Case No. S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM, et al.,

Plaintiffs and Appellants,

vs.

TOYOTA MOTOR CORPORATION, et al.,

Defendants and Respondents.

SUPREME COURT
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Second District Court of Appeal No. B247672
Los Angeles County Superior Court
The Honorable Raul A. Sahagun
Civil Case No. VC059206

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I. INTRODUCTION

Plaintiff William Kim – driving too fast on worn tires – crashed his 2005 Toyota Tundra pickup on a steep, wet, gravelly mountain curve. Kim asserts his Tundra was defectively-designed because it did not have electronic stability control ("ESC" or "VSC"), a then-emerging technology offered optionally on the Tundra and not yet offered by other pickup manufacturers.

The jury found no defect, with good reason. Plaintiffs' ESC expert refused to say the Tundra was defective. He had no problems with the Tundra's controllability and denied that vehicles without ESC were necessarily dangerous. Plaintiffs' accident reconstructionist testified the Tundra's tires and brakes were well capable of handling forces on the vehicle. Toyota's experts testified the Tundra was safe with or without ESC. They backed that testimony with tests showing it was very difficult to make the Tundra spin even on wet pavement, explaining how the vehicle's features made it difficult to spin. Toyota's experts ran tests under Kim's accident conditions showing he would have crashed even with ESC. Plaintiffs ran no tests. Their causation experts' theories relied on speculation about an additional vehicle that no one saw and plaintiffs' own reconstructionist denied existed, and on admittedly unrepresentative computer simulations.

Plaintiffs seek to overturn the verdict by claiming it was wrongly

influenced by industry-custom evidence. That effort faces three insurmountable hurdles.

First, plaintiffs did not preserve their objection. The evidence at issue here is testimony that no other full-sized pickup offered ESC. Plaintiffs acknowledged in the trial court that the evidence might be admissible depending on its purpose. They said what they were asking for was a limiting instruction, were invited to propose one, but never did. At trial, plaintiffs themselves introduced nearly all the evidence they now challenge (before Toyota introduced any). Their motion in limine to exclude the evidence failed to deal with all of the reasons the evidence was relevant at trial, and they did not renew their objection at trial. On all three counts, they forfeited any claim of error.

Second, the evidence was admissible. Plaintiffs claim the evidence was irrelevant and prejudicial. But they never come to grips with the relevant Evidence Code provisions or the trial court's broad discretion over relevance and prejudice. The evidence easily satisfies Evidence Code section 210's[1] definition of relevance. For example, the Court of Appeal explained that plaintiffs introduced it as relevant to their theory that Toyota did not install ESC *because competitors did not*. The evidence that competitors did not install ESC was obviously relevant to this theory. As discussed below, it was also relevant to every stage of the risk/benefit

[1] All further undesignated references are to the Evidence Code

inquiry – causation, the factors governing risks and benefits, and the decision whether the design embodied excessive preventable danger. Because relevant, the evidence was admissible except as provided by statute. § 351. Plaintiffs identify no statute making it inadmissible.

Plaintiffs' contrary arguments are unpersuasive. They assert such evidence should be inadmissible under public policy, but section 351 abolishes such non-statutory grounds to exclude evidence. Their purported policy arguments are, moreover, unpersuasive. Plaintiffs also cite a handful of cases saying industry-custom evidence is inadmissible. Most of those cases have no reasoning. None address the Evidence Code provisions governing relevance and admissibility, have this case's record establishing relevance, or identify any statutory basis to exclude the evidence.

Last, any claimed error is harmless. The other-pickups-did-not-have-ESC evidence was a small fragment of a large trial. It paled next to the other evidence showing the Tundra was not defective and absence of ESC did not cause this accident. The case was not close, and the jury verdict was quick and unanimous.

The Court should affirm.

II. FACTS

A. The Accident.

In April 2010, Kim was driving his 2005 Toyota Tundra pickup on a

narrow mountain highway. RT-III-1536-37,[2] IX-3604, IX-3661. Kim's tires had low tread. RT-IV-1857, IV-1960-61, V-2161. The roadway was wet, gravelly, and laden with debris. RT-III-1561, III-1572, III-1577, III-1602-03, III-1647, V-2107, IX-3606-07, IX-3648, IX-3655.

Kim descended a curve at 45-50 mph, 15-20 mph over the safe speed even for dry conditions. RT-III-1547, III-1567, III-1612, IV-1838-39, IX-3616-20, IX-3661, IX-3689-90. He lost control and drove over an embankment. RT-IX-3661-62, IX-3720-21.

Kim told police he swerved to avoid a vehicle. RT-V-2106. He "steered to the right and that put [him] on the gravel ... to the right of the roadway." RT-X-3967. He then "steered to the left." RT-X-3970. He then "lost control," and went "off the road." RT-X-3973.

The CHP officer found the "collision occurred when [Kim] attempted to negotiate a right-hand curve ... at a speed in excess of a speed safe for the conditions ...." RT-IV-1804. "Due to his speed the rear of [Kim's vehicle] skidded towards the outside of the curve" and "[Kim] attempted ... to correct by veering [his vehicle] hard to the left, at which point [Kim] lost control as [his vehicle] spun around in a counterclockwise motion and skidded off the west roadway edge ...." RT-IV-1804. The

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[2] We abbreviate the Reporter's Transcript "RT-*X-Y*"; X is the volume and Y the page. The Appellant's Appendix is "AA," the Respondent's Appendix "RA," the Court of Appeal Opinion "Op." and plaintiffs' Opening Brief "OB."

officer determined that Kim violated Vehicle Code 22350 (Basic Speed Law) and 22107 (improper turning). RT-IV-1805-06, IV-1809.

In the past decade, the curve where Kim crashed had only one other crash; that was on snow or ice. RT-IX-3610-11.

B. Plaintiffs' Defect Theory.

Plaintiffs claimed the Tundra should have had ESC. ESC helps a vehicle go where the driver aims the steering wheel. RT-IX-3756-57. If the vehicle turns more or less than the steering-wheel input, ESC brakes a wheel to counteract the vehicle's rotation. RT-V-2124-25, VI-2478-79.

C. Trial.

1. Plaintiffs' Motion In Limine.

Plaintiffs moved in limine to exclude "any" evidence or argument "comparing the Toyota Tundra to competitor's [sic] vehicles and designs," or "that defendants' design choices were not defective … because they were equivalent or superior to those of its competitors." AA-I-84-92; RT-II-310-12. The stated grounds were relevance and section 352. AA-I-85.

Toyota's counsel argued the evidence was relevant to both risk/benefit and the consumer-expectation test. RT-II-308-09; AA-I-242-45.

Plaintiffs acknowledged that admissibility would depend on the purpose for which the evidence was offered. Op.-19, 24. Indeed, plaintiffs said the jury could "t[ake] into consideration under the risk benefit doctrine

that they [Toyota] made a calculation not to take the risk and to ignore the benefit because their competitors didn't do it." RT-II-310-11. Plaintiffs also told the court Toyota's sport-utility vehicles (SUVs) all had ESC, SUVs are "like trucks," and Toyota did not put ESC on trucks "because their competitors didn't ...." RT-II-310-11.

Having acknowledged the evidence might be relevant, counsel for plaintiffs said what he wanted was a limiting instruction that it was offered to explain Toyota's motivation under the risk/benefit doctrine: "what I'm asking for is that if and when this evidence is received, it be for a limiting instruction as to a reason why it's being offered is to explain why they did or didn't do what they did under the risk benefit doctrine." RT-II-311.

The court accordingly denied the motion in limine, inviting plaintiffs to propose a limiting instruction. RT-II-312. Plaintiffs never proposed one.

2. Evidence That Other Pickups Did Not Have ESC.

At trial, plaintiffs' theme was that Toyota knew pickups needed ESC, but didn't make it standard because competitors didn't.

Opening statement: Plaintiffs told the jury Toyota's competitors did not install ESC: "Their competition wasn't doing it .... So why should they do it?" RT-II-1240. They said Toyota made ESC standard on SUVs, understood that SUVs and pickups have similar "controllability problems," intended to make ESC standard on 2005 trucks until it learned Ford was not going to, and did not put ESC on its trucks because "competitors" weren't.

RT-II-1235-36, II-1243.

Evidence: Plaintiffs called Toyota Motor Sales' manager of product planning, Sandy Lobenstein, as an adverse witness. They introduced evidence that Toyota made ESC standard on all SUVs by 2004. RT-VIII-3308, VIII-3355-56.

Plaintiffs asked Lobenstein about competitors' designs, repeatedly eliciting that competitors did not have ESC:

> Q. *You understood*, did you not, that ... *Ford in year 2000 announced that all SUV and pickups would have their version of E.S.C. by model year 2005; right*?
>
> A. I don't recall that announcement by Ford. I do know that at the time of this discussion, no other full-size pickup had V.S.C. except Tundra.

RT-VIII-3328.

> Q: Was there any surprise to you that the take rate on V.S.C was so low ...?
>
> A: No other full-size pickup was offering V.S.C at the time, so –
>
> Q: I know that's your mantra. *You want to talk about competitors. I'll ask you about that in just a second.*
>
> ...
>
> A: No one else had V.S.C at the time in a full-size truck, so we didn't have any expectations. We made the option available to consumers and we wanted to see what the

demand was. So I don't believe that I was surprised at the take rate at the time.

Q: Okay. So you are saying that *because Ford and Dodge weren't offering V.S.C, you didn't want to lose your competitive advantage by incurring the extra cost for V.S.C* even though your engineers were telling you to do so?

. . .

A: We were trying to make a vehicle, produce a vehicle that met the customer's needs based on price, based on future availability, and at the time we felt like optional V.S.C was the best decision.

. . .

Q: [Y]ou omitted what [Toyota] is telling you the safety features that they thought to be standard, *because your competitors were likewise omitting it?*

A: We studied what our competitors had and we studied what our customers wanted, and we made the feature available as an option so if somebody wanted it, they could have it.

RT-VIII-3338-39 (emphases added; objections omitted).

Q. *[B]ecause none of your competitors did* and V.S.C. wouldn't drive sales, you decided to make it optional rather than standard; is that right?

[Sustained objection]

Q.... Well, *your competitors weren't doing it;* right?

A. Competitors on full-size pickups were not offering V.S.C.

RT-VIII-3356 (emphases added). Plaintiffs' counsel did not object to his own questions, move to strike, or request a limiting instruction.

After plaintiffs' counsel questioned Lobenstein, Toyota asked him two questions that reiterated what plaintiffs had already elicited: in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. RT-VIII-3403. Plaintiffs' counsel made no objection relevant here, *see* § 353(a); he did not move to strike, or request a limiting instruction. These questions were asked in connection with showing why new safety technologies are phased in. RT-VIII-3403-06.

Plaintiffs wrongly suggest Toyota elicited industry-custom evidence from plaintiffs' expert Papelis. OB-40-41. The Court of Appeal found plaintiffs' argument on this point "is not based on a fair representation of the record." Op.-20. As the Court of Appeal explained, "Toyota's questioning of Papelis did not elicit any testimony about Toyota's competitors or industry custom and practice because there were no substantive answers to counsel's questions," a fact plaintiffs' brief glossed over by using ellipses to skip the answers. Op.-21. The only question even arguably related to industry custom was a single, non-leading question as to whether Papelis knew of any domestic pickup producers with ESC in 2005. RT-VII-2706. Papelis said his knowledge was irrelevant. RT-VII-2706.

Plaintiffs complain he was asked if it would surprise him that Toyota was an earlier developer of ESC. OB-41. He said it would not. RT-VII-2705. The other questions concern government standards, which plaintiffs had conceded "would be admissible." RT-II-304. The jury was instructed that lawyers' questions are not evidence (RT-X-4229), and no evidence about industry custom came in as a result of the questions to Papelis. Op.-21.

3. **Holes In Plaintiffs' Defect Case.**

Plaintiffs incorrectly assert "[t]he defense case was devoted almost entirely to causation, not defect," and that virtually Toyota's only defense on defect was that other pickups also did not have ESC. OB-11. Nothing could be further from the truth.

Plaintiffs' ESC expert, Gilbert, told the jury he had never "said a word about defect." RT-V-2207. He owned a first-generation Tundra (the same series as Kim's) drove it "very hard" and had "no problems" with maneuverability or anything else. RT-V-2206-07. Respecting controllability, it "performed at least equally well with other trucks [he has] owned." RT-V-2207. He did *not* think every vehicle without V.S.C. was dangerous. RT-V-2231.

Plaintiffs' reconstructionist, Meyer, testified the Tundra's brakes and tires were "well capable" of handling forces on the vehicle. RT-IV-1995-96.

At least three Toyota witnesses testified, and provided compelling

evidence, that the Tundra was safe with or without ESC. AA-IV-840 (Nagae); RT-VIII-3381, VIII-3410 (Lobenstein), IX-3780-81 (Carr). Carr opined: "[The Tundra] does not possess problems by design that make it unsafe. In fact, it has features that will make it unlikely that this kind of crash will occur if you use them." RT IX-3780. These include antilock brakes and understeer "purposely there to make it unlikely that you can make it spin." RT-VIII-3401-02, IX-3780-81. In tests, even "[t]urning the steering wheel and slamming on the brakes won't make it spin," even on wet pavement. RT-IX-3781. It's a "very effective design" to prevent spins, and you "have to do unusual things" to lose control. RT-IX-3781.

Meanwhile, ESC had significant downsides. ESC added at least $300-$350 per vehicle. RT-VIII-3423-24. Market research showed pickup buyers are "really price sensitive," so "[w]e couldn't price ourselves outside of the competitors." RT-VIII-3390-91, VIII-3406. Even Kim bought the Tundra because it was the "cheapest purchase," a "low price," and "discounted." RA-006-007. And consumers did not want ESC. In large independent surveys of thousands of pickup owners, less than 15% wanted ESC *even for free*. RT-VIII-3316, VIII-3350-51. In 2005, when the Tundra offered ESC optionally, less than 5% of Tundra customers chose it. RT-VIII-3315, VIII-3355, VIII-3370.

Offering new safety features optionally, before they become standard, is common. RT-VIII-3403-04. Such phase-ins promote

consumer acceptance. RT-VIII-3375. Indeed, "all manufacturers" phase in improvements. RT-VIII-3374. Typically new features, including safety features, start at upper-level models where customers are less price-sensitive, and are phased in on lower-end models as customers learn about them and they become more popular. RT-VIII-3375. The federal regulations requiring ESC were themselves phased in. 49 C.F.R. § 571.126 S3, S8 (ESC required on 55% of major manufacturers' Model Year 2009 cars and trucks, 75% for 2010 and so on, up to 100% of 2012 vehicles). Even today, "new safety technologies ... are being implemented and phased into Toyota and other vehicles." RT-VIII-3403-04.

4. Holes In Plaintiffs' Causation Case.

Plaintiffs' causation case was even less persuasive.

a. Papelis' Generic Simulations Showing ESC Does *Not* Prevent Most Losses Of Control.

Plaintiffs' first causation expert was computer engineer Papelis. He said his simulations of ESC on other vehicles and National Highway Traffic Safety Administration figures suggested ESC reduced "loss of control by approximately 28 or 30 percent." RT-VI-2477. In other words, ESC prevents only a minority of losses of control.

Based on his simulations of vehicles with ESC, he opined "if this vehicle had E.S.C., we just wouldn't be here today." RT-VI-2487. But for a simulation to be accurate, it must match the "particular vehicle,"

including suspension, size, weight, ESC algorithm, tires, and other characteristics. RT-VI-2566-68, VI-2572-74 (Papelis). Papelis did not simulate ESC in a Tundra, let alone with worn tires; he simulated ESC in an SUV and in a sedan with new tires. RT-VI-2466-71, VI-2480-81, VI-2513, VI-2564, VI-2602. He did not simulate the steep and wet roadway. RT-VI-2513, VI-2575. He never intended his simulations to predict the outcome of a specific accident, and had never heard of anyone relying on such generic simulations for a causation opinion. RT-VI-2559-60. Plaintiffs' ESC expert Gilbert and Toyota's human-factors expert Young agreed such simulations were not a valid way to determine causation. RT-V-2252, VIII-3445, VIII-3448.

b. Gilbert's Mistaken Assumptions.

Gilbert said ESC would have averted this accident. RT-V-2146. He relied on incorrect assumptions rebuffed by both sides' witnesses. He assumed Kim swerved to avoid an encroaching SUV that preceded the Archers (witnesses who had been driving an oncoming vehicle and witnessed the accident). RT-V-2148-51. But plaintiffs' reconstructionist found no physical evidence of such an additional vehicle, the Archers did not see one, and Kim saw only one oncoming vehicle – necessarily the Archers. RT-III-1554-1555, IV-1884-85, X-3964-3975. Gilbert's causation opinion also assumed Kim steered right and left four times. RT-V-2149-50. But Kim only described 2-3 steers. RT-X-3967-71. Neither

side's reconstructionist found evidence of four steers. RT-IX-3740, IV-1890-91.

c. **Toyota's Actual Testing Of ESC.**

In contrast to Papelis' generic computer simulations of ESC on other vehicles, Toyota's reconstructionist and ESC expert, Carr, actually tested two 2005 Tundras, one with ESC and one without. RT-IX-3758-61. The vehicles' tires and other characteristics matched Kim's vehicle. RT-IX-3759-61. He "recreated the curvature of the roadway" where Kim crashed. RT-IX-3763. He drove the Tundras on both a wet surface and one with accumulated water. RT-IX-3762. In these actual tests, ESC did not make a difference.

On the wet roadway, the Tundra without ESC would not spin, even with extreme steering and well above Kim's speed. RT-IX-3764-67, IX-3781.

On the roadway with accumulated water, he lost control at 49 mph even with ESC. RT-IX-3773; RA-001 (Exh.29). When he turned the wheel, the vehicle did not initially respond; then it shot to the right when it regained traction; then it kept "going to the right even though I turn the wheel ... back to the left." RT-IX-3774-75.

These results meant "with or without V.S.C. ... you are still going to go off the cliff with those same travel speeds and with those same steering choices." RT-IX-3777.

As Carr explained, ESC responds to the driver's steering inputs. RT-IX-3751, IX-3756-61. When Kim turned to the left to reenter the road, ESC would have helped him go left. ESC "can't change [Kim's] command .... It will obey Mr. Kim's command to turn to the left." RT-IX-3757. Given Kim's speed, the Tundra would then have gone off the cliff in about one second. RT-IX-3757-58.

Trying to buttress their causation case, plaintiffs cite testimony from Toyota's PMK on stability control, Nagae, regarding ESC's generic effectiveness and the decision to make it optional. OB-11. Nagae, however, knew nothing about Kim's accident and his testimony does not concern causation.

5. **Instructions And Verdict Form.**

Before trial, plaintiffs requested a jury instruction on the consumer-expectation test for design defect, in addition to the risk/benefit test. AA-I-155. Toyota responded, *inter alia,* "there is no consumer expectation regarding [ESC] essentially because ... [ESC] was in no trucks at the time." RT-X-4022. The court refused the instruction after the evidence closed. RT-X-4201.

The jury was instructed on the risk/benefit theory of design defect. The instructions stated that the jury "must" find for plaintiffs if plaintiffs carried their burden of proof and Toyota did not prove the design's benefits outweighed its risks, enumerating the *Barker* risk/benefit factors. RT-X-

4242-43.

Plaintiffs requested four special instructions saying it was "no defense" that the Tundra complied with industry standards or federal standards, or that such compliance did not satisfy Toyota's asserted duty to design a safe product. AA-III-545-48. The trial court denied both sides' special instructions as argumentative. RT-X-4218.

Plaintiffs' brief now claims the verdict form put questions in the wrong order, with defect first. OB-18, 50. Plaintiffs' counsel told the trial court, however, he was "good with" the form and had "no objection" to it. RT-X-4202-03.

6. **Closing.**

Plaintiffs wrongly claim the "core" of Toyota's defense was that other pickups did not have ESC. They quote material from Toyota's closing that in total comprises about one page of Toyota's 81-page closing argument. OB-2, 41-42; p. 60 below. Other pickups were not the focus of Toyota's closing. Toyota relied on the extensive evidence refuting defect and causation, emphasizing the refusal of plaintiffs' own witness to say the Tundra was defective.

Toyota emphasized that "the 2005 Tundra is a safe, nondefective vehicle with or without V.S.C." RT-X-4308. Toyota argued there was no evidence "that the 2005 Tundra is somehow unsafe without V.S.C." RT-X-4308. It emphasized that even plaintiffs' experts said the Tundra was not

defective and Gilbert agreed it was not. "[I]f we look at the very first question of the court's charge, 'did the Toyota Tundra contain a design defect when it left Toyota's possession,' even Mr. Gilbert agrees it's not defective. You didn't hear defect come out of his mouth one time on the stand in the context of the Tundra." RT-X-4338. "Mr. Gilbert in a moment of candor said in his answer about whether he thought there were problems with the Tundra ... he said, 'I didn't. In fact, I haven't said a word about defect to anybody.'" RT-XI-4503. "And that I think is a word that you have not heard other than in this context in this trial from any of plaintiffs' witnesses.... [Gilbert] thought it should have V.S.C., but he did not equate that to a defect. Nor did Dr. Papelis. He never said it was a defect nor is he qualified to say that." RT-XI-4503. "[T]he bottom line is you've heard no evidence in this case that there was any sort of defect, design or otherwise, in the Toyota Tundra." RT-XI-4503. *See also* RT-X-4329 (plaintiffs' failure to test); XI-4511-12 (phase-in), XI-4516-17 (testing).

Toyota's counsel also emphasized there was no good evidence of causation, and the evidence disproved it. Papelis' simulations involved very different vehicles, tires, and roadway conditions. Gilbert's opinion relied on a phantom vehicle all other witnesses agreed did not exist. Carr's testing showed that given Kim's high speed, low-tread tires, and sudden swerving, he would have skidded off the cliff even with ESC. That this curve had seen almost no crashes confirmed the problem was Kim's

driving. *See, e.g.*, RT-X-4307-09, X-4313-14, X-4316-17, X-4342, XI-4503-07, XI-4518-22, XI-4527-30, XI-4533-4538.

Plaintiffs' closing emphasized the risk/benefit instruction. Plaintiffs told the jury the risk/benefit instruction, including causation, is "the definition of defective design. If we prove one, two, three, and they can't prove A, B, C, D, or E, then the law says your decision in this claim must be for plaintiffs." RT-X-4289-90.

7. Verdict And Judgment.

The jury deliberated three hours, unanimously finding that the Tundra contained no design defect. RT-XI-4578, XI-4580-84; AA-III-550.

D. Court Of Appeal Opinion.

The Court of Appeal affirmed. It held industry-custom evidence can be admissible depending on its nature and purpose, subject to the trial court's discretion under section 352. Op.-2, 13-18. Industry custom, it explained, "may reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality." Op.-13. That the parties dispute whether custom strikes the appropriate balance "does not make the evidence inadmissible." Op.-14. "[W]hether offered by the plaintiff or the defendant, such evidence may be relevant in a strict products liability action in determining whether a product embodies excessive preventable danger, which is the ultimate question under the risk-benefit test." Op.-14. It may also be relevant to

feasibility and consequences of an alternative design. Op.-14.

The court rejected plaintiffs' attack on admissibility of their own questions to Lobenstein and Lobenstein's answers. Op.-21-22. Plaintiffs "obviously did not object" to their own questions. Op.-22. Further, plaintiffs' questions "sought information that was relevant to the Kims' products liability claim." Op.-22. Plaintiffs' question whether Lobenstein was surprised by the low take rate, and his answer that he had no expectations given the absence of ESC in full-size trucks in the market, were fair and plaintiffs "did not move to strike any of the answers or request a limiting instruction." Op.-22. Plaintiffs' other questions "were designed to show that Toyota was making VSC optional on its trucks ... because Toyota's competitors were not making VSC standard." Op.-22-23. The court held the questioning proper because it was "designed to show ... that Toyota was ignoring the advice of its engineers and putting profit over safety, and [it] illustrates how the plaintiff in a products liability case can properly introduce evidence of industry custom or practice." Op.-22-23.

The court held Toyota's two questions to Lobenstein relevant to rebut plaintiffs' argument in opening statement and at the in limine hearing that "pickup trucks are similar to SUVs, SUVs had ESC, and Toyota was going to make ESC standard on its trucks until it learned its competitors were not going to do so." Op.-19. The court also explained that testimony about how new safety technologies are phased in "first as an option and

then as standard equipment, is relevant to the risk-benefit analysis," and Toyota's two questions about "the state of the ESC in the pickup market in 2005 may have been valid introductory questions to that line of inquiry." Op.-24, fn.10. It also held the trial court did not err in admitting evidence because plaintiffs "did not object at trial" or "propose a limiting instruction." Op.-24.

Last, the court held that plaintiffs' proposed instruction 19 (compliance with custom is "no defense") was misleading, argumentative, and properly refused. Op.-25-26. It declined to address plaintiffs' other proposed instructions because plaintiffs' brief did not address them. *Ibid.*

Both sides petitioned for rehearing. Toyota pointed out perceived omissions and misstatements, *see* Cal. R. Ct. 8.500(c)(2); other than a change in counsel listing, the petitions were denied.

III. ARGUMENT

The industry-custom-and-practice evidence here is Lobenstein's testimony that no competing pickup manufacturer offered ESC in 2005. *See* Op.-19-25; OB-16-18, 41-42 (complaining that Toyota supposedly emphasized that no competing pickup manufacturer offered ESC). There was no reversible error in admitting this evidence.

A. Plaintiffs' Objection Is Not Preserved.

To preserve an evidentiary objection, a party must file an objection or motion that was "timely made" and "so stated as to make clear the

specific ground of the objection or motion." § 353(a). Plaintiffs did not meet these requirements, and invited any error by introducing the evidence themselves.

1. **Plaintiffs' Remedy, If Any, Was A Limiting Instruction.**

Plaintiffs' failure to request a limiting instruction means they have no error to review. As the Court of Appeal explained, plaintiffs had acknowledged that admissibility depended on the purpose for which it was offered. Op.-24. For example, they said the jury could consider the evidence for one purpose (considering whether Toyota "ignore[d] the benefit" of ESC "because their competitors didn't do it") but not for another purpose (showing the Tundra was not defective because competitors did not have ESC). RT-II-310-11.

In this situation, the trial court is required to admit the evidence and give a limiting instruction if requested. "The rule is well settled that if evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose." *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 665; *People v. Bryant* (2014) 60 Cal.4th 335, 405, as modified on denial of reh'g (Oct. 1, 2014), cert. denied (2015) 135 S. Ct. 1841. Such evidence is limited to its proper scope by requesting a limiting instruction. § 355 ("When evidence is admissible … for one purpose and is inadmissible … for another purpose, the court upon request

shall restrict the evidence to its proper scope and instruct the jury accordingly."); *Daggett*, 48 Cal.2d at 665-66. The trial court has no duty to give a limiting instruction *sua sponte*. *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.

This rule follows directly from the Evidence Code. To be relevant, evidence need only tend to prove or disprove any disputed fact of consequence. § 210. If evidence is relevant to prove "any" disputed fact of consequence, it is admissible except as provided by statute. § 351. No statute says evidence admissible for one purpose but not another is inadmissible. Instead, the statute says the court shall give a limiting instruction upon request. § 355.

Under *Daggett* and § 351, the trial court properly admitted evidence that no competing pickup had ESC, given plaintiffs' acknowledgment that the jury could properly consider such evidence for at least one purpose. To try to prevent the evidence from being used to show that the Tundra was not defective, plaintiffs had to request a limiting instruction under § 355. They never did.

Plaintiffs offer three excuses, all incorrect: (1) industry custom evidence was not relevant to any issues, (2) plaintiffs would have had to propose a limiting instruction based on the "middle ground" announced in the Court of Appeal Opinion, which was impossible to anticipate, and (3) "the court would not have given" one. OB-44-46.

First, "industry custom," as plaintiffs define it, is concededly *admissible* for some purposes. Plaintiffs define "industry custom" as "everybody does it" or "nobody does it." OB-28. Evidence that "their competitors didn't do it" (nobody does it) is industry custom under plaintiffs' definition. Plaintiffs acknowledged the jury could consider this evidence under the risk/benefit test in connection with their argument. RT-II-311. Thus this remains a case of evidence that is concededly admissible for one purpose, but assertedly inadmissible for a different purpose. Further, "[e]vidence" is testimony, documents or something else presented to the senses, offered to prove or disprove a fact. § 140. The *evidence* here is testimony that no competitor offered ESC. "Industry custom" is a description of the evidence; it is not the evidence. Plaintiffs acknowledged the *evidence* was relevant for at least one purpose.

Second, plaintiffs did not have to anticipate the Court of Appeal's opinion. Since the evidence could be considered for at least one purpose, its admissibility and the need to request a limiting instruction flowed directly from *Daggett* and sections 210, 351, and 355. This case is nothing like *People v. Kitchens* (1956) 46 Cal.2d 260, 264 or *People v. Nigri* (1965) 232 Cal.App.2d 348, where post-trial opinions overturned long-established law.

Third, plaintiffs' assertion that "the court would not have given" a limiting instruction is baseless. This argument could only succeed if it

would have been a "fruitless or an idle act" to propose an instruction. *See City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784-85. That is not this case. The trial court *specifically invited* plaintiffs to propose a limiting instruction, saying "I'll certainly review it and we'll litigate that instruction at the appropriate time." RT-II-312.

2. Plaintiffs Introduced The Evidence That No Other Pickups Had ESC Standard.

Introducing evidence waives objection to it. "If a party introduces inadmissible evidence over objection, and later the opposing party offers the same kind of evidence, the opposing party waives the prior objection and loses the right to complain of error." 3 Witkin, Cal. Evidence (5th ed. 2012) § 385(3); *e.g., Romeo v. Jumbo Market* (1967) 247 Cal.App.2d 817, 823 (plaintiff waived prior objection by later introducing evidence "contain[ing] the same objectionable material"); *Heiman v. Market St. Ry. Co.* (1937) 21 Cal.App.2d 311, 315-16 (plaintiff waived prior objection by causing the evidence to be exhibited again to the jury); *Ganiats Const., Inc. v. Hesse* (1960) 180 Cal.App.2d 377, 389-90.

This is an *a fortiori* case: plaintiffs introduced the evidence before Toyota did. Even if plaintiffs' motion in limine were otherwise sufficient, they waived any objection by introducing the evidence.

Trying to avoid this conclusion, plaintiffs say what they introduced

is "not 'industry custom' evidence" because it "had nothing to do with design criteria." OB-49. That assertion fails. First, the evidence they introduced was exactly the evidence their motion in limine sought to exclude: "evidence or testimony comparing the Toyota Tundra to competitor's vehicles and designs." AA-I-84. Again, the *evidence* here is testimony that no competitor offered ESC. § 140. What matters is whether they introduced the evidence they objected to, not whether "industry custom" aptly describes that evidence.

Second, the evidence is industry custom even under plaintiffs' definition. Plaintiffs purportedly define "industry custom" as evidence that "everybody does it" or "nobody does it." OB-28. That no competitor offered ESC meant "nobody does it."

Third, the evidence plaintiffs introduced does concern design criteria. Plaintiffs introduced it to show Toyota's *reason for the no-ESC design* was that competitors did not have ESC. Part II.C.2 above.

Plaintiffs did not introduce the evidence to lessen the impact of the denial of their motion. *Before* the court denied the motion, plaintiffs said the jury could consider "under the risk benefit doctrine" that Toyota did not make ESC standard "because their competitors didn't," and repeated that Toyota made ESC standard on SUVs but not on pickups "because their competitors didn't …." RT-II-310-11.

3. Plaintiffs' Motion In Limine Did Not Preserve The Objection.

"Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal." *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn.3. A motion in limine preserves an objection for appeal only if: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." *People v. Lucas* (2014) 60 Cal.4th 153, 220, fn.29 (quoting *People v. Morris* (1991) 53 Cal.3d 152, 190); *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1675. Plaintiffs' motion in limine fails (3).

Plaintiffs' motion was made pretrial. AA I-84-92. The evidence they objected to was relevant to issues raised at trial and not addressed in plaintiffs' motion – including causation, plaintiffs' theory that Toyota did not install ESC because competitors did not, to rebut plaintiffs' assertion that Toyota's use of ESC on SUVs meant Toyota knew it was needed on pickups, and to corroborate Toyota's evidence that consumers did not want ESC and so the phase-in was desirable and timely. Part III.B below; *see* Op.-18-19. Thus, the motion was not made at a time the judge could rule

on the evidence in its appropriate context.

B. <u>The Trial Court Did Not Abuse Its Discretion In Admitting The Evidence.</u>

As illustrated by this case, the Court of Appeal correctly held custom-and-practice evidence may be admissible depending on its nature and purpose and subject to the trial court's discretion under § 352. Op.-16-17. This rule follows directly from the Evidence Code. Evidence is relevant if it tends to prove or disprove "any" fact of consequence to determination of the action. § 210. The evidence here does. Once relevant, it is admissible except as provided by statute. § 351. The only potential exclusionary statute is § 352, which commits discretion to the trial court, and which did not require exclusion here. If the evidence is inadmissible for some other purpose, the trial court must normally admit it and give a limiting instruction upon request. *Daggett*, 48 Cal.2d at 665-66; § 355. Here, straightforward application of the Evidence Code makes clear that the no-competing-pickups-had-ESC evidence was admissible.

1. The Evidence Was Relevant.

The trial court has "broad discretion to determine the relevance of evidence…." *Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1213 (quoting *People v. Jones* (2013) 57 Cal.4th 899, 947). "[W]e will not disturb the court's exercise of that discretion unless it acted in an arbitrary, capricious or patently absurd manner." *Ibid.*

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," including evidence "relevant to the credibility of a witness." § 210. "The test of relevance is whether the evidence tends, 'logically, naturally, and by reasonable inference' to establish material facts...." *Coffey,* 60 Cal.4th at 1213 (citation omitted). Evidence is relevant not only when it tends to establish an ultimate fact, but also when it tends to establish an intermediate fact from which an ultimate fact can be inferred. *People v. Hill* (1992) 3 Cal.4th 959, 987; 1 Jefferson, Cal. Evidence Benchbook (4th ed. 2016) ["Jefferson"] § 21.16, p. 21-13-14, § 21.21, p. 21-15-16.

Here, the "evidence" (§ 140) was Lobenstein's testimony that no other full-sized 2005 pickup offered ESC. As detailed next, it tended to prove or disprove disputed facts of consequence to both plaintiffs' claim and Toyota's defenses.

a. **The Evidence Was Relevant Under The Risk/Benefit Test.**

Under the risk/benefit test, the jury evaluates the design's risks and benefits to determine whether the design embodies "excessive preventable danger." *Soule v. General Motors Corp.* (1992) 8 Cal.4th 548, 562; *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430.

The risk/benefit test has two parts: causation and risk/benefit

balancing. The product is "found defective in design if [1] the plaintiff demonstrates that the product's design proximately caused his injury and [2] the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." *Barker*, 20 Cal.3d at 432. Under the balancing prong, "[a] jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Id.* at 431. The jury was so instructed here, using the substantial-factor test for causation. RT-X-4242-43 (risk/benefit instruction).

The no-other-pickups-had-ESC evidence was relevant to both causation and risk/benefit weighing.

(1) The Evidence Was Relevant To Causation.

In the past decade, there had been only one other accident on the curve where Kim crashed; that was on snow or ice. RT-IX-3610-11. That no other 2005-or-earlier pickups had ESC meant non-ESC pickups had uniformly traveled this curve for many years without a problem. Knowing that non-ESC pickups had long traveled this curve without incident, and that Kim crashed while when he was speeding down a wet gravelly road on

marginal tires, a reasonable juror might infer that Kim's crash was not attributable to absence of ESC. *See* RT 4240 (substantial factor "is a factor that a reasonable person consider [sic] to have attributed to the harm").

If liability were found, similar reasoning tended to reduce comparative fault allocated to the design and increase the fault allocated to Kim's negligent driving. *See* RT-X-4243 (comparative-fault instruction).

(2) The Evidence Was Relevant To Risk/Benefit Balance.

The evidence was also relevant to the risk/benefit balance.

Relevance to plaintiffs' theory. Evidence that competitors did not have ESC was obviously relevant to plaintiffs' theory that Toyota did not make ESC standard because competitors did not. As the Court of Appeal explained, plaintiffs' questions to Lobenstein "were designed to show that Toyota was making VSC optional on its trucks, rather than standard as the engineers had suggested, because Toyota's competitors were not making VSC standard." Op.-22-23. This was "a proper line of questioning designed to show the jury that Toyota was ignoring the advice of its engineers and putting profit over safety, and illustrates how the plaintiff in a products liability case can properly introduce evidence of industry custom or practice." Op.-23

Plaintiffs nowhere dispute this reasoning. Their excuse that they introduced the evidence only after the trial court had denied their motion in

limine (OB-49) cannot be squared with the record; they told the trial court the jury could consider the evidence for this purpose *before* the court denied the motion. Part II.C.1 above.

In Evidence Code terms, the no-competitor-offered-ESC evidence tended in reason to prove a disputed fact of consequence to determination of the action: plaintiffs' assertion that Toyota did not install ESC because competitors did not. Because it tended to prove "any disputed fact" of consequence, it was relevant. § 210.

Relevance to consumer utility and financial cost of ESC. That no competing pickup manufacturer offered ESC tended to confirm Lobenstein's testimony that the overwhelming majority of consumers did not want ESC, they were very price-sensitive, and the evidence ESC would add hundreds of dollars. All of this went to risk/benefit, and to whether the benefits of making ESC optional outweighed the risks. Financial cost of the alternative design (here ESC) and the adverse consequences to the product and the consumer are *Barker* factors. *See Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 (adverse consequences to product include design's effect on product's "perceived benefit" to customers).

Further, this fact was disputed. Plaintiffs told the jury Toyota's evidence that the technology wasn't mature and customers didn't like it was "not to be believed" because Toyota had installed ESC on SUVs. RT-II-

1238. Toyota also contended plaintiffs' witness did not know ESC's cost. RT-VIII-3421-24, X-4326-27.

The jury had to resolve these competing accounts of ESC's impact on consumers' utility and balance them against ESC's safety benefits. The balance struck by other manufacturers in the field is relevant in deciding whom to believe. If every other manufacturer had installed ESC, the jury could have inferred Lobenstein's testimony about consumer acceptance and price-sensitivity was overblown or not credible. That no other manufacturer installed ESC supported an inference that concerns about consumer acceptance and price were real. "If few manufacturers decided to adopt the alternative, one can infer that consumers actually did consider the alternative ungainly or too expensive, and thus that the proposed alternative was not feasible." Urban, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect* (1990) 38 UCLA L. Rev. 439, 466; *accord,* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices* (1973) 73 Colum. L. Rev. 1531, 1542.

Relevance to desirability of phase-in. Plaintiffs' brief does not dispute the Court of Appeal's explanation that "testimony about how new safety technologies evolve and are phased in to vehicles in general, first as an option and then as standard equipment, is relevant to the risk-benefit analysis" and the other-pickup-makers-did-not-offer-ESC-in-2005 evidence was relevant to that phase-in. Op.-24, fn.10.

Relevance to disprove plaintiffs' claims on gravity and likelihood of harm. Because Toyota installed ESC on SUVs, plaintiffs sought to infer that "trucks" had similar controllability problems and, therefore, the Tundra needed ESC. RT-III-1224-25, III-1233, III-1235-36 (opening). That inference was made less likely by evidence that no other pickup had ESC. A reasonable juror was entitled to think plaintiffs' assertions did not add up: If trucks have significant controllability problems, ESC is as inexpensive and effective as plaintiffs claim, and consumers are not price-sensitive and not opposed to it, one would reasonably expect at least some other truck manufacturers would install it. The apples-to-apples comparison that no other *pickup* had ESC was relevant to rebut plaintiffs' proposed apples-to-oranges comparison of pickups to SUVs.

That no other pickup had ESC also made plaintiffs' defect claim less credible in other ways. Since there was no reason the Tundra needed ESC more than other pickups, plaintiffs' claim meant that every 2005 pickup was defective. Exercising common sense, the jury was entitled to look more skeptically on a claim that every design in the industry wrongly balanced risks and benefits.

The Court of Appeal held the evidence inadmissible for this latter purpose because "[a]ll manufacturers may be producing an unsafe product." Op.-19. That was incorrect. First, there was substantial evidence they were *not* all making unsafe products: Gilbert agreed that *not* all non-ESC

vehicles were dangerous. RT-V-2231. A court cannot hold evidence irrelevant based on a factual supposition at odds with substantial evidence. *See* § 403(a)(1) (where relevance depends on preliminary fact, evidence is inadmissible *unless* there is sufficient evidence to sustain finding of preliminary fact). Second, evidence is relevant if one reasonable inference from it is relevant, even if another nonrelevant inference is possible. *People v. Perry* (1972) 7 Cal.3d 756, 780, disapproved on other grounds, *People v. Green* (1980) 27 Cal.3d 1, 28; 1 Jefferson, *supra,* § 21.18. Evidence that no other pickup manufacturer offered ESC yielded a reasonable inference that Toyota's evidence about cost and consumer acceptance was correct. Whether to infer instead that all trucks were defective was for the jury; it did not make the evidence irrelevant.

Relevance to adverse effects on product and consumer. The risk/benefit test turns partly on "the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker*, 20 Cal.3d at 431. Adverse consequences include impact on the product's "perceived benefit" to customers. *Bell*, 181 Cal.App.4th at 1131. ESC would increase each Tundra's cost by hundreds of dollars, and customers were price-sensitive and did not want to pay for ESC. Part II.C.3 above. Competitors did not have this cost *because they lacked ESC.* Evidence that competitors lacked ESC tended to show that making ESC standard would have made the Tundra comparatively less attractive to consumers, an

adverse consequence to the consumer (and the product). The Court of Appeal disagreed on this point, saying this diminished consumer appeal was an adverse consequence to the manufacturer, not the product. Op.-18-19. The adverse consequence to the manufacturer, however, was the direct result of adverse consequences to the consumer (higher price) and the product (increased cost). Thus it is relevant under *Barker*.

Relevance to overall weighing. Industry practice is also relevant to the risk/benefit weighing. *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, overruled on other grounds by *Soule v. Gen. Motors Corp.* (1994) 8 Cal. 4th 548, 882, used custom evidence in just this way. Plaintiff was injured in a vehicular fire. Plaintiff's evidence showed other vehicles "had their fuel tanks located underneath the body inside the crossbars of the frame," and if defendant's "fuel tank had been similarly located it would have been well-protected in the collision." *Id.* at 6. *Self* held the jury could conclude that the design embodied excessive danger partly because it was "relatively more hazardous than others" and "the added hazard … has been recognized by the industry." *Ibid.* This Court has cited this part of *Self* to illustrate excessive preventable danger. *Barker*, 20 Cal.3d at 430.

Commentators and other states agree. *See, e.g.,* Rest.3d Torts: Product Liability, § 2, com. d ("How the defendant's design compares with other, competing designs in actual use is relevant to the issue of whether the defendant's design is defective."); Keeton, *Annual Survey of Texas Law –*

Torts (1982) 35 Sw. L. J. 1, 11 (custom is relevant, including to strict liability, "because it can be inferred that the industry has made some effort to weigh reasonably foreseeable dangers against utility, including the feasibility of safer alternatives"); Urban, 38 UCLA L. Rev. at 466 & fn.147 ("[A]n industry's common practice represents a valuable opinion regarding the proper balance of all the risk-benefit factors."); Henderson, 73 Colum. L. Rev. at 1542 (custom is an inexpensive, accurate, and optional standard to help the jury).

"In almost every jurisdiction, evidence with respect to trade customs, industry practices, and technical standards … is admitted into evidence in products liability cases on both negligence and strict liability causes of action." 3 Frumer & Friedman, *Products Liability* (2016) § 18.04[1] (citing numerous cases); 1 Owen & Davis, *Owen & Davis on Products Liability* (4th ed. 2014) § 16:9 (similar) (citing cases). "Proof of compliance with such industry customs, trade practices … is not conclusive evidence of the absence of a defect," but "the jury may consider such compliance or, indeed, noncompliance in reaching its verdict." 3 Frumer & Friedman, *Products Liability* (2016) § 18.04[1]; 1 Owen & Davis, *Owen & Davis on Products Liability* (4th ed. 2014) § 6:9 (similar).

Thus “most jurisdictions that use design defect tests similar to California’s risk-benefit and consumer-expectations tests have found evidence of custom relevant to the defect determination and admissible.” Urban, 38 UCLA L. Rev. at 441-42 (citing cases); *see, e.g., Back v. Wickes Corp.* (Mass. 1978) 378 N.E.2d 964, 970 (holding industry custom evidence admissible under risk/benefit test; “Evidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury”); *Holst v. KCI Konecranes Int’l Corp.* (S.C. 2010) 699 S.E.2d 715, 721 (industry custom relevant in risk/utility case); *Carter v. Massey-Ferguson, Inc.* (5th Cir. 1983) 716 F.2d 344, 348-49 (industry custom relevant under risk-benefit and consumer expectations tests).

Conduct of other manufacturers tends in reason (§ 210) to shed light on the risk/benefit balance. Manufacturers have an interest in making their products as safe as practicable at a price consumers are willing to pay. A manufacturer offering significantly increased safety at an economical price would have a competitive advantage. Sources frequently consulted by consumers, such as Consumer Reports and the Insurance Institute for Highway Safety, award higher ratings for better safety.[3]

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[3] Naranjo, *Car Safety at Any Price* (Feb. 23, 2016) Consumer Reports <http://www.consumerreports.org/car-safety/car-safety-at-any-price/> (“Bonus points will be given for FCW [forward collision warning], low-speed AEB [automatic emergency braking], and high-speed AEB in

Information about other manufacturers' designs is especially valuable in cases like this one, involving emerging technology and an inexpensive vehicle. Consumers have limited budgets. "Anytime you add a feature to the vehicle, it raises the price of the vehicle"; adding every available safety feature to a $15,000 vehicle would price it out of the market. RT-VIII-3406. Whether other manufacturers in the same market added the particular technology at issue sheds light on which technologies' benefits provide the best return on cost.

Additionally, custom helps jurors avoid judging in hindsight. "[J]urors are likely to speculate about how other actors or firms in the industry behave, based in part on their own casual observation or anecdote." Abraham, *Custom, Noncustomary Practice, and Negligence* (2009) 109 Colum. L. Rev. 1784, 1803. This is a particular concern for emerging technologies, such as ESC was in 2005. ESC had been installed on many SUVs and sedans since the early 2000's. RT-VIII-3307-08, VIII-3355-56. By late 2012, when this case was tried, essentially every new vehicle had ESC. *See* 49 C.F.R. § 571.126 S3, S8 (requiring ESC on 100% of 2012 vehicles). Jurors accustomed to ESC could have assumed it was

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vehicles that are equipped with the features as standard across all trim levels."); *Ratings*, Insurance Institute for Highway Safety Highway Loss Data Institute <http://www.iihs.org/iihs/ratings> (as of July 26, 2016) ("To qualify for 2016 Top Safety Pick+, a vehicle must earn … an advanced or superior rating for front crash prevention," *i.e.* "automatic braking and forward collision warning systems").

common in 2005 and Toyota was behind. That was 180° wrong: Toyota was the first to offer it. The evidence was relevant to forestall that inference.

(3) California Cases Have Long Admitted And Used Industry-Standard Evidence In Strict-Liability Cases.

California cases have long relied on comparison to the design of like products to assist the jury in deciding whether the defendant's product is defective. The evidence has been introduced by both plaintiffs and defendants, and appellate courts have relied on it to affirm both plaintiffs' and defendants' judgments.

As this Court summarized in *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383, the cases initially adopting strict liability relied on comparison to "like products" and "the norm" to help the jury determine whether the product was defective. "In *Greenman* [*v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 62 and] *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256 … a defective product is viewed as one which *fails to match the quality of most like products*, and the manufacturer is then liable for injuries resulting from *deviations from the norm*: the lathe [in *Greenman*] did not *like other lathes* have a proper fastening device, the brakes of the automobile [in *Vandermark*] went on unexpectedly…." *Jiminez*, 4 Cal.3d at 383 (emphases added). That confirms common sense that industry practice is relevant. Deviation-from-the-norm is not the *test* for defect,

Barker, 20 Cal.3d at 429, but that does not make it *irrelevant.*

Numerous cases have relied on comparison to other products to determine defect. *Self* affirmed a plaintiff's verdict because, among other things, the design is "relatively more hazardous than others" and "the added hazard ... has been recognized by the industry." *Self*, 42 Cal.App.3d at 6. *Barker* cited this passage of *Self* to illustrate excessive preventable danger. *Barker*, 20 Cal.3d at 430. *Accord, Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, 545 (following *Self*).

In *Garcia v. Halsett* (1970) 3 Cal.App.3d 319, plaintiff claimed a washing-machine was defective because it lacked a "micro-switch" to stop the machine when the door was opened. Plaintiffs' expert testified that micro-switches were inexpensive and "[m]achines produced by other manufacturers have micro switches which serve as safety switches." *Id.* at 323. Other machines by defendant also had them. *Ibid.* The Court of Appeal held these facts supported plaintiffs' defect verdict. *Id.* at 326.

In *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, plaintiff's expert opined that plaintiff's vehicle was defective based on comparison to industry practice. He testified that plaintiff's "VW would roll over on a flat paved surface, such as a freeway, street or highway, without being 'tripped'; *American cars [generally] would not do this;* in the United States, there is an *implied standard* that a car should not roll over on a smooth surface." *Id.* at 515 (emphases added). "[B]ased upon

this opinion, [the expert] concluded that any car that will roll over on a flat, smooth road is defectively designed." *Id.* at 518. The Court of Appeal held that based on this evidence, "the jury could reasonably conclude that no car, American or foreign, should roll over" under the circumstances. *Ibid*

In the case that adopted the risk/benefit test, *Barker*, both sides relied on industry-practice evidence. Plaintiff claimed that defendant's high lift loader tipped too easily and should have had outriggers for stability. Plaintiff's "[e]vidence at trial revealed that cranes and some high lift loader models are either regularly equipped with outriggers or offer outriggers as optional equipment." *Id.* at 420. Defendant's expert testified "no competitive loaders with similar height lifting capacity were equipped with outriggers." *Id.* at 421. Plaintiff also claimed the loader's transmission should have had a "park" position; defendants asserted this "should not be considered a defect because none of the transmissions that were manufactured for this type of vehicle included a park position." *Id.* at 421-22.

Barker does not suggest this evidence was irrelevant. To the contrary, it approvingly cites the portions of *Self*, *Garcia*, and *Buccery* cited above, as exemplifying the risk/benefit test and the risk/benefit factors, and cites the very portion of *Culpepper* cited above as illustrating use of circumstantial evidence to prove defect under the consumer-expectation test. *Id.* at 430.

Hansen v. Sunnyside Products, Inc. (1997) 55 Cal.App.4th 1497, relied on industry custom in affirming a defense verdict. Plaintiff claimed defendant's stain remover was defective because it contained hydrofluoric acid. The Court of Appeal reversed plaintiff's JNOV on a risk/benefit design-defect claim. It held the defense verdict on risk/benefit was supported by sufficient evidence, including that the warning label (relevant to likelihood of harm under *Barker*) "comported with industry custom" and that hydrofluoric acid "is used in a variety of consumer products." *Id.* at 1520.

Howard v. Omni Hotels Management Corp. (2012) 203 Cal.App.4th 403 relied on industry standards to affirm a defense summary judgment. A hotel guest who slipped and fell in a bathtub sued, *inter alia,* the bathtub manufacturer, claiming the tub was too slippery. The manufacturer moved for summary judgment, based partly on compliance with industry standards provided by "two trade associations." *Id.* at 413. *Howard* held that "[w]hen the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not 'irrelevant,' but instead properly should be taken into account through expert testimony as part of the design defect balancing process." *Id.* at 426.

Bozzi v. Nordstrom, Inc. (2010) 186 Cal.App.4th 755, 762-63 affirmed summary judgment for an escalator manufacturer on a strict-

liability claim and premises owner on a negligence claim because, *inter alia,* the escalator's warnings "met industry standards." *Binning v. Louisville Ladder, Inc.* (E.D. Cal., Aug. 27, 2014, No. 2:11-cv-03058-MCE-CKD) 2014 WL 4249667, *5 held compliance with industry standards governing a ladder admissible in a product-liability action.

These cases confirm that industry practice is relevant circumstantial evidence in deciding whether defendant's design is defective. Plaintiffs do not acknowledge, let alone come to grips with, most of these cases.

Plaintiffs do address *Howard,* conceding the standards in *Howard* were admissible. Their effort to distinguish *Howard* is unpersuasive. Plaintiffs admit "technical standards" such as the trade-association standards in *Howard* "may legitimately be cited" on risk/benefit because, plaintiffs say, they "bear on the objective characteristics of the products rather than the behavior of manufacturers." OB-21-22. But *Howard* and the Court of Appeal here both treated trade-association standards as indistinguishable from industry custom and practice. Plaintiffs' theory would mean that if every manufacturer decides not to install a feature, it would be inadmissible "industry custom" evidence – yet if a manufacturers' association promulgates that same decision, it would be an admissible "technical standard." That makes no sense, as the Court of Appeal here recognized. Op.-13.

Some of these cases used industry custom or practice to affirm

plaintiffs' verdicts. That does not distinguish them. The same evidence cannot be relevant when plaintiff introduces it to prove a defect, but irrelevant when defendant introduces it to disprove a defect. The definition of relevance turns on whether the evidence tends in reason to prove *or disprove* a disputed fact of consequence. § 210.

(4) The Cases Assertedly Rejecting Admissibility of Industry-Custom Evidence Are Off-Point Or Poorly Reasoned.

The assertion that industry custom-and-practice evidence is irrelevant crept into a handful of cases with no citation and often no reasoning. It does not withstand scrutiny. These cases did not address the Evidence Code provisions governing relevance and admissibility, identify a statutory basis to exclude the evidence, or have a record establishing relevance like this case. Only one addressed the deferential standard of review, and in that case the trial court had excluded the evidence.

Foglio v. Western Auto Supply (1976) 56 Cal.App.3d 470 did not suggest industry practice is irrelevant or inadmissible. The Court of Appeal reversed because the instruction on defect incorrectly referred to reasonable care. *Id.* at 477. The opinion did not address admissibility of custom and practice.

Heap v. General Motors Corp. (1977) 66 Cal.App.3d 824, 831 correctly stated that deviation from industry norm is not necessarily the test

for defect. It did not address admissibility of industry custom.

Titus v. Bethlehem Steel Corp. (1979) 91 Cal.App.3d 372 stated that custom is inadmissible, but provided no reasoning and ignored the controlling Evidence Code sections and standard of review. In *Titus*, plaintiff claimed an oil well should have had a guarding device to keep people out. The Court of Appeal held that the trial court prejudicially erred in jury instructions. *Id.* at 377. It then addressed defendant's argument at trial that it was "custom and practice in the industry that manufacturers offered security guards as optional equipment." *Id.* at 378. Citing only *Foglio, Titus* held that defendant's argument "was error because custom and usage is not a defense to a cause of action based on strict liability." *Ibid.* It commented that on retrial, "the evidence on custom and usage as it pertains to the optional sale of the safeguards will be inadmissible." *Id.* at 382. It did so without reasoning or citation, and its logic does not follow. That custom is not by itself a *defense* does not make it *inadmissible*. It is admissible if it tends to prove *any* disputed fact of consequence and not excluded by statute. §§ 210, 351.

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757 provides ostensible reasons for excluding custom evidence, but they do not withstand scrutiny. Plaintiff, injured in an automobile fire, sued over placement of the gas tank. The jury found in plaintiff's favor under the consumer-expectation test. On appeal, defendant contended the jury should

also have been instructed on risk/benefit. The Court of Appeal held the failure to instruct on risk/benefit was not prejudicial. It commented in dictum that defendant's risk/benefit instruction was also wrong because it included compliance with custom as a factor. *Id.* at 803. Citing *Titus* and *Foglio,* the court stated that "[i]n a strict products liability case, industry custom or usage is irrelevant to the issue of defect." *Ibid.* As already seen, *Foglio* does not say that; *Titus* announces it without citation or reasoning, and without considering the controlling Evidence Code sections or standard of review.

Grimshaw's other reasons fare no better. *Grimshaw* pointed out that custom is not itself a factor under *Barker. Ibid.* That does not make it irrelevant. As discussed above, evidence is relevant when it tends in reason to prove or disprove "any fact" of consequence to the outcome, including intermediate facts. § 210; Part III.B.1 above. Once relevant, it is admissible except as provided by statute. § 351. Industry-custom-and-practice evidence is relevant to several facts and helps the jury evaluate the risk and benefit evidence. Part III.B.1.a.(1)-(2) above.

Grimshaw also concluded that *Barker* "makes clear by implication that [custom and usage] are inappropriate considerations," by instructing that strict liability focuses on the product's condition, not the manufacturer's reasonableness. 119 Cal.App.3d at 803. That is incorrect on at least three fronts.

First, industry custom does relate to the product's condition. Custom is relevant to several of the risk/benefit factors (and here, causation) and the overall weighing. Parts III.B.1.a.(1)-(2) above.

Second, it misunderstands the test for admissibility of evidence. If evidence tends to prove or disprove *any* disputed fact of consequence it is relevant and so admissible unless otherwise provided by statute. §§ 210, 351; Parts III.B.1-2 above. Industry practice is relevant, especially on this record. Part III.B.1.a above,

Third, reasonableness is very much part of risk/benefit weighing. Part III.B.2.d below.

McLaughlin v. Sikorsky Aircraft (1983) 148 Cal.App.3d 203 adds nothing. It stated in passing that evidence of industry custom and usage is irrelevant in a products liability case, acknowledging the issue was not involved in that case. *Id.* at 210. It cited *Grimshaw* and *Barker* without further reasoning. As already stated, *Grimshaw*'s analysis conflicts with the Evidence Code and does not follow on several fronts. *Barker* involved industry-custom-and-practice evidence introduced by both sides and does not question its admissibility.

Buell-Wilson v. Ford Motor Co. (2006) 141 Cal.App.4th 525, 543-46 adds nothing to the legal analysis, and inadvertently demonstrates that industry practice *is* relevant. It held that the trial court did not abuse its discretion in excluding evidence that defendant's vehicle's rollover rates

were superior to peer vehicles, on the ground that it "improperly sought to show that it met industry standards or custom for rollovers" and that the statistics were unreliable. *Id.* at 545. *Buell-Wilson* did not provide any additional reasoning, but relied on *Grimshaw*, *Foglio*, *Heap*, and their misinterpretation of *Barker*. *Id.* at 545-46. Moreover, in *Buell-Wilson* the trial court had excluded the evidence; the deferential standard of review favored affirmance.

But *Buell-Wilson* unwittingly recognized that comparison to others' designs *is* relevant. Summarizing evidence of the Ford vehicles' "[s]tability defects," it emphasized that the Bronco II's "rollover rate is three times higher than the Chevy S-10 Blazer" and its stability index "was less" than that of "the Jeep CJ7, which had a widely reported rollover problem." *Id.* at 536.

b. **The Evidence Was Also Relevant To Issues Outside The Scope Of The Court's May 11, 2016 Order Limiting Briefing.**

Evidence that no other full-sized pickup offered ESC was also relevant for reasons. Toyota does not address these points fully because the May 2016 order limits briefing to relevance under the risk/benefit test. *See* Cal. R. Ct. 8.516(a)(1).

First, when the motion was denied and the evidence introduced, plaintiffs had requested a consumer-expectation instruction and the court had not yet refused it. That no other pickup had ESC tended to show that

ordinary pickup consumers would not expect ESC or ESC performance. Thus as Toyota argued, it was relevant to whether the consumer-expectation instruction should be given and, if given, whether pickup consumers expected ESC. *See* RT-II-308-09, X-4022; *Soule,* 8 Cal.4th at 570 (consumer-expectation test did not apply where ordinary experience would not inform consumers how obscure components should perform).

Second, the absence of ESC on other pickups, combined with the long accident-free history on this road, was relevant to comparative fault. P. 30 above.

In the unlikely event the Court holds the evidence irrelevant to risk/benefit, the Court should remand for determination whether the evidence was relevant to these other issues. The evidence was relevant if it tended to prove or disprove *any* disputed fact of consequence. §§ 210, 351.

2. No Statute Made The Evidence Inadmissible.

Because the evidence was relevant under section 210, it was admissible except as provided "by statute." § 351. Neither plaintiffs' opening brief, nor the cases in the *Foglio/Grimshaw* line, identify any statute making the evidence inadmissible.

Plaintiffs propose such evidence be inadmissible as a matter of "[p]ublic [p]olicy." OB-31-40. But "Section 351 abolishes all limitations on the admissibility of relevant evidence except those that are based on a statute ...." *Evidence Code With Official Comments* (1965) 7 Cal. Law

Revision Comm. Rep. 1000, 1042; *id.* 1007-08 (report contains official comments of Assembly and Senate Judiciary Committees and Law Revision Commission); *see* § 230 ("statute" includes constitution). Section 351's "[e]xcept as otherwise provided by statute" provision, like identical language in section 911, precludes courts from excluding evidence based on judge-made policy. *See People v. Gionis* (1995) 9 Cal.4th 1196, 1206 (section 911 "[e]xcept as otherwise provided by statute" language "reflects the Legislature's clear intent to ... keep the courts from creating new nonstatutory privileges as a matter of judicial policy."); *Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769 (same); *Witherspoon v. Superior Court* (1982) 133 Cal.App.3d 24, 29-30 (section 351 precluded judge-made rule that polygraph evidence was inadmissible);[4] *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 37 (section 351 "abolishes all limitations on the admissibility of relevant evidence" except based on statute; affirming admission of evidence that product had no previous accidents).

Section 351's "except as otherwise provided by statute" language contrasts with section 1200, which makes hearsay inadmissible "[e]xcept as provided by law." Because section 160 defines "law" to include "decisional law," judicial decisions can create exceptions to the hearsay

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[4] The Legislature later passed section 351.1, controlling admission of polygraph evidence.

rule. *In re Cindy L.* (1997) 17 Cal.4th 15, 26-27.

Plaintiffs' proposed policy reasons to exclude the evidence fail from the start because not based on statute. They are also unfounded.

a. **Plaintiffs Do Not Claim The Trial Court Abused Its Broad Discretion Under Section 352.**

The only statute that might authorize exclusion here is section 352. Section 352 states that the court "in its discretion" may exclude evidence if its probative value is "substantially outweighed" by the "probability" that its admission will (a) necessitate undue consumption of time or (b) create "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Plaintiffs do not claim the trial court was required to exclude the evidence under section 352. They do not cite section 352 or discuss the standard for excluding evidence under it or the standard of review of the trial judge's decision. The Court of Appeal also did not address whether section 352 required exclusion here; plaintiffs' petition for rehearing did not claim the court had omitted it. *See* Cal. R. Ct. 8.500(c)(1),(2).

b. **Plaintiffs' Prejudice Arguments Are Unfounded.**

Even if plaintiffs' arguments could be construed as section 352 arguments, they would show no error.

"The trial court enjoys broad discretion … in assessing whether

concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence." *People v. Clark* (2016) 203 Cal.Rptr.3d 407, 456. Its decision must be affirmed unless the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner." *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.

The trial court did not abuse its discretion. The evidence here was relevant to several parts of both plaintiffs' claim and Toyota's defense, as already stated. Plaintiffs' assertions that it could not be used to negate defect could have been addressed through a request for limiting instruction. The trial court did not act arbitrarily in admitting evidence of acknowledged relevance and treating its supposed inadmissibility for a particular purpose as a matter for a limiting instruction.

Still, plaintiffs say, industry-custom evidence is "inherently prejudicial" and should never be admitted. OB-31. This assertion fails on multiple fronts.

First, section 352 commits "discretion" to the trial court. This Court ordinarily eschews rigid rules in favor of case-by-case balancing. *E.g., People v. Collins* (1986) 42 Cal.3d 378, 391-92; *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 733; *People v. Stanley* (1967) 67 Cal.2d 812, 818; *but see Green*, 27 Cal.3d at 39 ("weighing process is ordinarily performed by the trial court" but establishing per-se rule against evidence of flight),

abrogated on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 973. Plaintiffs' arguments are general assertions about industry-custom evidence, untethered to the evidence in this record and its probative versus supposedly prejudicial effect.

Second, plaintiffs' arguments do not establish prejudice. "Prejudice" means evidence "which uniquely tends to evoke an emotional bias … and which has very little effect on the issues." *People v. Alexander* (2010) 49 Cal.4th 846, 905; *Ajaxo v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 48. The evidence here did not evoke emotional bias, nor does industry custom generally. It does not "pose[] an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" *Alexander*, 49 Cal.4th at 905 (quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1114).

Third, pleas of prejudice (or confusion of issues or misleading the jury) are not enough. There must be a "substantial danger" of the claimed prejudice, which must "substantially outweigh" the evidence's probative value before exclusion is permitted. § 352. Nothing compelled the court to conclude the probative value on several fronts was substantially outweighed by plaintiffs' generic claim of prejudice.

Plaintiffs' prejudice arguments are also substantively unfounded. For example, plaintiffs assert that industry custom distracts from feasibility, cost, and safety and focuses the jury on whether "everybody does it." OB-

31-33. That assertion is belied by this record. The no-other-pickup-had-ESC evidence was relevant to the core *Barker* inquiries. Part III.B.1.a above. Further, *plaintiffs* introduced the evidence, trying to prove that Toyota did not install ESC because competitors did not. Plaintiffs cannot introduce evidence about competitors, lose, then say competitors are irrelevant. "[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.

Next plaintiffs wrongly assert custom has "no value in balancing risks and benefits where it is undisputed that every truck on the road with ESC is substantially safer ... than the same vehicle without ESC." OB-32. Safety benefit, however, is only one factor. That other pickups did not have ESC was relevant to causation, gravity of harm, cost, and consumer acceptance. Part III.B.1.a above.

Similarly, plaintiffs say ESC "was mature and available." On this basis they try to distinguish "state of the art" evidence, which concededly may be used to show technological and economic feasibility. OB-26-28 (citing *Boatland of Houston, Inc. v. Bailey* (Tex. 1980) 609 S.W.2d 743). Whether the technology is available goes to only one *Barker* factor (feasibility). The evidence remained relevant to the other *Barker* factors. Part III.B.1.a above.

Plaintiffs say industry custom may be unsound, the product of inertia or a habit. OB-33-34. Arguments about reliability, however, are for the jury to decide and go to its weight. They are not a ground to exclude evidence. *People v. Merriman* (2014) 60 Cal.4th 1, 57.

Next plaintiffs claim industry custom is hearsay. OB-34. Plaintiffs raised no hearsay objection in the trial court (*see* § 353(a)), and the argument is meritless. Evidence of a person's conduct is not hearsay unless the person intends the conduct "as a substitute for oral or written verbal expression." §§ 1200 (hearsay is out-of-court "statement" used for its truth), 225 ("statement" excludes conduct not intended as substitute for verbal expression). Plaintiffs do not assert that other manufacturers' non-inclusion of ESC was a substitute for oral or written verbal expression. It was not.

c. **Custom Does Not Relate Solely To Negligence.**

Plaintiffs say custom shifts the jury's attention to a "negligence standard": it supposedly relates to the "manufacturer's behavior" rather than the product's features and benefits of alternative designs. OB-1, 38-40. Not at all.

Compliance or non-compliance with industry custom is admissible in negligence actions, though not conclusive. *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407; *Hernandez v. Badger Constr. Equip. Co.* (1994)

28 Cal.App.4th 1791, 1831 (same); Rest.3d Torts: Liab. for Physical and Emotional Harm, § 13; *id* at com. b (similar). That does not make it *inadmissible* in strict liability.

There is no reason to hold custom inadmissible under the strict-liability risk/benefit test when it is admissible in negligence. The legal standards governing the *objective features of the design* are similar. "[I]n products liability actions based on a design defect, both the negligence theory and the strict liability theory involve a risk/benefit analysis" (unless plaintiff sues on a consumer-expectation theory). *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 483. As with risk/benefit, the "test of negligent design 'involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm.'" *Id.* at 479 (quoting *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 468, 470). "[N]o practical difference exists between negligence and strict liability" in design-defect claims. *Lambert v. General Motors Corp.* (1998) 67 Cal.App.4th 1179, 1185; *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336, 348, 350.

Indeed, one of custom's main purposes in negligence is to help the jury assess the credibility of plaintiff's claim that the alternative design was better. "Those not in the know are prone to set impractical standards .... Evidence that the defendant has followed the ways of his calling checks

hasty acceptance of suggestions for unfeasible change." Morris, *Custom and Negligence* (1942) 42 Colum. L. Rev. 1147, 1148. That is equally true in strict-liability risk/benefit cases. *See Urban,* 38 UCLA L. Rev. at 466 ("If few manufacturers decided to adopt the alternative, one can infer that consumers actually did consider the alternative ungainly or too expensive, and thus that the proposed alternative was not feasible."); Henderson, 73 Colum. L. Rev. at 1542; *see Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 278-79.

The "one key" difference between strict liability and negligence is state of mind: strict liability "obviates the need for a plaintiff to show a manufacturer knew or should have known of the risk posed by his product—i.e., whether the manufacturer acted reasonably." *Merrill*, 26 Cal.4th at 485. Custom's relevance does not depend on the manufacturer's state of mind. The no-competing-pickups-have-ESC evidence would remain relevant to causation, cost, gravity of harm and so forth for the reasons stated (Part III.B.1.a) even if Toyota did not and should not have known of the custom. Even to the extent custom relates to state of mind, it was relevant because plaintiffs had put Toyota's state of mind at issue. Plaintiffs claimed Toyota had installed ESC on SUVs, SUVs "are considered to be like trucks," Toyota was "intending" to install it on pickups, but did not because "competitors didn't do it." RT-II-310-11, III-1235-36. Plaintiffs having put Toyota's state of mind at issue, Toyota was

entitled to respond. *See Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1234, 1241.

Nor is it a surprise that evidence relevant to *Barker's* risk/benefit test would also be relevant to negligence. Strict liability incorporates "a number of negligence principles ... including *Barker*'s risk/benefit test." *Merrill*, 26 Cal.4th at 480. "[T]he claim that a particular component 'rings of' or 'sounds in' negligence has not precluded its acceptance in the context of strict liability." *Anderson v. Owens-Fiberglas Corp.* (1991) 53 Cal.3d 987, 1001. As *Barker* itself explained, "most of the evidentiary matters" relevant to risk/benefit "are similar to issues typically presented in a negligent design case.'" *Barker*, 20 Cal.3d at 431.

d. Reasonableness Is An Inherent Part Of Risk/Utility Balancing.

While recognizing that out-of-state cases and the Restatement hold that custom is relevant to strict liability, plaintiffs argue these authorities concern whether the design is reasonably safe, and that unreasonable danger is not the test for defect in California. OB-37; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134-35; *e.g.*, Rest.3d Torts, § 2, com. d. The jury, however, can *consider* reasonableness. *Barker* rejected the argument that "*Cronin* broadly precludes any consideration of 'reasonableness.'" *Barker*, 20 Cal.3d at 433. To the contrary, the risk/benefit test seeks "reasonable and practical" safety. *Id.* at 434 (quoting

Self, 42 Cal.App.3d at 7) (emphasis added).

3. **Plaintiffs' Jury Instructions Are Outside The Issues For Review And Were Properly Refused.**

Plaintiffs assert the trial court erred in refusing their proposed jury instructions 19-22. OB-47-48. This Court's May 11, 2016 order limits briefing to whether the trial court reversibly erred in admitting evidence. Plaintiffs' complaint about denied jury instructions is not fairly included within admissibility of evidence. *See* Cal. R. Ct. 8.516(a)(1).

The Court of Appeal was, moreover, correct in affirming rejection of these instructions. "Irrelevant, confusing, incomplete or misleading instructions need not be given." *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209. Instruction 19 said it is "no defense" that the Tundra's design met industry standards, was similar to competing designs, or met Federal Motor Vehicle Safety Standards. AA-III-545. This proposed instruction was incorrect.

As the Court of Appeal explained, saying a fact is "no defense" incorrectly suggests it is legally irrelevant, and is error when the jury may properly consider the fact. Op.-25-26; *People v. Spencer* (1963) 60 Cal.2d 64, 84, fn.14, 87 (reversing instruction that drunkenness "is not of itself a defense" because instruction might have left impression "that as a matter of law a defendant's voluntary intoxication can have no effect on the criminality of his conduct"); *Veronese v. Lucasfilm Ltd.* (2012) 212

Cal.App.4th 1, 24-26; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1393-95.

When the proposed instruction said compliance with custom was "no defense," it misleadingly suggested custom could not be considered. When it said compliance with government regulations was "no defense," it misleadingly suggested that such compliance cannot be considered. That was wrong: Plaintiffs conceded that compliance with government regulations can be considered. RT-II-304 (compliance "would be admissible"); Op.-20, fn.9 (plaintiffs did not appeal admissibility of compliance with government standards and conceded relevance); OB-24 (government standards are "uniquely valuable as design criteria"); *O'Neill,* 147 Cal.App.4th at 1393-95 ("no defense" instruction as to government regulations was error). Additionally, the proposal argumentatively referred to other vehicles having "the same design defects" as the Tundra, wrongly suggesting the Tundra was defective.

Plaintiffs abandoned any argument about their other proposed instructions 20-22, failing to discuss them in their Court of Appeal brief. Op.-26.

C. <u>Any Error Was Harmless.</u>

"No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party." *Soule,*

8 Cal.4th at 580. Civil error "generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." *Id.* at 574; *see* Cal. Const. art. VI, § 13; § 353(b). Plaintiffs, as appellants, have the burden to demonstrate prejudice. *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.

Plaintiffs' prejudice arguments assert that Toyota's case was "nothing but 'our product is no worse than others'," and that the "'no defect' verdict thus could only rest on Toyota's argument that the Tundra was no worse than every other passenger truck." OB-30, 49. That is false.

First, the severe weaknesses in plaintiffs' case and strength of the defense no-defect case made the jury unlikely to find a defect for reasons having nothing to do with the no-competitor-had-ESC evidence: (1) plaintiffs' failure to get any expert to say the Tundra was defective; (2) Gilbert's proclamation he had never "said a word about defect" in the Tundra; (3) Gilbert's testimony that not all vehicles without ESC are dangerous; (4) Gilbert's testimony that he drove his Tundra hard and had no problems with maneuverability or anything else; (5) Meyer's testimony that the Tundra's brakes and tires were well capable of handling forces on the vehicle; (6) the testimony of Nagae, Carr and Lobenstein that the Tundra was safe with or without ESC; (7) Carr's testing demonstrating it was very difficult to make the Tundra spin, and explanation that other

features keep the vehicle in control; (8) ESC's expense, at least $300; (9) pickup consumers' price-sensitivity (exemplified by Kim himself) and (10) pickup consumers' overwhelming desire *not* to have ESC even for free. Toyota's closing emphasized these points. Part II.C.6 above.

Second, the no-competitor-had-ESC evidence was a small part of a long trial. It involved a handful of questions – mostly by plaintiffs – to Lobenstein. *See* Part II.C.6 above. This evidence was also a tiny part of Toyota's closing: in total, approximately one page out of an 81-page argument. *Compare* RT-XI-4506:13-18, XI-4508:21-4509:1, 4510:18-22, 4510:25-28 (portions cited by plaintiffs at OB-41-42) *with* RT-X-4303-44, RT-XI-4502-43 (full Toyota closing).

Third, the no-defect verdict may well have been based on absence of causation. The jury was instructed, and both sides' counsel explained, that the first step in the defect determination was whether the design caused plaintiffs' harm. Part II.C.5 above, p. 63 below. There was extensive evidence that ESC would not have prevented the accident. Carr's tests provided concrete, specific evidence that ESC would not have prevented it. His explanation that ESC would not have helped Kim, because it helps the vehicle go where the driver steers and Kim had steered off the road, was persuasive and easy to grasp. In contrast, plaintiffs did not test their theory that ESC would prevent the accident. Both sides' experts agreed that Papelis' generic simulations should not be used to show causation. His

statistics showed only that ESC can prevent only a *minority* of losses-of-control. Gilbert's causation opinion relied on fanciful factual assumptions, such as an additional vehicle that both sides' reconstructionists and the percipient witnesses rejected.

Still trying to suggest there was no real dispute on defect, plaintiffs say "Toyota never offered a technological reason not to make ESC standard in every vehicle" or denied its benefits. OB-16. Feasibility and benefit are just part of the risk/benefit balancing. Plaintiffs ignore the abundant evidence on the other *Barker* factors and Gilbert's unequivocal testimony that he had *not* said the Tundra was defective.

In a last-ditch effort, plaintiffs say they were prejudiced by the verdict form. Plaintiffs assert that by putting the defect question first, the form urged jurors to decide defect without considering causation. OB-50. That fails on multiple fronts. Their counsel expressly agreed to the verdict form. RT-X-4202-03. The jury knew the first step in deciding whether the Tundra was defectively designed was to decide whether the design was a substantial factor in causing the harm. The jury instructions said so, both sides' closing arguments said so, and plaintiffs reminded the jury that the "definition" of defect included causation. RT-X-4242-43 (instructions), RT-XI-4540-41 (defense argument that design was not a substantial factor in causing the harm, so "defect" question should be answered no), RT-X-4289-90 (plaintiffs' closing argument that plaintiffs' burden of proof,

including causation, was part of "definition of defective design").

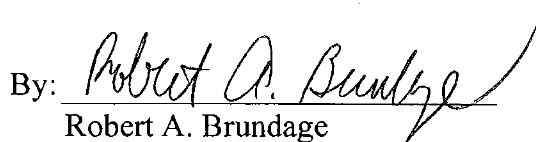
Last, this was not a close case. The jury took about three hours to deliberate and was unanimous. Part II.C.7.

IV. CONCLUSION

The Court should affirm.

Dated: July 27, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: 

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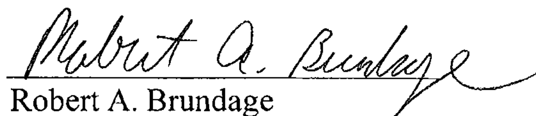
CERTIFICATE OF WORD COUNT

I certify that this brief contains 13,959 words, as counted by the Microsoft Word 2010 software used to generate it.

Dated: July 27, 2016



Robert A. Brundage

CERTIFICATION OF SERVICE

I, Jennifer Gray, certify and declare as follows:

I am a citizen of the United States and a resident of the State of California. I am over eighteen years of age, not a party to this action, and am employed in San Francisco County, California at One Market Street, Spear Tower, San Francisco, California 94105. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited that same day in the ordinary course of business.

On July 27, 2016, I served the following document via U.S. Mail on the parties set forth below:

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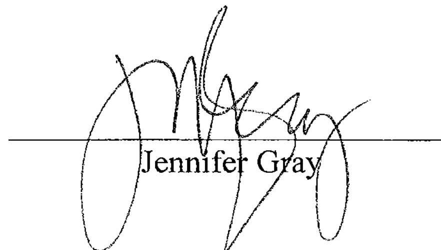
I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed on July 21, 2016, at San Francisco, California.



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