No. S240245

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HAIRU CHEN, et al.,
Plaintiffs and Appellants,

vs.

L.A. TRUCK CENTERS, LLC,
Defendant and Respondent.

FROM A DECISION OF THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DIVISION, DIVISION EIGHT, NO. B265304,
LOS ANGELES COUNTY SUPERIOR COURT NO. BC469935
(HON. J. STEPHEN CZULEGER AND HON. HOLLY E. KENDIG)

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiffs are the surviving members and relatives of a Chinese tour group that traveled to California and other states on vacation. They chartered a tour with a California touring company in a bus it had purchased from a California bus dealership—which had imported the bus for sale in California from an Indiana bus manufacturer. While the bus was being operated by a California driver and a California tour guide who were employed by the California touring company, it was involved in a rollover accident in Arizona on a trip to the Grand Canyon. Seven of the 11 members of the tour group were totally ejected from the bus, one was partially ejected, two suffered fatal injuries, and the rest suffered serious injuries. Seatbelts would have prevented the ejections, fatalities, and serious injuries.

The case ultimately went to trial in a California courtroom before a California jury solely against one defendant—the California dealership that made the fateful decision not to order seat belts for the rear seats when it imported the bus into California for sale in California. Even though the Indiana manufacturer had settled out of the case, and the only remaining defendant was the California dealership responsible for the decision not to order rear passenger seatbelts, the trial court instructed the jury under Indiana's law of products liability. Indiana does not recognize strict products liability and has no counterpart to California's risk-benefit theory of design

defect. The jury reached a defense verdict.

The Court of Appeal correctly ruled that the trial court committed reversible error by applying Indiana law at trial. First, applying California's governmental-interest test, the trial court was way off in ruling that California had "no interest" in applying its own law of strict products liability. California had a vital interest in applying its law to deter the sale of unsafe vehicles in California, advance the policies behind California's doctrine of strict products liability, and adjudicate a California dealership's liability for choosing, in California, not to order rear seat belts for a tour bus it imported into California and later sold to a California bus touring company for use on the roads and highways of California.

Second, the Court of Appeal correctly found that after the Indiana manufacturer had settled out of the case, and the only remaining defendant was the California dealership, Indiana had no interest in having its law applied. BusWest cites no authority supporting its claim that a choice-of-law ruling is inalterable once made, no matter what may occur later in the litigation to alter the respective interests of the relevant jurisdictions in having their laws applied.

In making the case for this immutable approach, BusWest confuses *historic facts* with *litigation facts*. It is true that a post-accident change in the *historic facts*—such as a party's move from one state to another—does not alter the court's choice-of-law analysis

because the historic facts must be frozen at the time of the underlying events. Otherwise, a party would be able to move to a different state after an event to take advantage of more favorable laws in that state. Just as obviously, however, the relevant *litigation facts* (such as the parties to the case and the claims asserted) cannot feasibly be determined as of the time of the underlying events, before the litigation has even been filed. Instead, a court must take account of the operative litigation facts at the time of trial to assess what law to apply *to the claims that are ultimately sent to the jury at trial*. Any other outcome would lead to absurd and arbitrary results.

Finally, even assuming that a court must blind itself to new litigation facts altering the relevant interests of the states, the trial court's initial ruling to apply Indiana law was still incorrect. Indiana *never* had a significant interest in having its law applied to this action—even when the Indiana manufacturer was still in the case. Unlike California, Indiana is a traditional *lex loci delicti* jurisdiction that applies the substantive law of the state where the harm occurred in all but rare and exceptional cases. Because even Indiana courts would not apply Indiana law to a case involving a vehicle accident that occurred on a highway outside Indiana's borders, Indiana had no interest in having its law applied by a California court. Thus, the trial court should have applied the law of California as the forum state—with a strong interest that was never outweighed by the interests of any other jurisdiction. The judgment of the Court of Appeal should be affirmed.

STATEMENT OF FACTS

A. The Dealer Agreement Between Forest River and BusWest

BusWest is a California corporation and bus dealership. It sells buses to retail clients, including the State of California. (1.AA.5,135,141; 8.RT.3420-3421,3428.)

Forest River, Inc. ("Forest River") is an Indiana corporation. Forest River manufactures recreational vehicles, buses, and boats, and sells its products in California and elsewhere. One of its divisions, Starcraft, manufactures tour and shuttle buses. Starcraft manufactured the 2006 Starcraft bus involved in this accident.[1] (1.AA.5,47-48,130,135; 7.RT.3002-3004,3030.)

Forest River does not have its own dealerships in California. It sells its buses in California solely through independent dealerships. (7.RT.3006.) In 2005-2006, BusWest was the only authorized dealer for Forest River's Starcraft fleet in California. (7.RT.3012-3013; 8.RT.3428.) California sales constituted a "good-size portion" of Starcraft's business. (7.RT.3010.)

The relationship between Forest River and BusWest was governed by a written Dealer Agreement of January 2004. Under its

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[1]Plaintiffs will refer to Forest River and Starcraft collectively as "Forest River."

terms, BusWest was required to promote and sell Starcraft buses in California and neighboring states, and had the "exclusive" right to discount pricing on Starcraft products for sale in the region. (7.RT.3022-3031; 4.AA.987-991.) Among other things, the Dealer Agreement required BusWest to (i) maintain and prominently display a minimum inventory of eight Starcraft buses at any given time; (ii) take delivery of and resell a minimum of 132 Starcraft buses each year; and (iii) advertise, promote, and display Starcraft products throughout the covered territory. (4.AA.987.)

The 2004 Dealer Agreement listed an address for BusWest in Santa Fe Springs, California. (4.AA.987.) It also listed addresses for eight BusWest "DEALERSHIP locations subject to this agreement." Seven were in California and one in Las Vegas, Nevada. (4.AA.989.)

B. Sale of Bus to California Bus Dealership

On September 26, 2005, pursuant to the terms of the Dealer Agreement, BusWest ordered from Forest River the 2006 Starcraft 16-seat tour bus involved in this accident. Under "Dealer Information," the Forest River Pricing & Order form listed a dealership address for BusWest in Santa Fe Springs, California. (1.AA.130,132; 4.AA.970.)

BusWest used Forest River's standard Pricing and Order Form to order the bus. (7.RT.3037-3038; 4.AA.964-967.) The form offered dealerships a number of different passenger seatbelt options,

including $12 per seat for non-retractable lap belts and $45 per seat for retractable lap/shoulder belts. (4.AA.967.) BusWest chose to order the bus without any passenger seatbelts. (7.RT.3045-3046,3058; 8.RT.3430,3439-3440; 4.AA.970-971.)

BusWest ordered the bus for its own inventory, not for any specific customer. (7.RT.3056; 8.RT.3444.) During this time period, BusWest had a standard practice of not ordering passenger seatbelts for its inventory of stock tour and charter buses. It only ordered passenger seatbelts for buses that were intended for use in the healthcare field. (8.RT.3438-3439.)

Starcraft manufactured the bus using a Ford Econoline cab and chassis. The driver's seat and front passenger seat of the Ford cab came already equipped with lap/shoulder belts. (7.RT.3020, 3052, 3059; 8.RT.3445-3446;10.RT.3964-3966.) Because BusWest chose not to order passenger seatbelts for the other seats, the 14 rear passenger seats had no seatbelts. (5.RT.2416-2419.) The applicable federal motor vehicle safety standard did not mandate passenger seatbelts for buses with a gross vehicle weight rating over 10,000 pounds.[2] (7.RT.3067-3068; 8.RT.3447.)

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[2]By definition, a federal motor vehicle safety standard is only a "minimum standard" (49 U.S.C. § 30102(a)(9)), and the federal statute's savings clause states that compliance "does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).) Under California law, a vehicle manufacturer or seller may be liable for defective design even if it complied with the federal standards. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298,

Starcraft manufactured the bus in Goshen, Indiana. (1.AA.130.) According to its general manager, David Wright, "F.O.B. was Goshen, Indiana." (*Ibid.*) The term "FOB" is "a shipping term which indicates the supplier pays the shipping costs (and usually also the insurance costs) from the point of manufacture to a specified destination, at which the buyer takes responsibility." (1.AA.25,fn. 2; 2.AA.279,fn. 2.) In early 2006, BusWest contracted with a third party to pick up the bus and bring it from Goshen, Indiana to its dealership in Santa Fe Springs, California. (8.RT.3449-3451.)

C. Sale of Bus by California Bus Dealership to California Bus Touring Company

The bus sat on the lot in BusWest's California inventory for over two years. (8.RT.3451.) In the meantime, BusWest moved its Santa Fe Springs dealership to Carson, California. (8.RT.3421.)

In March 2008, BusWest sold the bus from its Carson dealership to TBE International, Inc. ("TBE"), a California corporation and bus touring company operating out of the City of Industry, California. TBE offered bus tours in California and neighboring states. (1.AA.4; 2.AA.355,357,420-432; 5.RT.2404; 8.RT.3425-3426,3451-3452.)

1321; see also *Williamson v. Mazda Motor of America, Inc.* (2011) 562 U.S. 323 [California tort claim alleging Mazda should have installed lap/shoulder belt was not preempted by federal standard permitting lap-only belt].)

TBE had a Class B certificate to operate as a charter-party carrier of passengers pursuant to California Public Utilities Code section 5383. (2.AA.357.) The certificate, issued by the California Public Utilities Commission, identified the home terminal as TBE's address in the City of Industry. (*Ibid.*) The Class B certificate authorized TBE to carry passengers "from any point within the territory of origin specified in the certificate to any points in the state, or territory of origin." (Pub. Util. Code, § 5383.) The certificate itself stated that it "authorize[d] the transportation of passengers by motor vehicle over the public highways of the State of California." (2.AA.357.)

Betty Qi was the owner of TBE. (5.RT.2405.) She ran the business out of TBE's office in City of Industry, California, and before that in Hacienda Heights, California. She was a regular customer of BusWest. Before purchasing the Starcraft bus involved in this accident, she had purchased multiple other buses from BusWest in California. (8.RT.3425-3426,3436,3467-3482; 2.AA.328.)

BusWest sold the 2006 Starcraft bus to TBE for approximately $44,000. TBE traded in an older model Starcraft bus for a credit as part of the transaction. (2.AA.338-339; 4.AA.980-981; 8.RT.3451-3452.) The new bus was registered as a commercial vehicle in California, had California license plates, and was operated out of TBE's headquarters in California. (2.AA.344,350-353,379,387,390.)

The invoice for the sale included the dealership address for

BusWest in Carson, California and stated that payment was to be remitted to a BusWest P.O. Box address in Los Angeles. The invoice listed the customer address for TBE in City of Industry, California. (2.AA.338; 4.AA.977.)

The Purchase Agreement between BusWest and TBE also listed TBE's City of Industry address as the customer address. However, it stated that the purchase price "[i]ncludes delivery to Las Vegas." (4.AA.980.) The purpose of delivering the bus to Las Vegas was so that TBE could obtain "apportioned" license places, which meant that the vehicle could be used in interstate commerce and TBE did not have to pay California sales tax. (8.RT.3453; 2.AA.342; 4.AA.980.) TBE submitted a signed statement to the California Board of Equalization stating under penalty of perjury that the vehicle was being purchased for use outside California. (2.AA.342.) Thus, BusWest did not charge TBE any sales tax on the $44,000 purchase. (2.AA.338-339; 4.AA.980.) On the line for sales tax, the Purchase Agreement stated: "n/a out of St." (4.AA.980.)

The Board of Equalization form submitted by TBE stated that the vehicle was to be delivered to TBE at 3701 Freightliner Drive in Las Vegas. (4.AA.934.) This was the address of the BusWest dealership in Las Vegas. (4.AA.989.) BusWest sales manager Don Cox personally drove the bus to Las Vegas for pickup by TBE. (8.RT.3454-3455.) TBE had no office or storage yard of its own in Las Vegas. (5.RT.2446.)

TBE paid for the bus by check. The check showed TBE's address in the City of Industry, California and was made out to BusWest at its address in Carson, California. (2.AA.340.)

At the time of the accident, the bus still had "apportioned" California license plates. (4.AA.954.) TBE painted its logo in large letters on the side of the bus. (4.AA.953.) In smaller letters beneath the logo, TBE painted its full name and identified its location as "HACIENDA HEIGHTS, CA." (4.AA.953.)

D. The Accident

Zhi Lu is a California resident who was employed as a tour bus driver for TBE out of City of Industry. He had a California commercial driver's license. Lu primarily drove tourists to destinations in southern California, Las Vegas, and the Grand Canyon. (2.AA.362,379,387-388,414; 4.AA.993; 5.RT.2403-2406.)

On October 16, 2010, the day before the accident, Lu drove the Starcraft bus from Los Angeles to Las Vegas for TBE. According to the pre-printed portions of his "Driver's Daily Log," TBE's "Main Office Address" was in City of Industry, California, and its "Home Terminal Address" was a location in Rosemead, California. Lu picked up the 11 members of the Chinese tour group at their hotel in Los Angeles before driving them to Las Vegas. Lu was working with Qiang Du, another tour guide employed by TBE, who was also a resident of California. They spent the night in Las Vegas. They

were scheduled to drive the tour group back to Los Angeles after visiting the Grand Canyon the next day. (2.AA.362-363,381,388,421; 4.AA.946; 5.RT.2408-2414.)

The next morning, Lu was driving the Starcraft bus with the Chinese tour group en route from Las Vegas to visit the Grand Canyon. Du was seated in the front passenger seat. Lu and Du were both wearing their lap/shoulder seatbelts in the front seats, but the 11 rear passengers had no seatbelts to wear. While negotiating a turn in Mohave County, Arizona, Lu lost control of the vehicle. (2.AA.386-392,405,414,416; 5.RT.2416-2425,2436.)

The bus left the highway and rolled over twice. It was going approximately 54 miles per hour when it left the road. (9.RT.3707, 3720,3727-3728.) The daytime speed limit on the highway was 55 miles per hour, but there was a posted "advisory" speed limit of 35 miles per hour for the turn. (9.RT.3699.)

All three of the large panoramic windows on the passenger side of the tour bus broke out in the rollover, and the passenger door broke into pieces. (5.RT.2432; 6.RT.2770,2779; 9.RT.3718; 11.RT.4345-4350.) Seven of the rear passengers were totally ejected from the vehicle, and one was partially ejected. (5.RT.2466; 6.RT.2762.) Keer Huang was fully ejected and suffered fatal injuries. (6.RT.2791-2793; 9.RT.3675-3679.) Qin Peng was partially ejected and suffered a fatal head and brain injury when she was impaled by a mechanism above the door opening. (6.RT.2788-2790; 9.RT.3682-3685.) The other rear

passengers survived, but suffered serious injuries. (6.RT.2773-2805.) Because Lu and Du were both wearing their lap/shoulder seatbelts in the front seats, they were not ejected and suffered only very minor injuries. (5.RT.2425-2426,2436; 6.RT.2772,2781.)

E. Expert Testimony

Carley Ward is a biomechanical engineer with expertise in seatbelt performance and rollover accidents. (6.RT.2742-2754.) In her opinion, rear passenger seatbelts would have prevented the two fatalities and the serious injuries suffered by the other rear passengers. If the rear passengers had been wearing seatbelts, they would have suffered no injuries or only minor injuries. (6.RT.2764,2805-2808.)

Based on accident statistics that have been available for decades, it is well-known that seatbelts are by far the most effective device in preventing injuries in a rollover accident. (6.RT.2754-2760.) Without seatbelts, bus passengers are thrown around inside the vehicle and can be partially or completely ejected. (6.RT.2766-2767.) Seatbelt use virtually eliminates the risk of complete ejection, and reduces the risk of partial ejection. (6.RT.2804-2805.)

William Broadhead is a restraint system engineer and expert consultant on automotive safety. (10.RT.3497-3498.) According to publicly available accident statistics, the accidents with the highest fatality rates are rollovers of SUVs, minivans, and buses, due to

passenger ejection during the rollover event. (10.RT.3973.) The most important safety device for preventing injuries in rollover accidents is a seatbelt, because it virtually eliminates the risk of complete ejection. (10.RT.3975.)

In Broadhead's opinion, the bus was unsafe because it did not have seatbelts for the rear passengers. There was nothing to protect the passengers in a rollover accident. The bus was unreasonably dangerous, especially in a rollover event. The large size of the tour bus windows made passenger ejection even more likely. Seatbelts would have prevented the passenger ejections. Moreover, seatbelts were economically and technically feasible to install. (10.RT.3987-3999,4002,4020.)

Defense expert Eddie Cooper is an engineer specializing in restraint systems. (12.RT.4502.) He admitted that the number one most important factor for reducing ejection risk in rollover accidents is seatbelts. (12.RT.4602-4603.) There is no better countermeasure for keeping occupants in their seats in rollover accidents. (12.RT.4556.) Seatbelts are one of the best safety devices around in terms of occupant protection. (12.RT.4590.) Fatality rates are higher for unrestrained passengers in rollover accidents. (12.RT.4590.) 70 percent of all deaths in bus accidents involve a rollover event. (12.RT.4575,4602.) Cooper agreed that decades of data from the fatal analysis reporting system ("FARS") show a high fatality rate for bus rollover events. (12.RT.4578,4582.)

Between 1968 and 1973, the National Traffic Safety Board ("NTSB") made three recommendations to mandate passenger seatbelts for buses. These recommendations were met with industry opposition. (10.RT.4018.) In 1973, the National Highway Traffic Safety Administration ("NHTSA") issued a notice of proposed rule-making to mandate seatbelts in the passenger seats of buses. However, no such federal regulation had been adopted by the time BusWest sold the bus to TBE in 2008. (10.RT.3993-3995.) In a 1999 special report, the NTSB listed seatbelts for tour buses as one of its "most wanted" safety recommendations. (10.RT.3985-3986.) Although the federal motor vehicle safety standards did not mandate seatbelts for buses in 2008, these regulations are only "minimum" standards for vehicle safety. (10.RT.3959.)

The 1999 NTSB special report cited examples of unrestrained bus passengers being ejected and killed in rollover accidents. (12.RT.4574.) It stated: "The Safety Board became concerned that motor coach passengers are not adequately protected in collisions." (12.RT.4577.) "From 1968 through 1973, the Safety Board issued 11 recommendations to the Federal Highway Administration, NHTSA, or both, concerning restraints, including requiring that seat belts be installed in buses. These recommendations have not been implemented by either NHTSA or the FHWA." (12.RT.4578.) "As with school buses, the board has found that those occupants seated within the direct line of impact are often the most severely injured. However, unlike school buses, the Board has found that fatal injuries

in motor coach accidents are often the result of passenger ejection from the coach." (12.RT.4576.)

STATEMENT OF THE CASE

A. The Operative Complaint

Plaintiffs and appellants, the surviving members and relatives of the Chinese tour group, filed this lawsuit against Forest River, BusWest, TBE, and Lu in 2011. The operative Second Amended Complaint alleged the following causes of action: (1) wrongful death; (2) negligence; (3) strict products liability;[3] (4) loss of consortium; and (5) negligent infliction of emotional distress. (1.AA.1-16.)

The Second Amended Complaint alleged that BusWest was liable for failing to order seatbelts for all passenger seats in the Starcraft bus, and for selling the bus to TBE without seatbelts installed in all passenger seats. (1.AA.5-7.)

Plaintiffs settled their claims against TBE and its driver, Lu. However, the remaining defendants continued to assert comparative

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[3]The heading of the strict liability claim inadvertently omitted BusWest as a defendant. (1.AA.10.) As explained in the opening brief in the Court of Appeal, however, plaintiffs made clear in the text of the complaint and throughout the proceedings that they were asserting this claim against BusWest, and BusWest repeatedly acknowledged this in the trial court. (AOB 24,fn.1.) BusWest also did not dispute this point in the Court of Appeal either.

fault defenses based on Lu's allegedly negligent driving in Arizona. (See, e.g., 1.AA.55-56,58; 12.RT.5196-5197.)

B. The Initial Choice-of-Law Ruling

In December 2013, defendants Forest River and BusWest filed a single motion to apply the substantive law of Indiana law to the adjudication of plaintiffs' claims against all remaining defendants. Invoking California's governmental-interest approach to choice-of-law decisions, they argued that Indiana's products liability and wrongful death laws were more favorable to defendants than California law in multiple ways. (1.AA.29-31.) They further asserted that "California has no interest in the outcome of this action" and Indiana "has the predominant interest in protecting the economic well-being of the manufacturers who do business in the state." (1.AA.41.)

Plaintiffs filed a written opposition to the motion. (2.AA.271-294.) They agreed that California applies the governmental interests test and "that there are substantive differences between the laws of Indiana and California, as summarized in the DEFENDANTS' motion." (2.AA.282:3-4.) They also pointed out that California and Indiana law differ on the risk-benefit theory of design defect. They quoted directly from this Court's holding "'that a manufacturer who seeks to escape liability for an injury proximately caused by its product's design *on a risk-benefit theory* should bear the burden of persuading the trier of fact that its product should not be judged

defective.'" (2.AA.288:26-28, emphasis added & quoting *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 433.) Plaintiffs noted that "Indiana law has no similar burden-shifting." (2.AA.289:1; see also 2 AA.292:27-28 [noting that Indiana "does *not* shift the burden of proof to the manufacturer"].)

Plaintiffs also pointed out other material differences between California and Indiana law: (1) California imposes joint and several liability on all defendants in the chain of distribution, whereas Indiana applies principles of comparative fault in products liability cases; and (2) Indiana's definition of a defective product requires it to be "unreasonably dangerous," whereas California has explicitly rejected this requirement. (2.AA.287-288,292-293.) Plaintiffs argued that Indiana's more defense-oriented "rules are fundamentally incompatible with the public policies of California's strict liability doctrine." (2.AA.293.)

On the merits of the choice-of-law issue, plaintiffs asserted that: (i) Indiana had no genuine interest in applying its own law because Indiana is a traditional *lex loci delicti* jurisdiction that presumptively applies the law of the state where the harm occurred (here Arizona), and thus even the Indiana courts would not apply Indiana law to this case; (ii) California had a strong interest in applying its own laws to deter the sale of defective vehicles by licensed California dealerships to California consumers for use on the California roads; (iii) there was no "true conflict" because

Indiana had no interest in applying its law; and (iv) even if there were a true conflict, California's interests would be more impaired by applying Indiana law than would Indiana's by applying California law. (*Ibid.*)

On January 10, 2014, the Honorable Holly E. Kendig held a hearing on the defense motion to apply Indiana law. In an oral tentative ruling, the court found that "California has no interest in applying California law to this case" and "California and Indiana have the common interest of applying Indiana law." (2.RT.2.)

On January 13, 2014, Judge Kendig issued a final minute order granting the defense motion to apply Indiana law. In the order, the court summarized multiple differences between California and Indiana law (2.AA.452-456) and noted: "Plaintiffs do not dispute that there are substantive differences between the laws of Indiana and California, as summarized in defendants' motion." (2.AA.456.) Moreover, the court acknowledged that Indiana law was "more favorable to defendants" on these points. (2.AA.456-457.)

However, the court ruled that "no 'true conflict' exists because California has no interest in applying California law to this case." (2.AA.448.) The court acknowledged that states have a valid interest in deterring wrongful conduct within their borders. (2.AA.458.) But it concluded that "plaintiffs allege no specific wrongful conduct in California, which would give rise to an interest in California to deter bad conduct here." (2.AA.461-462.)

The court also found that California and Indiana have a shared interest in applying Indiana law in order to protect resident defendants from excessive financial burdens, because "Indiana law is more favorable than California law for the defendants in this action." (2.AA.462-463.)

Because the court found no true conflict, it ruled that there was no need to determine which jurisdiction's interests would be more impaired by applying the other's laws. However, the court concluded that even under a comparative impairment analysis, Indiana law would prevail because "the only interest relevant to either state is the interest of protecting resident defendants" and Indiana law is "more favorable" to defendants. (2.AA.463.)

The court rejected plaintiffs' argument that Indiana has no genuine interest in applying its own laws because the Indiana courts themselves would not apply Indiana law to an accident that occurred in Arizona. (2.AA.459-461.)

Plaintiffs filed a petition for writ of mandate challenging Judge Kendig's choice-of-law ruling. (No. B0253966.) The Court of Appeal summarily denied the petition on the ground that plaintiffs "failed to demonstrate entitlement to extraordinary relief."

C. The Summary Judgment Motion

BusWest, the only remaining California defendant, filed a motion for summary judgment under Indiana law. (2.AA.466-494.)

In response, plaintiffs asked the trial court to reconsider its choice-of-law ruling, arguing that "California has a strong interest in deterring the sale of dangerous vehicles within its own borders." (2.AA.507-508.) Judge Kendig did not reconsider her choice-of-law ruling, but denied the summary judgment motion applying Indiana substantive law. (2.RT.308-327, 375.)

D. The Renewed Requests to Apply California Law

Before trial, plaintiffs settled with the only two Indiana defendants (Forest River and Starcraft), leaving the California bus dealership, BusWest, as the sole remaining defendant. In the meantime, the case was reassigned for trial from Judge Kendig to Judge J. Stephen Czuleger.

Based on the fact that the Indiana defendants had settled out of the case, and Indiana no longer had any connection to the case, plaintiffs filed a motion in limine to apply California law. Plaintiffs further argued that California had a valid interest in applying its own laws to a California bus dealership to deter the sale of unsafe vehicles within its own borders. (3.AA.606-630; 4.AA.900-912; 2.RT.605-613.) In their trial brief, plaintiffs also asked the court to "reconsider its choice-of-law ruling" and apply California substantive law. (3.AA.547-548.)

Six weeks before trial, Judge Czuleger held a hearing on plaintiffs' request to apply California law. (2.RT.614.) At the

hearing, Judge Czuleger stated to plaintiffs' counsel, "California law is better for you... I mean, you wouldn't be arguing for it if it weren't true." (2.RT.610.) Plaintiffs' counsel responded, "Well, that's precisely the point." (*Ibid.*)

Plaintiffs' counsel went on to point out that "Indiana is fundamentally different from California in that it does not have a strict liability theory for design defect or failure to warn. So if Indiana law applies to this case, we cannot assert a strict liability claim against this California vehicle dealership." (2.RT.612.) Plaintiffs' counsel characterized this is as "a very significant difference" between California and Indiana law. (*Ibid.*)

Judge Czuleger denied plaintiffs' motion to apply California law. Procedurally, he ruled it was "not a proper motion in limine." (2.RT.602.) On the merits, he found that "the settlement and dismissal of Forest River and Starcraft does not change Judge Kendig's choice of law analysis in any way." (2.RT.603.) Judge Czuleger observed that "Judge Kendig ... found that California has *no interest* in the outcome of this action." (2.RT.603, emphasis added.) He agreed that "California has *no interest* because neither the alleged ... failures of the bus nor the accident or injuries occurred in California." (2.RT.603, emphasis added.) According to Judge Czuleger, plaintiffs had "failed to explain how California has an actual interest in applying its product defects law given the specific facts of this case." (2 RT.604.) He also concluded that "no specific

wrongful conduct is alleged to have occurred in California, giving rise to a California interest." (2.RT.604.) Judge Czuleger found that Indiana law should apply because "the bus was designed, made, and sold in Indiana." (*Ibid.*)

E. The Trial and Judgment

At trial, plaintiffs proposed standard CACI instructions based on California law (3.AA.588-598), including CACI No. 1204 on California's risk-benefit theory of strict liability and shifting burden of proof. (3.AA.591:16-18.) In their proposed jury instructions, plaintiffs stated: "PLAINTIFFS do not hereby concede that Indiana substantive law should govern this case. PLAINTIFFS contend that California substantive law should govern. PLAINTIFFS hereby propose jury instructions based on California substantive law and, only as an alternative, propose jury instructions based on Indiana substantive law." (3.AA.588.) Plaintiffs also invoked California's risk-benefit theory in motions in limine. (3.AA.579.)

The trial court submitted the case to the jury under Indiana law, solely on a claim for violation of the Indiana Products Liability Act. (Ind. Code, § 34-20-1-1 et seq.) The court only instructed the jury on Indiana's negligence-based, consumer expectations test of design defect. Using Indiana's model jury instructions, the court instructed: "A product is in a defective condition if when it is sold by the seller to another person or entity its condition, one, would not ... be anticipated by a reasonable expected user or consumer; and two,

is unreasonably dangerous to that user or consumer when he or she used the product in a reasonably expected way." (12.RT.5195.) The court further instructed: "A product is unreasonably dangerous if ... its use exposes a use[r] or consumer to a risk of physical harm beyond that contemplated by an ordinary consumer who purchases the product with ordinary knowledge about the product's characteristics." (12.RT.5195-5196.)

At the conclusion of trial, the jury voted 10-2 that the bus was not "in a defective condition at the time of the subject accident." (12.RT.5303-5305.) Accordingly, the trial court entered judgment for BusWest. (4.AA.996-997.)

F. The Court of Appeal's Decision

Plaintiffs appealed, challenging both Judge Kendig's initial choice-of-law ruling and Judge Czuleger's subsequent decision to apply Indiana law. The Court of Appeal reversed the judgment. The court did not decide whether the initial choice-of-law ruling was correct, and found it unnecessary to "address plaintiffs' argument that Indiana has no stake because Indiana courts themselves would not apply Indiana law." (Opn. at 20, fn. 8.) However, the Court of Appeal ruled that: (1) the trial court should have reconsidered its initial choice-of-law ruling after the Indiana manufacturer settled out of the case; (2) the products liability laws of Indiana and California differed significantly; (3) California has a "strong" interest in applying its own law; (4) Indiana had no interest in applying its law

after the Indiana defendants settled; and (5) thus, there was no true conflict and California law applied. (Opn. at 12-22.)

The Court of Appeal also found the error to be prejudicial. The court reasoned that "[h]ad the jury been instructed on California law, plaintiffs likely would have proceeded under the risk-benefit theory of defective design" and "this case presented a classic jury question for design defect under the risk-benefit analysis." (Opn. at 22-23.) "Faced with persuasive evidence on both sides, it is reasonably probable that a properly instructed jury would have found for plaintiffs." (*Id.* at 24.)

ARGUMENT

I. The Court of Appeal Correctly Ruled that the Trial Court Should Have Applied California Law Once the Indiana Manufacturer Settled Out of the Case

A. Standard of Review

A trial court's choice-of-law ruling is subject to de novo review. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 274.)

B. California Follows the Governmental-Interest Test

California follows the "governmental interest" approach for resolving conflict-of-law issues. This approach generally involves three steps. First, the court determines whether the relevant law of

each of the potentially affected jurisdictions is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in applying its own law to determine whether a "true conflict" exists. "Only if each of the states involved has a 'legitimate but conflicting interest in applying its own law' will we be confronted with a 'true' conflicts case." (*Offshore Rental Co. v. Continental Oil Co.* (1978) 22 Cal.3d 157, 163, citing *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 319.) Finally, if there is a true conflict, the court evaluates and compares the nature and strength of the interest of each jurisdiction to determine which state's interest would be more impaired if its policy were subordinated to the other state. (*McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 87-88; *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107-108.)

"The party arguing that foreign law governs has the burden to identify the applicable foreign law, show that it materially differs from California law, and show that the foreign law furthers an interest of the foreign state." (*Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1465.) Where the foreign state "has no interest whatsoever in having its own law applied, California as the forum should apply California law." (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 582.)

C. California and Indiana Law Differ Significantly

On the first prong of the "governmental interests" test, California law and Indiana law are substantively different. As the

lower courts found and plaintiffs conceded below (2.AA.282, 287-288, 292-293; 2.RT.610-612), Indiana law is less favorable to plaintiffs in products liability cases for multiple reasons. Two of these differences are particularly significant here.

First, the Indiana Products Liability Act does not allow *strict liability* for claims of design defect. For such claims, Indiana Code § 34-20-2-2 says that "the party making the claim must establish that the manufacturer or seller *failed to exercise reasonable care* under the circumstances in designing the product ...." (Emphasis added.) Based on this provision, Indiana courts have ruled that cases alleging a design defect sound in negligence, not strict liability. (*TRW Vehicle Safety Systems, Inc. v. Moore* (Ind. 2010) 936 N.E.2d 201, 209-210 & fn. 2 ["the Act departs from strict liability" and instead adopts "a negligence standard for product liability claims based on defective design"].) By contrast, California imposes strict liability for design defects on all defendants in the chain of distribution, including vehicle dealerships. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432; *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262.)

Second, Indiana has no counterpart to California's risk-benefit theory of design defect. (*Barker, supra,* 20 Cal.2d at p. 432.) Under Indiana law, the plaintiff must prove that the product was in a "defective condition" and "unreasonably dangerous." (Ind. Code, § 34-20-2-1.) Indiana law defines a "defective condition" to mean "a

condition: (1) *not contemplated by reasonable persons* among those considered expected users or consumers of the public; and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption." (Ind. Code, § 34-20-4-1, emphasis added.) "Unreasonably dangerous" is defined to mean "any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent *beyond that contemplated by the ordinary consumer* who purchases the product with the ordinary knowledge about the product's characteristics common to the community of consumers." (Ind. Code, § 34-6-2-146, emphasis added.) Thus, Indiana only has a negligence-based, consumer expectations theory of design defect.

Under California's risk-benefit theory, by contrast, a defendant is strictly liable "if the plaintiff demonstrates that the product's design proximately caused his injury and 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, supra,* 20 Cal.2d at p. 432.) "These tests are not mutually exclusive, and a plaintiff may proceed under either or both." (*McCabe v. American Honda Co.* (2002) 100 Cal.App.4th 1111, 1126, citing *Barker, supra,* 20 Cal.3d at p. 435.) Moreover, California does not require a showing that the product was "unreasonably dangerous." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121.)

The Indiana jury instructions given at trial reflected these fundamental differences between Indiana and California law. The court instructed the jury only on negligent design, not strict products liability. (12.RT.5192-5195.) The court also instructed on the Indiana requirements of a "defective condition" and an "unreasonably dangerous" product, and it defined these terms in the consumer expectations language of the Indiana statute. (12.RT.5195-5196.) The court did not give any jury instruction similar to California's risk-benefit theory of design defect. Thus, the Indiana jury instructions given at trial were significantly less favorable to plaintiffs than California jury instructions would have been. (See CACI No. 1204 [strict liability for design defect under risk-benefit test].)[4]

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[4]BusWest asserts that plaintiffs argued to the trial court that Indiana and California law are not different. (Op. Br. on the Merits, p. 17, fn. 4.) As noted in the Statement of the Case above, however, Judge Kendig decided the choice-of-law issue based on plaintiffs' explicit concession that the laws of California and Indiana are materially different in multiple ways. (2.AA.282,288-293,452-456.) In the pleadings later filed before Judge Czuleger, plaintiffs did assert that Indiana's consumer expectations theory was reasonably similar to California's. (RA.68; 3.AA.618-619.) At the hearing before Judge Czuleger, however, plaintiffs' counsel made clear that California law was otherwise much more favorable to plaintiffs and differed from Indiana law in important ways. (2.RT.610-612.)

D. The Trial Court Erred by Ruling That California Had "No Interest" in Applying its Law of Strict Products Liability

In both choice-of-law rulings (before and after the settlement with Forest River), the trial court found that California had no interest in applying its law to this case. Judge Kendig ruled "that no 'true conflict' exists because California has *no interest* in applying California law to this case." (2 AA.448; 2.RT.2, emphasis added.) Judge Czuleger later agreed that "California has *no interest* because neither the alleged ... failures of the bus nor the accident or injuries occurred in California." (2.RT.603, emphasis added.)

These findings were erroneous. The Court of Appeal correctly determined that this case—brought against a California bus dealership for importing a bus for sale in California without equipping it with available passenger seatbelts—implicates at least four of the public policy purposes behind California's adoption of strict products liability: (1) to impose the cost of defective products on those who put them on the market; (2) to provide an economic incentive for improved vehicle safety; (3) to induce reallocation of resources towards safer products; and (4) to spread the risk of loss among all who use the product. (See *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1185-1186 [describing interests supporting California's law of strict products liability].) Thus, the Court of Appeal concluded that California's interest in applying its own law

was "strong." (Opn. at 18.)

California has a vital interest in applying its own tort laws to deter such wrongful conduct by a California dealership and prevent future harm within the borders of California. "One of the purposes of tort law is to deter future harm." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081.) A "fundamental" purpose of California's law of products liability is "to deter manufacturers from marketing products that are unsafe." (*Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1062.) "[I]t is in the public interest to discourage the marketing of defective products." (*Id.* at p. 1056.)

This interest in discouraging the sale of unsafe products applies to vehicle dealerships. (*Vandermark, supra,* 61 Cal.2d 256 [applying California's enterprise theory of strict products liability extends to vehicle dealerships].) "[T]he retailer himself may play a substantial role in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety." (*Ibid.*)

The trial court was mistaken in finding that plaintiffs alleged no wrongful act committed by BusWest in California. Under California law, a manufacturer or distributor commits a wrongful act by placing a defective product on the market. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62.) Thus, plaintiffs *did* allege that BusWest committed a wrongful act in California by

ordering and importing a tour bus for sale in California, providing the specifications that resulted in no rear passenger seatbelts, and then selling the defective vehicle from its Carson, California dealership to a California bus touring company. (See also *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 632 [under strict products liability, "the concept of 'fault' ... is ... 'equated with the responsibility for placing a defective product into the stream of commerce ....'"]; *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1191 [the term "wrongful act" as used in wrongful death statute "means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce"].)

California has a stake in deterring such wrongful conduct within its borders. As alleged in the complaint, and confirmed at trial, BusWest had a consistent practice of purchasing stock tour "buses for sale and distribution into California that are not equipped with seat belts." (1.AA.5; see 8.RT.3438-3439.) Although the risks of ejections in a bus rollover event have been known for years (6.RT.2574-2575, 2804-2805; 10.RT.3973-3974, 3985; 12.RT.4574-4578, 4582, 4588), BusWest opted to place the Starcraft bus involved in this accident on the market in California without installing seat belts in the rear passenger seats.

The fact that the accident happened to occur in Arizona has no bearing on California's interest in deterring the sale of unsafe vehicles within its borders. Deterrence is prospective—the purpose

"is to deter *future* harm." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081, emphasis added.) Although *this* accident happened in Arizona, a similar rollover accident could just as easily happen in California. After all, LAT was the only authorized dealer for Starcraft buses in California, and it sold many Starcraft buses in California, almost always without passenger seat belts. (7.RT.3010, 3012-3013; 8.RT.3428,3438-3439.)

To protect *future* victims in California, California has a strong interest in applying its own laws of strict products liability to deter the importation and sale of unsafe vehicles by California dealerships. (See *Barrett, supra,* 222 Cal.App.3d at p. 1190 ["the theory of strict products liability ... furthers not only the policy of compensating survivors, but also furthers the policy of deterring conduct which is susceptible to conscious control"]; *id.* at p. 1186 ["the placing of defective products into the stream of commerce is conduct which can be deterred"].) The state's interest in deterring such conduct extends to all *potential* victims "present within its borders." (*Hurtado, supra,* 11 Cal.3d at p. 584.)

Likewise, the fact that BusWest delivered the bus to TBE in Las Vegas is irrelevant. BusWest knew that TBE would be operating the tour bus out of its California headquarters, not Las Vegas, and it delivered the bus to TBE at a BusWest dealership in Las Vegas only to allow TBE to get apportioned plates and avoid paying the California sales tax. (8.RT.3453; 2.AA.338-342; 4.AA.980.) California

has a compelling interest in the safety of a tour bus sold by a California dealership to a California business for use on California roads and highways.

California's interest in vehicle safety is also not limited to seat belts. One of BusWest's main defenses at trial was that it was not negligent under Indiana law because it complied with the federal motor vehicle safety standard (FMVSS) on passenger restraints, FMVSS 208. (See, e.g., 12.RT.4516-4548,5155.) The federal minimum safety standards govern many different features of motor vehicle equipment, not just seat belts. If the design of a particular vehicle feature satisfies the federal minimum, but the risks of the design exceed its benefits, California has an interest in applying its own law of strict liability to encourage the manufacturer to provide even greater safety than the federal floor. (See *Ketchum v. Hyundai Motor Co.* (1996) 49 Cal.App.4th 1672, 1679 [risk of tort liability encourages vehicle manufacturers to achieve even "higher safety performance" than the federal minimum standards].)

One of the main purposes of California's law of strict liability is to "create an incentive to develop safer products and to take steps to avoid accidents." (*Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 98.) This incentive would be diminished if the more defendant-friendly laws of another state were applied to California vehicle dealerships, especially the laws of a state like Indiana that does not even recognize strict liability for design defects.

Finally, California also has a legitimate interest in protecting foreign tourists traveling in vehicles operated by licensed California touring companies. (See *Hernandez v. Burger* (1980) 102 Cal.App.3d 795, 802 [Mexico had legitimate interest in applying its own laws to foster tourism]; Pub. Util. Code, § 5352 ["The use of the public highways for the transportation of passengers for compensation is a business affected with a public interest"].) Although the Chinese tourists were not California residents, they were visitors to California who contributed to California's economy by booking a tour through a licensed California bus touring company. Having given its official stamp of approval to the California bus touring company by licensing it to operate as a carrier of passengers on the California highways (2.AA.357), California has a valid interest in ensuring that tourists receive adequate protection from injuries and deaths caused by the touring company's use of a dangerous bus.

E. Even Assuming that Indiana Had an Interest in Protecting the Indiana Manufacturer, That Interest Was No Longer Implicated Once the Indiana Manufacturer Settled Out of the Case

The only interest the trial court ever found Indiana to have was an interest in protecting its "resident defendants," Forest River and Starcraft, "from excessive financial burdens." (2.AA.462-463.) But even assuming that this interest extended to accidents beyond the borders of Indiana (see Argument II, *post*), it evaporated once the

Indiana defendants settled out of the case. By the time of trial, the only remaining defendant was the California bus dealership. Because Indiana no longer had any interest in the case, the Court of Appeal correctly ruled that the trial court should have reconsidered its initial ruling and applied California law.

As the Court of Appeal noted, a motion to determine the law to be applied in a case is "the equivalent of an in limine motion that seeks to resolve a conflict of laws or choice of law issue." (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 502, citing cases.) In limine rulings are not binding, and are subject to reconsideration upon full information at trial. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 90, fn. 6; see also *NL Industries, Inc. v. Commercial Union Ins. Co.* (3d Cir. 1995) 65 F.3d 314, 324, fn. 8 [reconsideration of choice-of-law decision is warranted when there has been an intervening change in the controlling law, new evidence has become available, or there is a need to correct clear error or prevent manifest injustice].)

BusWest repeatedly argues that "the parties' relationships to the interested states, and the resulting interests of those states in application of their law, should be tied to the date of the accident or underlying transaction." (Op. Br. on the Merits, at 25.) But this argument conflates two different issues: historical facts and litigation facts. As to the former, BusWest is correct that the underlying facts are fixed as of the date of the accident. For example, BusWest could

not alter the historical fact that it was a California bus dealership at the time of the accident by moving all of its operations to Indiana just to take advantage of Indiana's more favorable tort law.

However, the same cannot hold true for litigation facts. Litigation facts cannot possibly be fixed as of the date of the accident because it is not yet known where the lawsuit will be filed, who the parties will be, what claims will be asserted, or what issues the jury will ultimately be asked to resolve. Likewise, the residences of the parties and the places where they did business at the time of the accident cannot be determined without knowing who the parties to the litigation are. Thus, the litigation facts relevant to the choice-of-law determination under California's governmental-interests test cannot be evaluated as of the date of the accident.[5]

BusWest does not explain how a court could go about assessing the relevant litigation facts as of the date of the accident. Is

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[5]It is for this reason that Bus West misplaces its reliance on *Reich v. Purcell* (1967) 67 Cal.2d 551. *Reich* was about historic facts, not litigation facts. In *Reich,* a car accident occurred in Missouri between the plaintiffs, who resided in Ohio, and the defendant, who resided in California. After the accident, the plaintiffs moved to California. In applying the governmental-interests test, this Court merely held that "plaintiffs' present domicile in California does not give this state any interest in applying its law." (*Reich, supra,* 67 Cal.2d at p. 556.) In this context, the Court stated that "if the choice of events were made to turn on events happening after the accident, forum shopping would be encouraged." (*Id.* at p. 555.) *Reich* was not referring to events that occur in the litigation itself.

the court supposed to put itself at the scene of the accident, pretend it knows nothing about the lawsuit, and just assume that every possible victim will sue every conceivable defendant on every imaginable legal theory? This blinders approach of ignoring the true litigation facts would lead to arbitrary and absurd results. Courts could be forced to apply the law of a jurisdiction that had a strong potential interest at the time of the accident, but ultimately has no actual connection to the parties and issues in the litigation.

BusWest's proposed rule also raises more questions than it answers. For example, if the litigation facts have to be assessed as of the date of the accident, why wouldn't the court in this case have to consider California's interest in applying its own law to the California driver and California bus touring company, who settled out of the case long *after* the accident? For that matter, why wouldn't the court also have to consider California's hypothetical interest in applying its law to the California tour guide (Qiang Du), who conceivably might have asserted some type of claim of her own arising out of the accident? Simply put, it makes no sense to assess the litigation facts as of a date before there is any litigation.

It would also make no sense to hold that the choice-of-law determination must be frozen in time based on the status of the pleadings at the time of the original complaint. For example, if plaintiffs had *only* sued the California bus touring company for its negligent driving in Arizona, no one could seriously have argued

that Indiana had an interest in having its law applied. But if plaintiffs had then amended their complaint to *add* the Indiana manufacturers as parties, it would have altered the analysis of governmental interests. Surely BusWest does not take the position that plaintiffs could have avoided the application of Indiana law by suing only TBE at first, obtaining a ruling that California law applies, then later adding the Indiana defendants and arguing that the court could not revisit its prior choice-of-law ruling. That would only invite the very type of manipulation BusWest decries in its brief.

A choice-of-law ruling should not be treated as if it were written in stone when the entire rationale for the ruling has been undermined by the subsequent additional or removal of a party before trial. Once the Indiana manufacturer settled out of the case, Indiana no longer had an arguable interest in applying its own law to protect it against excessive financial burdens. In the related field of personal jurisdiction, the U.S. Supreme Court has acknowledged that a state's interest may vary throughout a lawsuit depending upon the particular claims and parties in the lawsuit at the time. (*Asahi Metal Industry Co., Ltd. v. Superior Court of California* (1987) 480 U.S. 102, 114 ["California's legitimate interests in the dispute have considerably diminished" after California resident settled his product-liability claim, leaving only an indemnity action between Japanese and Taiwanese companies].)

Just as a court must consider which defendants are being sued

for what acts in making the initial choice-of-law determination, it should be prepared to consider whether the subsequent addition or deletion of parties has altered the states' respective interests in having their laws applied. (See, e.g., *Levin v. Dalva Brothers, Inc.* (1st Cir. 2006) 459 F.3d 68, 72-73 & fn. 1 [defendant did not waive claim that New York law applied by asserting it on first day of trial because posture of case had recently changed when district court severed defendants for trial].) The final determination should be made based on the litigation facts as they exist *at the time of trial*, when the decision-maker must actually apply the law to the facts to resolve the claims. Of course, a trial court might need to make tentative rulings on such questions ahead of trial to help guide discovery and decide motions, but it cannot make a final decision until the parties and issues for trial are clarified.

The logistical issues raised by BusWest are not a sufficient reason to continue applying the law of a jurisdiction that no longer has any interest in the case. If necessary, the trial court may always reconsider its prior rulings on dispositive motions or allow new motions to be filed. If that requires a continuance of the trial, the court may continue the trial. Otherwise, the issues may simply be adjudicated under the appropriate law at trial.

Nor do BusWest's speculative claims of gamesmanship justify a different result. First, as the Court of Appeal concluded, it is "unlikely that parties would settle, or hold up a potential settlement,

based on the effects a settlement may have on the law to be applied when the remaining parties proceed to trial." (Opn. at 15.) The many variables that go into a settlement agreement are unlikely to be skewed by the mere possibility that a settlement with one defendant might affect a choice-of-law ruling as to others. Moreover, it would rarely be clear enough to the plaintiff in advance that the court would alter its initial choice-of-law ruling to make such a risky gamble. Even in this case, for example, BusWest still claims that Indiana continued to have an interest even after the settlement with the Indiana manufacturer. Second, as explained above, the Court of Appeal's ruling is no more likely to encourage gamesmanship than a contrary rule making the initial choice-of-law decision inalterable no matter what happens later in the litigation. The latter rule would just encourage manipulation earlier on in the litigation.

Finally, BusWest suggests that Indiana still retained an interest in protecting the Indiana manufacturer because of an indemnity provision in the Dealership Agreement between it and Forest River. But under this provision, BusWest and Forest River *each* mutually agreed to indemnify *one another* for the acts of their own respective "agents, servants or employees." (4.AA.988.) BusWest's decision not to order passenger seatbelts offered by Forest River was an act of BusWest and its own agents, not an act of the Forest River and its agents. BusWest has failed to demonstrate that it would be entitled

to indemnity from Forest River for the acts of its own agents.[6] The mere possibility that BusWest might assert such a claim anyway does not give rise to any Indiana interest—certainly not one significant enough to outweigh California's "strong" interest in applying its own law. (Opn. at 18.)

In sum, Indiana had no interest in applying its law after the Indiana manufacturer settled out of the case. "Only if each of the states involved has a 'legitimate but conflicting interest in applying its own law' will we be confronted with a 'true' conflicts case." (*Offshore Rental Co. v. Continental Oil Co.* (1978) 22 Cal.3d 157, 163, citing *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 319.) Where the foreign state "has no interest whatsoever in having its own law applied, California as the forum should apply California law." (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 582.) Thus, the trial court erred by refusing to apply California law at trial.

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[6]If anything, the existence of the indemnity agreement diminishes any interest Indiana may have had in protecting Forest River. To the extent California law would make Forest River jointly and severally liable for BusWest's decision not to order rear seatbelts, Forest River would be entitled to indemnity from Bus West. Thus, the economic consequences of applying California law to Forest River would actually be mitigated by the indemnity agreement.

II. Alternatively, The Trial Court's Initial Choice-of-Law Ruling Was Incorrect

Assuming that the pretrial settlement with Forest River did not require reconsideration of the initial choice-of-law ruling, the Court of Appeal's judgment should still be affirmed because the initial choice-of-law ruling itself was wrong. Even when Forest River was still in the case, the trial court erred by applying Indiana law. As previously noted, California has a strong interest in applying its own law. In contrast to California, however, Indiana is a traditional *lex loci delicti* jurisdiction—it has a strong presumption in favor of applying the substantive law of the state where the harm occurred. Only in extremely rare cases would Indiana courts apply Indiana law to a case where a defective product caused death or injury in another state. Because even the Indiana courts would not apply the substantive law of Indiana to this case, Indiana never had a significant interest in having its own tort law applied by a California court—even when the Indiana defendants were still in the case. Thus, there was no true conflict and California law should have applied all along.[7]

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[7]BusWest's petition for review only challenged the Court of Appeal's ruling on the reconsideration issue. However, the crux of the issue is whether Indiana or California law should have applied at trial. "[F]airly included" in this issue is whether the initial choice-of-law ruling was correct. (Cal. Rules of Court, rule 8.516(b)(2)).) Plaintiffs also briefed this issue in their answer to the petition for review. (Answer to Petition for Review, at 10-19.)

A. Indiana Is a *Lex Loci Delicti* Jurisdiction

"In tort cases, where a conflict exists, Indiana presumes that the traditional rule-*lex loci delicti*-governs. [Citation.] Under the rule, the district court applies the substantive law of 'the state where the last event necessary to make an actor liable for the alleged wrong takes place.'" (*Klein v. DePuy, Inc.* (7th Cir. 2007) 506 F.3d 553, 555, quoting *Hubbard Mfg. Co. v. Greeson* (Ind. 1987) 515 N.E.2d 1071, 1073.) This is almost invariably the place where the harm occurred. (*Alli v. Eli Lilly and Co.* (Ind. Ct. App. 2006) 854 N.E.2d 372, 378-379, citing cases.) "Indiana is a *lex loci delicti* state: in all but exceptional cases it applies the law of the place *where harm occurred.*" (*In re Bridgestone/Firestone, Inc.* (7th Cir. 2002) 288 F.3d 1012, 1016, emphasis added.) "Only in 'rare cases' will the presumption in favor of the traditional rule be overcome." (*Klein, supra,* 506 F.3d at p. 556, quoting *Simon v. United States* (Ind. 2004) 805 N.E.2d 798, 806.)

Specifically, in products liability cases, Indiana's strong presumption is to apply the substantive law of the state where the product caused harm, rather than the state where the product was designed or manufactured. (See, e.g., *Klein*, 506 F.3d at 555-56 [Indiana *lex loci delicti* rule required application of substantive law of North Carolina, where patient received allegedly defective hip prosthesis, rather than Indiana, where product was manufactured, marketed, and distributed]; *In re Bridgestone/Firestone, supra,* 288 F.3d at 1015-1016 [Indiana *lex loci delicti* rule required application of

substantive law of states where defective tires caused harm, rather than law of Indiana, where defendants were headquartered and tires were designed]; *Alli, supra,* 854 N.E.2d at pp. 378-379 [Indiana *lex loci delicti* rule required application of substantive law of Michigan, where patient committed suicide after taking Prozac, rather than Indiana, where drug manufacturer was headquartered].)

Likewise, in wrongful death cases, Indiana applies the substantive law of the state where the death occurred. (*Maroon v. State Dept. of Mental Health* (Ind. Ct. App. 1980) 411 N.E.2d 404, 409 [holding that Illinois substantive law applied to wrongful death claim against Indiana Department of Mental Health arising from murder of woman in Illinois committed by criminal sexual deviant who escaped from Indiana mental hospital].)

And in automobile accident cases, Indiana's *lex loci delicti* rule requires application of the substantive law where the accident occurred and the plaintiff was injured. (See, e.g., *Tompkins v. Isbell* (Ind. Ct. App. 1989) 543 N.E.2d 680, 681-682 [applying Illinois law to a vehicle accident that occurred in Illinois, even though all parties were residents or corporations of Indiana and plaintiff was returning to Indiana at the time of the collision, because "the last act necessary to make the defendant liable took place in Illinois" under "the doctrine of *lex loci*"]; *Umbarger v. Bolby* (Ind. Ct. App. 1986) 496 N.E.2d 128 [applying Michigan law to automobile accident that occurred in Michigan even though plaintiff/passenger and

defendant/driver were both Indiana residents and were returning to Indiana together after a visit to Michigan].)

Under Indiana law, the strong presumption in favor of the *lex loci delicti* rule may be overcome only in "rare cases in which the place of the tort is insignificant." (*Simon, supra,* 805 N.E.2d at p. 806; see also *Alli, supra,* 854 N.E.2d at p. 379 ["Indeed, it is a 'rare case[]' when the place of the tort is insignificant."].) In *Simon,* for example, the Indiana Supreme Court applied this "rare" exception to an airplane crash that occurred in Kentucky. (*Simon, supra,* 805 N.E.2d at p. 806.) The Court reasoned that "[t]he plane flew over multiple states during the course of the flight, and the crash might have occurred anywhere." (*Ibid.*) Moreover, the Court expressly distinguished cases involving automobile accidents as follows: "[U]nlike in cases involving an automobile accident, the laws of the state where the crash occurred did not govern the conduct of the parties at the time of the accident." (*Ibid.*)

"*Simon* indicates that the presumption of applying the *lex loci delicti* rule is strong and should only be overcome in rare cases, and that automobile accidents were generally not intended to fall under this exception." (*Rexroad v. Greenwood Motor Lines, Inc.* (Ct. App. 2015) 36 N.E.3d 1181, 1184; see also *Melton v. Stephens* (Ind. Ct. App. 2014) 13 N.E.3d 533, 540 ["*Simon* appears to suggest that most cases involving an automobile accident will be governed by the laws of the state where the accident occurred"]; *Patel v. Chriscoe* (S.D. Ind. July 7,

2011) 2011 WL 2671221, at *2 [*Simon* exception not applicable to automobile accident].)

This case is nothing like an airplane crash where the location of the crash is nearly random and the laws of the state where the crash occurred do not govern the conduct of the parties. Here, the accident occurred on a highway in Arizona; it involved a group of tourists who were on a trip to visit the Grand Canyon in Arizona; the bus driver and touring company were co-defendants who were sued for their negligent driving in Arizona; and even after they settled, their negligent driving was still the focus of the other defendants' claims of comparative fault. Thus, this is not one of those "rare cases where the place of the tort is insignificant." (*Simon, supra,* 805 N.E.2d at p. 806; see also *Melton, supra,* 13 N.E.3d at p. 541 [drivers' conduct "was governed by the rules of the road of the state in which the accident occurred" and thus "the presumption of the *lex loci delicti* remains significant and is not overcome"].) Under Indiana's traditional *lex loci delicti* rule, the Indiana courts themselves would not apply Indiana law to this case.

B. As a *Lex Loci Delicti* Jurisdiction, Indiana Had No Significant Interest in Having Its Law Applied to an Accident That Occurred Outside Indiana

Courts applying the governmental interests test have consistently held that a *lex loci delicti* jurisdiction has no interest in applying its own laws to an accident that occurred outside its

borders. (See, e.g., *Forsyth v. Cessna Aircraft Co.* (9th Cir. 1975) 520 F.2d 608, 612 [Kansas had no interest in applying its laws to products liability claim against Kansas airplane manufacturer for accident that occurred in Washington because "the public policy of the state of Kansas is to utilize the rule of lex loci delicti in actions on out-of-state accidents"]; *Tramontana v. S.A. Empresa De Viacao Aerea Rior Grandense* (D.C. Cir. 1965) 350 F.2d 468, 473-475 [Maryland had no interest in applying its law to Brazilian air collision because Maryland follows *lex loci delicti* doctrine and its courts would have applied Brazilian law]; *Paxton v. Washington Center Corp.* (D.D.C. 2013) 991 F. Supp. 2d 29, 33 [Virginia did not have "a significant governmental interest" because "Virginia choice-of-law rules would apply the place where the injury occurred"]; *Danziger v. Ford Motor Co.* (D.D.C. 2005) 402 F. Supp. 2d 236, 240-241 [Maryland had no interest in applying its laws to accident that occurred in Nebraska because "Maryland applies the traditional test of *lex loci delicti*" and thus its own courts "would apply the law of Nebraska, where the accident occurred"]; *Phillips v. General Motors Corp.* (Mont. 2000) 995 P.2d 1002, 1011 [North Carolina had no interest in Kansas vehicle collision because "North Carolina still adheres to the traditional place of injury rule in tort cases" and thus "a North Carolina Court would not apply North Carolina law to these facts"]; *Sutherland v. Kennington Truck Service, Ltd.* (Mich. 1997) 562 N.W.2d 466, 467 [Ontario had no interest in applying its laws because it follows the *lex loci delicti* rule and the accident occurred in Michigan].)

These cases all stand for a simple proposition: a state cannot have a genuine interest in having its laws applied by the courts of another jurisdiction if even its own courts would not apply that state's laws to the action. In this case, for example, BusWest has never explained how Indiana could have a genuine interest in having a *California* court apply Indiana law to a case in which even the Indiana courts would not apply Indiana law. The fact that the Indiana courts would not apply Indiana law "indicate[s] that no important interest of that state would be infringed if the [Indiana] rule were not applied by the [California] forum." (Rest. 2d Conflict of Laws, § 145, com. h ("Restatement").) As a *lex loci delicti* jurisdiction, Indiana "has no law or public policy against employing out-of-state tort law against [Indiana] corporations in accident cases arising in other states." (*Forsyth, supra*, 520 F.2d at p. 612.) Thus, there is no "true conflict." (*Id.* at pp. 612-613.)

California law supports the same result. In *Robert McMullan & Son, Inc.* (1980) 103 Cal.App.3d 198, the court considered Maryland's choice-of-law rules in applying California's governmental interest test. The question was whether California or Maryland law should apply to a contract action between a California corporation and its Maryland insurer. Even though the substantive laws of California and Maryland arguably differed on the issue in question, the Court of Appeal determined that there was no true conflict by consulting Maryland's choice-of-law rules. In contract cases, Maryland follows the doctrine of *lex loci contractus* by applying the law of the place

where the "last act" was performed to make the contract binding. Because that "last act" was performed in California, the Court of Appeal concluded that "Maryland law selects, designates California laws for the determination of the validity and effect of the provisions contained in the policies in issue here." (*Id.* at p. 204.) For this reason, the Court of Appeal said, "[t]here appears to be no conflict on the precise rule of law in issue." (*Ibid.*)

Similarly, there is no true conflict here because Indiana as a *lex loci delicti* jurisdiction has no significant interest in having its law applied to a case in which "the last act necessary to make the defendant liable took place" outside Indiana's borders. (*Tompkins, supra*, 543 N.E.2d at pp. 681-682.) "Clearly, if the state to which the forum's choice rule leads would not apply its own law to the case at hand, it is doubtful if that state can be said to have an 'interest'." (Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress?* (1998) 46 Am. J. Comp. L. 197, 221.)

Citing non-Indiana authorities, BusWest asserts that *lex loci delicti* is merely "a rule of convenience." (Op. Br. on the Merits, at 35.) In Indiana, however, "[c]hoice-of-law rules are ... designed to ensure the appropriate substantive law applies." (*Hubbard Mfg., supra*, 515 N.E.2d at p. 1073.) Indiana follows the *lex loci delicti* rule for a number of related policy reasons: (1) in cases where the injury occurred in another state and gives rise to a cause of action under the law of that state, "principles of comity" dictate that it should be

adjudicated according to the law of the state where the injury occurred (*Burns v. Grand Rapids & I.R. Co.* (Ind. 1888) 15 N.E. 230, 232); (2) if no cause of action exists in the state where the injury occurred, the plaintiff should "carry no right of action with him by coming into the state of Indiana" and suing in the Indiana courts (*Baltimore & O.S.W. Ry. Co. v. Read* (Ind. 1902) 62 N.E. 488, 489); (3) an Indiana law "giving a right of action for a tort committed can have no extraterritorial force or effect, so as to create thereby a right of action in another state" (*id.* at p. 490); and (4) "*lex loci delicti* provides consistency and discourages forum shopping." (*Umbarger, supra,* 496 N.E.2d at p. 129.)

There is no conceivable reason why California courts should not respect these policy choices made by Indiana in determining whether Indiana has a genuine interest in applying its substantive law to an accident that occurred outside Indiana's borders. (See, e.g., *Standard Fire Ins. Co. v. Ford Motor Co.* (6th Cir. 2013) 723 F.3d 690, 698-699 (6th Cir. 2013) [lex loci delicti jurisdiction's interest in "discouraging forum shopping is a legitimate factor in the interest-weighing analysis"].) By following the traditional *lex loci delicti* doctrine, Indiana has deliberately chosen "to circumscribe the applicability of its laws according to these rules. The rules thus define the state's 'interests' in the only sense in which that concept is meaningful, and they should be respected by courts in other states." (Kramer, *Return of the Renvoi* (1991) 66 N.Y.U. L. Rev. 979, 1011.)

For these reasons, even when Forest River was still in the case, there was either no "true conflict" because Indiana itself would not apply its own law to the conflict, or California's strong interest in applying its law outweighed any interest Indiana had in an accident that occurred outside Indiana's borders.[8]

C. Plaintiffs Are Not Invoking the Traditional Doctrine of *Renvoi*

BusWest claims that plaintiffs' argument rests on a discredited theory of *renvoi*. But Bus West is confusing the traditional doctrine of *renvoi* with its more modern use as part of the governmental-interests analysis. The latter has been approved by courts and endorsed by legal commentators and the Restatement (Second) of Conflict of Laws ("Restatement"). (Rest. 2d Conflict of Laws, § 8, com. k; *id.* at § 145, com. h.)

The traditional form of renvoi is "[t]he doctrine under which a

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[8]BusWest tries to suggest that the Court has already decided this issue by applying Ohio law to a Missouri car accident in *Reich v. Purcell, supra*, 67 Cal.2d 551. But *Reich* said nothing about Ohio being a *lex loci delicti* jurisdiction, and there is no indication in the opinion that the Court considered the issue or the parties argued the point. A Supreme Court decision is only authority "'for the points *actually involved* and actually decided.'" (*Trope v. Katz* (1995) 11 Cal.4th 274, 284, quoting *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61.) "[A] case is not authority for a point that was not actually decided by the court." (*Consumer Lobby Against Monopolies v. Public Utilities Com.* (1992) 25 Cal.3d 891, 902.)

court *in resorting to foreign law* adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." (Black's Law Dict. (9th ed. 2009) p. 1412, emphasis added.) For obvious reasons, this doctrine "is commonly rejected as causing hopelessly circular reasoning." (*Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal.App.2d 11, 22.)

But this traditional theory of *renvoi* is different from the more modern idea of considering another jurisdiction's choice-of-law rules in applying the governmental-interest test to ascertain whether that jurisdiction has any genuine interest in having its laws applied in the first place. While strictly limiting the more traditional theory of renvoi, the Restatement explicitly endorses its modern use as part of the governmental-interest test. (Rest. 2d Conflict of Laws, § 8, com. k; *id.* at § 145, com. h.)

The Restatement explains the difference between this modern rule and the more traditional theory of *renvoi.* In the modern rule, "the forum consults the choice-of-law decisions of one or more other states for whatever aid these decisions may give it in determining which states have interests involved and which one of those states should be the state of the applicable law." (Rest. 2d Conflict of Laws, § 8, com. k.) By contrast, the more traditional theory of *renvoi* "does not come into play until a later stage in the proceeding, namely, after the forum has already determined which is the state of the applicable law." (*Ibid.*)

"The crucial distinction is that 'traditional' renvoi was the forum state's application of the competing State's choice of law rules. Conversely, 'modern' renvoi is the forum's act of referring to the competing State's choice of law rules ... to fully ascertain the competing State's interest, if any, in having its law apply." (Chait, *Renvoi in Multinational Cases in New York Courts: Does Its Past Preclude Its Future?* (2003) 11 Cardozo J. Int'l & Comp. L. 143, 168; see also Egnal, *The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law* (1981) 54 Temp.L.Q. 237, 246 [distinguishing "modern renvoi" from "traditional renvoi" and describing "modern renvoi" as "a reference to the choice of law decisions of another state in order to learn more about that state's interest in the particular choice of law issue being decided"].)

As the late Professor Paul Freund has explained, this "way of reconciling the interests of the states does indeed have some similarity to the renvoi in that the conflict-of-laws reference of another state is taken into account; but those criticisms which have been justly leveled at the renvoi are not pertinent here." (Freund, *Chief Justice Stone and the Conflict of Laws* (1946) 59 Harv. L. Rev. 1210, 1218.) Specifically, the modern rule "leads to no endless series of reference; and it does not require the forum to surrender its choice-of-law rule for that of another state on the same subject." (*Ibid.*) As applied here, it merely recognizes that if Indiana would not apply its own substantive law to this conflict, then Indiana has no genuine interest in having California courts apply Indiana law. In Professor

Freund's words, "there is no need to be more Roman than the Romans." (*Id.* at p. 1220.)

III. The Court of Appeal Correctly Found that the Error Was Prejudicial

BusWest does not contest the Court of Appeal's ruling that the trial court's error in applying Indiana law at trial was prejudicial. As a result of the error, the jury received erroneous instructions under Indiana law, rather than California law. Instructional error is reversible if it seems probable that the error prejudicially affected the verdict. (*Soule v. General Motoros Corp.* (1994) 8 Cal.4th 548, 580.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) In making this determination, the court must evaluate: (1) the state of the evidence; (2) the effect of the other instructions; (3) the effect of counsel's arguments; and (4) any indications the jury was misled. (*Soule, supra,* 8 Cal.4th at pp. 580-581.)

The Court of Appeal correctly found that the error here was prejudicial. First, the effect of the Indiana jury instructions was to remove California's risk-benefit theory of design defect from the jury's consideration entirely. The jury only found that the bus was not "defective" within the narrow Indiana statutory definition, which requires an unreasonably dangerous condition "not

contemplated by reasonable persons among those considered expected users or consumers of the public" (Ind. Code, § 34-20-4-1) and a risk "beyond that contemplated by the ordinary consumer." (Ind. Code, § 34-6-2-146.)

Under California law, however, "a product may be found defective in design, even if it satisfied ordinary consumer expectations." (*Barker, supra,* 20 Cal.3d at p. 430.) Thus, the jury was not even presented with the main theory of recovery available under California law, and its verdict did not resolve the question whether BusWest was liable under California's risk-benefit theory. Such an error cannot be found harmless by attempting "to speculate on what the jury would have found if fully and properly instructed" on the omitted theory. (*Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th 1220, 1241.)

Second, even if it were proper to speculate on this issue, the evidence would easily have supported a finding of design defect under the risk-benefit theory. Plaintiffs at least made a prima facie showing that the deaths and injuries were proximately caused by the design of the bus, i.e., the absence of rear seatbelts to keep the passengers restrained and prevent their ejection in a rollover. (See, e.g., 6.RT.2757-2764,2805-2808; 10.RT.3974-3975,3988-3989.) Under California law, once plaintiffs made this causation showing, the "burden" would have "shift[ed] to the defendant to prove, in light of the relevant factors, that the product is not defective." (*Barker, supra,*

20 Cal.3d at p. 431.) The "relevant factors" include "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." (*Ibid.*)

As summarized in the Statement of Facts, plaintiffs submitted ample evidence that the absence of passenger seatbelts in a tour bus poses a grave danger of ejections, fatalities, and serious injuries; that rollovers have the highest fatality rates of all types of accidents; that the likelihood of the danger occurring had been known for years when BusWest sold the bus in 2008; that the cost of installing passenger seatbelts was negligible; that it was technically feasible to install passenger seatbelts; that seatbelts are by far the most effective device in preventing deaths and injuries in rollovers; and that any adverse consequences were far outweighed by the substantial safety benefits. (See, e.g., 6.RT.2754-2760,2804-2805; 10.RT.3970-3975,3987-3989,4018; 12.RT.4556,4574-4578,4582,4590,4602-4603.) Based on this evidence, there is at least a "reasonable chance" that a properly instructed jury would have returned a verdict favorable to the plaintiffs on California's risk-benefit theory of design defect. (*College Hospital, supra,* 8 Cal.4th at p. 715.)

Third, no other jury instructions cured or mitigated the trial court's error in applying Indiana law and failing to instruct on

California's risk-benefit theory of design defect. Again, there is no comparable theory of strict products liability under Indiana law.

Fourth, defense counsel's arguments to the jury exacerbated the trial court's error. Defense counsel emphasized that plaintiffs had to prove BusWest acted negligently. (12.RT.5145,5149,5158.) Defense counsel repeatedly argued that there was no evidence any other vehicle dealership was selling buses with seatbelts in 2008. (5.RT.2137,2140; 12.RT.5145-5146,5160,5166,5169.) He also argued that the bus complied with government standards. (12.RT.5146, 5151,5155,5159-5160,5169.) And he argued that the "burden of proof" was on the plaintiffs "to get over the high-jump bar" and "defendants don't have to jump." (12.RT.5154.) These arguments likely persuaded the jury that plaintiffs failed to meet their burden of proving the bus was in a condition that would not be "anticipated by a reasonable expected user or consumer" or posed a risk "beyond that contemplated by an ordinary consumer." (12.RT.5195-5196.)

California's risk-benefit theory of design defect would not have required any such showing—and would have shifted the burden of proof *to the defense* to prove that the benefits of having no rear seatbelts outweighed the risks. (*Barker, supra,* 20 Cal.3d at pp. 431-432; CACI No. 1204.)

Finally, even applying Indiana law, the jury was split 10-2 on the existence of a defective condition. (12.RT.5403-5405.) "A close verdict is a key indication that the jury was misled by an

instructional error." (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 665 [9-3 and 10-2 jury verdicts "strongly suggests the instructional error was prejudicial"], citing *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1055 [9-3, 11-1, and 10-2 verdicts supported finding of prejudice]; *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1389 [9-3 verdict supported finding of prejudice].)

For all these reasons, the Court of Appeal correctly ruled that the trial court's error in applying Indiana law was prejudicial.

CONCLUSION

The trial court erred by applying Indiana law at trial. California had a strong interest in applying its own law of strict products liability to a California bus dealership that chose not to order rear seatbelts when it imported the bus into California, then sold the bus to a California bus touring company for use on the roads and highways of California and neighboring states. By contrast, Indiana had no remaining interest once the Indiana manufacturer settled out of the case. Thus, the trial court should have instructed the jury under California law. Alternatively, the initial choice-of-law ruling was incorrect because Indiana as a *lex loci delicti* jurisdiction never had a significant interest in applying its law to an accident that occurred outside its borders. Either way, the

error was prejudicial and the judgment of the Court of Appeal should be affirmed.

Dated: May 24, 2017

LAW OFFICES OF MARTIN N. BUCHANAN

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing Answer Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief, is 13,823 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: May 24, 2017

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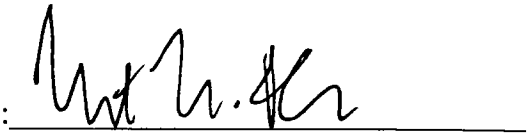
By: 

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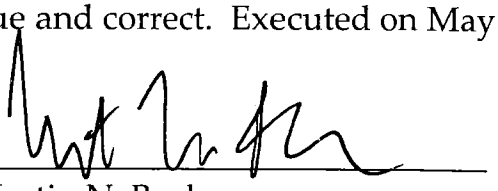
CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 W. Broadway, Suite 1700, San Diego, California 92101. On May 24, 2017, I served the **ANSWER BRIEF ON THE MERITS** by mailing a copy by first class priority mail to each of the following:

Frank C. Rothrock (SBN 54452) Shook Hardy Bacon LLP 5 Park Plaza, Suite 1600 Jamboree Center Irvine, CA 92614-2546 (Counsel for Respondent L.A. Truck Centers, L.L.C.)	Hon. Holly E. Kendig Department 42 Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012
Hon. J. Stephen Czuleger Department 3 Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012	California Court of Appeal Second District, Division 8 300 S. Spring Street, N. Tower Los Angeles, CA 90017

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 24, 2017, at San Diego, California.



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