Supreme Court No. S 232754
2nd Civil No. B 247672
LASC Case No. BC VC059206

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM JAE KIM, et al. Plaintiffs and Appellants, vs. TOYOTA MOTOR CORPORATION, et al., Defendants and Respondents.	Case No. S 232754

From a Decision of the Second District
Court of Appeal – Division Seven
[2nd Civil No. B 247672]
Los Angeles County Superior Court
Hon. Raul A. Sahagan, Judge Presiding
[LASC Case No. VC 059206]

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

1. INTRODUCTION

In the Opening Brief, Appellants distinguished the true "industry custom" evidence and argument which was the subject of their motion *in limine* from the varieties of evidence which are often lumped under that term, including technical standards, specific instances of alternative designs, and state of the art or industry capability. As Appellants observed, each of the latter instances are legitimate *Barker* factors which can and should be proven with the type of specific and objective evidence that allows jurors to themselves weigh feasibility, risks and benefits.

By contrast, the "industry custom" relied upon by Toyota amounts to no more than a remote and factually unfounded inference that the fact that nobody in the industry has adopted a given safety feature is the result of industry experience, that the industry has based its custom on a weighing of risks and benefits, and hence its omission cannot render the product defective. That inference serves as a proxy for the jury's own weighing of factors, though in truth it may reflect nothing more than industry inertia or the fact that – as here – the manufacturer felt no competitive pressure to adopt the design and so overrode engineering recommendations.

Indeed, Lobenstein's testimony demonstrates that the omission of ESC had nothing to do with risk/benefit considerations or industry experience and research: it was pure marketing. And the fact that ESC had been generally implemented on passenger vehicles and was scheduled to made standard on trucks establishes that there was no industry consensus that ESC was impractical or cost-prohibitive, or that its omission from passenger trucks was justified by *Barker* factors.

Toyota's Brief proves the danger of the indiscriminate use of the term. It fails to distinguish authorities which condemn industry custom from those which allow

evidence of specific competing models to show the feasibility of alternative and safer designs, and it fails to refute the inevitable effect of such evidence – to influence jurors to decide based on an industry "standard of care" instead of themselves weighing risks and benefits.

Nor does Toyota refute the central point of the Opening Brief: if the existing practice of the industry actually reflects research or experience bearing on cost, feasibility, benefit or detriment to product utility, than that research or experience can be placed before the jury with far greater edifying effect than the smoke-screen of mere custom. In not one instance does Toyota demonstrate that the inference of industry "balancing" which is its justification for custom evidence cannot be far better served by showing exactly how that "balance" is the result of real risks and benefits rather that irrelevant competitive factors or mere lethargy.

Respondent's contention that objection to industry custom was not preserved because only a limiting instruction can afford relief for misuse of evidence properly admitted ignores the fact that instructions were in fact submitted and refused, and that a principal purpose of *in limine* motion is to prevent the misuse of even properly admitted evidence, as well as to preclude arguments which are not legally sustainable. Plaintiff's motion *in limine* gave the court the opportunity and duty to do exactly that.

Finally, while Toyota argues that there were "holes in plaintiff's causation case," the jury never reached causation due to Toyota's improper verdict form. Toyota ignores the rule of substantial evidence and the jury's right to accept plaintiffs' evidence irrespective of the rather tepid defense arguments.

2. TOYOTA OFFERS NO TENABLE JUSTIFICATION FOR TRUE INDUSTRY CUSTOM EVIDENCE IN RISK BENEFIT CASES

None of Toyota's arguments for relevance detract from the fact that it had only one purpose in eliciting "custom and practice" evidence - to sway jurors into believing that if nobody made a truck with standard ESC, a truck without ESC could not be defective. That use was plainly intended to induce the jury to rule on a negligence standard rather that apply the rigor of the risk-benefit test.

A. Toyota's Reliance on Consumer Demand Distorts the Role of Consumer Knowledge and Choice and Undermines the Manufacturer's Duty to Make Design Choices

Throughout its Brief, Toyota harks upon lack of consumer demand for ESC, the supposed unwillingness of consumers to pay a few hundred dollars for the device, and the industry's supposed adherence to the consumer's supposed rejection of the ESC's benefits, allegedly reflected in the general failure to have it on 2005 trucks. The argument is that consumers rejected ESC and manufacturers' deference to such a decision is a valid expression of risk-benefit. This has dangerous public policy implications.

First, it offends the policy of driving safety improvement based on an objective and informed balancing of risks and benefits by a well-informed jury. Contrary to Toyota's claim that jurors should not apply hind-sight, it is exactly their role to second guess the manufacturer's design decision (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430), not the customer's choice. Consumer demand for unknown technology is nil, and manufacturers themselves create or retard the demand for product innovation; it is their role in creating consumer demand which calls for

imposition of strict liability. *Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576; *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 725; *Bay Summit Community Ass'n v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 771-776

Second, the policy of allocating the costs of product defects and improving product safety rests on the manufacturer's superior knowledege and ability to weigh and avoid risks, and to assess the costs of a less safe product. This is defeated if a less safe product is justified by lack of consumer knowledge and hence demand. As Justice Traynor put it:

> The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. . .
> [*Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 467-468]

"Courts should design rules of products liability to address situations in which market forces cannot be relied on to ensure the fulfillment of consumer safety demands. The goal of products liability law therefore should be to hold manufacturers to the level of safety that consumers would demand through market choices if they were adequately informed about product risk characteristics. . . Product users are entitled to the benefit of the hypothetical safety bargains that they would have struck with manufacturers, given a more textbook market setting." Kysar, *The Expectations of Consumers* (2003) 103 Colum.L.Rev. 1700, 1749.

The marketing of a less-safe product, and advertising and marketing that does not aim to promote a safer product which does not enhance profits, means that the

manufacturer has unlaterally increased the number of persons exposed to risk of injury. The manufacturer should bear the burden of the resulting injuries, or it will continue to promote the less safe product and the consumer will bear the cost of avoidable accidents, as happened here. *Bay Summit Community Ass'n v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 771-776; *LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 756-757.

Consumer acceptance might be validly considered if it actually reflected the consumer's weighing of the decreased danger against the increased costs, but that is not even arguably the case with ESC. Consumer reaction might be a factor if a safety device substantially impedes the intended use or performance of the product. But "consumer acceptance" is no excuse when it amounts to nothing more than the assertion that the safety device costs marginally more, where the device has no impact on utility (in the case of ESC, it actually increases utility), and where consumer acceptance consists of no more than a lack of consumer comprehension of safety benefits.

That there was no strong consumer demand for seatbelts before they were mandated, or that there was no clamor for air bags in their early years, was no excuse for manufacturers failing to install them. Omission of devices which have zero impact on utility cannot be justified by lack of demand.

Lack of "acceptance" of obscure electronic features is readily distinguished from cases like *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131, holding that aesthetic considerations are pertinent because the appearance of a car bears on its perceived utility. In *Bell*, the design choice had an actual impact upon the usefulness of the product: the consumer's aesthetic was one aspect of utility. *Bell* is a case of informed and actual consumer decision, not of a

marketing decision driven by lack of consumer appreciation.

Where new technology is virtually unknown to consumers, offers drastic improvement to safety, but has no impact on utility, citing "consumer acceptance" which consists of no more than lack of consumer knowledge shifts the burden of design choices from the manufacturer to a user who is simply unequipped to make that decision.

B. **Industry Custom is Irrelevant to Causation**

Toyota advances the theory that the absence of ESC from other trucks was probative of causation because other non-ESC equipped trucks presumptively had negotiated the curve. (RBM 29-30)

The premises for making an "absence of other accidents" argument are missing. Absent evidence that other trucks had engaged in a similar collision-avoidance maneuvers and reached loss-of control parameters in which ESC would have cut in, this is conjectural. Particularly where an accident involves multiple steering inputs, there is no basis to assume that similar prior emergency maneuver ever occurred, or to conclude that ESC wouldn't have operated in the instant case. *Cooper v. Firestone Tire and Rubber Co.* (9th Cir. 1991) 945 F.2d 1103, 1105; *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 555; *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1345. And because this particular curve was not unique, it has no more probative value as to causation than the accident history of millions of other curves where trucks equipped or not equipped with ESC either lost or recovered control.

Even were it true that Kim was traveling faster that other ESC-equipped vehicles, or that he reacted less adroitly than other drivers, it does not follow that ESC

would not have made a difference. That issue turned on expert testing and opinion, not on a general accident history of other vehicles.

In any event, evidence that no other manufactuer offered ESC in 2005 was not used for this purpose, and Toyota was free to argue that innumerable other vehicles without ESC had navigated the turn without losing control without using the "industry custom" argument.

C. Industry Custom is Irrelevant to Risk-Benefit Factors

Citing the Opinion below, Toyota claims that Lobenstein's admission that the failure to make ESC standard was due to lack of consumer demand, or the fact that Ford decided not to make it standard, demonstrate that "industry custom" is relevant to risk- benefit. (RB 30-31) But what that evidence showed was that Toyota's decision was not based on risk-benefit factors. As discussed below, evidence that Toyota disregarded engineering recommendations and went with marketing considerations goes not to the merits of the design, but furnishes background evidence that there was no valid risk-benefit reason for the decision. That point is not disproven by "industry custom."

Toyota also suggests that industry custom supports its position that ESC technology for trucks was not mature, though it had been on every other sort of vehicle for years. Since ESC was available as an option and Toyota engineers urged its implementation, it is absurd to claim it was not mature. No witness so testified.

Similarly, Toyota refers to"desirability of phase-in" as an industry practice. (RB 32-33) But given that Toyota offered ESC as an option, there was no "phase-in" issue. The technology was mature enough to put it on the Tundra in 2005, and there was no

contention that standard ESC was in any manner different than optional ESC.

That technology is generally "phased in" is not a excuse where it is already available and in use. And that other manufacturers "phased in" technology on their models is no excuse for Toyota failing to install a device it had on the shelf, since the issue before the jury is the feasability of an alternative design *for the Tundra*, not for competitors' vehicles. Whether or not anyone else delayed in phasing in ESC is not evidence that it posed a technical challenge to Toyota, or that it was unreasonably costly in view of the safety benefits, or that it impaired utility. If Toyota had the capability, it was irrelevant under risk-benefit whether others had that capacity.

Were there a true phase-in issue, it should have been presented in technical detail to show difficulty or impracticability in 2005, not by a tenuous inference that other manufacturer's delay in "phasing in" represented a feasibility problem for Toyota.

The "maturity" and "phase in" arguments are not based on real feasibility or concern, but just another way of saying "nobody does it so it must be safe."

At RB 33, Toyota claims the industry custom refutes plaintiff as to "gravity and likelihood of harm" on the theory that if ESC were really cost-effective, other manufacturers would implement it. The proper comparison is an ESC-equipped Tundra with a non-ESC equipped Tundra, and if ESC was essential to reduce the risk on the Tundra (as it was), it was immaterial whether any other manufacturer even had the capacity to install ESC on trucks. If Toyota were the only one in the industry with the technology, it was required by the risk-benefit test to adopt it. Further, there was no dispute that trucks had controllability problems, as attested to by defendant's own engineering recommendations (OBM at 11-12), so there was no issue as to the risk

reduction offered by ESC.

The only "adverse effect" on consumers identified by Toyota (RB 33) is a cost increase of a few hundred dollars. As discussed above, and as the Court of Appeal noted, the cost is to be balanced against the improvement to safety, not against the price advantage as against other equally unsafe vehicles. It is the cost and safety of the ESC-equipped Tundra as against the non-ESC-equipped Tundra that is balanced. To allow the manufacturer to justify the absence of a crucial safety device because it keeps the price at a level with competitive models that are equally unsafe invites a race to the bottom and undermines the product improvement objective of products liability law (*Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 696), much like the negligence standard inherent in the "industry custom" evidence.

Toyota asserts that "custom helps to jurors avoid judging in hindsight" and prevents jurors from assuming that ESC was common in 2005 and Toyota was behind rather than the first to offer it. Jurors are supposed to second-guess design decisions based upon the technology available in 2005. It is irrelevant under Barker whether ESC was common and whether Toyota was the first to offer it. The absence of an essential safety device from other trucks cannot justify the absence of essential device from the Tundra. Again, the jury is to compare alternative available designs, not to compare various manufacturers' conduct.

In a case with abundant direct and uncontradicted technical evidence of the feasibility and effectiveness of ESC on the Tundra, the inference that the failure of other makers to put it on their trucks by 2005 undermined that evidence is a tacit admission of defendant's inability to produce real evidence on risk-benefit, and Toyota's need to resort to an standard-of-care argument. That this was the core of the defense is evident from Toyota's argument is at RB 33:

> Since there was no reason the Tundra needed ESC more than other pickups, plaintiff's 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.

This is very much the argument condemned by *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803 and related cases as undermining risk-benefit evaluation by a "standard of care" drawn from an industry which may well be universally producing vehicles with excessive preventable danger. It is the popularity contest theory of liability.

D. "Consumer Acceptance" Is Not a Risk-Benefit Factor Where it Consists of No More Than Marketing Advantage

Toyotas "concerns about consumer acceptance" (RB 32) is indistinguishable from the assertion that ESC offers no marketing advantage. As previously noted, when it involves technology and safety benefits beyond the consumer's ability to evaluate, and no effect on utility other than to reduce accidents, it is entitled to no weight at all. The popularity or commercial success of a product (*e.g.*, the Ford Pinto or the early Explorer) is not a consideration. *Culpepper v. Volkswagen of America* (1933) 33 Cal.App.3d 510, 518 (suspension system of VW bug which enjoyed wide consumer acceptance found defectively designed); *Roy v. Volkswagen of America, Inc.* (9th Cir. 1990) 896 F.2d 1174, 1177.

E. Industry Custom is Irrelevant to Consumer Expectations

Toyota asserts that because the trial court had not yet rejected plaintiffs Consumer expectations theory, industry custom was admissible to show that ordinary

consumers would not expect ESC because they had no experience with it. (RB 48-49)

In the case of an ordinary consumer product, jurors are to look to their own experience as to how a product should behave in given circumstances. That means they assess the product as a whole (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 746; *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1449-1450) – i.e. look at the *truck*'s behavior in an emergency maneuver. Jurors are not asked to determine how ESC performs, as Toyota suggests, and need not compare ESC and non-ESC vehicles, but only decide whether the Tundra responded as a driver would have expected in the circumstances at bar.

Since this case turns on the vehicle's response to driver input, "the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567.[1] By similar reasoning, evidence about other truck models is irrelevant since jurors are to rely on their own sense of vehicle behavior.

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[1] Toyota cites *Soule* for the proposition that expert testimony is required where the performance of an "obscure component" is at issue. *Soule* was a crashworthiness case involving a structural failure under extreme stress. Ordinary drivers have experience of maneuverability and emergency maneuvers. *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120, citing *Soule*, 8 Cal.4th at 563, and *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126; *Buell-Wilson v. Ford Motor Co., supra*, 141 Cal.App.4th 525 (applying consumer expectations test to Ford SUV roll-over); *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1001; *Bell v. Bayerische Motoren Werke Aktiengesellschaft, supra*, 181 Cal.App.4th 1108, 1129 (rollover of a sports car within realm of reasonable consumer's expectations); *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 518 ("emergency situations requiring severe turning movements arise every day.")

Since ESC is intended it to make the vehicle perform as the driver expects (to avoid under-steer and over-steer), the consumer expectations test is perfectly suited to the lay juror's evaluation of whether the vehicle conforms with the ordinary drivers expectations. That other trucks fail to respond as drivers expect is immaterial, as is the presence or absence of ESC or other equipment in those other trucks.

F. Evidence of Custom is Not Justified As Going to "Reasonableness"

Toyota asserts that *Barker* allows evidence of "reasonableness," which it seems to equate to standard-of-care as exemplified by industry custom. (RB 58) But *Barker* defines "reasonableness" in terms of the enumerated risk/benefit factors, not in terms of a "reasonable manufacturer" standard. Even a reasonably prudent manufacturer may be held liable where the product embodies excessive preventable risk. *Barker*, *supra*, 20 Cal.3d at 434. The "reasonable manufacturer" is the very standard which products liability doctrine deemed inadequate to assure safe products and shift the cost of avoidable injuries to the manufacturer who is in a superior position to avoid risks.

G. Toyota's Rationales for Industry Custom Are Uniformly Speculative and Designed to Divert Juror Attention

In each instance, Toyota's explanation for the relevance of industry custom demonstrates the point made in the Opening Brief: such evidence simply invites speculation in disregard of the actual technical evidence bearing upon the *Barker* factors. In each instance, Toyota's argument is that industry-standard undermines ***direct actual evidence*** of feasibility and cost effectiveness of ESC because it allows a jury to conjecture that industry-wide failure to offer ESC in pickup trucks is due to lack of feasibility or consumer rejection.

3. THE AUTHORITIES DO NOT SUPPORT INTRODUCTION OF INDUSTRY CUSTOM IN A RISK-BENEFIT CASE

A. California Cases

Toyota's discussion of California authorities fails to discriminate between true industry custom, which is uniformly condemned in pure risk-benefit cases, and evidence of competing models which embody alternative designs and so are informative under *Barker* criteria.

Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379, 383, involved a manufacturing defect – not the risk-benefit test – and used a "deviation-from-the-norm" standard which refers to like exemplars of the *same model.* It did not endorse "industry custom" or discuss risk-benefit, but affirms the right to a *res ipsa* loquitur instruction where the product failed in an unexpected fashion.

Self v. Gen. Motors Corp. (1974) 42 Cal.App.3d 1, 6 (overruled by *Soule v. General Motors*, *supra*, 8 Cal.4th 548), refers to industry recognition of the danger of a certain tank placement – *i.e.*, a specific engineering risk which the defendant should have designed against.[2] In *Garcia v. Halsett* (1970) 3 Cal.App.3d 319, an expert referred to a specific switch used in other models – a particular design choice with particular safety advantages. In *Culpepper v. Volkswagen of America*, *supra*, 33 Cal.App.3d 510, where a car rolled over in a normal maneuver, an expert attested to the performance of the Volkswagen as compared with domestic vehicles in particular circumstances. Each case involves specific performance and design criteria, not an

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[2] *Self*, like *Jaramillo v. Ford Motor Co.* (9th Cir. 2004) 116 Fed.Appx. 76, discussed below, also illustrates why the admission of evidence pertaining to the manufacturer's knowledge or the reason for his design choice does not open the door to industry custom.

amorphous "industry custom" of making less safe products.

Barker likewise cites only alternative models which illustrate alternative designs with superior safety performance, affirming that "the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct." (*Barker*, 20 Cal.3d at 433-434)

Hansen v. Sunnyside Prod. Inc. (1997) 55 Cal.App.4th 1497, held that warnings could be considered in assessing the product as a whole under the risk benefit test because it is relevant to "the risk that the danger would cause damage" and hence " does comply with Barker's mandate to focus on the product." (*Id.* 1516) It cites expert testimony that the manufacturer's label "comported with industry custom and practice and with the Federal Hazardous Substances Act" (*Id.* 1520), *i.e.*, a specific technical standard presumably based on research and experience. *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, was primarily a negligence case, with uncontradicted evidence of proper design and of posted "warnings that met industry standards and all state code requirements" (*Id.* 762)

Each case involves specific design criteria. None was called upon to address the claim that "industry custom" consisting of no more than the absence of products employing the alternative design or safety feature issue was admissible or relevant. "It is elementary that cases are not authority for propositions not therein considered." *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388. None of these cases are remotely comparable to the claim that "you cant find every 2005 truck defective."

It is unnecessary to linger on Toyota's attempt to criticize or distinguish the *Grimshaw* line of cases except to note that they do in fact condemn true "industry custom" evidence ("everybody does it") while permitting evidence of alternative

designs and state of the art – evidence that Toyota mischaracterizes as "industry custom." They are discussed at 28-30 of the Opening Brief and they clearly condemn evidence as to the "average quality" and the "norm" for other models (*Grimshaw* at 803), conformance with an industry "custom and practice" (*Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477), and correctly distinguish between irrelevant industry custom and admissible industry capability. *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 210.

Titus v. Bethlehem Steel Corp. (1979) 91 Cal.App.3d 372, 379, in particular, cannot tenably be distinguished since the manufacturer's defense was that the safety guard was offered as an option pursuant to industry custom, and the court found it was necessary to disabuse the jury of the notion that the product lacking such a device was not defective if it was industry practice to make it optional.

B. **Other Jurisdictions**

Toyota also asserts at 35 to 38 that most jurisdictions allow "industry custom." As the authorities cited by Toyota show, this statement obscures the distinction between industry standards which consist of particular standards based upon research and experience, and thus a considered balancing, and industry custom which consists of no more than the fact that nobody does it. Many of the authorities actually concern competing models which demonstrate alternative design[3], or "state of the art" which represents a limitation on technical capacity. *Cantu v. John Deere Co.* (Ct.App.1979) 24 Wash.App. 701, 603 P.2d 839, 840; 1A L. Frumer & M. Friedman, *Products Liability* §2.26[8][b][I] n. 6 at 2–1667.

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[3] *Rest.3d. Torts: Products Liability,* §2 com. d: "How the defendants' design compares with other competing designs in actual use . . ."

Many of these authorities arise out of jurisdictions which incorporate the Restatement's "unreasonableness" standard in their product liability doctrine[4], or involve manufacturing defects, or collapse consumer expectations and design-benefit into a single test. In fact, a survey reveals that the rejection of "industry custom" consisting of no more than "nobody does it" in products cases is widespread. See *Products Liability: Admissibility of Defendant's Evidence of Industry Custom or Practice in Strict Liability Action*, 47 A.L.R.4th 621.

These case are fairly useless in evaluating the sort of evidence and argument adduced in this case, and equally balanced by decisions holding that "evidence of industry standards . . . go to the reasonableness of the appellant's conduct in making its design choice [and] would have improperly brought into the case concepts of negligence law. . . [S]uch evidence would have created a strong likelihood of diverting the jury's attention from the appellant's control box to the reasonableness of the appellant's conduct" and hence should be excluded as irrelevant and confusing. *Lewis v. Coffing Hoist Div.* (1978) 515 Pa. 334, 343, 528 A.2d 590, 594.

Even those authorities which allow some potential for relevance for "industry custom" where it might reflect feasibility reject its admission where – as here - that factor is not at issue.[5] *Carter v. Massey Ferguson, Inc.* (5th Cir. 1983) 716 F.2d 344,

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[4] "Section 402A provides no definition of the term 'defect,' and thus, of itself, does not afford an effective working guide as to what kinds of factual circumstances will result in the imposition of strict liability on a manufacturer for injuries which are caused by its product. Consequently, the various jurisdictions have fashioned diverse formulas, most especially with regard to the subject of design defects." *Lewis v. Coffing Hoist Div.* (1987) 515 Pa. 334, 339, 528 A.2d 590, 592-593.

[5] Even in negligence cases, custom must be based on some meaningful industry experience or deliberation: "[m]uch the better view, therefore, is that custom . . must meet the challenge of 'learned reason,' and be given only the evidentiary weight which the situation deserves." Prosser & Keeton, *The Law of Torts 5th* §33, at 195 (1984).

349-350, applying Texas law which incorporates an "unreasonably dangerous" notion, notes that "industry custom might reflect considerations of costs, profits, or marketing strategies, rather than product safety," and that "[d]espite the limitations of the industry custom evidence, Dean Keeton would admit it and would place the burden on the advocates to explain its narrow function in a strict product liability case." *Id* at 349, citing Keeton, *Annual Survey of Texas Law – Torts*, 35 Sw.L.J. 1, 11 (1981). Despite this theoretical relevance in some cases, it was held improper to admit it where feasibility was not at issue.

> . . . in the light of the limitations imposed on its effect and Dean Keeton's comment on its unreliability in a design defect case, we conclude that it has a low probative value when, as here, neither the feasibility of an alternative design nor the foreseeability of harm is at issue
> [*Id.* at 350]

A cautionary note is also found in cases like *Back v. Wickes Corp.* (Mass. 1978) 378 N.E.2d 964, 970, allowing evidence that "all product designers in the industry balance the competing factors in a particular way." As the Opening Brief makes clear, evidence of actual balancing and the reason therefore are unobjectionable, whether by other designers or not. That is what *Barker* calls for. But it is not what Toyota advocates and offers since there was no evidence of any balancing on ESC by other designers – only a lack of competition.

Industry custom had no function here, since feasibility was clear, the industry had no "custom and practice" calling for omission of ESC but was gradually making it standard on all vehicles, and the decision to omit ESC as standard was based on marketing and not engineering criteria. Toyota adduced no evidence that "industry custom" was the result of experience or a deliberative process, and in fact the industry

was equipping all vehicle with ESC. What this illustrates is that the Court of Appeal's view is a gateway for junk evidence of standards which are not standards at all and have nothing to do with *Barker* factors.

4. THE CLAIM THAT THE "DOOR WAS OPENED" TO IMPROPER ARGUMENT OR EVIDENCE OF INDUSTRY CUSTOM IS BASELESS

Toyota claims that any reference to what other manufacturers were doing "opened the door" not just to industry custom – indiscriminately defined – but to any argument, inference or use of "industry custom." It asserts that because plaintiffs conceded that it was proper to show that Toyota refrained from making ESC standard because no one else was offering it, it must also be permissible for Toyota to cite the lack of industry acceptance as evidence that the Tundra was not defective.

The argument fails on several levels.

A. Testimony that Toyota's Decision to Make ESC Optional in 2005 Was Due to Lack of Competitive Pressure is Not Logically Countered by Evidence or Argument that the Tundra Was Not Defective Because Other Brands of Truck Lacked ESC

Evidence that the decision to make ESC optional was due to competitive considerations – the lack of competition from others and lack of consumer interest – had nothing to do with risk-benefit, but went to the fact that the decision was not based on *Barker* factors. It cannot logically "open the door" to evidence or argument that the absence of other vehicles with ESC reflected a valid design choice.

Jaramillo v. Ford Motor Co. (9th Cir. 2004) 116 Fed.Appx. 76, addresses this fallacy. In *Jaramillo*, plaintiffs alleged that a Ford vehicle that rolled over when the driver swerved to avoid a deer was defective. They offered evidence of a *Consumer Reports* article and the deposition of a Ford engineer to show "that Ford had notice before it designed the Explorer that rollover accidents presented a significant risk. In doing so, the Jaramillos introduced statistics from Ford's own documents that showed that Ford knew that light trucks and small utility vehicles rolled over more frequently than cars, and that the Ford Bronco II rolled over more frequently than some other SUVs." Ford argued that this justified admission of testimony as to how the 1995–1999 Explorer performed relative to other vehicles on the road. Rejecting the claim that plaintiffs "opened the door," the Ninth Circuit held

> The Jaramillos did not introduce any comparative accident statistics that suggested the Explorer had a higher propensity to be involved in a rollover or any other type of accident than other SUVs or other types of vehicles. Pascarella's testimony merely provided background information about what Ford knew before the Explorer was designed. Similarly, the Consumer Reports article's discussion of the rollover rate of the Bronco II did not address the safety of the Explorer; it only provided background information about what Ford knew before Ford designed the Jaramillos' vehicle. Accordingly, the Jaramillos did not open the door to Ford's comparative accident statistics.
> [116 F.App'x at 78]

Similarly, that Toyota made a decision based on marketing rather than engineering is probative of the lack of a risk/benefit justification for omission of ESC, but does not open the door to the claim that because every other truck is just as risky the Tundra cannot be defective. There is no parity in the two uses.

B. The Proffer of Evidence on a Relevant Point Does Not Justify Its Misuse for Unrelated and Irrelevant Purposes

The open-the-door rule operates to prevent witnesses from misleading the jury or misrepresenting facts. *People v. Robinson* (1997) 53 Cal.App.4th 270, 282–283; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1267. It does not render relevant evidence or argument which does not contradict the matter which has been "opened," nor make relevant an otherwise irrelevant issue simply because the proffered evidence might arguably be used to support the opponent's claim on that irrelevant issue.

"Th[is] so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.'" *People v. Gambos* (1970) 5 Cal.App.3d 187, 192, quoting *People v. Johnson* (1964) 229 Cal.App.2d 162, 170. "'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.'" *People v. McDaniel* (1943) 59 Cal.App.2d 672, 677.

"'Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.'" *People v. Williams* (1989) 213 Cal.App.3d 1186, 1189, fn. 1.

In *People v. Luparello* (1996) 187 Cal.App.3d 410, 422, where "admission of marginally relevant evidence [of gang membership] was later turned on its head when the prosecutor sought to take advantage of its inflammatory effect," the court observed that

> The fact that a topic is raised on direct examination and may therefore appropriately be tested on cross-

> examination . . does not amount to a license to introduce irrelevant and prejudicial evidence merely because it can be tied to a phrase uttered on direct examination.

Toyota was not disproving plaintiff's point that the omission of ESC was unrelated to engineering or safety concerns, but using it to advance the legally impermissible argument that industry-wide omission of ESC was evidence of the lack of defect.

The doctrine of multiple admissibility also does not help. That evidence was admitted without a limiting instruction and is admissible for "all purposes" does not allow its use for illegitimate purposes, and there is no waiver where that misuse has been specifically objected to *in limine*. *People v. Vinson* (1969) 268 Cal.App.2d 672, 674–675.

One cannot, for instance, get in an out-of-court statement for some non-hearsay purpose, then argue to the jury that it can be used for the truth of the matter it asserts in violation of the hearsay rule. *Werner v. Upjohn Co., Inc.* (4th Cir. 1980) 628 F.2d 848, 854. And admissibility of evidence for a legitimate purpose does not allow its use for a non-issue, or to make an argument which is contrary to public policy. *Love v. Wolf* (1964) 226 Cal.App.2d 378, 389 (where drug manufacturer's sales volume was admitted to show a possible motive for its aggressive promotion of drug, it was misconduct for counsel to argue that sales volume justified large damages.)

5. THE CONTENTION THAT MISUSE OF INDUSTRY CUSTOM EVIDENCE AND ARGUMENT WAS NOT SUBJECT TO *IN LIMINE* CONTROL IS BASELESS

A. The Motion *in Limine* Was Properly Framed to Control Improper Questioning and Argument

Contrary to the assertion at pages 21 to 24 of Toyota's Brief, the remedy to the improper use of industry custom, to improper questions, and to improper argument was an *in limine* order at ***the outset of trial***, not a limiting instruction which would be virtually ineffective after Toyota's theme has been thoroughly wrung before the jury.

A principal purpose of an *in limine* ruling is to foreclose questioning aimed at placing before the jury an impermissible argument or theory. "In other words, the motion seeks to avoid the prejudicial effect of questions asked or statements made in connection with the offer of objectionable evidence." 3 Witkin, *Cal. Evidence 5th*, "Presentation at Trial" §379; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 608. An objection to a line of questioning is sufficient where it is evident that a given line of inquiry will be permitted. 3 *Cal. Evidence 5th*, "Presentation at Trial" §393; *People v. Antick* (1975) 15 Cal.3d 79, 95. A question may be as prejudicial as an uncontroversial answer. *U.S. v. McCord* (9th Cir. 1993) 15 F.3d 1093 ("the danger of unfair prejudice was high because the nature of the questioning gave the questions undue credibility, making the questions themselves akin to evidence in the minds of the jurors.")

> The purpose in filing a motion *in limine* to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with

> respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach [*Bridges v. City of Richardson* (1962) 163 Tex. 292, 293, 354 S.W.2d 366, 367–68]

B. Nothing Prevented the Trial Court from Granting the Requested *in Limine* Order

Toyota denies that the court was in a position to rule on the admissibility of industry custom evidence and argument at the time of the motions.

The motion was specifically directed at true "industry standard" evidence and argument as defined in the Opening Brief: "me too" evidence that "nobody in the industry does it" and hence it must be acceptable. (See OBM at 43-44) As such, granting the motion would not have precluded evidence that the industry had failed in attempts to adopt ESC for trucks, or that such efforts proved financially prohibitive. Nor would it have been infringed by the sort of background evidence adduced from Lobenstein to the effect that the omission of ESC was a marketing decision and not a considered safety or technical judgment. (RT 3310-3315, 3327-3338)

Thus, nothing prevented the court from a ruling which embodied the well accepted *Grimshaw* rule. It was not any deficiency in the motion, but the Court's ambivalent reading of the case law that resulted in denial of the motion. (RT 312)

Grimshaw, *Foglio*, and similar cases demonstrate exactly what evidence and

argument is objectionable; comparison with other vehicles as a form of "standard of care" evidence, rather than risk-benefit evidence. Had the court issued that order – as other courts have -- it would not have impaired defendant's ability to present evidence of technical or financial feasibility – had such evidence existed.

C. Plaintiffs' Instructions Bearing on Industry Custom Were Improperly Rejected

Plaintiffs, of course, did submit instructions embodying the Grimshaw rule, all of which were rejected. Having insisted that a limiting instruction was the appropriate means, Toyota then claims at RB 59 that such instructions are "outside the issues" on this review!!! It makes little sense to assert that this Court's limitation of review to the issue of industry custom precludes consideration of instructions going to the proper use or misuse of such evidence. This Court can hardly give appropriate guide to the bar and bench without addressing the both the trial courts duties in both admitting and limiting the use of such evidence.

Toyota also argues at RB 59 that use of the term "no defense" justifies rejection of Instruction 19, but cites no similar problem with other instructions. The contention that the phrase "no defense" improperly suggests that industry custom cannot be considered is hardly a tenable ground for rejecting an instruction since, as discussed above, industry custom ***cannot be considered*** as a factor in a risk-benefit case. And instructions19, 20, 21 and 22 were all tendered on appeal. (AOB 18, 22-24)

D. Questioning About "Industry Custom" was Inherently Prejudicial and Should Have Been Precluded

Toyota cites the Court of Appeal's observation that in response to a series of

questions from Toyota about the lack of competing vehicles with ESC, plaintiffs' expert Yannis Papelis gave no substantive response. (See OBM 40-41; RT 2705, 2706) Defendants' questioning was not, of course, aimed at eliciting information: the fact that ESC was on no other truck was clear. Rather, rather it was aimed at reinforcing the notion that Toyota more than complied with industry practice, that it was no worse than other manufacturers. It is precisely the question that should have been precluded, as requested in the motions in limine.

Where "the party alleging error had strenuously made his objection and then acted defensively to lessen the impact of the error . . . No waiver can be predicated on this course of action." *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857.

E. **Public Policy Directly Impacts the Admissibility of Industry Custom**

It is far too late to assert that public policy – and particularly the policies underlying product liability -- play no role in admissibility. *Ault v. Int'l Harvester Co.* (1973) 13 Cal.3d 113, 119 (corrective measures in strict liability cases); *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal. App. 3d 95, 108 (remarriage evidence excluded for public policy reasons); *People v. Thompson* (1980) 27 Cal.3d 303, 315 (admissibility of "other crimes" evidence "depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence."); *Hrnjak v. Graymar, Inc.* (1971) 4 Cal3d 725, 729-732; *Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 245 (public policy exclusion of collateral source benefits.)[6]

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[6] "Unlike evidence of defendant's liability insurance coverage, the admissibility of evidence of plaintiff's receipt of collateral insurance benefits is not governed by

"Courts retain ... a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." *People v. Rodriguez* (1999) 20 Cal.4th 1, 10, fn. 2.

It is odd that Toyota should cite *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, claiming that court have no discretion to exclude evidence of the absence of prior accidents when such evidence has been held inadmissible except where its reliability is shown. *Benson v. Honda Motor Co., supra*, 26 Cal.App.4th 1337, 1345.

The point of *Grimshaw* and similar cases is that the nature of the risk-benefit test as defined in *Barker* restricts the evidence to that bearing on the objective features of the product and alternative designs – how much danger can be engineered out of the product – rather than the conduct of the manufacturer. That risk-benefit rule, and the public policy underlying products liability, necessarily defines the sort of evidence that is admissible.

F. Plaintiff's Motion *in Limine* and Briefing Plainly Assert the Issue of Prejudice

Plaintiffs' motion in limine, like her briefs on appeal and before this Court, squarely posed the issue of prejudice given the limited value and high propensity of industry custom evidence to mislead the jury into forgoing its own weighing of risks and benefits. Motion *in Limine 4* was made "on the grounds that such comparison evidence is inadmissible, irrelevant, and properly excluded under *Evidence Code* §352

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specific statutory exclusion. Nevertheless, a pervasive public policy has been judicially expressed and California remains a firm proponent of the "collateral source rule." *Hrnjak v. Graymar, supra*, 4 Cal. 3d at 729.

as likely to confuse or mislead the jury or consume undue time," and asserted that "comparative evidence of other vehicles should accordingly be excluded as it can only mislead the jury." (App. 85:2-4; 86:23-14; 90:1) Motion in limine 9 was made on similar grounds. (App. 411:1-5, 417:19-21)

Evidence Code §352 was plainly cited below, and no one reading the briefs either before the Court of Appeal or this Court can seriously contend that the issue of prejudice was not squarely raised and argued. It is thus fatuous to assert that the question of the prejudicial effect of such evidence is not before this Court.

6. THE ISSUE OF CAUSATION IS ONE OF SUBSTANTIAL EVIDENCE AND WAS NEVER REACHED BY THE JURY

As the Briefs demonstrates, this is a typical case of conflicting expert testimony. Toyota's "Hail Mary" contention that there was no evidence sufficient to support a finding of causation flounders on the rule of substantial evidence. Suffice it to say that it was for the jury to decide whether, as Mr. Kim testified, his effort to avoid an oncoming vehicle initiated the loss of control, and which experts had the better point as to causation.

The significant fact is that the special verdict form allowed jurors to skip the issue of whether the design was a substantial factor in plaintiff's injury, and hence to avoid causation. They answered only the first question:

> Did the Toyota Tundra contain a design defect when it left Toyota's possession?
> [App. 551]

This allowed the jury to apply a street corner notion of "defect," looking at the

vehicle as it came out of the factory without considering both the causal relationship between the design defect in injury, and without doing the risk benefit analysis upon which Toyota had the burden.

The abbreviated special verdict is also significant for Toyota's claim that the errors were harmless. Toyota's own engineers attested to the dramatic safety improvement attendant upon ESC, and had recommended that it be made standard in the 2005 Tundra. (RT 3310-3315, 3328) There was absolutely no feasibility issue, no detriment to the Tundra's utility, and no safety reason not to make ESC standard in 2005. The sole factor cited by Toyota that has any weight is the additional $300 dollars that it would have added to the vehicle, a price which obviously was not a significant factor given the engineering department's recommendation that it be made standard and the fact that Toyota planned on making it standard very soon. Toyota offers no explanation as to why that cost presented a sound reason for a markedly less safe vehicle in 2005 but not in 2007. In short this is not a case in which the *Barker* factors are closely balanced, but a case in which risks were set aside for commercial reasons

7. CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully Submitted,

Dated: September 6, 2016 **LAW OFFICES OF IAN HERZOG**

By:_____
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(4) of the California Rules of Court, the enclosed Reply Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 8,069 words, which is less than the 8,400 words permitted by Rule 8.204c. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: September 6, 2016

_____

Evan D. Marshall

PROOF OF SERVICE

Kim v. Toyota

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On September 6, 2016 I served the attached **REPLY BRIEF ON THE MERITS** on the parties in this action by placing a true copy in a sealed envelope with proper postage in the U.S. mail at Los Angeles, California, addressed as follows:

Robert A. Brundage Morgan Lewis and Bockius LLP One Market, Spear Street Tower San Francisco, CA 94105-1596	Atty for Respondents Toyota Motor Sales, USA; Toyota Motor Corporation; Toyota Motor North America; Toyota Engineering and Manufacturing North America; Power Toyota Cerritos
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Clerk Second District Court of Appeal Division Seven 300 S. Spring Street, 2nd Floor, North Tower Los Angeles, CA 90013	Court of Appeal

I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on September 6, 2016.

Linda Barber