I was with them for about two hours." *Id.* at **18.** She then examined Tony and Samuel. See id. Regarding Tony, she testified:

> I diagnosed Tony with post-traumatic stress disorder. The three main criteria for post-traumatic stress disorder are, well, the main criteria is that you have to have been in a trauma that was life threatening, potentially, or very traumatic in another way, and then the three criteria beyond that are re-experiencing that trauma, avoidance and increased arousal and Tony meets [the] criteria for that diagnosis, so re-experiencing is a little bit hard for Tony because he's so shut down and doesn't really verbalize or show a lot in his play but he does show in his behavior the re-experiencing. The big one with Tony is the avoidance. He makes efforts to avoid thoughts, feelings or conversations associated with the trauma. This was apparent on my interview with him as well as the information that I got from his parents. Another area of avoidance is decreased interest and participation. He used to be real involved in extra curricular activities and sports and he no Ionger does that sort of thing and another role, [a] big one for Tony, is his restricted range of affect. He was very flat and doesn't show a lot of emotional expression throughout his interview. His mom indicates that he's not as intimate with her and the rest of the family. And another one for Tony is a

> sense of foreshortened future which is indicative of post traumatic stress disorder. He couldn't describe a family or a career which most 12 years old should be able to do. He couldn't even describe what he would like his school to be like for him so he had that criteria and the last criteria of increased arousal Tony displayed was sleep difficulty, decreased concentration, and his parents said irritability and anger – he slammed the doors and punched the walls and acted in a different way after the accident.

Id. at 7-8. Regarding Samuel, she testified:

> I also diagnosed Sammy with post-traumatic stress disorder. He's very verbal and was able to describe the re-experiencing well, and Yolanda and Will were able to describe that on Sammy's part. He has recurrent and intrusive recollections of the accident. He drives by the accident site frequently as a passenger – driving by frequently and has distress while driving by the accident site. He describes some physiological reactivity like if he sees a passenger in a car and someone gets close to their vehicle, he'll kind of involuntarily slam his foot on the floorboard as if to slam on an imaginary brake. He also has avoidance and decreased interest in activities. He's in a club at school. but the club leader told Mrs. Barahona that he doesn't participate in any after-school activities or weekend activities because he said he needs to rush home and take care of Alex, and then the last criteria of increased arousal, Sammy has that with sleep disturbance and hypervigilance. He really has that in his care of Alex. He knows Alex's care better than the nurses. He knows how to suction him and catheterize him and he feels responsible and a caregiver for Alex.

Id. at 9-10.

Dr. Gaines testified that subjecting the boys to oral depositions would be harmful for the fairly obvious reasons that it would force them to relive an extremely traumatic experience, during which their brother and cousin was' rendered a quadriplegic and other members of the family were seriously injured, and deepen their impressions of survivor guilt. See *id.* at 10-11. She also questioned the reliability of any testimony they might

give, and explained that she had not questioned them much about what they remembered from the accidents:

> Q: When you met with Mark Anthony Barahona or Samuel Rivera, did you ask them of their remembrance of the accident and the events leading up to the accident:
>
> A: A little bit. I didn't pry too much because I thought that would be detrimental, number one reason; and number two, I didn't really think that given the fact that this was three years ago and given their ages and given all of the things that they have been through since then, I didn't really think the information would be valuable. Children have a problem remembering whether they have seen something or heard something, the literature calls it a source attribution error and I thought that would be a big problem with them knowing what they had seen and what they had heard and also the trauma can affect memory so I didn't think I'd get a lot of valuable memory from them anyway.

Id. at 25-26. Later in the hearing, she again testified about the dubious reliability of any testimony from the boys:

> I think there are a lot of factors that affect the reliability and in a negative way. The number one thing is just the huge trauma, whether they might have lost consciousness at the time of the accident, and the other is the age at the time of the accident and their ages now. The other is the time frame, the three years, and all the many different stories that they have heard since then. I think they would have a hard time distinguishing in what they heard or experienced. I think those are big factors that make their memories less reliable.

Id. at *32-33.*

Finally, Dr. Gaines also testified that the procedure of depositions on written questions would be less detrimental to the boys:

> A. We just talked about the diagnosis and how much distress they are already in, and I feel like a setting like that would increase those symptoms, especially the

survivor guilt which they really both seem to have and the responsibility even though it's an illogical responsibility that they have, that that would be detrimental and also to have to relive the details of that accident would be detrimental for them.

Q: Dr. Gaines I want to talk about some alternative methods of Toyota getting the information that they apparently need in this case. Do you believe that some type of a less confrontational method of obtaining information other than a direct deposition should be looked at if needed?

A: If needed. I was also really careful in interviewing them on just my interview because I knew how affected they had been by the trauma. So I approached questions very gently in talking with them and kind of knew where to draw the line. I'm even worried about asking them too many questions myself even though I have training in that area. So I think it would be fragile – it would be difficult.

Q: Do you believe that specific written questions sent to them to be answered in private with their attorneys and parents there – you don't have the lights and cameras and attorneys present – would be the best method for Toyota to use if they need information from these two little kids?

A: It would certainly be better than a formal hearing with the lights and the oral questions.

Id. at 10-11; see also id. at 22-23 (referring to "whole atmosphere [of a deposition], like the attitude of the interviewer and how the questions are asked and what questions are asked rather than where you are"), 25, 27-28.

Following Dr. Gaines' testimony, the court held that the boys could be deposed by means of written questions, rather than orally. See id. at 33.[2]

[2] Comments made by the parties and the trial court at the May 22 hearing may have given rise to uncertainty as to how the depositions on written questions should proceed,

Toyota filed a petition for mandamus with the Tenth Court of Appeals, but that court denied the petition. See Petition at xv-xvi. Toyota repeatedly cites Judge Gray's "spirited dissent" from the Court's denial, see id. at xvi and Relators' Emergency Motion for Temporary Relief at 3-4, but that opinion that it is mainly directed to Toyota's complaint that the trial court denied its request for a thirty day continuance. See Relators' Motion, Exhibit 1. Because the trial court has now granted Toyota's wish for a thirty day delay in the trial, the issue of a continuance is not before this Court.

ARGUMENT

I. Standards for Mandamus Relief

Repeated decisions of this Court have made clear that mandamus is an "extraordinary remedy," to be used sparingly, in cases of "manifest and urgent necessity" to correct clear abuses of discretion by the trial court. See *Walker v. Packer, 827* S.W.2d 833, 839-40 (Tex. 1992); *accord Able Supply Co.* v. *Moye, 898* S.W.2d 766,768 **(Tex.** 1995). Mandamus will not issue if the facts underlying the petition are disputed. *See Dow Chem. Co. v. Garcia, 909* S.W.2d 503,505 (Tex. 1995).

A trial court does not abuse its discretion unless it "'reaches a decision so arbitrary and unreasonable as to amount to a- clear and prejudicial error of law."' *Walker,* 827 S.W.2d at 839 (quoting *Johnson v.*

see, e.g., Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 37, but the Barahonas assume they will occur according to the procedure set forth in Tex. R. Civ. P. 200.1 - 200.4.

Fourth Court of *Appeals,* 700 S.W.2d 916, 917 (Tex. 1985)). Importantly, this Court may not substitute its judgment for that exercised by the trial court. See id. (quoting *Flores v. Fourth Court of Appeals, 777* S.W.2d 38, 41-42 (Tex. 1989). "The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable." Id. at 840 (citations omitted); *accord Liberty Nat'l Fire Ins. Co. v. Akin, 927* S.W.2d 627,629 (Tex. 1996). In general, questions involving whether information is discoverable, and how discovery should be managed, fall well within the broad discretion of the trial court. See In *re* CSX Corp., 124 S.W.3d 149,152 (Tex. *2003); Flores v. Fourth Court of Appeals, 777* S.W.2d 38, 41-42 (Tex. 1989). "[T]he system cannot afford immediate review of every discovery order in general." *Walker, 827* S.W.2d at 842.

Additionally, mandamus will not issue where the relator has an adequate remedy at law. CSX, 124 S.W.3d at 152. "Without this limitation, appellate courts would 'embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts,' and mandamus 'would soon cease to be an extraordinary writ.'" *Walker,* 827 S.W.2d at 842 (quoting *Braden v. Downey,* 811 S.W.2d *922, 928* (Tex. 1991). In *Walker,* this Court posited three situations where an appellate remedy might be inadequate: (1) where the trial court's discovery ruling could not be cured, as when privilege information would be disclosed; (2) where the complaining "party's ability

to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error;" or (3) where the discovery cannot be made part of the appellate record, thus effectively preventing appellate review. 827 S.W.2d at 843-44.

II. Neither Mandamus Nor Temporary Relief Should Be Ordered With Regard to The Requested Oral Depositions

A. The Trial Court Did Not Abuse Its Discretion in Ordering: Depositions on Written Ouestions

The trial court was perfectly within its discretion to balance the interests of two minors understandably traumatized by a severe accident during which another child in the family was nearly killed and was left a quadriplegic, and Toyota's interest in pursuing additional discovery about the circumstances of the accident.

First, it is worth noting that Toyota already has voluminous information about the facts Tony and Samuel would be questioned about, namely, how Alex was sitting and wearing his seatbelt immediately before the accident. Toyota asserts that the boys have "unique knowledge" about the events in question, Petition at 6, but that is simply untrue. Yolanda Barahona and two third party witnesses who reached the car immediately after the accident, Wiana Smith and Brian Hall, have been deposed'on the subject. See Real Parties in Interest Appendix, Tabs 1-3. In, addition, expert witnesses from both sides have examined the car and seatbelts and rendered opinions about who was belted in the back seat and how they were wearing their belts. See ***id.,*** Tabs 4-6.

More importantly, Toyota has already obtained discovery on these questions, and will obtain more, from Tony *and Samuel.* First, Toyota served interrogatories on Tony. Although it now asserts that Samuel's knowledge is critical to the case, Toyota did not propound interrogatories to him. Tony's interrogatory answers addressed the question of how Alex was belted; thus Toyota already knows what Tony knows on that subject. Now, Toyota will be able to depose Tony and Alex on written questions. The Court did not foreclose Toyota from deposing the boys, it only exercised its basic power to supervise discovery to regulate the manner in which the deposition will occur. Thus, the question raised by Toyota's petition is not whether Toyota's need' for information possessed by the boys outweighs their interest in mental well-being; Toyota already has that information and will get more through the deposition on written questions. The question here is only whether Toyota's interest in obtaining whatever additional information, if any, may be obtained in an oral deposition versus a written one outweighs the boys' interests.

Toyota has done nothing at all to establish that this additional quantum of information, if any, might be significant. It simply asserts, as an *ipse dixit,* that "[d]epositions on written questions do not provide Toyota with the opportunity to fully cross examine Tony and Samuel," Petition at 7, but even this is not fully correct, since the trial judge indicated he would probably permit follow up questioning from Toyota. See Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T at *37*

("...and then I suspect what I'll then allow is after they have been answered and sent back to [Toyota's counsel] and so forth, then assuming they are going to have some follow up questions, they can submit those to me for ruling as to whether they can ask them").

Second, while Toyota understandably focuses its petition on its supposed need for the discovery, its failure to address the effect of oral depositions on the boys is striking: It is to be expected that Tony and Samuel would be deeply and seriously affected by the collision wherein their brother and cousin was horribly injured, and other family members suffered lesser but also serious harm. The testimony of Dr. Gaines merely substantiates what would otherwise be a matter of common sense: (1) that reliving the experience of the accident in the form of answering presumably adversarial questions from unfamiliar lawyers in the setting of an oral deposition, subject to videotaping, would be a traumatic and harmful experience; and (2) that there are reasons to doubt the reliability of their testimony in any case.

Toyota asserts cavalierly that "the very fact of [the psychiatrist's] interviews shows that the boys can be questioned about the accident without traumatizing them," Petition at 8, but this blithely assumes that cross examination by a seasoned litigator intent on ferreting out evidence supporting his client's case in a videotaped deposition is indistinguishable from an interview conducted by a specially trained, non-adversarial child psychiatrist. Indeed, Dr. Gaines testified that she herself treaded very

gingerly around the subject of the accident – treatment it is reasonable to expect Toyota's counsel will have little incentive to emulate. By the same token, Toyota borders on the offensive by suggesting that the situations of children exposed to the horrifying events of the Barahonas' accident can be analogized to the average adult deponent who may find having to testify in a standard civil case "annoying." Petition at 8 (quoting *In re Amaya,* 34 S.W.3d at 357).

The trial court had ample discretion to limit discovery that presented an undue burden, harassment or an invasion of personal rights. See Tex. R. Civ. P. 192.6(b). And courts have long recognized that those suffering from the mental trauma of an injury or illness, especially minors, are due special solicitation. In *Ma yland v. Craig, 497* U.S. 836 (1990), the Supreme Court recognized that the state's substantial interest in protecting minors suffering from the mental trauma of abuse justified restricting a criminal defendant's Sixth Amendment right to confront his accuser. Thus, the Court approved special and limiting procedures for cross examining minors that balanced their interest in minimizing further damage with the defendant's interest in eliciting information. See *id.* at 851-57. It can hardly be argued that Toyota's interests in pursuing more civil discovery than the substantial amount it already has on the seatbelt issue exceeds the interests of a criminal defendant on trial for his liberty.

In civil cases, too, trial judges have limited parties' deposition rights to protect fragile witnesses. For example, in *Schorr* v. *Briarwood Estates Ltd.*

Partnership, 178 F.R.D. 488 (N.D. Ohio 1998), the court circumscribed the subjects. to be covered at the plaintiff's deposition in light of her post-traumatic stress disorder, the same condition experienced by the boys here. The court held that defendants could not depose the plaintiff about issues relating to the damages she sought or her PTSD, and limited the deposition in various other ways, such as dictating its time and place and ordering it to be overseen by a magistrate judge. See id. at 492. In *Frideres* v. *Schiltz*, 150 F.R.D. 153 (S.D. Iowa 1993), the court prohibited the deposition of a witness who suffered from gastrointestinal conditions that could be exacerbated by the stress of a deposition, resulting in serious injury or death. *See id.* at *157*. .In *Medlin* v. *Andrew*, 113 F.R.D. 650 (M.D.N.C. 1987), the court granted a thirty day stay of the plaintiff's deposition, on the advice of her psychiatrist who indicated that conducting the deposition would exacerbate the plaintiff's condition, and gave the plaintiff leave to seek a longer or permanent stay if substantiated by her doctors. See *id.* at 653. In *In re McCorhill Pub., Inc.*, 91 B.R. 223 (S.D.N.Y., Bkrtcy. 1988), the court quashed the deposition of a creditor because his medical condition cast doubt on the reliability of any testimony he could give, and because the court found that a deposition could threaten his health or even survival. Id. at 224-25.

In this case, the trial court did not foreclose Toyota's ability-to extract information from the boys. It merely limited the way in which the deposition will be conducted by restricting it to written questions, acting

on the testimony of a psychiatrist who testified that the setting of a deposition on written questions would be far more accommodating to their conditions. Of course, were this Court making the decision in the first instance, it might have balanced the factors differently and ordered oral depositions, instituted other safeguards or not, or prohibited any form of deposition altogether. Any of these might be reasonable decisions given the factors in play. But this Court should avoid second-guessing or substituting its judgment for that of the trial court when confronting discretionary questions of discovery management. ***See Walker, 827*** S.W.2d at 839. Otherwise, the trial court's discretion to oversee discovery would be denuded of its authority, and mandamus will come to resemble ordinary de *novo* appellate review. The record reflects more than adequate evidence supporting the trial court's decision.

B. Toyota Has An Adequate Appellate Remedy

Even if the trial court erred in ordering the deposition on written questions, Toyota has an adequate appellate remedy. None of the conditions supporting mandamus of discovery orders discussed in ***Walker*** is present here.

First, Toyota relies on the language in ***Walker*** suggesting that mandamus may be available to, correct erroneous discovery rulings that prevent a party from "developing the merits of its case." Petition at 13. But the bar erected in ***Walker*** is high: mandamus may be available where a "party's ability to present a viable claim or defense at trial ***is vitiated or***

severely *compromised* by the trial court's discovery error." *Walker, 827* S.W.2d -at 843 (emphasis added). Here, as discussed above, Toyota has ample other discovery from multiple sources – including, most importantly, Tony and Samuel – on the question of how Alex was wearing his seatbelt. Moreover, the issue of seatbelt use, while important to the case, is only one of several subsidiary factual issues relating to liability. Toyota offers no evidence or argument whatsoever establishing that – even if Tony and Samuel suddenly contradict Tony's interrogatory answer, and even if the jury then disregards other evidence and accepts its theory of how Alex was wearing his seatbelt – Alex would not have sustained injuries anyway or that the car would not be found to have been defectively designed.

Toyota also claims that oral depositions must go forward in order to preserve the appellate record, citing *Tom L. Scott, Inc. v. McIlhany, 798* S.W.2d 556, 558 (Tex. 1990). See Petition at 14: But in Tom L. Scott, the question involved depositions of experts – not minors who would be harmed by the very act of undergoing the deposition. Here, the oral depositions themselves threaten damage. In these circumstances, to order them to go ahead anyway in the name of improving appellate review does not simply preserve the *status* quo for later consideration, it would vitiate the reason for limiting the discovery in the first place, akin to ordering the production of privileged documents. The damage, in that event, could not be undone. Moreover, the Court in *Walker* cautioned that, before granting

a mandamus to preserve an appellate record, the court must consider "the presence or lack of other discovery." 827 S.W.2d at 844. Here, there is ample other discovery bearing on the question at issue. An appellate court will also have testimony from Tony and Alex in the form of interrogatory answers and depositions on written questions. In light of this other discovery, it will hardly be ***"impossible*** to determine on appeal if the denial [was] harmful error." Tom *L.* Scott, 798 S.W.2d at 558 (emphasis added).

III. Prior Non-Designation of Dr. Gaines Does Not Warrant Mandamus or Temporary Relief

Toyota also complains about the trial court's allowing Dr. Gaines to testify without prior designation. See Petition at 9-10. The Tenth Court of Appeals properly rejected Toyota's position in this regard. Rule 196.3 speaks of the "effect *on* trial" of non-designation. The trial court correctly noted that the inquiry regarding the boys' depositions was "an ancillary matter having to do with a specific motion to quash [the] deposition – notice of deposition, not the case, in chief... Were she to testify at trial on some issue, obviously that would be a totally different matter." Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab **T,** at ***12.*** In Monsanto Co. v. ***Davis,*** 25 S.W.3d 773 (Tex. App. – Waco 2000), on which the Tenth Court of Appeals correctly relied in this case, the court held that Rule 193.6 is not applicable to proceedings other than trials, such as class certification hearings. See ***id.*** at 785. Thus, the triaf court did not err in denying Toyota's request to exclude Dr. Gaines' testimony on this ground.

Moreover, Rule 193.6 permits testimony with&t prior designation if the record supports good cause for, or lack of unfair prejudice from, the failure to designate. Both are present here. The trial court noted that Toyota was notified of Dr. Gaines "as soon as practical or practicable." Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 12. Having earlier agreed to pursue discovery from Tony and Samuels by means of interrogatories, Toyota did not change course and revive its request to seek oral depositions until noticing them on May 4, 2006. See Petition at 3, Relators' Appendix at Tabs L and M. Dr. Gaines was retained and saw the Barahonas thereafter. The court held its hearing on the matter on May 22. Given this compressed schedule, a result of the impending trial then scheduled for June 12, 2006, the trial court did not abuse its discretion in holding that the Barahonas had good cause for not designating Dr. Gaines. In addition, the record reflects that Toyota was not prejudiced by the lack of prior notice. Toyota's counsel had ample opportunity to cross examine Dr. Gaines at the May 22 hearing and did so at length. See Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 14-28. Any additional benefit Toyota might have gained from learning her views earlier would have been de *minimus,* especially given the lack of great complexity in her testimony. Toyota offers no reason to believe that some prior discovery from Dr. Gaines would have resulted in a different decision from the trial court.

In sum, the fact that Dr. Gaines was not disclosed to Toyota earlier does not justify granting the extraordinary temporary or permanent relief Toyota seeks.

III. Discovery from Dr. Gaines

Toyota also argues that it should be entitled to pursue discovery from Dr. Gaines, including her notes and recollections of her interviews with the family. See Petition at 10-13. In light of the postponement of the trial in this matter for thirty days, as Toyota requested, the Barahonas will not oppose this additional discovery.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should deny Toyota's petition and motion for temporary relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the following attorneys on June 5, 2006:

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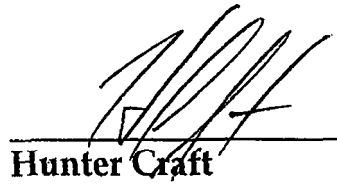

Hunter Craft

CAUSE NO. 03-22,254

WILFRED0 BARAHONA, INDIVIDUALLY AND AS NEXT FRIEND OF FABIAN ALEXANDER BARAHONA, A MINOR;	§	IN THE DISTRICT COURT OF
VS.	§	WALKER COUNTY, TEXAS
JERROLD WILLIAM YOUNG, LEVINGE TRANSPORTATION, LLC, TOYOTA MOTOR CORPORATION, & TOYOTA MOTOR SALES, U.S.A., INC.	§	12th JUDICIAL DISTRICT

AFFIDAVIT

STATE OF TEXAS §
§
HARRIS COUNTY §

Before me, the undersigned notary, on this day personally appeared J. Hunter Craft, a person whose identity is known to me. After I administered the oath to him, upon his oath, he testified as follows:

1. "My name is J. Hunter Craft. I am a duly licensed attorney, and I represent Real Parties in Interest Wilfredo Barahona, Individually, and as Next Friend of Fabian Alexander Barahona, a minor, in this lawsuit. I am fully competent to make this affidavit;

2. "I have read this Response to Petition For Writ of Mandamus And Relators' Emergency Motion For Temporary Relief, and the facts stated in it are within my personal knowledge and are true and correct."

FURTHER AFFIANT SAYETH NOT

J. Hunter Craft

Sworn to and Subscribed before me by J. Hunter Craft on June 4, 2006.

MARIA G. SALAS
MY COMMISSION EXPIRES
March 16, 2009

Notary Public in and for the State of Texas

MARTIN J. SIEGEL

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).

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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.

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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.

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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

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

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