IN THE SUPREME COURT OF TEXAS

NO. 01-0030

NISSAN MOTOR COMPANY LTD. A/K/A NISSAN MOTOR COMPANY & NISSAN MOTOR CORPORATION IN U.S.A., PETITIONERS

v.

MARIAN ARMSTRONG, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued March 3, 2004

JUSTICE O'NEILL, concurring.

I agree with the Court that judges must be especially vigilant in assuring that evidence of other incidents involving a product to show a specific product defect must be sufficiently similar to be admissible. Other-incidents evidence like much of that presented in this case poses a significant risk of confusing the jury and creating prejudice, while its probative value is relatively low. Accordingly, a high degree of similarity to the specific defect in issue must be shown to meet the threshold for admissibility. I also agree with the Court that the number of other incidents improperly admitted in this case to show that the plaintiff's vehicle was defective as alleged resulted in reversible error. I write separately, though, out of concern that the breadth of the Court's opinion could cause the trial court to perceive that its hands are tied upon retrial.

The Court categorically deems much of the plaintiffs' evidence inadmissible, when such evidence might prove to be admissible for other purposes as the retrial unfolds. Nissan could, for example, present evidence that opens the door to other-incidents evidence. And some of the evidence that the Court dismisses out of hand could prove to be the proper subject of rebuttal, depending upon how the case develops. We simply will not know until the case is retried, and the experienced trial judge in this case should be free to re-evaluate such evidence as it is presented under the parameters the Court describes.

I am also concerned with the Court's view that the "sheer number" of other incidents could never raise an inference that unintended acceleration was caused by something other than driver error. ___ S.W.3d at ___. If a particular vehicle model had experienced, say, thousands of unintended-acceleration incidents, while other comparable models had experienced only two, an inference might be raised that driver error was not the cause.

In sum, I agree with the similarity standard the Court sets and its conclusion that harmful error occurred in this case. But for the foregoing reasons I cannot fully join the Court's opinion, though I concur in its judgment.

Harriet O'Neill
Justice

OPINION DELIVERED: August 27, 2004.