YOU SHALL NOT PASS!!: HOW *KIA MOTORS CORP. V. RUIZ* DRASTICALLY RAISED THE BAR FOR THE ADMISSION OF OTHER SIMILAR INCIDENTS EVIDENCE FOR PRODUCTS LIABILITY CLAIMS IN TEXAS

Comment*

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I. PRELIMINARIES—INTRODUCTION

A. Preface

Imagine a mother driving her daughter home from school. They are chatting amiably, but mom is playing it safe—she and her daughter are wearing their seatbelts, and she is paying careful attention to the road. Then, out of nowhere, a truck appears over the horizon, driving in her lane. She sees the truck coming directly towards her but has no time to react, and the two vehicles collide head on. Two airbags deploy—one does not. Two people walk away from the accident—one dies at the scene. A daughter is left motherless, wondering how and why her life has changed in a matter of seconds. Who is to blame?

Now imagine that the airbag that failed to deploy was defective.[1] What if the car manufacturer had knowledge of both the defect and of the fact that the airbags in this particular model tended not to deploy?[2] Can the surviving family present evidence of these other similar incidents to a jury?[3] According to the Supreme Court of Texas's holding in *Nissan Motor Co. v. Armstrong*, this type of evidence is admissible against the car manufacturer.[4] The incidents in question need only be similar, not identical, to be deemed relevant evidence to the case at hand.[5]

This Comment follows the case of *Kia Motors Corp. v. Ruiz* through the trial and appellate courts, exploring the various impacts of the eventual decision by the Supreme Court of Texas.[6] Part II introduces the *Armstrong* standard of the admissibility of "other similar incidents" (OSI) evidence in Texas courts, while Part III lays out the case the Ruiz family made against Kia Motors Corporation (Kia) after an airbag in one of their vehicles failed to deploy, killing Andrea Ruiz.[7] Next, Part IV discusses Kia's appeal to the Dallas Court of Appeals, where the court deemed the OSI evidence admitted at trial to be relevant.[8] Part V unpacks the decision of the Supreme Court of

1. *See* discussion *infra* Part I.
2. *See* discussion *infra* Parts II–III.
3. *See* discussion *infra* Part II.
4. Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 138 (Tex. 2004); *see* discussion *infra* Part II.
5. *Armstrong*, 145 S.W.3d at 138; *see* discussion *infra* Part II.
6. *See* discussion *infra* Parts III–V.
7. *See* discussion *infra* Parts II–III.
8. *See* discussion *infra* Part IV.

Texas, which deemed the evidence not only irrelevant, but also prejudicial and harmful to the defendants, setting a new standard for OSI evidence across the state.[9] Parts VI and VII reveal the immediate and long-term, negative impacts of the *Ruiz* decision.[10] The new evidence standard has effectively rendered evidentiary hurdles impossible for Texas plaintiffs to scale.[11]

Under the Supreme Court of Texas's decision, Texas plaintiffs find it more difficult to make it through the courthouse doors and harder still to win cases that do make it to trial.[12] For these reasons, Part VIII recommends two legislative solutions to remedy the problem created by *Ruiz*: a new evidence exception specifically for OSI evidence, and a legislative definition for the term "reasonably similar" so that Texas practitioners can anticipate which evidence is likely to be considered admissible.[13]

B. Prologue

On January 16, 2006, Andrea Ruiz and her daughter, Suzanna, were driving along Texas Highway 317 in Andrea's 2002 Kia Spectra.[14] Both were properly wearing seatbelts.[15] At 5:00 p.m., Harvey Tomlin crossed the centerline, causing his GMC pickup truck to collide head-on with Andrea's car.[16] Suzanna's passenger airbag properly deployed, and she was, thankfully, not seriously injured in the accident.[17] Her mother Andrea, however, was not so fortunate. The driver's-side airbag did not deploy, and Andrea received fatal injuries in the crash, dying at the scene of the accident from a broken neck.[18]

Andrea's husband, Lawrence Ruiz, on behalf of their three children and Andrea's estate, sued both Harvey Tomlin and Kia for negligence, wrongful death, and products liability related to the airbag's failure to deploy.[19] At the trial, Ruiz and his attorneys presented evidence from a study of Andrea's vehicle, which proved that Andrea's airbag failed to deploy due to an open

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9. *See* discussion *infra* Part V.

10. *See* discussion *infra* Parts VI–VII.

11. *See* discussion *infra* Part VI.

12. *See* discussion *infra* Part VII.A−B.

13. *See* discussion *infra* Part VIII.

14. Combined Appellees' and Cross-Appellants' Brief at xiv, Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465 (Tex. App.—Dallas 2011) (No. 05-10-00198-CV), 2010 WL 4361467; Brief of Appellants at 1, *Ruiz I*, 348 S.W.3d 465 (No. 05-10-00198-CV), 2010 WL 2585313.

15. Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 1.

16. *Id.*

17. Motion for Default Judgment and Supplemental Response to Defendant Kia Motors Corp.'s Motion to Quash Service of Process and to Abate at 1, Ruiz v. Tomlin (*Tomlin*), No. 06-06281, 2007 WL 6999309 (95th Dist. Ct., Dallas County, Tex. Nov. 3, 2006), 2006 WL 6438204.

18. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14.

19. Plaintiffs' Original Petition at 1−3, *Tomlin*, 2006 WL 6438204 (No. 06-06281), 2006 WL 638208. The Ruiz family later settled with Mr. Tomlin. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14; Full Final and Complete Release, Compromise and Indemnity Agreement at 2, *Tomlin*, 2006 WL 6438204 (No. 06-06281), 2007 WL 6997956.

circuit in the airbag wiring.[20] This means that when Harvey Tomlin's truck crashed into Andrea's Spectra and the onboard computer signaled the airbags to deploy, Andrea's airbag could not do so because the circuit was already open.[21] Ruiz and his attorneys introduced evidence, backed by expert testimony, showing that Kia had knowledge that the front airbags in some of the Spectra models were faulty.[22] Evidence of similar incidents with defective front airbags was admitted to show that Kia knew or should have known that the connectors in the airbags were defective.[23]

II. "THE SHADOW OF THE PAST"—THE *ARMSTRONG* STANDARD

In 2004, the Texas Supreme Court held that plaintiffs with tort claims against manufacturers, such as automobile companies, could present evidence of other similar incidents to a jury to prove various elements of their claims.[24] The court decided *Armstrong*, which set the standard for the admissibility of OSI evidence in Texas.[25] Under the so-called *Armstrong* standard, courts must consider OSI evidence to be relevant and admissible when a plaintiff's case includes proving that a certain "product was unreasonably dangerous; a warning should have been given; a safer design was available; or a manufacturer was consciously indifferent toward accidents in a claim."[26] When a plaintiff can provide more than one example (and a plaintiff can usually provide several dozen) of the same defect or pattern of behavior, the plaintiff's claims are significantly strengthened.[27] A jury will likely assume greater harm when presented with evidence that the same or similar harm has happened before.[28] The court placed restrictions on the admissibility of OSI evidence to protect against overuse and the potential of prejudice to the defendant when OSI evidence is used.[29] For example,

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20. *See* Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 477 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014).

21. *See* Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 875 (Tex. 2014).

22. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at xv−xvi.

23. *See id.* at xv.

24. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 138 (Tex. 2004).

25. *Id.* at 131.

26. *Id.* at 139 (footnotes omitted).

27. *See id.* at 138.

28. Telephone Interview with Professor Eric Porterfield, former trial and appellate attorney for the Ruiz family (Sept. 25, 2014) [hereinafter Telephone Interview]. The information in this Comment that Professor Porterfield provided is the result of his recollections and personal insights from this case. In no way and at no time should his comments be taken as representing UNT Law School, Texas Tech University School of Law, the Lee Brown Firm, or the Ruiz family. The author thanks Professor Porterfield for his willingness to provide key insights into the background and impact of the *Ruiz* case at trial and the subsequent appellate decisions. *See Armstrong*, 145 S.W.3d at 138.

29. *Armstrong*, 145 S.W.3d at 138.

plaintiffs could not present evidence of similar incidents (i.e., similar accidents) merely to confuse or distract a jury from the question before it.[30]

Additionally, the other incidents must be truly similar.[31] While the degree of similarity required depends upon the facts of each case, the court held that for such OSI evidence to be admissible, the incidents in question need to be "reasonably similar (though not necessarily identical)" to the incident in the current claim.[32] Before *Armstrong*, Texas courts could already admit OSI evidence.[33] But the standard was broad—identical situations were not required to make the OSI evidence admissible.[34] As long as the incidents in question were reasonably similar, the trial court was required to admit the evidence.[35] Because this rule was broad and open to various interpretations, clarification was necessary.[36] The court attempted to clarify this legal question of the admissibility regarding OSI evidence in *Armstrong*.[37] The court retained the rather broad admissibility language, stating that accidents did not have to occur under identical circumstances to be considered admissible as OSI evidence.[38] Regardless, *Armstrong* was not a low threshold for plaintiffs to meet; in fact, even the plaintiff in *Armstrong* was unable to prove that the OSI evidence she wanted to present was reasonably similar enough to meet the court's new standard.[39]

III. "A CONSPIRACY UNMASKED"—*RUIZ V. KIA MOTORS*

In *Ruiz*, the plaintiffs presented conclusive evidence that a faulty circuit in Andrea's airbag prevented the safety mechanism from deploying at all, which led to Andrea's death.[40] Kia admitted to these facts and to the defect in the connectors of the circuit.[41] An expert testified at trial that Kia had paid

30. *Id.* ("[E]vidence of similar incidents is inadmissible if it creates undue prejudice, confusion, or delay."). In other words, a plaintiff could not simply pull a long list of car accidents involving a Dodge Ram, even if those accidents had nothing to do with the claim at hand, just to engender favor or sympathy with the jury panel. *See id.*

31. *Id.*

32. *Id.*

33. *See* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340 (Tex. 1998).

34. *See id.* at 340−41.

35. *See id.*

36. *See id.* at 341.

37. *Armstrong*, 145 S.W.3d at 138.

38. *Id.*

39. *See generally id.* (holding that evidence that other cars had experienced incidents of acceleration, but not under the same conditions as those in *Armstrong*, was not reasonably related to Armstrong's claim to warrant its admission). Armstrong, the plaintiff in this case, wanted to introduce into evidence a database of over 750 other incidents where a Nissan owner or driver experienced unwanted acceleration. *Id.* at 140. The Supreme Court of Texas held that this OSI evidence was inadmissible because none of the claims in the database specified the same problem that Armstrong experienced—a defective throttle cable—and in fact, more than 200 of the claims involved vehicles that were never equipped with the throttle cable at issue. *Id.* at 140−41.

40. Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 13.

41. *Id.*

sixty-seven warranty claims for the exact same connector defect found in Andrea's airbag—a "code-56" defect of the connectors, leading to an open circuit in the airbag—in the past fourteen months.[42]

The plaintiffs also showed a spreadsheet, created by Kia, to the jury during the trial.[43] The spreadsheet exhibited 432 claims of defects caused by an open circuit in the front airbags of 2002 Kia Spectras.[44] At the request of Ruiz and his attorneys, Kia compiled the necessary information and prepared the document, listing all paid maintenance for these specific types of claims.[45] Eric Porterfield, counsel for the Ruiz family during the original trial and during the subsequent appeals, described the timeline in the following way: the Ruizes' attorneys presented a "narrowly tailored request" for discovery to Kia, demanding all warranty claims concerning airbags that failed to deploy from the same model as Andrea was driving.[46] Kia responded by investigating all warranty claims and creating a document (the spreadsheet) that identified each time Kia had paid out a claim on one of the defective airbags.[47] Sixty-seven of the 432 paid warranty claims listed were "virtually identical" to the electrical short that caused the defect in Andrea's airbag.[48] Kia designated these shorts code-56 in their internal memoranda.[49] This specific code simply denotes an electrical short between two specific points.[50] Lee Brown, another of the Ruizes' trial attorneys, called Michelle Cameron as a witness to testify regarding the investigation Kia conducted into the warranty claims on the airbag defects.[51] Ms. Cameron, Kia's Director of Warranty Operations, was designated as an expert witness and testified to both her part in the investigation and to her findings.[52] Additionally, the Ruizes' attorneys questioned Ms. Cameron about Kia's knowledge of the airbag defect before Mr. Brown ever began questioning her about the spreadsheet she created in response to the discovery request.[53]

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42. *Id.* at 21–22; Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 478 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014).

43. Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 13.

44. *Id.*

45. Telephone Interview, *supra* note 28.

46. *Id.*

47. *Id.*

48. Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25; *see* Telephone Interview, *supra* note 28.

49. *Id.*

50. Telephone Interview, *supra* note 28.

51. *See id.*

52. Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 485 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014); Brief on the Merits of Petitioners Kia Motors Corp. and Kia Motors America, Inc. at 42, *Ruiz I*, 348 S.W.3d 465 (No. 05-10-00198-CV), 2013 WL 4771378; Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25; *see* Telephone Interview, *supra* note 28.

53. Telephone Interview, *supra* note 28; *see* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25.

Eventually, the court presented a negligence charge to the jury.[54] Almost as soon as the jury retired, the jurors requested to see the warranty spreadsheet Kia created.[55] Ultimately, the jury returned a verdict in favor of the Ruiz family.[56] The jury found that Kia was 45% negligent, that the company was grossly negligent, and that it negligently designed Andrea's Kia Spectra.[57] The jury then awarded the Ruiz family almost $2 million in actual damages and $2.5 million in exemplary damages.[58]

IV. "MANY MEETINGS"—DALLAS COURT OF APPEALS DECISION

Kia appealed the verdict on several grounds, arguing that the Ruizes had not proven the elements of negligence, that the presumption of liability was inappropriate, and that the spreadsheet was admitted in error.[59] Because the Dallas Court of Appeals is known for its conservative approach in large-scale products liability and personal injury lawsuits, the Ruiz family's counsel anticipated a reversal due to the rather large jury verdict.[60] Instead, the court of appeals rendered a decision completely in favor of the Ruizes.[61]

The court of appeals held that it was not error to admit the spreadsheet containing 432 warranty claims of open or defective circuits in 2002 Spectras

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54. *Ruiz I*, 348 S.W.3d at 471; Charge of the Court, Ruiz v. Kia Motors Corp., No. 06-06281, 2009 WL 4836477 (95th Dist. Ct., Dallas County, Tex. Oct. 13, 2009), 2009 WL 4821812.

55. Telephone Interview, *supra* note 28.

56. *Ruiz I*, 348 S.W.3d at 471.

57. *Id.*; Verdict and Settlement Summary, *Ruiz*, 2009 WL 4836477 (No. 06-06281), 2009 WL 3802529.

58. *Ruiz I*, 348 S.W.3d at 471. In a previous suit, Ruiz settled with Harvey Tomlin, the other driver, for an undisclosed amount. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14. In that case, the jury apportioned 55% of the liability to Harvey Tomlin and Lawrence Ruiz, finding the remaining 45% to be Kia's responsibility. *Ruiz I*, 348 S.W.3d at 471. The judge reduced Kia's actual damages by 55% according to the jury's apportionment of liability, which left the Ruiz family $887,400 in actual damages. *Id.* The trial court also set aside the exemplary damages the jury awarded because the jury was not unanimous in finding Kia grossly negligent. *Id.* The court did, however, award Ruiz pre- and post-judgment costs, along with interest. *Id.*

59. Brief of Appellants, *supra* note 14, at xvi−xvii.

60. Telephone Interview, *supra* note 28.

61. *See Ruiz I*, 348 S.W.3d at 470. Though not the focus of this Comment, both the Dallas Court of Appeals and the Supreme Court of Texas agreed with the Ruiz family's argument that Kia was not entitled to a statutory presumption that Kia lacked liability. TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(a)–(b) (West 2011); *see Ruiz I*, 348 S.W.3d at 471−76. The court of appeals, in particular, made several excellent and creative arguments that were never briefed or mentioned in oral argument by the Ruiz family's attorneys. *See Ruiz I*, 348 S.W.3d at 471–76 (arguing, *inter alia*, that the drafters' legislative intent was for the statutory exemption to be construed narrowly and only in regards to performance); Plaintiffs' Motion for Partial Summary Judgment Against Kia Motors Corp. & Kia Motors America, Inc. as to Section 82.008, at 3−7, *Ruiz*, 2009 WL 4836477 (No. 06-06281), 2009 WL 4821808; Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 4–10; *see* Telephone Interview, *supra* note 28. This type of exemption from liability has typically been a relatively easy burden for defendants to claim. Telephone Interview, *supra* note 28. Therefore, the fact that both the Dallas Court of Appeals and the Supreme Court of Texas sided with Ruiz on this issue was surprising and creates enough issues to sustain a Comment on its own.

and similar vehicles.[62] The court held that the claims contained in the spreadsheet were relevant to proving the elements of the Ruiz family's claims against Kia.[63] Further, the court held that even though only 67 of the 432 claims were code-56 claims, because Kia did not request a limiting instruction from the trial judge, it had effectively waived the issue.[64] Kia also argued that the sixty-seven claims did not meet the *Armstrong* standard, which Kia claimed requires that OSI evidence be "substantially similar" before being admissible.[65] The court did not agree with Kia's argument, however, finding that, coupled with Ms. Cameron's testimony, the contents of the spreadsheet were necessary to the Ruiz family's claims.[66]

Finally, the court held that even if the trial court admitted the spreadsheet in error, the results were harmless, stating, "[I]t cannot be said that admitting [the spreadsheet] into evidence probably caused the rendition of an improper judgment."[67] Instead, the court posited that the spreadsheet was not the only information offered by the Ruiz family to prove the existence of duty, defect, knowledge, and causation; the plaintiffs provided expert testimony and introduced various pieces of evidence other than the spreadsheet.[68] The court acknowledged that in *Armstrong*, the plaintiff was not allowed to present evidence of cases where unexplained acceleration occurred as evidence of her claim.[69] But the court distinguished the Ruiz claims from those in *Armstrong* by pointing to the fact that Kia's own expert testified to the information uncovered in the investigation and that a defect did in fact exist.[70] The court held that Kia did not adequately prove that the jury's decision "turned on the admission of the spreadsheet," finding that there was further evidence of the defect.[71] Further, the court of appeals held that the admission, if erroneous, was harmless.[72]

V. "THE COUNCIL OF ELROND"—TEXAS SUPREME COURT DECISION—*KIA MOTORS CORP. V. RUIZ*

When word came down that the Supreme Court of Texas had granted Kia's petition for review, Eric Porterfield worried it meant that the court

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62. *Ruiz I*, 348 S.W.3d at 484.

63. *Id.* at 483–84.

64. *Id.*

65. *See* discussion *supra* Part II. *But see* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 138 (Tex. 2004) (requiring only reasonable similarity for OSI evidence to be admissible).

66. *Ruiz I*, 348 S.W.3d at 484.

67. *Id.* at 484−85.

68. *Id.*

69. *Id.* at 483–84; *Armstrong*, 145 S.W.3d at 138.

70. *Ruiz I*, 348 S.W.3d at 483–84; Telephone Interview, *supra* note 28; *see Armstrong*, 145 S.W.3d at 138 (holding that "evidence of similar incidents is inadmissible if it creates undue prejudice, confusion, or delay").

71. *Ruiz I*, 348 S.W.3d at 485.

72. *Id.*

disagreed with the statutory presumption argument made both at the trial and before the Dallas Court of Appeals, and that his clients might lose their sizable jury verdict.[73] With the benefit of discretionary review, the Texas Supreme Court takes precious few cases as it is; hearing that the court would be reviewing his clients' case worried Eric Porterfield that the court was "looking for a way to reverse . . . a personal injury case with a large verdict."[74] Little did he know, the court would approach the issues in *Ruiz* with puzzling methods.

A. "The Ring Goes South"—Trial Court Erroneously Admitted OSI Evidence

Writing for the court, Justice Lehrmann stated that the spreadsheet containing OSI evidence was admitted in error.[75] Additionally, the court held that the OSI evidence was not relevant to the Ruizes' arguments or claims because all of the code-56 claims included in the spreadsheet were not exact replicas of the open circuit that probably caused the defect in Andrea's airbag.[76] Instead, some of the code-56 claims on the spreadsheet were from different connectors, though all incidents included in the spreadsheet resulted in an open circuit, as in Andrea's case.[77] The court held that neither the similar nor identical circumstances provided by the Ruiz family were *relevant* to the case at hand, finding that the existence of more than 400 open circuit claims was not meaningfully tied to proving that Kia had notice that their Spectra airbags had an issue with open circuits that should be addressed.[78]

According to the Texas Rules of Evidence, "*Relevant evidence* means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[79] This is a very broad standard and a rather low threshold for a party to meet.[80] As such, one would think it would be difficult to conclude that any significant piece of evidence is truly *irrelevant* according to the Rules of Evidence.[81] Or, as Eric Porterfield put it, "relevance just has to be a brick; it doesn't have to be a

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73. Telephone Interview, *supra* note 28; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(a)–(b) (West 2011); *Ruiz I*, 348 S.W.3d at 471−76; Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 884 (Tex. 2014).

74. Telephone Interview, *supra* note 28.

75. *Ruiz II*, 432 S.W.3d at 881.

76. *Id.* at 882.

77. *Id.* at 881–82; *see* Telephone Interview, *supra* note 28.

78. *Ruiz II*, 432 S.W.3d at 882; *see* Telephone Interview, *supra* note 28.

79. TEX. R. EVID. 401 (emphasis added) (internal quotation marks omitted).

80. *See id.*; Telephone Interview, *supra* note 28.

81. Telephone Interview, *supra* note 28.

wall."[82] In addition, Professor J.P. McBaine, a legal giant in the field of evidence said, "it is not to be supposed that every witness can make a home run."[83] In other words, each piece of evidence or period of witness testimony need only move the party's case or theory forward—it does not have to prove the entire case to be considered relevant.[84]

So, if it is so easy to show relevance, why would the supreme court hold that evidence, which showed that Kia had knowledge of a serious defect in their vehicles, was irrelevant?[85] Neither of the Ruizes' arguments—that the introduction of the spreadsheet showed notice or that the spreadsheet was not the only evidence presented to prove the existence of the actual defect—was convincing enough to persuade the court.[86] Because the court held that most of the claims on the spreadsheet were irrelevant, it then held that it was error for the trial court to admit the spreadsheet in the first place.[87]

B. "The Breaking of the Fellowship"—The Admission of the OSI Evidence by the Trial Court Caused the Defendants' Harm

Despite disagreeing with the court of appeals on the admission of the spreadsheet, the supreme court still could have held that the error of admitting the OSI evidence was harmless.[88] The supreme court could have determined that Kia failed to prove the verdict itself was improper.[89] Instead, the supreme court disagreed with the court of appeals and held that the error was harmful and "probably caused the rendition of an improper judgment."[90] In defense of this holding, the court pointed to the fact that Ms. Cameron's expert testimony was primarily in regard to the warranty claims, which were contained within the spreadsheet.[91] Consider, however, that Mr. Brown examined Ms. Cameron about her job and investigation into the warranty

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82. *Id.*; *see also* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 185, at 308 (Kenneth S. Brown ed., 6th ed. 2006) ("A brick is not a wall."); Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 576 (1956).

83. Falknor, *supra* note 82 (quoting Professor James Patterson McBaine).

84. *See* FED. R. EVID. 401.

85. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25.

86. Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 882 (Tex. 2014); *see* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 17, 24.

87. *Ruiz II*, 432 S.W.3d at 881–82.

88. *Id.*; *see* Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 484−85 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014).

89. *Ruiz II*, 432 S.W.3d at 883; *see* U-Haul Int'l, Inc. v. Waldrip, 380 S.W.3d 118, 136 (Tex. 2012) ("Reversal of erroneously admitted evidence is warranted only if the error probably resulted in the rendition of an improper judgment."); *see also* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 143–44 (Tex. 2004) (holding that the admission of cumulative OSI evidence was harmless error). To find harmful error, an appellate court must essentially find that the entire case turned on the disputed piece of evidence. *See U-Haul Int'l, Inc.*, 380 S.W.3d at 136; Telephone Interview, *supra* note 28. In this case, the spreadsheet was only one piece of evidence in a long trial filled with exhibits and testimony. Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25–26; Telephone Interview, *supra* note 28.

90. *Ruiz II*, 432 S.W.3d at 884.

91. *Id.* at 883–84.

claims before even bringing up the spreadsheet or asking her about it on the stand.[92] In fact, Mr. Brown asked Ms. Cameron to take a piece of paper and a blue marker and do the math; she calculated the number of circuit failures per million vehicles based on her own investigation before the spreadsheet was ever shown to the jury.[93] The court focused on the technicality that the plaintiffs entered the spreadsheet into evidence just before Ms. Cameron took the stand instead of separating her testimony from the admission of the spreadsheet.[94]

Additionally, although the admission of the spreadsheet was "hotly contested" during the trial, Kia never objected to Ms. Cameron's testimony, in her capacity as Kia's expert witness, even though she testified about many of the facts found in the spreadsheet before Mr. Brown ever presented the spreadsheet to her on the stand.[95] Regardless, the court also reasoned that since the jury requested the spreadsheet during deliberations, it was "very difficult to overlook the likely [irrelevant yet prejudicial] effect it had," and the admission of the spreadsheet was harmful.[96] Accordingly, the supreme court reversed the court of appeals' judgment and remanded the case for a new trial.[97]

VI. "THE URUK-HAI"—IMMEDIATE NEGATIVE IMPACT OF THE *RUIZ* DECISION

The Texas Supreme Court's decision in *Ruiz* quickly caught the attention of practitioners across the state.[98] Eric Porterfield was less surprised

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92. *See* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25–26; Telephone Interview, *supra* note 28.

93. *See* Telephone Interview, *supra* note 28.

94. *Ruiz II*, 432 S.W.3d at 884. One wonders if the court would have approached this issue differently had Mr. Brown asked Ms. Cameron to calculate the failures by hand *and then* requested the spreadsheet be admitted into evidence. There is some indication that the order in which the examination transpired swayed some of the justices on the court. *See id.* at 884; Telephone Interview, *supra* note 28.

95. *Ruiz II*, 432 S.W.3d at 884; *see* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 26.

96. *Ruiz II*, 432 S.W.3d at 884. Interestingly, the jury would have received the spreadsheet whether they requested it or not. Telephone Interview, *supra* note 28. As a trial exhibit, it was being re-labeled for presentation to the jury and had not yet been sent back to the jury deliberation room when the jurors sent out the request for it. *Id.* Justice Lehrmann and the rest of the court, however, honed in on the fact that the jury specifically requested this piece of evidence, and the court used the jurors' request as evidence that they were unduly swayed by the admission of the spreadsheet. *Ruiz II*, 432 S.W.3d at 884. While the jury's request to have the spreadsheet immediately does speak to the jurors' interest in the document and the information found therein, if the jurors would have received the spreadsheet whether they requested it or not, should their request really be considered evidence of prejudice? *See* Telephone Interview, *supra* note 28.

97. *Ruiz II*, 432 S.W.3d at 884.

98. *See* Igor Kossov, *Texas High Court Gives Kia New Trial in Failed-Airbag Suit*, LAW360 (Mar. 28, 2014, 6:30 PM), http://www.law360.com/articles/522856/texas-high-court-gives-kia-new-trial-in-failed-airbag-suit; Jay Pate, *Texas Supreme Court Grants Kia New Trial Following $1.9 Million Verdict in Defective Airbag Lawsuit*, HEYGOOD, ORR & PEARSON BLOG (Apr. 13, 2014), http://www.hop-law.

than most, however.[99] The Ruizes' attorneys had prepared themselves and their clients for the possibility that the court would not agree with the Ruizes' arguments for Kia's statutory liability.[100] Even though the court did not reverse on those grounds, the fact that the supreme court set the verdict aside was unsurprising, though still disappointing.[101] The Ruizes' attorneys had to call and tell Lawrence Ruiz that he and his children must go through another trial and that the family's chance at seeing the $887,000 from Kia was gone.[102]

The court held that a majority of the claims from the spreadsheet were *irrelevant*, including the sixty-seven claims involving a code-56 error—the faulty connector at issue in Andrea's airbag.[103] The immediate impact of this type of ruling is devastating to plaintiffs.[104] If a plaintiff cannot even present OSI evidence to the jury regarding an electrical short between two specific points in a driver's side airbag in a specific model of Kia vehicles, what type of evidence can a plaintiff present at trial?[105] The supreme court's holding also breathes new life into other previously decided, large-scale negligence and products liability cases that hinged on or involved the admission of OSI evidence.[106] Large companies might appeal cases they would not have otherwise appealed on the chance that appellate courts will view the OSI evidence in their cases as irrelevant and prejudicial to the outcome of the trial.[107] These same companies and their attorneys will be less likely to settle meritorious claims because the risk of taking a case to trial is less when a plaintiff cannot present OSI evidence to prove a pattern of negligence, knowledge, or defect.[108] Ultimately, the impact of *Ruiz* is that OSI evidence necessary to plaintiffs' claims is no longer admissible, which may drastically lessen a plaintiff's likelihood of success either at trial or on appeal.[109]

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com/texas-supreme-court-grants-kia-new-trial-following-1-9-million-verdict-in-defective-airbag-law suit/.

99. Telephone Interview, *supra* note 28.

100. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(a)–(b) (West 2011) (setting forth the presumption in products liability cases); Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 477 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014) (upholding the jury's finding of a design defect); *Ruiz II*, 432 S.W.3d at 881 (rejecting the Ruizes' use of OSI evidence).

101. Telephone Interview, *supra* note 28; *see Ruiz II*, 432 S.W.3d at 884.

102. *Ruiz II*, 432 S.W.3d at 884; Telephone Interview, *supra* note 28.

103. *Ruiz II*, 432 S.W.3d at 882; *see* discussion *supra* Part V.A.

104. Telephone Interview, *supra* note 28.

105. *Id.*; *Ruiz II*, 432 S.W.3d at 882.

106. Telephone Interview, *supra* note 28.

107. *Id.*; *see Ruiz II*, 432 S.W.3d at 884; discussion *supra* Part V.

108. *See* discussion *infra* Part VII.B.

109. *See Ruiz II*, 432 S.W.3d at 884; Telephone Interview, *supra* note 28.

VII. "THE PALANTÌR"—UNINTENDED CONSEQUENCES OF *RUIZ*

A. "The Black Gate Is Closed"—Ruiz Locked Courthouse Doors that Tort Reform Had Already Closed in Texas

In 2003, the Texas Legislature passed major tort reform legislation, which drastically cut down on the number of medical malpractice suits in the state.[110] The Medical Malpractice and Tort Reform Act of 2003 also limited the amount of noneconomic damages a plaintiff could receive from a jury.[111] Tort reform, however, was not simply an act of the legislature; Texans voted to amend the Texas Constitution in 2003 in a way that reinforced the new law.[112] Now, more than ten years after a massive change in the world of high-dollar liability suits, Texas is known as a place that shelters defendants from lawsuits, frivolous or otherwise.[113] While proponents of tort reform see the decline in lawsuits as a good thing, the fact remains that many plaintiffs had the courthouse doors shut on their meritorious claims because of the Medical Malpractice and Tort Reform Act.[114] Between 1985 and 2002, civil jury verdicts dropped by one-half in Texas, a statistic largely attributed to the push for tort reform.[115] While legislative tort reform eliminated many claims from the Texas courthouses, the supreme court's decision in *Ruiz* is also a form of "judicial tort reform" because the decision bars plaintiffs from bringing claims that cannot be proven without the admission of OSI evidence—effectively locking the doors that tort reform had already shut.[116] The court's decision in *Ruiz* tracks the Texas Legislature's predisposition for tort reform and could be seen as a proper reaction to the wishes of our state's legislative branch.

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110. House Comm. on State Affairs, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. 1 (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0; *see also* Joseph Nixon, *Ten Years of Tort Reform in Texas: A Review*, HERITAGE FOUND. (July 26, 2013), *available at* http://www.heritage.org/research/reports/2013/07/ten-years-of-tort-reform-in-texas-a-review (explaining the implications of Texas's tort reform).

111. House Comm. on State Affairs, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. 1 (2003); *see also* Roger Sherman & Geraldine Szott Moohr, *Medical Malpractice Tort Reform in Texas: Treating Symptoms Rather than Seeking a Cure*, 12 J. CONSUMER & COM. L. 143, 144 (2009) (explaining the non-economic damages cap that resulted from tort reform in Texas).

112. Crystal Zuzek, *Tort Reform Attracts Physicians to Texas*, TEX. MED., Sept. 2013, at 20–30, *available at* http://www.texmed.org/Template.aspx?id=27834.

113. *Id.* ("Fast forward a decade. A . . . study of all 2012 health care liability suit judgments and settlements . . . reports Texas is at the absolute bottom in payments per capita.").

114. *Compare* Nixon, *supra* note 110 ("The common-sense reforms written into HB4 . . . were designed to end legal gamesmanship."), *with* Terry Carter, *Tort Reform Texas Style*, A.B.A. J., Oct. 2006, at 30, 30, *available at* http://www.abajournal.com/magazine/article/new_laws_and_med_mal_damage_caps_devastate_plaintiff_and_defense_firms_alik ("But with new restrictions on . . . suits, many otherwise meritorious cases are no longer economically practical.").

115. David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4 (2007).

116. *Id.* at 3; *see* Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 884 (Tex. 2014).

The general public believes that jury verdicts in civil trials are generally too high.[117] Perhaps the supreme court was responding to the fact that, especially after tort reform, the public perception is that high jury verdicts are unreasonable.[118] State supreme courts respond to the public's view on certain matters and "will take care not to issue decisions that significantly diverge from public opinion."[119] It is possible that the court's decision was a reaction to the ordinary Texan being in support of tort reform and thus, against large jury verdicts.[120] In this case, however, the person who was most affected had a meritorious claim against a defendant with actual knowledge of a product defect.[121]

Kia and the Ruiz family were not the only interested parties in the suit by the time the case made its way to the Texas Supreme Court.[122] In fact, many organizations filed amicus briefs in support of one of the parties.[123] Kia received a wide array of amici support—from groups interested in the effects of judicial decisions on products liability claims, to defense attorney and automotive industry lobbyists, among others.[124] The Ruiz family, on the other hand, received amici support from two associations: the Texas Trial Lawyers Association and the Attorneys Information Exchange Group.[125] The amicus brief serves the purpose of lobbying to the judiciary: "Because judges are elected in Texas, an interest group—albeit in an amicus brief—may dangle its support in front of the judge by communicating its concern regarding how the court will decide a particular issue."[126] Did effective lobbying by amici and other interested parties impact any of the justices' opinions in a case in which the supreme court effectively limited tort liability

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117. Herbert M. Kritzer, *Public Perceptions of Civil Jury Verdicts*, 85 JUDICATURE 78, 79 (2001), *available at* http://users.polisci.wisc.edu/kritzer/research/opinion/verdicts.pdf.

118. *Id.* ("[T]he public is more likely to say that awards and settlements obtained through the civil justice system are too large than that they are either about right or inadequate.").

119. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 473 (2010).

120. *See* Kritzer, *supra* note 117; Nixon, *supra* note 110.

121. Kia Motors Corp. v. Ruiz (*Ruiz I*), 348 S.W.3d 465, 485 (Tex. App.—Dallas 2011), *rev'd*, 432 S.W.3d 865 (Tex. 2014); Telephone Interview, *supra* note 28.

122. *See* Appellate Briefs for Case No. 11-0709, TEX. JUD. BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=11-0709&coa=cossup (last visited Apr. 20, 2015).

123. *See id.*

124. Brief of Amici Curiae the Ass'n of Global Automakers and the Alliance of Automobile Manufactures, *Ruiz II*, 432 S.W.3d 865 (No. 11-0709), 2012 WL 6044250; Brief of Amicus Curiae Product Liability Advisory Council in Support of the Briefing of Petitioners Kia Motors Corp. and Kia Motors America, Inc., *Ruiz II*, 432 S.W.3d 865 (No. 11-0709), 2012 WL 6044252; Brief of Amicus Curiae Texas Ass'n of Defense Counsel, *Ruiz II*, 432 S.W.3d 865 (No. 11-0709), 2012 WL 6044251.

125. Brief of Amicus Curiae Attorneys Information Exchange Group, *Ruiz II*, 432 S.W.3d 865 (No. 11-0709), 2013 WL 6173784; Brief of Amicus Curiae Texas Trial Lawyers Ass'n, *Ruiz II*, 432 S.W.3d 865 (No. 11-0709), 2013 WL 6047633.

126. Nancy Bage Sorenson, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY'S L.J. 1219, 1248 (1999).

of civil defendants?[127] Regardless of the actual reasoning for the court's decision, whether due to lead of the legislature, the pull of public opinion, or the effective lobbying by PACs and amici, the fact remains that the doors shut on plaintiffs because of tort reform legislation were effectively locked by the court's judgment in *Ruiz*.

B. "The Forbidden Pool"—There Is Now a Smaller Pool of Potentially Successful Texas Plaintiffs with Large-Scale Negligence Claims

Mr. Brown stated that the court's "decision limits what kind of evidence can be admitted in similar cases to such a small amount, it is going to be very difficult to see how other consumers were hurt in similar accidents. It provides a snapshot of the situation for the jury, instead of the whole movie."[128] Jurors demand proof that unfortunate events have happened before to give them context for their ultimate decision and verdict.[129] Juries tend to assume that tragedies like Andrea Ruiz's death are uncommon—like being struck by lightning.[130] "As most successful trial lawyers will tell you, the key to victory . . . is persuasion."[131] Plaintiffs and their attorneys must convince the jurors that the accident or defect at issue in their case is not a "lightning strike" but instead, that this type of thing has happened before.[132]

The best way to go about showing a jury that a claim is not a lightning strike is by first admitting and then presenting OSI evidence to the jury: "Lay people will want to know why they've never heard about [this type of accident] happening before. Juries are practically begging you to tell them [that] this has happened before. If you don't, they will assume it's a lightning

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127. Texans for Lawsuit Reform is a political action committee dedicated to "restor[ing] litigation to its traditional and appropriate role in our society." *About TLR*, TEXANS FOR LAWSUIT REFORM, http://www.tortreform.com/about (last visited Apr. 20, 2015). The PAC has contributed to the political campaigns of the nine justices currently sitting on the Supreme Court of Texas. *Texans for Lawsuit Reform PAC*, TEX. TRIB., http://www.texastribune.org/library/data/campaign-finance/contributor/75283/ (last updated Dec. 31, 2014) (showing contributions to Chief Justice Nathan Hecht, Justices Paul Green, Phil Johnson, Don Willett, Eva Guzman, Debra Lehrmann, Jeff Boyd, John Devine, and Jeff Brown). TLR even endorsed three of the justices ahead of the November 2014 general election, though it should be noted that Justice Jeff Boyd did not participate in the *Ruiz* decision. *TLR PAC Republican Primary Endorsements for 2014*, TEXANS FOR LAWSUIT REFORM PAC, http://www.tlrpac.com/content/tlr-pac-republican-primary-endorsements-2014 (last visited Apr. 20, 2015); *see Ruiz II*, 432 S.W.3d at 884 (noting Justice Boyd had no part in the decision).

128. Kossov, *supra* note 98 (quoting Lee Brown); *see Texas High Court Orders New Trial After $887,000 Verdict Against Kia*, 33 WESTLAW J. AUTOMOTIVE 4 (2014); Telephone Interview, *supra* note 28.

129. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 983 n.127 (2004) ("Without context, the story simply did not cohere [to the jury]."); *see also* Telephone Interview, *supra* note 28 ("[Jurors] are predisposed—even those who like your client—to think this is just a random, isolated occurrence.").

130. Telephone Interview, *supra* note 28.

131. Tab Turner, *Proving Design Defects with Other Similar Incidents Evidence*, TRIAL, Mar. 1999, at 42, 42.

132. *Id.*; Telephone Interview, *supra* note 28.

strike."[133] OSI evidence goes a long way towards convincing a juror that a product is actually dangerous to the public because it has malfunctioned before.[134] Now that plaintiffs' attorneys are unable to present OSI evidence, the jury's lightning-strike mentality of approaching liability cases will be increasingly difficult, if not completely impossible, to overcome.[135]

The court's decision in *Ruiz* also surprised practitioners because the court backed away from language suggesting that when a plaintiff is introducing OSI evidence to prove the element of notice, the similarity standard is more relaxed.[136] Any differences in the accidents presented via OSI evidence did not previously affect the admissibility of the evidence; it merely went to the weight of the evidence—a factor the jury could consider when deciding liability.[137] This new standard will make lawyers less likely to take plaintiffs' cases unless the stakes—and the possibility for a large verdict or settlement—are very high.[138] As the venerable Judge Learned Hand once said "'I should dread a lawsuit beyond almost anything short of sickness and death.' . . . Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming."[139] It is little wonder that when faced with the possibility that the suit will be thrown out at trial or at the appellate level because OSI evidence is inadmissible, Texas lawyers will consult basic law firm balance sheet economics and decide that the risk of accepting a large-scale products liability case does not outweigh the benefits.[140]

Texas plaintiffs are now at a distinct disadvantage because the rule of *Ruiz* is harsher than other states' rules on the admissibility of OSI evidence.[141] For example, in Oregon, evidence of similar incidents is admissible, provided the events are of "substantial similarity."[142] In *McCathern v. Toyota Motor Corp.*, evidence of similar rollovers that occurred when the vehicle came in contact with another object, coupled with

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133. Telephone Interview, *supra* note 28; *see also* Tuerkheimer, *supra* note 129 (explaining jurors' mentality that accidents are isolated incidents).

134. Turner, *supra* note 131; *see* Telephone Interview, *supra* note 28.

135. Telephone Interview, *supra* note 28.

136. Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1440 (10th Cir. 1992) ("The requirement of substantial similarity is relaxed, however, when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect."); *see also* Wheeler v. John Deere Co., 862 F.2d 1404, 1407−08 (10th Cir. 1988) (holding that this relaxed standard is applicable when OSI evidence proves notice or awareness); Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1083 (5th Cir. 1986) (admitting evidence of similar incidents to determine the magnitude of the danger).

137. *Jackson*, 788 F.2d at 1083; *see* Telephone Interview, *supra* note 28.

138. *See* Telephone Interview, *supra* note 28.

139. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77 n.1 (1997) (quoting David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) (quoting Judge Learned Hand)).

140. Telephone Interview, *supra* note 28.

141. McCathern v. Toyota Motor Corp., 985 P.2d 804, 807 (Or. Ct. App. 1999), *aff'd*, 23 P.3d 320 (Or. 2001); Jones v. Ford Motor Co., 559 S.E.2d 592, 602 (Va. 2002).

142. *McCathern*, 985 P.2d at 823.

an impaired driver and tripping mechanisms, was deemed admissible.[143] The Oregon Court of Appeals clarified that "[o]nly substantial similarity, not complete identity of circumstances, is required" for OSI evidence to be relevant to a case.[144] Similarly, Virginia law protects plaintiffs' rights to present relevant OSI evidence to prove notice or knowledge of a defect.[145] Remember, the Ruiz family used the code-56 spreadsheet to prove notice during the trial against Kia.[146] Even the Fifth Circuit regards OSI evidence in a more generous light than the Texas Supreme Court, holding that trial judges should admit evidence of accidents concerning the same or similar components occurring under comparable circumstances.[147] In fact, when, as in *Ruiz*, the plaintiff is presenting OSI evidence to show knowledge, "the rule requiring substantial similarity . . . should be relaxed."[148]

It is also unclear if the new standard applies across the board for the admissibility of all OSI evidence in all types of cases or merely in cases with similar facts to those in *Ruiz*.[149] Large-scale products liability cases are not the only types of cases where OSI evidence is presented at trial.[150] In fact, many claims depend upon forms of OSI evidence to prove (or disprove) patterns of negligence or neglect, defect, premises liability, medical malpractice, or "small-scale" product liability.[151] Does the new *Ruiz* standard affect these claims? We simply do not know; the Texas Supreme Court neglected to address the possibility of such an important consequence of its decision.[152]

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143. *Id.*

144. *Id.*

145. *Jones*, 559 S.E.2d at 601 ("[E]vidence of similar accidents, when relevant, will be received to establish that defendant had notice and actual knowledge of a defective condition, provided the prior incident occurred under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue." (quoting Gen. Motors Corp. v. Lupica, 379 S.E.2d 311, 314 (Va. 1989))).

146. *See* discussion *supra* Part III.

147. Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1083 (5th Cir. 1986).

148. *Id.*

149. Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 881 (Tex. 2014).

150. *See* Telephone Interview, *supra* note 28.

151. *See, e.g.*, Perez v. DNT Global Star, L.L.C., 339 S.W.3d 692 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding evidence of nonviolent crimes in the neighborhood was too dissimilar to the crime of murder to be relevant to prove the landlord's breach of duty); *In re* Exmark Mfg. Co., 299 S.W.3d 519 (Tex. App.—Corpus Christi 2009, no pet.) (holding that evidence of incidents causing harm by different models of riding lawnmowers made by the manufacturer–defendant was relevant and admissible); Columbia Med. Ctr. Subsidiary, L.P. v. Meier, 198 S.W.3d 408, 411–12 (Tex. App.—Dallas 2006, pet. denied) ("An unrelated incident may be relevant and admissible if it and the incident involved in the lawsuit occurred under reasonably similar circumstances, the two incidents are connected in a special way, or the incidents occurred by means of the same instrumentality."); McEwen v. Wal-Mart Stores, Inc., 975 S.W.2d 25 (Tex. App.—San Antonio 1998, pet. denied) (holding that evidence of other customers tripping over floor mats at the customer entrance of the store was similar enough to be admissible because it was the same instrumentality at issue in the case).

152. *See Ruiz II*, 432 S.W.3d at 881–83.

We see then that a wide swath of Texas plaintiffs will be disenfranchised by the supreme court's decision in *Ruiz* and will be unable to succeed or even file claims that would be successful in other states.[153] For a state that prides itself in the individualism of its citizens, the fact that an Oregonian or Virginian plaintiff would succeed when a Texan plaintiff will fail is a sad thought indeed.

VIII. "THE FIELD OF CORMALLEN"—SUGGESTED REMEDIES

The Texas Legislature has consistently led other states regarding the issue of tort reform and should continue to do so in this case.[154] Texas plaintiffs find themselves painted into an unfair and untenable corner with the supreme court's decision in *Ruiz*, and legislators should act promptly to protect their constituents from further harm and unfair treatment. Several viable legislative solutions exist that would allow meritorious claims to move forward while still protecting defendants from unnecessary and frivolous lawsuits.[155]

A. "The Steward and the King"—The Legislature Should Create a Set Rule for the Admissibility of Relevant OSI Evidence

Texas Rule of Evidence 401 states, in part, that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[156] Of course, all relevant evidence is not always admissible, and the trial court has discretion to limit the introduction of relevant evidence for reasons such as unfair prejudice, surprise, attempting to confuse or mislead the jury, delaying the proceedings, or wasting time.[157] The legislature, however, has adopted several rules, which provide guidance to courts and practitioners as to when relevant evidence would still be admissible or inadmissible.[158] It should proceed similarly here.

A set rule of evidence for dealing with OSI evidence would be beneficial to all parties: plaintiffs, defendants, practitioners, and the courts.[159] This rule would allow judges to ensure that justice prevails in their courts and that the

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153. *See Jackson*, 788 F.2d at 1083; McCathern v. Toyota Motor Corp., 985 P.2d 804, 823 (Or. Ct. App. 1999), *aff'd*, 23 P.3d 320 (Or. 2001); Jones v. Ford Motor Co., 559 S.E.2d 592, 601 (Va. 2002).

154. *See* discussion *supra* Part VII.A.

155. *See* discussion *infra* Part VIII.A−B.

156. TEX. R. EVID. 401; *see* discussion *supra* Part V.A.

157. *See* TEX. R. EVID. 403.

158. *See, e.g.*, TEX. R. EVID. 404 (defining circumstances when character evidence is admissible); TEX. R. EVID. 406 (defining circumstances when evidence of habit or routine practice is admissible).

159. Telephone Interview, *supra* note 28; *see* TEX. R. EVID. 102.

truth behind cases that need OSI evidence would be revealed to the jury.[160] Judges would have a greater ability to discern whether OSI evidence would be overly prejudicial to the defendant, while still keeping the rights of the plaintiff in proper measure.[161]

A new rule for this type of evidence would not be unusual; the Rules of Evidence have several specific standards regarding how to deal with unique circumstances such as this.[162] For example, the fact that a person does or does not have liability insurance is not admissible as evidence to prove the person "acted negligently or otherwise wrongfully."[163] But, this same evidence can be admitted to prove a variety of other issues, such as agency, control, witness impeachment, or bias.[164] Similarly, Rule 407 lays out specific guidelines for when "Subsequent Remedial Measures" are admissible when a company or defendant takes such measures after an injury has occurred.[165] These measures are typically inadmissible except to prove ownership or control, or to impeach a witness.[166] Rule 407(b), however, provides for the admissibility of written acknowledgment of the defect so long as the evidence is otherwise deemed relevant.[167] Therefore, a rule addressing the admissibility of OSI evidence would not be unique—it would merely be beneficial.

To provide protection for defendants, the proposed rule should not allow the admissibility of all evidence of similar accidents—the evidence must still be relevant both to the case at hand and to the element or theory the party offering the evidence is trying to prove.[168] But, the proposed rule ought to allow evidence that tends to prove or disprove an element of the claim.[169] If

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160. TEX. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

161. A judge would still have the ability to exclude OSI evidence if its probative value is outweighed by the possibility of harm or prejudice to the defendant, or if the judge found that the OSI evidence is being offered for an improper purpose. *See* TEX. R. EVID. 403. Importantly, however, this evidence would still be *relevant* evidence that would be excluded because of possible prejudice to one of the parties. *Id.* ("Exclusion of *Relevant Evidence* on Special Grounds" (emphasis added)).

162. TEX. R. EVID. 404−412.

163. TEX. R. EVID. 411.

164. *Id.*

165. TEX. R. EVID. 407.

166. TEX. R. EVID. 407(a).

167. TEX. R. EVID. 407(b). This is interesting to note because the spreadsheet at issue in the *Ruiz* case was introduced as a manner of proving notice of the defect. Telephone interview, *supra* note 28; *see* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25. As mentioned previously, Kia compiled the data and prepared the spreadsheet, which included all of the instances when the defect in question led to vehicle failures. *See supra* notes 46−48 and accompanying text. One wonders if, under Rule 407, this was a written acknowledgement of the defect. *See* TEX. R. EVID. 407(b).

168. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 138 (Tex. 2004) ("[E]vidence of similar incidents is inadmissible if it creates undue prejudice, confusion, or delay." (citing TEX. R. EVID. 403)).

169. Telephone Interview, *supra* note 28. *See generally Armstrong*, 145 S.W.3d at 138−39 (detailing several circumstances where the admission of OSI evidence would be appropriate).

the probative value of the evidence outweighs any potential unfair prejudice to the other party, then the evidence should be admitted.[170]

Below is a proposition that this author proposes of how a rule crafted specifically for OSI evidence might look should the legislature decide to create one:

> Proposed Texas Rule of Evidence: Other Similar Incidents (OSI)
>
> (a) Relevant evidence of prior incidents is admissible, provided the details of the similar incidents are reasonably similar to the case at hand.[171]
>
> (b) OSI evidence is admissible to show:
>
> - knowledge of a defect;[172]
> - whether or not a product was unreasonably dangerous;[173]
> - whether or not a warning should have been provided to consumers, customers, or the public at large;[174]
> - whether or not a safer design or configuration was available;[175]
> - whether or not a manufacturer exhibited conscious indifference;[176] or
> - any other case where the judge reasonably believes that the evidence could show, prove, or disprove an element of a claim.[177]
>
> (c) OSI evidence is not admissible when its admission would:
>
> - cause undue prejudice;
> - tend to confuse the jury; or
> - unnecessarily delay the proceedings.[178]

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170. *See* TEX. R. EVID. 403.

171. *See id.* This wording is important because a judge would first weigh the OSI evidence under the proper relevance standard as set forth in Rules 401−403. TEX. R. EVID. 401−03. The "reasonably similar" language in the proposed rule is borrowed from the old *Armstrong* standard, and a definition is proposed in the next section. *See Armstrong*, 145 S.W.3d at 138; *infra* Part VIII.B.

172. Astolfo v. Hobby Lobby Stores, Inc., No. 01-06-00486-CV, 2008 WL 2186319, at *3 (Tex. App.—Houston [1st Dist.] May 22, 2008, no pet.) (mem. op.).

173. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340–41 (Tex. 1998).

174. *See* Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 356 (Tex. 1993).

175. *See* Hernandez v. Tokai Corp., 2 S.W.3d 251, 258 (Tex. 1999).

176. *See* Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 921–22 (Tex. 1993).

177. Telephone Interview, *supra* note 28. This is not intended to be an exhaustive list, but provides a list of the situations that most often result in the need for OSI evidence. *Id.*; *see* Farr v. Wright, 833 S.W.2d 597, 601–02 (Tex. App.—Corpus Christi 1992, writ denied); *Astolfo*, 2008 WL 2186319, at *3 (holding that if the plaintiffs had submitted OSI evidence, they likely would have been able to prove notice of premises defect). This wording would also enable *defendants* to use OSI evidence to disprove elements of a plaintiff's case by presenting evidence that widespread or other similar incidents had, in fact, *not* occurred. *See* Boatland of Hous., Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (West 2011); Telephone Interview, *supra* note 28.

178. *See* TEX. R. EVID. 403; N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 125 (Tex. App.—Beaumont 2001, pet. denied) (holding that OSI evidence of children burning to death was unfairly prejudicial). While this section of the proposed rule reiterates some of the language found in Rule 403, it also stands as a safeguard against relevant OSI evidence coming in for untoward purposes. TEX. R. EVID. 403; Telephone interview, *supra* note 28.

While this proposed rule would not fix every problem associated with OSI evidence, it would provide Texas judges and practitioners with a clear understanding of when the admission of OSI evidence is appropriate.[179] Perhaps the most important language is the language giving the trial judge discretion to admit *relevant* OSI evidence when the judge reasonably believes it will affect a claim.[180] This portion of the proposed rule puts the power to determine what evidence should come in back in the hands of the trial judge—where it belongs.[181] Trial judges can apply the proposed rule on a case-by-case basis; the rule gives judges proper discretion to decide if the facts of the case merit the admission of OSI evidence.[182] Appellate courts should not overturn a judge's decision to admit OSI evidence under this rule, apart from a clear abuse of discretion, because the trial court is in the best position to decide relevancy matters.[183]

Proponents of tort reform might suggest that this proposed rule will undo much of the successes they have enjoyed over the past ten years.[184] But, this remedy would not negatively affect the advances of tort reform in Texas at all.[185] Instead, it regards only a subset of claims and merely legislatively imposes a standard that works to keep out more OSI evidence than it admits.[186] The Texas Legislature certainly favors tort reform legislation, and a bill devised to make it easier for plaintiffs may not find much support during the 84th Legislative Session.[187] But the possibility of failure this session does not mean that this type of legislation is not needed immediately.[188]

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179. *See* discussion *infra*, notes 180–83. The proposed rule would not allow the admission of evidence deemed irrelevant, as the Supreme Court of Texas did in this case. Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 882 (Tex. 2014). The proposed rule, however, does categorize some of the specific instances when OSI evidence is appropriate, such as to prove knowledge of a defect, which is what the Ruizes' attorneys admitted into evidence to show. Telephone Interview, *supra* note 28; *see* Combined Appellees' and Cross-Appellants' Brief, *supra* note 14, at 25.

180. *See supra* note 177 and accompanying text.

181. *See* Hernandez v. State, No. 03-13-00186-CR, 2014 WL 7474212, at *8 (Tex. App.—Austin Dec. 30, 2014, no pet.) (mem. op.).

182. *Id.*; *see supra* note 177 and accompanying text.

183. Russo v. State, 228 S.W.3d 779, 799 (Tex. App.—Austin 2007, pet. ref'd) ("In evaluating the trial court's determination [of relevancy] under Rule 403, a reviewing court is to reverse the trial court's judgment 'rarely and only after a clear abuse of discretion,' recognizing that the court below is in a superior position to gauge the impact of the relevant evidence." (quoting Mozon v. State, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999))).

184. *See* Telephone Interview, *supra* note 28; discussion *supra* Part VII.A.

185. *See supra* Part VII.A.

186. *See supra* note 39. This is not a low bar for plaintiffs to meet—all of the OSI evidence must first be considered relevant; the purpose for presenting the evidence is also scrutinized under this proposed rule. *See supra* note 179 and accompanying text.

187. *See supra* discussion Part VII.A.

188. *But see* Lisa A. Rickard, *Rickard: Texas Should Continue to Lead on Legal Reform*, AUSTIN AM.-STATESMAN (Jan. 6, 2015, 6:00 PM), http://www.mystatesman.com/news/news/opinion/rickard-texas-should-continue-to-lead-on-legal-ref/njhCX/ ("In nearly every legislative session over the past 20 years, Texas has enacted meaningful reforms to protect individuals, businesses and health care providers from abusive lawsuits by plaintiffs' lawyers. . . . But Texas can't rest on its laurels. To ensure this progress continues, Texas must continue to lead on legal reform *in the 2015 legislative session*." (emphasis added)).

Texas plaintiffs and defendants deserve the right to present evidence supporting their claims to the jury.[189] This legislative standard for the admissibility of OSI evidence will protect both plaintiffs and defendants while allowing the trial court some discretion with particularly disturbing or prejudicial evidence.[190] The proposed rule succeeds where the court's decision in *Ruiz* does not—it unlocks the courthouse doors for plaintiffs with meritorious claims and allows them the opportunity to present their full case to a jury.

B. "The Scouring of the Shire"—Defining the Term "Reasonably Similar" Would Benefit Texas Courts and Practitioners

Under both the newly retired *Armstrong* standard and the proposed rule above, OSI evidence must be "reasonably similar," though not identical, to the incident in the current claim in order to be admissible as evidence.[191] Though some guidance has been given to practitioners and courts, the term "reasonably similar" itself has remained undefined, both by the courts and the legislature.[192] Regardless, courts across the state continue to reference this standard phrase.[193] As recently as December 2014, the Houston Court of Appeals held that "[e]vidence of similar events is admissible if the 'earlier accidents occurred under reasonably similar . . . circumstances.'"[194] Accordingly, even if the legislature should decide not to adopt the proposed rule, reasonably similar still needs to be defined, especially in light of the court's decision in *Ruiz*.[195]

Texas courts still need to interpret the phrase and decide if OSI evidence is relevant; practitioners still need to know if they will be able to present OSI evidence and *how* the courts will weigh that evidence.[196] The legislature needs to define reasonably similar for the purpose of predictability and

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189. Cathleen C. Herasimchuk, *The Relevancy Revolution in Criminal Law: A Practical Tour Through the Texas Rules of Criminal Evidence*, 20 ST. MARY'S L.J. 737, 784 n.116 (1989) ("[R]ule 403 . . . 'should be used . . . sparingly since it permits the trial court to exclude concededly probative evidence.'" (quoting United States v. Betancourt, 734 F.2d 750, 757 (11th Cir. 1984))).

190. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989) (holding that the trial court, "in its discretion," decides whether or not evidence should be admitted); *see also* Shuffield v. State, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006) ("Even when the evidence is relevant, the trial court may be within its discretion to exclude it pursuant to Texas Rule of Evidence 403.").

191. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 138 (Tex. 2004); *supra* note 171 and accompanying text; *see also* discussion *supra* Part II (providing an overview of the *Armstrong* standard).

192. *See Armstrong*, 145 S.W.3d at 138; discussion *supra* Part II.

193. *See* Welcome v. Tex. Roadhouse, Inc., No. 01-12-00317-CV, 2014 WL 7335183, at *4 (Tex. App.—Houston [1st Dist.] Dec. 23, 2014, no pet.) (mem. op.).

194. *Id.* (quoting McEwen v. Wal-Mart Stores, Inc., 975 S.W.2d 25, 29 (Tex. App.—San Antonio 1998, pet. denied)).

195. *See* Kia Motors Corp. v. Ruiz (*Ruiz II*), 432 S.W.3d 865, 881–82 (Tex. 2014); Telephone Interview, *supra* note 28; discussion *supra* Part VIII.A.

196. Telephone Interview, *supra* note 28.

uniformity, "thus simplifying the task of both lawyers and the courts."[197] Having a wide variety of outcomes concerning the same legal terminology is confusing and leads to distrust of the justice system by the general public.[198]

Few lower courts have defined reasonably similar, and those that have only found that it "generally means the same type of occurrence."[199] Other states, however, have defined similarity in circumstances or transactions quite well. In Georgia, for example, one cannot present OSI evidence until the party offering the evidence "first shows that there is a 'substantial similarity' between the other transactions, occurrences, or claims and the claim at issue in the litigation."[200] The test of "substantial similarity" is that the products in the OSI evidence have a common design or defect, and that those common defects caused the same harm.[201] Courts in Georgia are admonished to "focus on the similarities, not the differences" when deciding whether to admit OSI evidence.[202] In South Carolina, "[e]vidence of similar accidents, transactions, or happenings is admissible . . . where there is some special relation between the accidents tending to prove or disprove some fact in dispute."[203] In California, the necessary level of similarity changes depending on the purpose for which the OSI evidence is being offered.[204]

In Texas, reasonably similar should be defined as having common attributes with other transactions or occurrences.[205] To avoid prejudice to the other party, other incidents need to share the same general cause as the incident leading to the litigation in question.[206] This two-pronged definition will allow for predictability for Texas practitioners and uniformity among

197. Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979).

198. *Id.* ("[E]very alternative theory proposed . . . would lead to varying, inconsistent, and unpredictable results, which would serve only to confuse the public and profession alike, as well as to burden the courts with a difficult chore.").

199. Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194, 201 (Tex. App.—Texarkana 2000, pet. denied); *see also* John Deere Co. v. May, 773 S.W.2d 369, 372 (Tex. App.—Waco 1989, writ denied) (noting that reasonably similar circumstances would have occurred "if they involved *the same type of occurrence*").

200. Colp v. Ford Motor Co., 630 S.E.2d 886, 887 (Ga. Ct. App. 2006).

201. *Id.*

202. Brittain v. State, 766 S.E.2d 106, 117 (Ga. Ct. App. 2014).

203. Watson v. Ford Motor Co., 699 S.E.2d 169, 175 (S.C. 2010). Note how this language tracks the Texas Rules of Evidence on relevant evidence being that which has "any tendency" to make a fact more or less likely without its admission. TEX. R. EVID. 401(a).

204. Sambrano v. City of San Diego, 114 Cal. Rptr. 2d 151, 161 (Cal. Ct. App. 2001) ("Thus, if offered to show a dangerous condition of a particular thing . . . the other accident must be connected in some way with that thing; but if offered only to show knowledge or notice of a dangerous condition, an accident at the place[—]a broader area[—]may be shown." (quoting 1 B.E. WITKIN, CALIFORNIA EVIDENCE § 102 at 450–52 (4th ed. 2000))).

205. *See infra* notes 206–08. This is not as high of a burden as Georgia's terminology presents, but Georgia law requires "substantial similarity," while Texas jurisprudence, the *Armstrong* standard, and the proposed rule all use the term "reasonably similar," which is certainly less stringent than a "substantial" requirement. *See supra* notes 200−01; discussion *supra* Part VIII.A.

206. *See* Benoit v. Mo. Highway & Transp. Comm'n, 33 S.W.3d 663, 669 (Mo. Ct. App. 2000).

Texas courts.[207] This proposed definition would be advantageous even if the legislature does not accept the proposed rule.[208] Texas courts and practitioners lack a definitive answer for what constitutes reasonably similar, and it is time to remedy the problem.

IX. "THE GREY HAVENS"—CONCLUSION: TEXAS SHOULD ENSURE THE JUDICIAL PROCESS FUNCTIONS FAIRLY AND PROPERLY FOR ALL ITS CITIZENS

Justice Thurgood Marshall once said, "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process."[209] While the judicial system should, in theory, function correctly every time, sometimes the courts get things wrong. When an innocent Texas family loses a wife and mother in a preventable accident, that family should be able to hold someone accountable.[210]

The *Armstrong* standard allowed the Ruiz family to present evidence that Kia had knowledge and notice of the defect that contributed to Andrea Ruiz's death.[211] The trial judge and the jury found the OSI evidence relevant, compelling, and determinative.[212] Even the Dallas Court of Appeals had no issue in admitting evidence of accidents so similar to the one that killed Andrea.[213]

But the Supreme Court of Texas decided that the OSI evidence—the evidence that this exact manufacturing defect had happened before to other families—was irrelevant evidence.[214] The result of the court's decision was immediate, negative, and lasting; Texas plaintiffs no longer have the ability to prove the elements of their claims.[215] In fact, wronged parties in our great state are better off bringing suits in other states than in their home—they are now more protected in Oregon or Virginia than in Texas.[216]

The Texas Legislature should act this legislative session and implement a fair policy that protects Texas plaintiffs and defendants.[217] Because OSI evidence is used in areas from tort law to criminal law, a set standard for the admissibility of OSI evidence will benefit Texas lawyers and enable them to protect their potential clients.[218] Defining the term "reasonably similar" will

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207. *See supra* notes 197–98 and accompanying text.
208. *See supra* Part VIII.A.
209. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).
210. *See supra* notes 14–23 and accompanying text.
211. *See supra* Part II.
212. *See supra* Part III.
213. *See supra* Part IV.
214. *See supra* Part V.
215. *See supra* Parts VI–VII.
216. *See supra* Part VII.B.
217. *See supra* Part VIII.
218. *See supra* Part VIII.A.

allow Texas courts to rule uniformly and permit Texas practitioners to more accurately predict what evidence will be admissible.[219] Texas leads in so many areas—it is time we lead in the protection of our citizens and thus "assure a proper functioning" of our judiciary.[220]

219. *See supra* Part VIII.B.
220. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).