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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| HILARIO CRUZ et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>SOLOMON MATHENGE,<br><br>Defendant, Cross-complainant and Appellant;<br><br>NISSAN NORTH AMERICA, INC.,<br><br>Defendant, Cross-defendant and Appellant. | B286067<br>(Los Angeles County Super. Ct. Nos. BC493949, BC529912, BC577815) |

APPEAL from judgment of the Superior Court of Los Angeles County, Randolph M. Hammock, Judge. Affirmed.

Kiesel Law and Paul R. Kiesel; The Ehrlich Law Firm and Jeffrey I. Ehrlich; Cory Watson, F. Jerome Tapley and Hirlye R. "Ryan" Lutz, III, for Plaintiffs and Appellants Hilario Cruz and Araceli Mendez.

Kiesel Law and Paul R. Kiesel; The Ehrlich Law Firm and Jeffrey I. Ehrlich; Carter Wolden Curtis and Kirk J. Wolden, for Defendant, Cross-complainant and Appellant Solomon Mathenge.

Bowman and Brooke, Mark V. Berry, Jordan S. Tabak; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Bradley J. Hamburger, Lauren M. Blas, for Defendant, Cross-defendant and Appellant Nissan North America, Inc.

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Defendant, cross-defendant, and appellant Nissan North America, Inc., appeals from a judgment following a jury trial in favor of plaintiffs, and appellants Hilario Cruz and Araceli Mendez (plaintiffs), and defendant, cross-complainant, and appellant Solomon Mathenge in this action for wrongful death and personal injury arising from an automobile design defect. On appeal, Nissan contends: (1) the trial court abused its discretion by admitting evidence of other incidents; (2) expert testimony was required to establish causation; (3) there was no substantial evidence of causation; (4) there was no substantial evidence to support finding Mathenge's negligence did not cause harm to the plaintiffs; (5) Mathenge's claims were barred by the statute

of limitations; and (6) the plaintiffs' claim for failure to recall the vehicle was preempted by federal law.

We conclude the trial court did not abuse its discretion by allowing evidence of similar incidents. There was substantial evidence to support the jury's findings on causation and the statute of limitations. Nissan did not establish that the claim for failure-to-recall is preempted by federal law.

In their cross-appeal, the plaintiffs contend that the trial court erred by applying a pretrial settlement with another defendant to reduce Nissan's liability. We conclude the trial court did not abuse its discretion by giving credit to Nissan for the amount of the settlement. The judgment is affirmed.[1]

## FACTUAL AND PROCEDURAL HISTORY

### Design

Nissan manufactured the 2004 Infiniti QX56 involved in this case. Continental Automotive Systems, Inc. supplied

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[1] The plaintiffs also contend the collateral source rule permitted them to recover medical bills that were gratuitously forgiven by the hospital. In the event that the judgment was otherwise affirmed, however, the plaintiffs expressly waived this contention. Since we affirm the judgment, we do not address the plaintiffs' contention regarding the collateral source rule.

the components for the braking system in the QX56, as well as for Nissan's Armada and Titan models.

The 2004 Infiniti QX56 has two methods available to supplement braking power: a vacuum booster and a hydraulic pump. The primary method is through the vacuum booster. The brake pedal pushes a lever, which pushes the booster. Using vacuum, the booster increases the force applied to the brake pedal to provide additional power to compress the hydraulic fluid in the brake system. In the event of a loss of vacuum to the brake booster, Nissan's optimized hydraulic braking system (OHB) uses the hydraulic pump to provide brake pressure. When OHB is triggered, the hydraulic pump is the primary source of hydraulic pressure in the system, rather than the force applied to the brake pedal.

The design of a car includes a target "feel" of the brake pedal during normal driving conditions. OHB is an emergency system, so Nissan did not adjust the feel of the pedal during OHB use based on customer perception. When OHB is activated, the driver often hears the "grinding" sound of the hydraulic pump starting. The brake pedal will feel less linear and have a longer pedal stroke, meaning that the driver would push the pedal further than normal. Subjectively, it will feel different from the driver's expectation of the pedal feel under normal conditions.

The delta stroke sensor (DSS) is part of the OHB system. It measures the stroke in the vacuum booster. If the delta stroke sensor detects data that it interprets as a

loss of vacuum through the stroke, or the delta stroke sensor fails, the software sends a fault code to the electronic control unit. The diagnostic trouble code for an issue with the delta stroke sensor is C1179. In vehicles manufactured by other companies using Continental's braking components, a C1179 code triggered a warning light on the dashboard to have the brakes checked. Nissan chose to have a C1179 code activate OHB. The delta stroke sensors in certain Nissan cars, including Mathenge's car, were calibrated to measure from a starting value that was set at the factory. Sensors like this "drift" over time, meaning the "zero" point that the sensor is calibrated to measure from may change over time and start from the wrong point. The drift may cause the sensor to register a false C1179 code.

Nissan received complaints from customers, who described their brake pedals as going to the floor or having very long pedal travel in OHB mode after a C1179 code. Nissan and Continental determined the delta stroke sensor was erroneously detecting a loss of vacuum in some cases and sending false C1179 codes that triggered OHB. Nissan received 37,184 warranty claims related to false C1179 codes that unexpectedly triggered OHB mode, and 4,527 of the customers said their brake pedal went to the floor.

Turning the car off and restarting it temporarily cleared a C1179 code and returned the brakes to normal functioning. Once the sensor began to send false C1179 codes, however, the problem continued to happen until the

sensor was replaced or the calibrating software was reprogrammed.

In 2005, Nissan directed Continental to develop a correction for the delta stroke sensor software. The new software had the delta stroke sensor calibrate itself each time the car was started. Nissan had several choices to address the issue, including a service campaign, a voluntary recall, or a technical service bulletin (TSB). A service campaign addresses customer satisfaction issues by mailing information to all customers of the affected vehicles, typically at no cost to the consumers. A voluntary recall for safety issues informs customers to return their vehicles to their dealerships to have the issue corrected. A TSB is sent to Nissan dealerships, rather than to customers, to update the printed service manual with instructions for repairing a vehicle. Nissan decided the system was operating as it should in OHB mode, so the problem was not a potential safety issue or a defect. Instead of a recall or a service campaign, Nissan issued a TSB to dealers in May 2006, without notifying customers to bring their vehicles to dealerships for repairs.

Nissan's Director of Product Safety from 2003 to 2011, Robert Yakushi, testified that it was not possible for Nissan to make an unsafe design decision. Representatives of the National Highway Traffic Safety Administration (NHTSA) toured automobile manufacturers in Japan. In a meeting with Yakushi in Japan, NHTSA inquired about the TSB that Nissan had issued for the DSS software. Yakushi sent an e-

mail to Nissan employees to be prepared, "NHTSA gave me a heads-up in our meeting with them in Japan and is going to send us something unless we can head them off." NHTSA could have sent an engineering inquiry related to the delta stroke sensor issue. When Yakushi returned to the United States, he provided NHTSA with the information that they had requested about the reason for the TSB. NHTSA took no further action with regard to any further safety issue concerning OHB mode. Yakushi stated that NHTSA did not have a concern about OHB mode and there was no further contact about the issue.

**Vehicle History and Accident**

Shailesh Bhatka purchased the 2004 Infiniti QX56 involved in this case when it was new in 2004. In 2005, the car was hit from behind and pushed into the car ahead of it. The damage was repaired and Bhatka sold the car back to the dealership to purchase a new model in 2006. He never experienced any problems with the brakes.

Jeffrey Rohrer purchased the car in June 2006. He hit a cement wall at under 25 miles per hour and the car was not drivable. His insurance company concluded it was less expensive to total the car than pay to repair it. Rohrer never experienced any brake problems and was never told that the car had a C1179 code.

Mathenge, who was 74 years old, purchased the car for $8,000 in August 2012 at Insurance Automobile Auction

(IAA) in North Hollywood. He had it towed to a body shop that repaired the damage and serviced the car. He received a certificate that the car, including the brakes, had been inspected and was in working condition. The DSS software had not been updated.

At 6:30 a.m. on August 29, 2012, Mathenge left his home in Lawndale to attend another auction at IAA. He did not put on his seatbelt, because he had gained weight and did not like the feel of the seatbelt over his stomach. He drove northbound on Highland Avenue in Hollywood. The speed limit was 35 miles per hour. He testified that he was travelling at about 40 miles per hour, keeping up with the flow of traffic, and plaintiffs' reconstruction expert estimated that his speed was 47 to 48 miles per hour. After he crossed Melrose Avenue, about half a block from Willoughby Avenue, he saw the signal had turned red and cars were stopped ahead of him. He put his foot on the brake pedal to slow down and it did not hold. He pushed the brake pedal to the floor, but the car was not stopping. He started to panic. He pumped the brakes repeatedly and pressed the pedal as far as it would go, but the car kept going.

To avoid colliding with the cars stopped ahead of him, Mathenge changed from the far right lane to the center lane, then to the far left lane, continuing to pump the brake pedal, but the brakes did not work. To avoid the car stopped at the light in front of him, he pulled into the oncoming southbound lanes. He honked his horn to alert that he was in trouble. He did not see a red light on the dashboard, feel any

vibration in the brake pedal, or hear a grinding noise. The light turned green for east-west traffic on Willoughby, and cars driving on Willoughby began to enter the intersection. Mathenge crashed into the side of a van driven by Saida Mendez, who had two of her daughters with her. Mendez and the children died from the collision. Mathenge's body lodged under the dashboard on the passenger side of his car.

Mathenge was taken to a hospital. He had fractured his hip, broken ribs, and suffered head and shoulder injuries in the accident. A Los Angeles Police Department officer who interviewed Mathenge at the hospital that day concluded that he was not intoxicated. Mathenge's blood and urine toxicology screening were negative for alcohol and all drug categories, confirming that he was not impaired at the time of the accident.

Mathenge provided a statement about the accident to the police approximately 4 hours after the collision. The officer wrote that Mathenge was having problems with his brakes around Melrose. He applied the brakes, but the car did not slow down. The car sped up and was going wild. He was driving about 45 miles per hour with light traffic. He kept pressing the brake and it kept going. He honked his horn to let people know that he was out of control and tried to avoid the cars ahead of him. He moved his car to the left. He saw the car in the intersection, but could not remember the impact.

William Arndt, who was an equipment mechanic with the Los Angeles Police Department, inspected the car after

the crash. He checked the NHTSA website, because he knew Mathenge said the brakes failed, but did not find a recall issued for the car. He tested the car's mechanical braking system and found it operational. The brake pads were virtually new and the rotors were in good condition. The vacuum boost was normal and the brake pedal had normal resistance to pressure. He could not push it to the floor.

When Mathenge returned home in late 2012, after three weeks in the hospital, his family members met with him. Mathenge said he pumped the brakes and they did not work. His son Michael Mathai Mathenge (Mathai) went home and conducted research on the internet through the Google search engine for about an hour. He used key words including Infiniti, brakes, recall, and the make and model of the car. He did not find anything about the Infiniti QX56 that connected with the information he had heard from his father. He did not find anything related to brakes and recall. Mathai did not know about the diagnostic code C1179 or the delta stroke sensor. Mathai told his father that he did not find anything on the internet. When Mathenge's daughter Nyawira Juliet Mathenge (Juliet) heard there were no mechanical issues with the QX56's braking system, she accepted the theory that her father must have confused the pedals.

## Legal Proceedings

Cruz, who was the children's father, filed a wrongful death action against Mathenge on October 16, 2012. Mathenge was arrested in February 2013 and charged with vehicular manslaughter. He did not conduct any personal investigation to learn what happened with his brakes, because he had hired an attorney and left his defense to the attorney. On December 10, 2013, Mendez, who was Saida's surviving daughter, also filed an action for wrongful death against Mathenge.

In early December 2014, Juliet learned of a lawsuit against Nissan in which drivers were claiming the same thing her father had said, namely, that they pushed the brakes and the brakes did not work. She went to her father's house and told him about the lawsuit. Mathenge's car was retrieved from storage and a C1179 fault code was found stored in the vehicle's computer.

Juana de la Cruz Bernardino, who was Saida's mother, filed an action against Nissan and Continental on April 6, 2015. Cruz and Mendez amended their complaints to add Nissan and Continental as defendants.

On September 22, 2015, Mathenge filed a cross-complaint against Nissan and Continental for negligence, products liability, implied equitable indemnity, and intentional and negligent emotional distress. The lawsuits were consolidated. Cruz, Mendez, and Bernardino filed a consolidated complaint on January 14, 2016. They alleged

causes of action for products liability and negligence against both Nissan and Continental. They alleged a cause of action for negligence against Mathenge, but later dismissed their claims against him with prejudice. All of Bernardino's claims were voluntarily dismissed before trial. The criminal charges against Mathenge were dismissed in January 2017.

Nissan filed a demurrer to Mathenge's cross-complaint on the ground that his claims were barred by the two-year statute of limitations, which the trial court denied. Nissan filed a motion in limine seeking to exclude evidence of other incidents. The trial court ruled that evidence of other incidents was admissible for the purpose of showing that Nissan was on notice of the alleged defect. Nissan also sought to exclude opinion testimony from the plaintiffs' electrical engineering software expert Ioannis Kanellakopoulos. Plaintiffs stipulated that Kanellakopoulos would not offer an opinion that the C1179 code caused the accident. The trial court ruled that the plaintiffs could not recover as damages the medical expenses charged by the hospital for care rendered to the decedents, because the hospital had written off the charges.

Continental settled the claims against it prior to voir dire in the trial. The settlement amount was not allocated between causes of action or between economic and noneconomic damages.

**Trial**

Opening statements in the trial began on June 26, 2017. The plaintiffs' attorney stated the evidence would show that Nissan knew: (1) the design of the brakes suddenly and unexpectedly changed the way the brakes felt and operated to stop the car, and (2) when the brakes did not respond as expected, drivers panicked and had accidents. Rather than issue a recall, Nissan had provided information to dealers to correct the issue of false codes after drivers brought their cars in for repair. Nissan did not consider the vehicles to be defective, because they were performing as intended.

Nissan's attorney stated that the evidence would show Mathenge was speeding on Highland Avenue at 51 miles per hour when he passed a security camera, became confused and stepped on the gas pedal instead of the brake. He never stepped on his brake pedal after he passed Melrose Avenue. Mathenge testified in preliminary criminal proceedings that the gas pedal or the brakes malfunctioned, and the car began to speed up. An accident reconstruction expert would testify that Mathenge was traveling 72 miles per hour when he hit the van. An accident at 48 miles per hour, which was the speed that the plaintiffs' reconstruction expert estimated, would not have caused the extent of damage to the van.

Nissan argued that if Mathenge was accelerating and never stepped on the brake, OHB mode was irrelevant and unrelated to the accident. The vacuum boost of power

brakes allows the driver to work the brakes without pushing very hard. The power booster in Mathenge's car worked after the accident. The sensor in the power brakes senses a loss of vacuum, and therefore a loss of the power assist to the brakes. It would switch to the backup braking system by turning on the pump for the anti-lock brakes. The sensor was set to be too sensitive. The sensor would give a false positive signal that the vacuum pressure was lost and the vehicle would turn on the anti-lock brakes. The pedal would go down further, it might vibrate, and there would be a noise in OHB mode. Mathenge did not see any warning lights, feel vibrations or hear a noise. Mathenge did not experience the OHB conditions that other customers experienced. The only similarity was that they all reported it felt like their brake pedal went to the floor. Also, the code that was found could have occurred in the intervening years between the accident and the software review.

The plaintiffs introduced the deposition testimony of seven Nissan customers who reported similar experiences with their cars to Nissan. Rebecca Carnell owned a 2006 Infiniti QX56. In January 2010, her brakes failed. She was traveling about 5 or 10 miles per hour. She attempted to slow down to turn at a green light when the brake pedal went to the floor without activating the brakes and stopping the car. She pumped the brake and still did not have any braking ability. It felt like there was no resistance to the brake pedal. Carnell had to avoid pedestrians and vehicles in the area. She was able to coast to a frontage road and

turn into a parking lot. She never felt any braking response from the brake pedal. The event happened very fast. It was very frightening to be moving in traffic in a vehicle that she could not stop. After the incident, she noticed a brake light on. She told the dealership that she also heard a grinding noise. Carnell wrote a letter to her Infiniti dealer describing the experience. The service log showed that she had a delta sensor C1179 code. Her husband wrote a message to Infiniti about the brake failure and Infiniti responded that his message had been received.

Anthony Anderson owned a 2004 Infiniti QX56. Anderson had C1179 Delta stroke sensor issues three times. Each time, he pumped the brake several times and it felt like there were no brakes. He could feel that there was nothing there and had no response in the pedal. The first time occurred on July 1, 2011. He was driving very slowly, pushed the brake and had no brakes. The pedal went all the way down. It was shocking and he was quite scared. He kept pressing the brake pedal, and the brake pedal went all the way to the floor. He heard a screeching noise and nothing happened. He did not try to use the parking brake, downshift into a lower gear, or steer up a hill to slow it down. He took the car directly to his mechanic, who said there was nothing wrong with it. He took it to the Infiniti dealer and explained the problem. He was told it was fixed. On July 27, 2011, he had no brakes again. He tried to stop and the brakes would not do anything. He pressed the pedal and it went all the way down. He heard a noise like metal

rubbing metal. It was very scary and he was very upset when he returned to the dealership. About a year later, when he was in the car, a light came on the dashboard, and he tried to stop the car and had no brakes. He heard the same grinding noise. They told him it was the same sensor issue and replaced every electrical component. Anderson called Nissan's consumer complaint department and explained the situation. He also sent an e-mail to Infiniti in Japan explaining his experience with brake loss and the dealership's attempt to replace components, which had not solved the problem. The company responded.

Rick Cowart was the general manager at Sewell Infiniti Dallas, and a vice president of Sewell at the time of his deposition. Sewell communicated warranty repairs to Infiniti for approval. In October 2005, he sent an e-mail to Nissan North America about three QX56s purchased from Sewell in 2004 and 2005 that failed to stop when the brakes were applied. The dealership had been unable to duplicate the problem, but Infiniti had said the issue was the brake booster. Cowart added, "We have been fortunate so far. Two of our customers are from small east Texas towns and the brakes failed at low speeds or in areas of low traffic. The third occurred in a Dallas neighborhood and the driver, Ms. [Melora] Leiser, ran 2 or 3 stop signs but did not hit anything or anyone." Infiniti's regional parts and service manager forwarded Cowart's message to other employees, stating that Nissan was aware of a handful of incidents and

Cowart's message elevated the issue to a very high level, because Cowart was on the National Dealer Advisory Board.

Leiser's testimony was also provided. She had owned a 2004 Infiniti QX56. In September 2005, she was driving home at around 20 or 25 miles per hour with her sister-in-law and several of their children in the car. She pushed on the brake as she approached a stop sign and there were no brakes. She pushed again, harder, and her foot went to the floor. She was screaming to her sister-in-law that her brakes were not working and she was very scared. Leiser pumped the brakes and nothing happened. She went through the intersection without stopping and the next intersection as well. She kept pushing the brakes, using all the force she had, and felt like she was standing up. The car eventually stopped before the next stop sign, and she thinks she used the emergency brake to stop it. The service report stated that she also heard a grinding noise when the brakes failed. A C1179 code was found in the car.

Rick Nord owned a 2006 Infiniti QX56. His wife had an incident with the brakes on the car and they took the car to a mechanic for repairs. A C1179 code was found. About a month later, in March 2012, he was driving his sister-in-law down a decline on a local rural road. He went to activate the brakes to slow down to make a turn. The brake went all the way to the floor. In his peripheral vision, he saw lights come on, but he did not read them. It was like the experience that his wife had described, although his wife did not see any lights. It was shocking for him. He was extremely alarmed

and his sister-in-law was scared too. He had trained for brake lock and evasive maneuvers in connection with his job, but he was not prepared. He pushed the brakes very hard, as if through the floorboard, but it was not productive at all to slow the car. He had no brakes, the brakes did not perform at all, and he could not stop. He felt a grinding sensation, but the car did not slow. He pumped the brakes, pushing really hard, but there was no response. He was fortunate to be approaching an incline. He used his left foot to activate the emergency brake and turned the wheel to direct the car uphill, which stopped the car. The lights were still on, saying check engine, VDC and ABS. He took the car to the dealership. The service report said a C1179 code was found and recommended complete replacement of the brake booster. He paid $1,099 for the repair.

Jon Rousseaux owned a 2005 Nissan Armada. In June 2011, he was driving around 40 miles per hour when he noticed a brake light come on, a shuddering feeling that indicated something was wrong with the car, a grinding noise, and the brake pedal went down to the floor. The car was not stopping, and he was not sure if he would get it to stop. He finally stopped the car and checked the manual, but there was nothing about the brake pedal. He turned the car off, waited a few minutes, turned it back on and drove a little bit to see if the brakes were working, which they were. He took the car to the dealership. The dealership ran a diagnostic and found a C1179 code. He believed the dealership had resolved the issue.

In September 2011, he experienced a second brake failure as he was driving about 60 or 65 miles per hour on a highway and tried to brake for traffic. The brake light came on, there was a grinding feeling, as if the brakes were grabbing, a grinding noise, and the brake pedal went to the floor. He put the car in neutral and coasted off an exit to an access road. When he came to a stop, he turned the car off and back on again. He was extremely frustrated and concerned, because the car was supposedly fixed. Being on the highway with no braking power at all could have been a bad situation. He took his car to the dealership, which again found a C1179 code stored in the vehicle. The dealership offered to pay for half of the repair as a gesture of goodwill. Rousseaux called Nissan North America Consumer Affairs and reported his experience with the brakes, including the code information. He said the brake failure was a safety issue and the car should be recalled. Rousseaux also filed complaints with the Better Business Bureau and the NHTSA.

Rajesh Surana owned a 2004 Nissan Armada. In January 2011, he was driving at approximately five miles per hour in the parking lot of his daughter's daycare facility and felt the brake pedal go all the way to the floor. He had no stopping power at all. He pressed the pedal all the way to the floor, as far as it would go. He heard a grinding, cranking noise, like something was stuck in the rotor, and the brake pedal vibrated. He saw at least two lights come on the dashboard. After he pressed the pedal for three to five

seconds, he had about ten percent of the normal braking power, which helped him stop on the way to a parking spot. He turned slowly into the parking spot and parked. He took the car to a dealership and explained the issue. The dealership told him that the car had a C1179 code stored in it. He experienced the loss of brakes three or four more times. He called Nissan and reported his experience, including the code. The individual on the telephone told him to take the car back to the dealership and show them that the C1179 code returned. The person also told him that it was the first time that she had ever heard of the issue. The repair estimate was $1,000, so he called Nissan again to try to resolve the issue. The person that he spoke with never called him back and he never heard anything. Surana had the brake booster repaired. He filed complaints with the Better Business Bureau and with a car website.

Brandon Banks owned a 2004 Nissan Titan. In early 2011, he was driving at a slow speed on a private road. When he pushed the brakes, his foot traveled all the way through the zone where he would expect to have braking power, and he had no brake power. He pressed the pedal all the way through until his leg was straight and he could not press it further. He felt vibration in the brake pedal, saw lights on the dashboard, and heard a weird noise. He had no ability to stop the car. He slowed down to the point where he could eventually put the car in park. He turned it off and turned it back on again. The problem did not recur while he was driving. He took it to the service technician at his

dealership. The technician downloaded a C1179 code. The technician said the car was no longer covered by warranty and Banks would have to pay for the repairs. Banks believed the issue warranted a recall. He notified Nissan's corporate office of the problem, but they would not provide any coverage. Banks paid more than $1,000 to have the vacuum booster replaced.

The trial court repeatedly instructed the jury during trial that the evidence from witnesses who experienced brake problems and a C1179 code was admitted for the limited purpose of showing Nissan had notice of these incidents and no other purpose.

Nissan's brake design engineer, Andrew Smith, testified that it was difficult to modulate the brake pedal in OHB mode because of the low-force feedback. As a result of the lower force feedback, the pedal felt "softer" and pedal travel increased.

Plaintiffs' expert Kanellakopoulos described the experience of driving a QX56 in OHB mode. The brake pedal provided almost no counter-pressure or feedback to his foot for the first half of the pedal travel. He heard a screeching or grinding noise, followed by pulsating pedal feedback at the very end of the pedal stroke. The deceleration at the end of the pedal travel was very high, compared to the beginning of the pedal travel. A red light appeared on the dashboard. In every test, he was eventually able to stop the car in OHB mode.

A witness to the accident testified that Mathenge traveled at a steady speed, slightly faster than the normal flow of traffic of around 40 miles per hour. The Infiniti's speed did not seem to change. At the time of the accident, she estimated he was traveling 50 miles per hour.

The plaintiffs' attorney gave closing argument on July 19, 2017. He argued that Nissan knew a design resulting in a sudden, unexpected change in the feel and operation of the brakes was dangerous. They knew that when a driver pressed the brakes and the brake pedal did not feel the way the driver expected, in a sense feeling like there were no brakes and the brake pedal was going all the way to the floor, drivers would panic, react, and people would get hurt. The evidence established that Nissan knew by 2012 that their brake system was causing people to feel as if they had no brakes and panic. They argued that the evidence showed Mathenge panicked. There was no evidence of any benefit from the design, and any benefits did not outweigh the risks. A reasonable manufacturer would have recalled the vehicle.

The plaintiffs' attorney noted that the survivorship claims required some amount of economic damages, so they had calculated the value of the clothes that the children were wearing at the time of their death. Specific amounts were provided for Saida's future financial support of her daughter Araceli and the present value of her household services. The plaintiffs also argued the value for suffering and loss was $77 million per death. The plaintiffs did not argue any apportionment of damages between the claims for design

defect and failure to recall. The plaintiffs simply argued the total amount of their damages.

Mathenge's attorney provided a closing argument as well. He mentioned that Mathenge was not wearing a seatbelt at the time of the collision, and he acknowledged, as Nissan's expert had testified, that Mathenge would not have broken his femur if he had been wearing a seatbelt. He argued that Mathenge still would have had traumatic brain injury and significant injuries to his chest and ribs whether he was wearing a seatbelt or not. There was a stipulation that Mathenge's economic damages were $115,958.32 for medical bills. Mathenge's attorney suggested a fair award for emotional damage would be $1 million per year for 13 years with the brain injury, encompassing the time of the accident through his reasonable life expectancy, and half that amount for his physical limitations.

Nissan's attorney argued that Mathenge was not in OHB mode at the time of the collision. It was physically impossible for the brake pedal to go to the floor. Mathenge was speeding, and he never stepped on the brake pedal. Older drivers make more errors. He stepped on the wrong pedal by mistake and started to panic, and that panic prevented him from figuring out his pedal confusion. There were witnesses who heard the car accelerating. He noted that Mathenge chose to drive 16 miles above the speed limit and argued that Mathenge's decision to speed caused the crash. If Mathenge had been traveling at 35 miles per hour, or 40 miles per hour, the van would have already cleared the

intersection by the time Mathenge went through it. Nissan's expert testimony showed the car was traveling at 72 miles per hour when it hit the van. The brakes were working and Mathenge failed to brake. Even in OHB mode, the brakes work. Customers did not like the feel of OHB mode, but it provided more braking power. The C1179 code may have occurred when one of the earlier owners drove the car, but was likely caused by the crash. He distinguished the evidence from witnesses about other incidents, because none of them said the car sped up. Unlike Mathenge, they saw brake warning lights, felt vibrations, heard grinding noises, and were traveling slowly.

In discussing the verdict form with the jury, Nissan's attorney said that if the driver was stepping on the gas pedal, the braking system was not a factor and there was no causation. He argued that the benefits of the design outweighed the risks, because OHB mode provided additional braking power and feedback, alerting the driver to take the car in for repair. The TSB was a proper method to address the customer complaints, when most customers were never going to experience OHB mode.

He also argued that there was no failure to recall. He noted that NHTSA asked Nissan why there were more warranty claims than normal related to this issue. Nissan provided information and NHTSA took no further action with respect to any safety issue regarding OHB.

With respect to damages, he argued that the plaintiffs inflated their figures so the jury would think of big numbers.

He noted the testimony during trial that if Mathenge had worn his seatbelt, he would not have gotten a closed head injury, in contrast to counsel's closing argument that the jury should award $13 million for an injury that he would not have had if he had worn his seat belt. In connection to the verdict form question on comparative responsibility, allocating fault between Nissan and Mathenge, he argued that the brake system was not a cause. In this collision, the responsibility was 100 percent attributed to Mathenge because of pedal error.

In rebuttal, Mathenge's attorney argued that if the jury felt Mathenge's speed contributed to the collision, they should assign some of the comparative fault to Mathenge. But Nissan was not taking any responsibility. They were unable to produce a safety assessment that they had conducted, because they lost it.

The plaintiffs' attorney argued in rebuttal that Mathenge was not negligent, because he acted with reasonable care in an emergency situation. He had proved that he had a sudden and unexpected emergency, which he did not cause, and he acted as a reasonably careful person would have in similar circumstances. He noted that Mathenge was traveling 51 miles per hour in a 35 mile per hour zone, so if the jury wanted to apportion fault for that, it was understandable. But everything that took place after Mathenge encountered OHB mode was attributable to Nissan.

The jury returned its verdict on July 21, 2017. They made findings on the statute of limitations issues through special interrogatories. The jury found that before April 16, 2013, Hilario Cruz did not know of facts that would have caused a reasonable person to suspect that he suffered harm from a problem in the braking system of Mathenge's 2004 QX56 at the time of the crash. The jury also found that before February 18, 2013, Mathenge did not know of facts that would have caused a reasonable person to suspect that he had suffered harm caused by a problem in the braking system of his 2004 QX56 at the time of the crash.

On the verdict form, the jury found the design of the 2004 Infiniti QX56's braking system was a substantial factor in causing harm to Cruz, Mendez, and Mathenge. The benefits of the design did not outweigh the risks. The next question on the verdict form asked whether Nissan was negligent in failing to recall the 2004 Infiniti QX56. The jury found Nissan was negligent in failing to recall the 2004 Infiniti QX56, and Nissan's negligence in failing to recall the car was a substantial factor in causing harm to Cruz, Mendez, and Mathenge.

The jury considered Mathenge's responsibility next. They found Mathenge was negligent. The jury found, however, that Mathenge's negligence was not a substantial factor in causing harm to Cruz and Mendez. The verdict form stated that if the jury answered that Mathenge was negligent, but not a substantial factor in causing harm to Cruz and Mendez, then they should insert a zero by

Mathenge's name for the percent of responsibility that Mathenge had for Cruz and Mendez's harm.

The jury found Cruz's total economic damages were $40 and his total noneconomic damages for the wrongful death of the children were $14,000,000. Mendez's total economic damages were $431,019, which included future financial support of $109,284, and future household services of $299,735. As her mother's successor-in-interest, her economic damage was $50. Her noneconomic damages were $7,000,000 for the wrongful death of her mother. The jury awarded Mathenge no damages for his past medical expenses. They found his noneconomic damages were $3,500,000, including past noneconomic damages of $2 million and future noneconomic damages of $1,500,000.

The jury found Nissan was 100 percent responsible for the harm to Cruz and Mendez. Mathenge had no responsibility. The verdict form did not present the jury with an option to assign any responsibility for the harm to Continental. It also did not require the jury to allocate the damages attributable to the design defect and the amount attributable to the negligent failure to recall the vehicle. The jury found that Nissan did not engage in the conduct with malice, oppression, or fraud.

The trial court entered judgment on August 3, 2017. Nissan filed motions for judgment notwithstanding the verdict and for a new trial, which the trial court denied. Nissan filed a motion to amend the judgment to provide an offset against the entire verdict based on the amount of the

settlement with Continental. The trial court granted Nissan's motion to reduce its liability based on the amount of the settlement paid by Continental. The judgment was amended to award Mendez a total amount of $6,518,069, to award Cruz a total amount of $12,174,040, and to award Mathenge a total amount of $2,939,000. An amended judgment was filed on October 30, 2017, including an award of costs. Nissan filed a timely notice of appeal. Cruz and Mendez filed a timely cross-appeal.[2]

## DISCUSSION

### Evidence of Other Incidents

Nissan contends the trial court abused its discretion by admitting evidence of third party incidents, because the incidents were not sufficiently similar to the accident in this case. We find no abuse of discretion.

"Evidence of prior accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote. (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 121–122.)" (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 555 (*Elsworth*).) "'Identical conditions will rarely be found. Substantial

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[2] Mathenge filed a notice of appeal as well, but later abandoned the appeal.

similarity is normally sufficient.' [Citation.] This determination 'is primarily the function of the trial judge.' [Citation.]" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404 (*Hasson*).) "When evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: "'all that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation. . . .'" [Citation.]" (*Ibid.*)

"We review a challenge to a trial court's decision to admit or exclude evidence for abuse of discretion. [Citation.] We will not disturb a trial court's exercise of discretion "'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' (*People v. Holford* (2012) 203 Cal.App.4th 155, 168.) 'While the concept "abuse of discretion" is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded "'the bounds of reason, all of the circumstances before it being considered. . . .'" [Citations.]' (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.) 'A decision will not be reversed merely because reasonable people might disagree.' (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573–574.)" (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1000–1001.)

We find no abuse of discretion in the trial court's admission of evidence of other incidents to show Nissan had been alerted to the faulty C1179 issue. The witnesses who

testified about these incidents all stated that their brake pedals went to the floor and they felt as if they could not slow or stop their vehicles as they expected. Each of the witnesses had C1179 codes that activated OHB mode. Nissan's software expert stated that the witnesses described experiences consistent with OHB mode. The testimony about other incidents was sufficiently similar to Mathenge's experience. The trial court did not abuse its discretion in admitting the testimony for the purpose of showing Nissan had notice of the defect.

**Evidence Supporting Jury's Findings**

Nissan raises several issues concerning the jury's findings on causation and the statute of limitations. None of the contentions have merit.

**A. Standard of Review**

In reviewing the jury's factual determinations on appeal, we resolve all conflicts in the evidence and make all reasonable inferences in favor of the prevailing party to determine whether there is substantial evidence to support the judgment. (*Hasson, supra,* 32 Cal.3d at p. 398.) "We may not substitute our own judgment for that of the jury or set aside the jury's findings if the record contains any evidence which under any reasonable view supports the jury's apportionment. [Citation.] Additionally, as always,

'we start with the presumption that the record contains evidence sufficient to support the judgment. It is the appellant's affirmative burden to demonstrate otherwise.' [Citation.] Under these standards, 'courts rarely disturb the jury's apportionment of fault.' [Citation.]" (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 203.)

### B. Evidence that Design Defect Caused Collision

Nissan contends that under the risk-benefit test for design defects, the plaintiffs were required to present expert evidence that OHB mode caused the accident. Nissan also contends there was no substantial evidence of causation to support finding that OHB mode caused the accident in this case. We disagree with both contentions.

A design defect occurs "when the product is built in accordance with its intended specifications, but the design itself is inherently defective. (*Barker*[ *v. Lull Engineering Co.* (1978)] 20 Cal.3d [413,] 429.) In *Barker,* the Supreme Court recognized two tests for proving design defect. The 'consumer expectation test' permits a plaintiff to prove design defect by demonstrating that 'the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.' (*Id.* at pp. 426–427, italics omitted.)" (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 (*McCabe*).)

"The second test for design defect is known as the 'risk-benefit test.' Under this test, products that meet ordinary consumer expectations nevertheless may be defective if the design embodies an "'excessive preventable danger.'" (*Barker, supra,* 20 Cal.3d at p. 430; *Soule*[ *v. General Motors Corp.* (1994)] 8 Cal.4th [548,] 567 [(*Soule*)].) To prove a defect under this test, a plaintiff need only demonstrate that the design proximately caused the injuries. Once proximate cause is demonstrated, the burden shifts to the defendant to establish that the benefits of the challenged design, when balanced against such factors as the feasibility and cost of alternative designs, outweigh its inherent risk of harm. (*Barker,* at p. 431; *Soule,* at p. 562.)" (*McCabe, supra,* 100 Cal.App.4th at pp. 1120–1121.)

The plaintiff's initial showing "requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. [Citation.] If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective." (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678.) In other words, if the plaintiff has met the burden of demonstrating that the product's design caused the injury, the defendant manufacturer has to prove that the benefits of the product's design outweigh the risks of the design. (*Barker*, *supra*, 20 Cal.3d at p. 431.)

"[T]he consumer expectation test is 'reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions and is thus defective *regardless of expert opinion about the merits of the design*.' [Citation.] For example, 'the ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions.' [Citations.]" (*McCabe, supra,* 100 Cal.App.4th at pp. 1121–1122, fn. omitted.)

"Some products 'cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has "no idea" how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.' (*Soule, supra,* 8 Cal.4th at pp. 566–567.) In those cases, where plaintiff's theory of defect seeks to examine the behavior of 'obscure components under complex circumstances' outside the ordinary experience of the consumer, the consumer expectation test is inapplicable; and defect may only be proved by resort to the risk-benefit analysis. (*Id.* at p. 570 [where automobile collision resulted in left front wheel breaking free, collapsing rearward and smashing floorboard into driver's feet, it was error to instruct jury with consumer expectation test; proper test for

defect is risk-benefit because behavior of obscure component parts during complex circumstances of accident not within ordinary experience of consumer]; *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, 793–795 [consumer expectation test inapplicable to assess defect in latex glove where chemical in the rubber caused allergic reactions in those sensitive to latex; the allergenicity of the rubber is "'a matter beyond the common experience and understanding'" of the product's consumers].)" (*McCabe, supra,* 100 Cal.App.4th at p. 1122.)

The *McCabe* court concluded the plaintiff in that case was not required to submit expert testimony to establish causation, even under the risk-benefit theory of liability. The plaintiff "was injured when the driver's side air bag in her Honda Civic failed to deploy in a frontal collision with another car." (*McCabe, supra,* 100 Cal.App.4th at p. 1116.) The court found that "[u]nder the risk-benefit theory, McCabe need only show the design caused her injuries; if so, the burden shifts to the defendant to prove the benefits of the design outweigh its inherent risks. [Citation.] McCabe provided evidence of causation when she testified the failure of the air bag to deploy forced her head to crash into the steering wheel, resulting in facial and dental injuries. Honda did not dispute McCabe's evidence of causation, nor did it provide any evidence as to the relative risks-benefits of the air bag's design." (*Id.* at p. 1126.)

In this case, there was substantial evidence that Mathenge's car switched into OHB mode on the day of the

collision. The plaintiffs presented expert testimony that the calibration of the delta sensor drifted over time, resulting in the sensor sending a false C1179 code, which activated OHB mode, even when the vacuum booster had not failed. Plaintiffs' expert described the brake pedal sensation from the driver's perspective when OHB mode is activated. Stepping on the brake pedal did not stop the car as the driver expected. Previous owners of Mathenge's car had no problems with the brakes, but on the day of the collision, Mathenge felt he lost braking ability and a C1179 code was found stored in the car's software after the collision. There was no evidence that his hydraulic system actually lost fluid pressure. Mathenge's experience was consistent with the evidence of delta sensor drift resulting in a false C1179 code that shift the braking method to OHB mode.

There was also substantial evidence to support the jury's finding that switching into OHB mode caused the accident in this case. Mathenge perceived OHB mode as brake failure. As a result of the lack of response from the brake pedal, Mathenge could not stop his car before it hit another vehicle. Mathenge's testimony was sufficient to establish that the change in his brakes caused him to keep moving forward, unable to brake to avoid the objects in front of him. This is not a case where the causation issue was so complex that it was beyond common experience and required expert testimony. The jury could evaluate the safety of the brake system and find causation based on Mathenge's testimony that it felt like he could not stop the car. Nissan

provides no persuasive explanation why Mathenge's testimony was not sufficient to establish causation. Mathenge met his burden to show that switching to OHB mode caused the accident, and in response, Nissan failed to show that the risks of false C1179 codes were outweighed by the benefits of the original calibration.

### C. Substantial Factor

Nissan contends the jury's finding that Mathenge was negligent is irreconcilable with their finding that Mathenge's negligence was not a substantial factor in causing harm to Cruz and Mendez. We disagree.

"Where, as here, there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict. As long as a single theory of negligence is lawfully rebutted on a lack of causation theory, it matters not that another theory of negligence is not so rebutted." (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 26.)

In this case, there was no special finding as to what conduct by Mathenge the jury found to be negligent. The jury's findings are reconcilable with the theory that Mathenge was negligent in failing to wear his seatbelt that day. Mathenge's failure to wear a seat belt did not cause any harm to Cruz or Mendez. Failing to wear a seat belt, however, was a substantial factor in causing Mathenge's own injuries. No question on the verdict form apportioned fault

between Nissan and Mathenge for the harm caused to Mathenge. The jury's award of damages shows they found Mathenge's negligence was a substantial factor in his own harm, however, because they did not award any damages for Mathenge's past medical expenses. The jury's findings are consistent with the theory that Mathenge was negligent for failing to wear a seatbelt. Because the jury's findings are consistent with this theory of negligence, we need not consider other negligence theories.

We note, however, that Nissan contends the jury must have found Mathenge's speed was negligent. The evidence showed Mathenge was driving with the flow of traffic. All of the other cars stopped for the red light. If Mathenge had been driving more slowly or substantially faster, he might have avoided this particular collision, but hit something else in his path when his brakes failed to slow the car. The jury could find that Mathenge's speed was not a substantial factor in causing the collision in this case.

### D. Statute of Limitations

Nissan contends Mathenge's claims are barred by the statute of limitations, because he was on notice as of the date of the accident that his brakes did not work as expected and he failed to conduct a diligent investigation of the circumstances of the injury. Mathenge contends he was not aware that any wrongdoing caused his brake problem until his daughter told him about the lawsuit against Nissan. We

conclude substantial evidence supports the jury's findings on this issue.

The parties agree that the two year statute of limitations for personal injury claims applies in this case. (Code Civ. Proc., § 335.1.) "Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.] An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806–807 (*Fox*).)

"A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.] *Norgart* [*v. Upjohn Co.* (1999) 21 Cal.4th 383, 397,] explained that by discussing the discovery rule in terms of a plaintiff's suspicion of 'elements' of a cause of action, it was referring to the 'generic' elements of wrongdoing, causation, and harm. (*Norgart, supra,* 21 Cal.4th at p. 397.) In so using the term 'elements,' we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the

plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Fox*, *supra*, 35 Cal.4th at p. 807.)

Under the discovery rule, a cause of action accrues even if the plaintiff does not know the identity of the defendant, because the identity of the defendant is not an element of a cause of action. (*Fox*, *supra*, 35 Cal.4th at p. 807.) "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ""information of circumstances to put [them] *on inquiry*"" or if they have ""*the opportunity to obtain knowledge* from sources open to [their] investigation."" [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox*, *supra*, 35 Cal.4th at pp. 807–808, fn. omitted.)

"The Legislature, in codifying the discovery rule, has also required plaintiffs to pursue their claims diligently by making accrual of a cause of action contingent on when a party discovered or *should have* discovered that his or her injury had a wrongful cause. (E.g., Code Civ. Proc., §§ 340.1, subd. (a) ['within three years of the date the plaintiff discovers or reasonably should have discovered'], 340.15, subd. (a)(2) ['[w]ithin three years from the date the plaintiff

discovers or reasonably should have discovered'], 340.2, subd. (a)(2) ['[w]ithin one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known'], 340.5 ['one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered'].) This policy of charging plaintiffs with presumptive knowledge of the wrongful cause of an injury is consistent with our general policy encouraging plaintiffs to pursue their claims diligently. (*Norgart, supra,* 21 Cal.4th at p. 395.)" (*Fox*, *supra*, 35 Cal.4th at p. 808.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox*, *supra*, 35 Cal.4th at p. 808.)

"Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation

would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." (*Fox*, *supra*, 35 Cal.4th at pp. 808–809.)

In this case, there was substantial evidence to support the jury's finding that Mathenge did not know of facts before February 18, 2013, that would have caused a reasonable person to suspect harm was caused by a problem in the braking system of his 2004 QX56 at the time of the crash. Mathenge knew that his brakes did not respond on the day of the collision. An inspection of the brakes revealed nothing mechanically wrong, however, as a LAPD mechanic found. The evidence also showed that a reasonable search of the internet at the time of the collision would not reveal any evidence of a recall or problem with the braking system. The LAPD mechanic and Mathenge's son both consulted internet sources without locating information about a recall or other braking problem. Nissan did not introduce evidence to the contrary, and the testimony of witnesses about other incidents was admitted solely to show Nissan had notice of the DSS problem. There was substantial evidence to support finding that the accrual of Mathenge's cause of action was delayed, because a reasonable investigation of all potential causes of his injury would not have disclosed a factual basis for a cause of action earlier. Despite diligent investigation of

the circumstances of the injury, he could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. A reasonable investigation would not have uncovered the basis for the defect until Mathenge learned of it in 2014.

**Preemption**

Nissan contends the failure-to-recall claim under state law is preempted by the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 et seq.) (the Safety Act). We disagree.

Federal law may expressly or impliedly preempt state law. (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 95.) "The Safety Act does not include 'explicit preemptive language.' [Citation.] In fact, the Safety Act expressly provides that rights and remedies created by the Act are supplemental to rights and remedies provided by State law. *See* 49 U.S.C. § 30103(d). Thus, the Safety Act does not expressly preempt State law." (*In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation* (C.D.Cal. 2010) 754 F.Supp.2d 1145, 1195 (*In re Unintended Acceleration*).)

"There are two types of implied preemption: field preemption and conflict preemption." (*In re Unintended Acceleration*, *supra*, 754 F.Supp.2d at p. 1195.) Field preemption occurs when the scope of a federal statute shows Congress intended to occupy the legislative field exclusively.

(*Elsworth*, *supra*, 37 Cal.3d at p. 548.) The Safety Act does not exclusively occupy the field of vehicle safety law. (*Harris v. Great Dane Trailers, Inc.* (8th Cir. 2000) 234 F.3d 398, 400.) "'The plain language of 49 U.S.C. § 30103(b)(1) indicates . . . that Congress intended to leave open to consumers State remedies in addition to the administrative petition process. Even if the relevant field were recalls, because this savings clause also makes particular reference to notification and recall provisions as non-exclusive remedies, [an] argument that State law in this area is field-preempted [would] run[] contrary to the plain language of the statute.' [(*Chamberlan v. Ford Motor Co.* (N.D.Cal. 2004) 314 F.Supp.2d 953, 959–960 (*Chamberlan*).)] In addition to the plain language of the Safety Act, case law and legislative history 'support the conclusion that Congress did not intend to supplant all State regulation of motor vehicle safety.' [(*Id.* at p. 961.)]" (*In re Unintended Acceleration, supra,* at p. 1195, fn. 29.)

Conflict preemption occurs when state law "conflicts with federal law so that it is impossible to comply with both, or if the state regulations stand as an obstacle to the accomplishment of the full purposes that Congress sought to achieve. (*Pac. Gas & Elec. v. Energy Resources Comm'n.* (1983) 461 U.S. 190, 203.)" (*Elsworth*, *supra*, 37 Cal.3d at p. 548.) Nissan argues that imposing liability under California law for failing to recall vehicles would interfere with the comprehensive federal scheme governing vehicle recalls and the determination of the federal agency charged

with monitoring vehicle safety that a recall was unwarranted. To find a claim is preempted, there must be clear evidence of a conflict between state and federal requirements. (*Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 885.)

"As a threshold matter, the Court must decide if the presumption against preemption applies to this case. 'There is a presumption against implied preemption of State law in areas traditionally regulated by the States.' [Citation.]" (*In re Unintended Acceleration*, *supra*, 754 F.Supp.2d at p. 1196.) "The conflicting outcomes of [*In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation* (S.D.Ind. 2001) 153 F.Supp.2d 935, 944–948 (*Bridgestone*)] and *Chamberlan* are attributable, in large part, to the contrary conclusions those courts drew on this issue. The courts reached contrary conclusions because they defined the area of law relevant to the inquiry differently. In *Bridgestone,* the court concluded that the presumption against preemption did not apply to a claim for injunctive relief in the form of a recall because 'states have never assumed a significant role in *recalls* related to vehicle safety.' *Id.* at 942 (emphasis in original). In *Chamberlan,* on the other hand, the court concluded that the relevant area of law was not that of recalls, but rather of motor vehicle safety. 314 F.Supp.2d at 958. Thus, the *Chamberlan* court found that the presumption against preemption was triggered because motor vehicle safety 'is an area of traditional State police power.' *Id.* (citing *City of Columbus*

*v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 439 (2002)." (*Ibid.*)

"This Court agrees with the *Chamberlan* court that the proper area of law to consider in determining whether Plaintiffs' requested relief falls within an area of law traditionally occupied by the States or one where there has been a significant federal presence is that of motor vehicle safety. A recall 'is a remedy rather than a substantive field of regulation.' *Id.* Therefore, recalls do not provide the relevant area of law. Rather, the regulatory field in question is more properly defined as that of motor vehicle safety. [Citation.] Motor vehicle safety is an area of law traditionally regulated by the states. . . . 'In fact, "[i]n no field has . . . deference to state regulation been greater than that of highway safety regulation."' *Chamberlan,* 314 F.Supp.2d at 958 (quoting *Raymond Motor Transp., Inc. v. Rice,* 434 U.S. 429, 443 (1978)). Thus, because the Court concludes that motor vehicle safety, not recalls, is the area of law applicable to the presumption inquiry, the Court finds that the presumption against preemption applies in this case." (*In re Unintended Acceleration*, *supra*, 754 F.Supp.2d at pp. 1196–1197.)

We must determine whether an actual conflict exists between the state law claim for failure-to-recall and the Safety Act. "'[B]ecause a presumption against preemption applies in this case, Defendant bears the burden of showing that it was Congress' "clear and manifest" intent to preempt State law.' [Citation.]" (*In re Unintended Acceleration*,

*supra*, 754 F.Supp.2d at p. 1197.) In *In re Unintended Acceleration*, the plaintiffs sought an injunction ordering Toyota to install a safety mechanism on vehicles with a fully electronic throttle control system. (*Id.* at p. 1198.) Toyota argued that the plaintiffs' relief amounted to a recall that would frustrate the NHTSA's efforts to investigate and address the same issues. (*Ibid.*) The court cited *Kent v. DaimlerChrysler Corp.* (N.D.Cal. 2002) 200 F.Supp.2d 1208, to explain that "'ordinarily it is assumed that the full cause of action under state law is either available or preempted. [Citation.] Remedies are split only when there is evidence of Congressional intent to treat remedies differently. The Court finds no indication in the language of the Safety Act that Congress intended that actions for injunctive relief should be treated differently from actions for damages. Indeed, if an injunction requiring a particular repair would "interfere" with the federal regulatory scheme—so too would a damages award based on the failure to make such a repair. Therefore, the Court declines to treat Plaintiffs' request for injunctive relief differently from its request for damages in determining whether or not there is an actual conflict.' [¶] 200 F.Supp.2d at 1217." (*In re Unintended Acceleration*, *supra*, at p. 1197.)

The court in *In re Unintended Acceleration* similarly found that the plaintiffs' requests for relief should not be treated differently. "While NHTSA has been involved in an ongoing investigation into the [sudden unintended acceleration] issues and, under the Safety Act, possesses

discretion to administer a recall where it determines that a motor vehicle contains a defect relating to safety, NHTSA's involvement and discretion do not indicate that Congress intended to split remedies for the purpose of determining whether an actual conflict exists. [¶] Toyota has not offered evidence that the language or legislative history of the Safety Act evince such an intent to split remedies. Thus, the Court sees no reason to treat Plaintiffs' request for a recall differently from its other requests for relief in determining whether an actual conflict exists." (*In re Unintended Acceleration*, *supra*, 754 F.Supp.2d at pp. 1197–1198.)

Even considering the recall request separately, the court in that case concluded that Toyota had not demonstrated the existence of an actual conflict. (*In re Unintended Acceleration*, *supra*, 754 F.Supp.2d at p. 1198.) The court found that the possibility of a conflict between the plaintiffs' relief and NHTSA's actions was insufficient to find preemption. (*Ibid*.) "Second, 'to constitute an actual conflict, the state law at issue must conflict with the intent of Congress in a specific and concrete way.' *Kent,* 200 F.Supp.2d at 1217. Congress' primary intent in passing the Safety Act is articulated most clearly 'in the first section of the Act itself: "the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."' *Chrysler Corp. v. Tofany,* 419 F.2d 499, 508 (2d Cir. 1969). Toyota has not shown that a court-ordered recall would frustrate Congress' intent to 'reduce traffic accidents and deaths and injuries to persons resulting

from traffic accidents,' or that Plaintiffs' proposed remedy would actually conflict with NHTSA's ongoing investigation. Like the defendant in *Kent,* Toyota '[a]t most . . . has demonstrated that the relief sought by Plaintiffs *might* conflict with some future action of NHTSA as it investigates the alleged defect[s] at issue in this action.' *Kent,* 200 F.Supp.2d at 1217–18." (*Ibid.*, fn. omitted.)

In this case, the plaintiffs sought damages for a failure to recall the defective vehicles. The Safety Act expressly permits common law claims: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).) Nissan can also recall a defective vehicle without being ordered to do so by the NHTSA. If an injunction ordering a vehicle recall under state law is not preempted by the Safety Act, then a remedy imposing damages as a result of the failure to recall the vehicle is not preempted.

Nissan contends that the NHTSA is empowered to investigate defects and order vehicle recalls under the Safety Act. (49 U.S.C. §§ 30118, 30119.) The code sections cited by Nissan set forth the process for the Secretary of Transportation to order a manufacturer to remedy a defect, but none of the code sections state that the Secretary of Transportation is the only entity who may order a remedy or that NHTSA has exclusive authority to recall motor vehicles. Nissan has not shown that the claim for failure to recall actually conflicts with federal law, since the NHTSA has not

issued any regulations related to OHB mode. There is no evidence as to what information was provided to NHTSA about the TSB, and there is no evidence that NHTSA made any decision about OHB mode at all. NHTSA simply did not pursue the matter further based on the information provided. We find no preemption.

**Proposition 51**

In their cross-appeal, plaintiffs contend that as a result of Proposition 51, the judgment should not have been reduced by the amount of the settlement with Continental. This is incorrect.

**A. Statutory Scheme for Settlement Credit and Standard of Review**

In general, Code of Civil Procedure section 877[3] provides credit to non-settling defendants for settlement amounts paid by joint tortfeasors as follows: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution

[3] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

"[T]he offset provided for in section 877 assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another." (*Reed v. Wilson* (1999) 73 Cal.App.4th 439, 444.) If the settlement amount exceeds the damage award, the award is entirely offset, and the plaintiff recovers nothing. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330, 1334.)

Section 1431.2, subdivision (a), known as Proposition 51, modified liability for noneconomic damages in personal injury, property damage, or wrongful death actions as follows: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

"Thus, in an action subject to Proposition 51, each tortfeasor remains jointly and severally liable to the plaintiff

for economic damages, but is liable to the plaintiff for only its proportionate share of noneconomic damages. (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 600.) Because each tortfeasor is only severally liable for its share of noneconomic damages, a nonsettling defendant is not entitled to an offset credit under section 877 for the portion of any settlement that is attributable to noneconomic damages. (*Hoch v. Allied–Signal, Inc.* (1994) 24 Cal.App.4th 48, 63, 64.)" (*Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 102.)

"In general, 'a ruling granting or denying a section 877 settlement credit' is reviewed for an abuse of discretion. [Citation.] 'To the extent that we must decide whether the trial court's ruling was consistent with statutory requirements, we apply the independent standard of review.' [Citation.]" (*Hellam v. Crane Co.* (2015) 239 Cal.App.4th 851, 863.)

### B. Application to Strict Liability Claims

"The doctrine of strict products liability imposes strict liability in tort on all of the participants in the chain of distribution of a defective product. [Citations.]" (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88 (*Bostick*).) "Under the doctrine of strict products liability, the liability of all defendants in the chain of distribution 'is joint and several.' [Citations.] Accordingly, each of those defendants can be held liable to the plaintiff for all damages caused by a defective product reduced only by the plaintiff's

comparative fault. (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 736–737.)" (*Id.* at pp. 88–89.)

"*Wimberly* [*v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 633,] held that Proposition 51 did not modify the common law rule that defendants in an action for strict products liability who are in the chain of distribution of the same defective product are jointly and severally liable for all of the plaintiff's economic and noneconomic damages." (*Bostick*, *supra*, 147 Cal.App.4th at p. 90.) "*Wimberly* stated: 'Accordingly, we hold Proposition 51 has no application in a strict product liability case where, as here, the plaintiff's injuries are caused solely by a defective product. A strictly liable defendant cannot reduce or eliminate its responsibility to the plaintiff for all injuries caused by a defective product by shifting blame to other parties in the product's chain of distribution who are ostensibly more at "fault," and therefore may be negligent as well as strictly liable. The defendant's recourse, if not precluded by good faith settlement principles, lies in an indemnity action. [Citations.] [Fn. omitted.]' (*Wimberly*, *supra*, 56 Cal.App.4th at p. 633; accord, *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1575–1576.)" (*Id.* at p. 92.)

"The doctrine of strict products liability attaches without regard to fault as a matter of social policy. Thus, Proposition 51, which by its terms applies to actions 'based upon principles of comparative fault' (Civ. Code, § 1431.2, subd. (a)), is not triggered by facts of this case. To apportion the noneconomic damages under Proposition 51 would be to

reduce or potentially eliminate a plaintiff's recovery of noneconomic damages, which are often far greater than the economic damages, thereby reallocating the risks and losses associated with the use of defective products and utterly defeating the principal social justifications for the adoption of strict products liability. (*Wimberly, supra,* 56 Cal.App.4th at p. 632.)" (*Bostick*, *supra*, 147 Cal.App.4th at p. 93.)

"Some have observed that liability for noneconomic damages can be apportioned because strict products liability is not liability without fault. (See, *Daly v. General Motors Corp., supra,* 20 Cal.3d at p. 739; *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 853.) Yet, as *Wimberly* explained, the only 'fault' relevant in strict products liability cases, if any, is the defendant's participation in the chain of distribution of a defective product. (*Wimberly, supra*, 56 Cal.App.4th at p. 632; see also, *Barrett v. Superior Court* [(1990)] 222 Cal.App.3d [1176,] 1189.) That is, liability under the strict products liability doctrine—just as with vicarious liability—is *imposed* on a defendant irrespective of negligence, as a matter of social policy, not because of independent and culpable conduct. It is imposed on defendants because of their status as a member of the chain of distribution. (*Wimberly*, *supra*, at pp. 630, 632–633, quoting from *Greenman* [*v. Yoba Power Products, Inc.* (1963)] 59 Cal.2d [57,] 63; accord Malone, *Contrasting Images of Torts*[—The Judicial Personality of Justice Traynor (1961)] 13 Stan. L.Rev. [779,] 804; *Pierce v. Pacific Gas & Electric Co.* [(1985)] 166 Cal.App.3d [68,] 83.)

Defendants in strict products liability cases are not joint tortfeasors in the traditional sense. Their liability attaches regardless of the extent of their participation in the conduct that caused the plaintiff's injuries. These defendants are not *independent* tortfeasors, but are held responsible by reason of liability imposed by a rule of law born of public policy. (See, e.g., *Rashtian v. BRAC–BH, Inc.* [(1992)] 9 Cal.App.4th [1847,] 1852.) Thus, the defendants within the chain of distribution of a defective product are viewed "'as a single entity.'" (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1142–1143.) By its terms, Proposition 51 is not triggered in a case of strict products liability where there is one defective product and all of the defendants are in the same chain of distribution. The reason is that in strict products liability cases, *there is no fault to compare.* All defendants are liable for the same conduct. (*Ibid.*) [¶] Indeed, applying concepts of 'fault' in a strict products liability case would defeat the very purposes of the doctrine because it would reimpose on the plaintiff the burden of proving negligence—an obligation that the doctrine was designed to eliminate. (*Daly v. General Motors Corp.*, *supra*, 20 Cal.3d at p. 736; *Wimberly*, *supra*, 56 Cal.App.4th at p. 632; *Pierce v. Pacific Gas & Electric Co.*, *supra*, 166 Cal.App.3d at p. 83.) Application of Proposition 51 to abolish joint liability for noneconomic damages based on fault would also allow defendants to escape liability for such damages while avoiding the risks incident in their enterprise, thereby undermining the goals of spreading the risk throughout society and inducing safety.

(*Wimberly*, *supra*, at p. 633.) Effectively, to hold, as the concurring opinion urges, that Proposition 51 eliminates liability for noneconomic damages for all defendants beyond that attributable to their fault would abrogate the doctrine of strict products liability imposed strictly based on status and irrespective of fault." (*Bostick*, *supra*, 147 Cal.App.4th at pp. 93–94.)

In *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178 (*Arena*), the appellate court reconciled the case law holding that Proposition 51 does not apply to claims based solely on strict liability (*Wimberly*, *supra*, 56 Cal.App.4th 618) with case law allocating fault between strictly liable defendants and other responsible tortfeasors (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322). *Arena* involved multiple defective products. (*Arena*, *supra*, at p. 1196.) The *Arena* court found Proposition 51 applied to apportion noneconomic damages supported by the evidence between separate products that caused injury to the plaintiff. (*Id.* at p. 1193.) "While the evidence may show that each product caused a specific percentage of harm, we conclude that defendants who are within the same chain of distribution of a single product remain jointly and severally liable to the plaintiff for the harm caused by that product. This conclusion involves a compromise between the inherently contradictory policies of strict products liability, which protects the plaintiff at the expense of a deep-pockets defendant, and Proposition 51, which protects the defendant

from paying more than its share of noneconomic damages." (*Ibid*.)

"Therefore, we determine that Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products. Where the evidence shows that a particular product is responsible for only a part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility for that part of the injury to that particular product's chain of distribution. Here, if supported by the evidence, it is appropriate to determine the percentage of respondent's injury that is attributable to each asbestos product and allocate that percentage of fault to the entire chain of defendants in that product's distribution system. Defendants who are in the same chain of distribution of a specific defective product remain jointly and severally liable for all harm caused by that product. By this resolution, we give effect to the protective purposes of Proposition 51 for defendants, but retain the strict liability policy of relieving plaintiffs of proving negligence within the defective product's distribution network." (*Arena*, *supra*, 63 Cal.App.4th at pp. 1198–1199, fn. omitted.)

*Wilson v. John Crane, Inc.*, *supra*, 81 Cal.App.4th at pages 855–859, involved multiple manufacturers of different packing materials. The *Wilson* court broadly concluded that the term "comparative fault" included strict liability, *Arena*

was correctly decided, and section 1431.2 applies in strict liability actions. ""It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."' [Citation.] "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided."' [Citation.]' (*People v. Knoller* (2007) 41 Cal.4th 139, 154–155.) Mere observations by an appellate court are dicta and not precedent, unless a statement of law was 'necessary to the decision, and therefore binding precedent[].' (*Krupnick v. Hartford Accident & Indemnity Co.* (1994) 28 Cal.App.4th 185, 199.)" (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1005–1006.) The facts of *Wilson* did not involve defendants who were all in the chain of distribution of the same defective product.

In *Bostick,* the plaintiff filed an action against several defendants for negligence, strict liability for product defects and failure to warn, and breach of implied warranty arising from the use of equipment manufactured by Flex in Gold's Gym. (*Bostick, supra,* 147 Cal.App.4th at pp. 85–86.) The plaintiff dismissed his negligence cause of action and settled his product liability claim against Gold's Gym. He prevailed at trial against Flex based on the jury's finding that there was a design defect or a failure to warn of a defect, and Flex was negligent. The jury assigned 90 percent of fault to Flex, 10 percent to Bostick, and none of the fault to other entities. The trial court found the settlement with Gold's Gym was

based on products liability, because the negligence claim had been dismissed. The liability common to Gold's Gym and Flex was fully joint and several, and therefore, the court gave credit for the full amount of the settlement against the damages, which the appellate court affirmed.

The Bostick court examined the relevant case law applying Proposition 51 to strict liability claims and concluded, "In sum, following *Wimberly, supra,* 56 Cal.App.4th 618, we hold that in a strict products liability action involving a single defective product where all of the defendants are in the same chain of distribution, Proposition 51 does not eliminate the liable defendant's joint responsibility for noneconomic damages because that defendant's liability is not based on fault but rather is imposed by a rule of law as a matter of public policy." (*Bostick, supra,* 147 Cal.App.4th at p. 95.)

### C. Application in the Present Case

The plaintiffs contend that their negligence claim for failure to recall was subject to the limitations of section 1431.2, and therefore, Nissan was not entitled to settlement credit against noneconomic damages. We find no abuse of the trial court's discretion in awarding settlement credit under section 877.

Plaintiffs' claims against Continental were based on strict products liability. The plaintiffs readily admit in their briefs on appeal that Continental had no responsibility for

failing to recall the product after the defect was discovered. Therefore, as in *Bostick*, the liability common to Continental and Nissan was fully joint and several. The jury found Nissan was liable for the defective design, and awarded the full amount of the plaintiffs' damages in connection with the claim for product liability. There was no apportionment of any separate amount of damages to the cause of action for failure to recall. If the trial court had not credited the full amount of the settlement against the award of damages, the plaintiffs would have recovered more than the amount of their damages. Because Continental and Nissan were jointly and severally liable for the product liability claim, the trial court did not abuse its discretion by crediting the settlement amount against the total damage award.

## DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

MOOR, J.

We concur:

RUBIN, P.J.

KIM, J.