SUPREME COURT NO. S240245

IN THE SUPREME COURT OF CALIFORNIA

HAIRU CHEN, et al.,

Plaintiffs and Appellants,

v.

L.A. TRUCK CENTERS, LLC,

Defendant and Respondent.

REPLY BRIEF ON THE MERITS

From the Opinion of the Court of Appeal of the State of California,
Second Appellate District, Division Eight, Case No. B265304
on Appeal from The Superior Court of California,
County of Los Angeles, Case No. BC469935
(Hon. J. Stephen Czuleger and Hon. Holly E. Kendig)

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I. INTRODUCTION

Plaintiffs argue choice of law should be treated as a routine motion in limine subject to reconsideration until – and perhaps through – trial as parties are added or dismissed and new facts discovered. They contend that once the Indiana-based manufacturer, Starcraft, settled and was dismissed, any interest of Indiana in application of its law evaporated and the trial court should have reconsidered its choice-of-law determination and chosen California law.

Plaintiffs virtually ignore *Reich v. Purcell* (1967) 67 Cal.2d 551, 555 (*Reich*). Their discussion of *Reich* is limited to footnotes in which they assert *Reich's* reference to the residences of the parties should be consigned to a category of historical facts unrelated to events in the litigation and that *Reich* never explicitly addressed the doctrine of *renvoi*. (Ans. Br. 46, fn. 5, and 61, fn. 8.) Instead, they advance three principal arguments in support of their position that choice of law should remain fluid and be revisited as parties are added or dropped from a case.

First, plaintiffs argue a distinction should be made between historical and litigation facts, with only the former tied to the date of the accident. (Ans. Br. 12-13, 44-46 & fn. 5.) Second, they contend application of *Reich's* time-of-accident rule to issues beyond the residences of the parties would result in "inalterable" choice-of-law decisions that are "frozen in time," would require trial courts to wear "blinders," and would lead to "absurd and arbitrary results." (Ans. Br.

12, 13, 46-47, 49-50.)

Finally, plaintiffs discount the possibility that recalculation of choice of law during the progress of a case to trial will permit it to be shaped by the parties' tactical decisions rather than the underlying facts of the dispute. They assert a plaintiff will rarely have sufficient information to make a calculated choice to settle with a defendant in order to obtain a more favorable choice-of-law ruling. (Ans. Br. 49-50.)

Each of these arguments is rebutted by the record in this case and is contrary to sound choice-of-law policy. Plaintiffs' attempt to avoid *Reich* and open choice of law to post-accident manipulation should be rejected for the following reasons:

- Resolution of choice-of-law questions should be based on the underlying facts of the dispute, not the parties' strategic choices during the litigation, such as a decision to settle with one of multiple defendants. (Symposium, *Comments on Reich v. Purcell* (1968) 15 UCLA L.Rev. 551, 588 (hereafter "UCLA Symposium") [comment by Professor Herma Hill Kay: "[N]ormally the forum's interest in applying its law should be assessed at the time of the transaction or events on which the rights of the parties depend."]. The relevant state interests arise from the underlying facts of the dispute, not the parties' tactical litigation decisions.

- Sanctioning serial choice-of-law rulings based on decisions whether to add, dismiss, or settle with selected parties ignores the essential role played by pretrial rulings on choice of law in influencing litigation decisions (e.g., whether to seek summary judgment) and enabling parties to value their claims and defenses for

purposes of settlement. It also creates the risk that similarly situated defendants will be treated differently under different substantive laws.

- Plaintiffs offer no support for their proposed distinction between historical and litigation facts. Why, for example, should a decision to change residence after an accident be treated differently from a decision to settle? As explained by Professor Clyde Spillenger in his March 8, 2017 letter to the Court supporting review (hereafter "Spillenger ltr."): "It is difficult to see whether the result in the present case should be any different simply because Starcraft's post-transaction change consisted of settling the claims against it rather than moving its operations to California." (Spillenger ltr. at pp. 3-4, fn. 2.)

- The argument that a plaintiff will rarely have sufficient information to make a calculated decision to settle with a defendant in order to obtain a more favorable choice-of-law ruling is belied by the facts of this case, which reveal a close link between settlement and a requested change in choice of law. Plaintiffs settled with Starcraft on August 6, 2014, shortly before the case was set for trial. (RA 3:23, 26.) A few weeks later, at the hearing on Starcraft's good-faith settlement motion, plaintiffs requested the trial court change its choice-of-law decision and apply California law. (RA 4:61-62.)

- Plaintiffs contend Buswest seeks a rule that would result in premature choice-of-law decisions that will be immutable. This misreads Buswest's position. Motions to determine choice of law – whether construed as motions in limine or otherwise – should not be made until the facts are developed through discovery and perhaps, in some cases, not until the applicable statute of limitations has run. But

once made, they should be subject to modification only on a showing of the discovery of significant new facts. Even then, the determination of choice of law should be based on the underlying facts of the dispute, not on later events such as a decision to change residence or settle. Here, there were no missing persons and plaintiffs made no claim that the trial court's choice-of-law ruling was premature.

Plaintiffs' brief is focused on an effort to reargue the merits of the underlying choice-of-law question. They repeatedly invoke "California" (seven times in their opening paragraph at Ans. Br. 11) and give singular emphasis to California's purported deterrent interest in application of its law. The record demonstrates, however, that this case arose from a bus designed, manufactured, and sold in Indiana that was involved in a rollover accident in Arizona while taking Chinese residents from Las Vegas to the Grand Canyon. And application of California or Indiana law was not an all-or-nothing choice in responding to either state's deterrent interest.

To the extent California may have a deterrent interest, it was – as the trial court held in its initial ruling – subordinate to that of Indiana. (2 AA 10:462.) And application of Indiana law, which plaintiffs on multiple occasions argued was reasonably identical to California product liability law, amply vindicated any deterrent interest California may have had despite the non-California locus of the underlying facts. Indiana law did not give Buswest a free pass. Its potential sting motivated Starcraft to settle for $3.25 million. (RA 3:26, 5:81.)

Plaintiffs also emphasize Indiana's *lex loci delicti* choice-of-law rule, which they contend demonstrates Indiana never had an interest in application of its law. (Ans. Br. 56-60.) They do not dispute that application of Ohio's then *lex loci delicti* rule would have changed the Court's decision to apply Ohio law in *Reich* or that governmental interest scholars have consistently rejected application of *renvoi*, at least where the other jurisdiction applies the rule of *lex loci delicti*. Although *renvoi* may make sense where the other state applies the governmental interest approach to choice of law, it is alien to the governmental interest analysis where – as here – the other state is a *lex loci delicti* jurisdiction. (See, e.g., Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning* (1986) 65 Tex. L.Rev. 215, 228 [where the other state selects choice of law based "on a territorial rule that sticks a pin in a map without regard to state purposes . . . no functional information can be gleaned from [it] and it should not be read as a disclaimer of interest in the outcome."].)

Under plaintiffs' (and the Court of Appeal's) view of choice of law, a plaintiff may reshape the choice-of-law calculus through a pretrial settlement with one of multiple defendants who are residents of different states. But the settlement with Starcraft should not be viewed as extinguishing any interest of Indiana in application of its law any more than an earlier settlement with Buswest should have been viewed as removing any potential interest of California in application of its law. Choice of law should not turn on the parties' strategic decisions whether, when, and with whom to settle. It should be based on the underlying facts of the dispute.

The Court should affirm that *Reich* reaches beyond the issue of the parties' residences. The governmental interest analysis in determining choice of law in a personal injury or wrongful death case should be based on the parties' relationships to the interested states on the date of the accident or injury. Post-accident transactions such as settlement with one of multiple defendants, should not be part of the analysis. Choice of law should be anchored to the underlying facts of the dispute.

II. RESPONSE TO PLAINTIFFS' STATEMENTS OF FACTS AND OF THE CASE

In their effort to emphasize a California connection with this litigation, plaintiffs state that the day before the accident they were driven in the bus from Los Angeles to Las Vegas. (Ans. Br. 20.) This is not correct. Several plaintiffs testified that they flew to Las Vegas the evening before the accident. (6 RT 2707; 8 RT 3370.) This was confirmed by plaintiffs' counsel in his opening statement to the jury in which he explained that the plaintiffs flew from San Francisco to Las Vegas and were taken directly from the McCarran Airport to their hotel, where they were picked up the next morning by the bus for their trip to the Grand Canyon. (5 RT 2117, 2118.)

Plaintiffs assert the bus operated out of TBE's headquarters in California for use on California roads and highways. (Ans. Br. 17-18, 42-43.) Although there is no dispute that TBE was located in California and the bus had California apportioned license plates, there is no evidence in the record indicating the bus was used primarily to carry passengers in California and there is no disagreement that TBE

submitted a statement to the California Board of Equalization under penalty of perjury that the vehicle was being purchased for use outside California. (2 AA 7:342.) This statement contained a "Notice to Purchaser" advising TBE to maintain records documenting that the bus was used outside California. (*Ibid.*) Although it was headquartered in California, TBE maintained an apartment for its drivers in Las Vegas. (5 RT 2414, 2446.)

Plaintiffs ask why the California-resident owner and the driver of the bus, TBE and Mr. Lu, should not also be considered in the choice-of-law analysis despite the fact they settled early in the case. (Ans. Br. 47.) Plaintiffs omit that TBE and Lu were sued only under a theory of negligence. Plaintiffs' product liability claim, which was the focus of the choice-of-law motion and determination, was brought only against Starcraft and Buswest. (1 AA 1:8-54.) And no party contended that California and Indiana negligence law differ.

Plaintiffs emphasize the testimony of their experts regarding positions taken by the National Highway Transportation Safety Administration (NHTSA) and National Transportation Safety Board (NTSB) on whether seatbelts should be required in buses. But they overlook several important points. Plaintiffs' central theme throughout the trial was that two-point lap seatbelts could – and should – have been installed in the tour bus at a cost of only $12 per belt, for a total additional cost of $168. (5 RT 2110; 10 RT 3984; 12 RT 4555, 5125, 5142.) Plaintiffs' expert Carly Ward acknowledged, however, that use of lap belts could be "catastrophic" in frontal collisions, which are the most common type of bus accident. (6 RT 2812-2813.) Plaintiffs' expert William Broadhead also agreed that lap

belts create a significant risk of jackknifing and he is afraid to advise people to wear lap belts because of the risk of frontal collisions. (10 RT 4005-4007.)

Mr. Broadhead conceded the NHTSA's decision not to require passenger belts for this type of bus was due to concerns over low expected use of seatbelts by bus passengers and retrofit problems, and that it was interested in exploring other protection systems that would be more effective, less costly, and more likely to be accepted by the public. (10 RT 3992-3993.)

Plaintiffs emphasize that the trial court's first choice-of-law ruling by the Hon. Holly E. Kendig was based on its conclusion that California has no interest in applying its law in this case. (Ans. Br. 28, 31.) The trial court actually found that California's deterrent interest in controlling the design and manufacture of the bus in Indiana was "subordinate" and that, "[a]s between California and Indiana, Indiana has a greater interest in deterring the conduct at issue here." (2 AA 10:462.) It concluded, "Indiana has a greater interest than California in applying its law here." (2 AA 10:463.)

In denying plaintiffs' motion in limine seeking application of California law in light of the settlement with Starcraft, the trial court (the Hon. J. Stephen Czuleger) commented that there is no California interest in applying its law. (2 RT 603.) It appears, however, the trial court's decision to deny plaintiffs' motion was based primarily on its view that the settlement with Starcraft should not justify a change in the prior choice-of-law decision. (2 RT 604.)

III. CHOICE OF LAW SHOULD BE BASED ON THE UNDERLYING FACTS OF THE DISPUTE, NOT ON PARTIES' STRATEGIC LITIGATION DECISIONS.

There is no dispute that choice of law plays an essential role in important pretrial rulings and enables parties to value their claims and defenses for purposes of settlement. Motions for summary judgment, identification of issues that must be addressed by experts, selection of experts, and preparation of motions in limine and jury instructions, all turn on the applicable substantive law. The issue here is whether choice of law should be based on the underlying facts of the dispute or whether – as argued by plaintiffs – it should be subject to change based, for example, on a party's strategic decision whether to join, settle with, or dismiss selected defendants or cross-defendants. Should the choice-of-law determination be tethered to the date of the underlying accident or, as held by the Court of Appeal, should it be subject to reconsideration based on changes in the parties or their status as a case proceeds to or through trial?

Reich dealt with the issue of whether the plaintiffs' change in residence from Ohio to California prior to filing suit in California should be considered in the choice-of-law analysis. Addressing choice of a law in a wrongful death case arising from a vehicular accident, the Court held it would be inappropriate if "choice of law were made to turn on events happening after the accident." (*Reich, supra*, 67 Cal.2d at p. 555.) Although plaintiffs and the Court of Appeal attempt to limit *Reich* to the narrow issue of the parties' residences, choice-of-law scholars recognize that *Reich* reaches beyond the historical facts of the parties' residences and holds that

choice of law should be based on the underlying facts of the dispute, not strategic choices made by the parties while litigating the case.

Professor Herma Hill Kay observed that a rule tethering the parties' relationships with the potentially interested states to the date of the underlying accident or transaction "is to be preferred as the one carrying the least risk of unsettled expectations" and is consistent with Professor Brainerd Currie's view that "normally the forum's interest in applying its law should be assessed at the time of the transaction or events on which the rights of the parties depend." (UCLA Symposium, *supra*, 15 UCLA L.Rev. at pp. 588-589.) This position is echoed in the amicus letters by Professors Andrew D. Bradt and Clyde Spillenger to the Court in support of review in this case. (Bradt, March 4, 2017 letter to the Court supporting review at pp. 2-4 (hereafter "Bradt ltr."); Spillenger ltr. at pp. 2-4.) As noted by Professor Kay, *Reich* is consistent with prior decisions by the Court, as well as the views of the acknowledged architect of the governmental interest analysis, Professor Currie. (UCLA Symposium, *supra*, 15 UCLA L.Rev. at pp. 588-589 & fn. 30 [citing *Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 595; *People v. One 1953 Ford Victoria* (1957) 48 Cal.2d 595, 598-599; and Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress* (1964) Sup.Ct.Rev. 89, 92-99].)

Plaintiffs ignore this authority and attempt to distinguish *Reich* on the ground it "was about historic facts, not litigation facts." (Ans. Br. 46, fn. 5.) Plaintiffs do not fully describe the distinction between historic and litigation facts, but it appears historic facts are consigned to the situation prior to the initiation of a lawsuit. Litigation facts are

apparently based on conduct after a lawsuit is filed. Plaintiffs cite no authority that has made or endorsed this distinction and they offer no reason why the significance of an event (e.g., a decision to settle with one of multiple defendants) should be considered in the choice-of-law analysis if it happens after a lawsuit is filed, but not if it occurs before.

Plaintiffs claim that tying choice of law to the date of an accident or transaction would require a court to wear "blinders" and lead to "absurd and arbitrary" results. (Ans. Br. 13, 47.) They argue it makes "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 an original complaint." (Ans. Br. 47.) They dismiss as speculation the possibility that, under the Court of Appeal's decision, choice of law would be subject to manipulation and potential gamesmanship and argue "the mere possibility that a settlement with one defendant might affect a choice-of-law ruling as to others" would be a "risky gamble," that would rarely be taken by a plaintiff. (Ans. Br. 50.) None of these objections supports discarding the rule of *Reich* in favor of the approach adopted by the Court of Appeal.

First, connecting the choice-of-law analysis to the underlying facts of the dispute, rather than the parties' tactical decisions during litigation, does not make a choice-of-law ruling immutable or frozen in time. It does not require a trial court to wear blinders in assessing choice of law. There is no dispute that a choice-of-law ruling is premature until the parties have engaged in discovery and have had an opportunity to identify all potential parties and tortfeasors. In some cases, this may require the parties to wait for expiration of the statute of limitations. But this is an issue of the appropriate time for making

a choice-of-law ruling. This is distinct from whether the analysis should focus on the underlying facts of the dispute at the date of the accident or transaction in issue or be shaped by post-accident or post-transaction events such as settlements with selected defendants.

Plaintiffs' argument that a plaintiff will rarely have sufficient information to gamble on a pre-trial settlement with a selected defendant in order to reshape a choice-of-law determination is unmasked by the facts of this case. Shortly before the then-set trial date, plaintiffs settled with Starcraft. (RA 3:23, 26.) They then promptly sought reconsideration of the Court's prior choice-of-law ruling at the hearing on Starcraft's Motion for a Judicial Determination of Good Faith Settlement. (RA 4:61-62.) The connection between plaintiffs' decision to settle with Starcraft and their attempt to change the trial court's choice-of-law ruling is transparent.

Plaintiffs echo the Court of Appeal's conclusion that a motion to determine applicable law should be treated as an in limine motion, which is not binding and should be subject to reconsideration "upon full information at trial." (Ans. Br. 45.) This is arguably a matter of form rather than substance. But regardless of the nomenclature used to describe a motion to determine applicable law, a ruling on such a motion should not be subject to change based on the parties' tactical litigation decisions. It should be premised on the discovery of new facts related to the underlying dispute or a change in the law.

Plaintiffs and the Court of Appeal rely on *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 502 (*State Farm*), to support their position that choice of law should

be addressed through a motion in limine that is subject to change through trial. (Opn. p. 13; Ans. Br. 45.) But, as explained by Professor Spillenger, the court in *State Farm* analogized a motion to determine applicable law to a motion in limine in an effort to distinguish it from dispositive motions in the context of a post-reversal peremptory challenge to the trial judge. (Spillenger ltr. at p. 5; see also Bradt ltr. at p. 3 ["[B]y characterizing the trial court's decision on choice of law to be a mere motion in limine, the Court of Appeals gave short shrift to the importance of that decision to the conduct of the litigation."].) If anything, *State Farm* supports the position that a ruling on choice of law is an important decision that needs to be made before dispositive motions can be filed. (*State Farm, supra*, 121 Cal.App.4th at p. 502 [citing *First State Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 327, for the position that choice of law must be determined before a court is able to rule on dispositive motions].)

Plaintiffs cite *Levin v. Dalva Brothers, Inc.* (1st Cir. 2006) 459 F.3d 68 (*Levin*), as an example of a change in choice of law recognized on the first day of trial. (Ans. Br. 49.) But this was the first time the issue of choice of law had been raised in that case (*Levin, supra*, 459 F.3d at pp. 72-73.) Nothing in *Levin* suggests the determination of choice of law should be shaped by post-accident or post-transaction events such as a settlement with one of multiple defendants. Plaintiffs cite *NL Industries, Inc. v. Commercial Union Ins. Co.* (3d Cir. 1995) 65 F.3d 314, 324, fn. 8, for the position a choice-of-law decision should be subject to reconsideration when there is a change in controlling law. (Ans. Br. 45.) But this says

nothing about whether choice of law should be shaped by the parties' tactical litigation decisions.

Plaintiffs attempt to downplay the risk of manipulation or gamesmanship that will result from the Court of Appeal's conclusion that choice of law should be fluid and subject to change through trial based on a defendant's settlement and dismissal. (Ans. Br. 49-50.) But here, for example, what would be the impact if Buswest had settled before trial rather than Starcraft? Would the payment of substantial money to plaintiffs as part of such a settlement satisfy any California deterrent interest? Would California have retained any interest in application of its law? At a minimum, this hypothetical situation underscores the risk of manipulation and gamesmanship posed by the Court of Appeal's decision. As emphasized by Professor Bradt, the underlying policies at issue in weighing the potential governmental interests should not be affected by events that occur after the litigation has begun. (Bradt ltr. at p. 3 ["The extent to which any of the involved states' policies will be advanced has nothing to do with whether one of the defendants has settled. To put it slightly differently, a state's interest in having its law applied to one defendant does not change because a different defendant has exited the litigation."].)

The Court should reaffirm the rule of *Reich*. The governmental interest analysis should be based on the relationships between the parties and the potentially interested states on the date of the underlying accident or transaction. It should not be shaped by the parties' tactical litigation decisions.

IV. THE COURT SHOULD REJECT PLAINTIFFS' ATTACK ON THE TRIAL COURT'S CHOICE-OF-LAW RULING.

Plaintiffs challenge the trial court's initial choice-of-law ruling on two principal grounds. First, they contend the facts of this case are centered in California and this state has a compelling deterrent interest in application of its law that was substantially impaired by application of Indiana products liability law. (Ans. Br. 39-44.) Second, they argue Indiana's *lex loci delicti* rule means it has no interest in application of its law in this case, which arises from an accident in Arizona. (Ans. Br. 2-64.) Plaintiffs assert this is consistent with the "more modern use" of *renvoi* as part of the governmental interest analysis. (Ans. Br. 61, 62-64.) As demonstrated below, these arguments should fail.

A. Plaintiffs Overstate Any California Deterrent Interest, Which Was Protected By Application Of Indiana Law.

Plaintiffs overstate any California deterrent interest. The accident did not occur in California and did not cause injury to a Californian. The bus was designed, manufactured, and sold in Indiana. Although plaintiffs contend the accident "could just as easily happened in California" (Ans. Br. 42), they presented no evidence the bus had substantial operations in California and, in fact, concede that TBE submitted a signed statement to the California Board of Equalization that the bus was being purchased for use outside California (Ans. Br. 19).

In *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 584 (*Hurtado*), the Court described the interest in deterrence in a wrongful death context as follows: "California has a decided interest in applying its own law to California defendants who allegedly caused wrongful death within its borders." But even if California has a deterrent interest that extends to an accident in another state involving non-residents and a bus designed and manufactured elsewhere, this interest was not abandoned by application of Indiana's unreasonably dangerous standard for a product defect.

Plaintiffs proceed on the assumption that application of Indiana law somehow deeply offended or jeopardized any California deterrent interest. Their position ignores several important factors. This was not a choice between all or nothing. Indiana law did not give Starcraft or Buswest a free pass. The threat of liability under Indiana's unreasonably dangerous test carried sufficient risk to motivate Starcraft to settle with plaintiffs for $3.25 million. (RA 3:26, 5:81.) Although California rejected the unreasonably dangerous test in a case involving an alleged manufacturing defect (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 133-135) and later adopted the alternative consumer-expectations and risk-benefits test for a design defect (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432), this does not mean the unreasonably dangerous test has no deterrent impact.

As illustrated by Starcraft's settlement, strict products liability based on the unreasonably dangerous standard of the Restatement Second of Torts, section 402A (1965) rests on goals that mirror the policies underlying California's version of strict products liability. (Rest.2d Torts, § 402A, com. c, pp. 349-350; see *Beron v. Kramer-*

Trenton Co. (E.D. Pa. 1975) 402 F.Supp. 1268, 1276 [describing deterrence and compensation functions of § 402A].) And plaintiffs argued repeatedly to the trial court that Indiana's unreasonably dangerous standard was "reasonably identical" to California's consumer-expectations test for a product defect. (3 AA 21:618-619 ["California and Indiana define a defectively designed product under the same standard"]; RA 4:67-68 ["most, if not all, identified conflicts in Indiana and California law are illusory or immaterial, irrespective of whether [Starcraft] remains a party to this lawsuit."].)[1] Application of California strict products liability law may have favored plaintiffs, but Indiana law still threatened Buswest with a significant risk of liability. Any California interest in deterrence was amply protected by application of Indiana law.

Plaintiffs cite a series of cases in support of their argument that California has a compelling deterrent interest in this case because the bus was sold by Buswest to TBE in California, even though possession was transferred in Nevada. (Ans. Br. 39-44 [citing *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081 (*Burgess*); *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1062 (*Brown*); *Hurtado, supra*, 11 Cal.3d 574, 584; *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262 (*Vandermark*); *Greenman v. Yuba Power*

[1] Plaintiffs attempt to explain their statements by suggesting that Judge Kendig based her decision on plaintiffs' "explicit concession that the laws of California and Indiana are materially different in multiple ways" and noting their counsel corrected their position at the hearing before Judge Czuleger. (Ans. Br. 38, fn. 4.) A more plausible interpretation is that plaintiffs repeatedly changed their position on whether Indiana's unreasonably dangerous standard is similar to California's consumer-expectations test based on their perception of which argument would be more likely to prevail at the time.

Products, Inc. (1963) 59 Cal.2d 57, 62 (*Greenman*); *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 632 (*Wimberly*); *Ketchum v. Hyundai Motor Co.* (1996) 49 Cal.App.4th 1672, 1679 (*Ketchum*); *Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 98 (*Mancuso*); *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1191 (*Barrett*); *Hernandez v. Burger* (1980) 102 Cal.App.3d 795, 802 (*Hernandez*)].)

But, with the exception of *Hernandez*, it appears each of these cases involved deaths or injuries that occurred in California. (*Burgess, supra*, 2 Cal.4th at p. 1070, fn. 1 [alleged medical malpractice in West Covina]; *Brown, supra*, 44 Cal.3d at pp. 1054-1055 [no indication plaintiffs' mothers ingested DES outside California]; *Hurtado, supra*, 11 Cal.3d at p. 578 [auto accident in Sacramento County]; *Vandermark, supra*, 61 Cal.2d at p. 258 [auto accident on San Bernardino Freeway]; *Greenman, supra*, 59 Cal.2d at p. 59 [no indication injury occurred outside California]; *Wimberly, supra*, 56 Cal.App.4th at p. 624 [no indication mountain bike accident occurred outside California]; *Ketchum, supra*, 49 Cal.App.4th at p. 1675 [accident on I-605 Freeway in or near Seal Beach]; *Mancuso, supra*, 232 Cal.App.3d at p. 92 [electrical fire in Torrance]; *Barrett, supra*, 222 Cal.App.3d at p. 1181 [no indication accident took place outside California].)

The sole exception is *Hernandez,* where the accident occurred in Mexico and the Court of Appeal affirmed the trial court's application of Mexico law. (*Hernandez, supra*, 102 Cal.App.3d at pp. 797, 804.) Although the plaintiff alleged negligence by the California-resident defendant, the Court of Appeal in *Hernandez*

declined to apply California law. It explained that, in contrast to *Hurtado, supra*, 11 Cal.3d 574, where the accident occurred in California, this state had "no legitimate interest" in the possible deterrent effect of its unlimited recovery rule on conduct that occurred in Mexico. (*Id.* at pp. 799-800.) If anything, *Hernandez* supports the trial court's decision to apply Indiana substantive law in this case.

Here, the modest or minimal nature of California's deterrent interest is underscored by several other factors. First, choice-of-law decisions involving conduct by Californians whose alleged or admitted negligence caused injury or death outside California have not identified any California interest – deterrent or otherwise – in applying California law. (*Reich, supra*, 67 Cal.2d at p. 552; *Hernandez, supra*, 102 Cal.App.3d at p. 797; *Howe v. Diversified Builders, Inc.* (1968) 262 Cal.App.2d 741, 745-746 [a Nevada resident, who was injured in Nevada by falling scaffolding on construction project, alleged negligence by the California-resident general contractors].) Under plaintiffs' theory, the courts in these cases should have identified some California interest in deterring tortious conduct by a Californian that caused injuries or death to a non-resident in another state or country, not least because – in plaintiffs' words (Ans. Br. 42) – it could "just as easily happen in California." But no California interest in deterrence was identified in these cases.

Second, plaintiffs ignore the Court's cautionary statement in *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 320, 323 (*Bernhard*), that, when faced with an apparent true conflict, a California court should not weigh which law is worthier or better from

a policy prospective but should, as part of a comparative impairment analysis, reexamine whether a more moderate and restrained interpretation of California's interest in application of its law will resolve the apparent conflict. The Court in *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, confirmed this cautionary injunction against weighing which of the competing laws reflects the better social policy. (*Id.* at p. 97 ["our task is not to determine whether the Oklahoma rule or the California rule is the better or worthier rule, but to decide – in light of the legal question at issue and the relevant state interests at stake – which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case."]; see also Horowitz, *The Law of Choice of Law in California – A Restatement* (1974) 21 UCLA L.Rev. 719, 753 [explaining that an attempt to weigh which competing law reflects the worthier social policy is inappropriate in a comparative impairment analysis].) Here, neither plaintiffs nor the Court of Appeal complied with this admonition, which seeks to temper the obvious bias in favor of application of forum law.

At most, California had a modest deterrent interest in application of its law in this case. This interest was addressed by application of Indiana's unreasonably dangerous version of strict products liability. The trial court's first ruling on choice of law correctly and reasonably evaluated the competing potential state interests. The trial court's second choice-of-law decision correctly declined to consider Starcraft's settlement as a reason to change the prior choice-of-law ruling.

B. Indiana's Adherence To *Lex Loci Delicti* Says Nothing About Its Interest In Application Of Its Substantive Law.

Plaintiffs contend that, because the accident took place in Arizona, Indiana's *lex loci delicti* rule demonstrates it has no interest in application of its substantive law. Although they do not dispute the general rule that application of another state's choice-of-law rules (i.e., *renvoi*) has no place in the governmental interest analysis, plaintiffs contend a series of cases has applied the doctrine of *renvoi* in an interest analysis and that the "more modern use" of *renvoi* as part of the governmental interest analysis is supported by a body of legal scholarship. (Ans. Br. 56-64.)

Plaintiffs do not claim that *renvoi* was part of the interest analysis applied by the Court when it adopted governmental interest approach in *Reich*. They do not dispute that, if it had been, the Court in *Reich* would probably not have chosen Ohio law because the accident occurred in Missouri. Instead, plaintiffs note that the Court in *Reich* did not explicitly address *renvoi*. (Ans. Br. 61, fn. 8.)

Plaintiffs do not deny that Professor Currie rejected consideration of a state's choice-of-law rules when determining its interest in application of its substantive internal law. (See, e.g., Currie, *The Disinterested Third State* (1963) 28 Law & Contemp. Probs. 754, 784-785 & fn. 108.) But they argue a more modern view supports application of a state's *lex loci delicti* rule in determining choice of law, at least where the policies underlying the state's adoption of *lex loci delicti* can be identified. (Ans. Br. 59-60.)

Plaintiffs cite several old cases for the proposition that Indiana's *lex loci delicti* rule rests on principles of comity and a policy that "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.' " (Ans. Br. 60 [citing *Burns v. Grand Rapids & I.R. Co.* (Ind. 1888) 15 N.E. 230, 232; quoting *Baltimore & O.S.W. Ry. Co. v. Read* (Ind. 1902) 62 N.E. 488, 489].) But they also cite the more recent decision in *Umbarger v. Bolby* (Ind. Ct. App. 1986) 496 N.E.2d 128, 129, which explains the primary rationale for the *lex loci delicti* doctrine is to provide consistency of result. (Ans. Br. 60.) This is in harmony with the view that *lex loci delicti* is a rule designed to achieve simplicity, uniformity, and convenience in application. (*Pfau v. Trent Aluminum Co.* (N.J. 1970) 263 A.2d 129, 136-137 ["*Lex loci delicti* was born in an effort to achieve simplicity and uniformity, and does not relate to a state's interest in having its law applied to given issues in a tort case"]; Kay, *Theory Into Practice: Choice of Law in the Courts* (1983) 34 Mercer L.Rev. 521, 546.)

Although some commentators have advocated application of *renvoi* in addressing choice of law, they have focused primarily on whether the other state's choice-of-law rule reveals something about its interest in application of its substantive law. (See, e.g., Weintraub, *supra*, 65 Tex. L.Rev. at p. 228; UCLA Symposium, *supra*, 15 UCLA L.Rev. at p. 589, fn. 31 [comment by Professor Kay]; Von Mehren and Trautman, The Law of Multistate Problems (1965) p. 549 [as long as mechanical choice-of-law rules exist in many jurisdictions alongside choice-of-law rules based on a functional analysis, the forum that employs a functional analysis "probably best proceeds

without assigning decisive importance to choice-of-law rules of the other jurisdictions concerned."].) Although there may be debate among scholars about use of *renvoi*, at least if the other jurisdiction employs a governmental interest approach, the weight of scholarly authority is against application of *renvoi* where, as here, the other jurisdiction applies the rule of *lex loci delicti.*

Plaintiffs cite *Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co.* (1980) 103 Cal.App.3d 198 (*McMullan*), as an example of at least one decision by the Court of Appeal that applied *renvoi* in resolving choice of law. *McMullan* contains no policy analysis about whether *renvoi* should be part of the governmental interest approach to choice of law, and the decision cites no scholarly analysis or case authority on this issue. And it is questionable whether *McMullan* stands for the proposition that a California court should interpret another state's adoption of *lex loci delicti* as a disclaimer of any interest in application of its underlying substantive law.

In *McMullan*, the plaintiff was a California-resident business that purchased an insurance policy delivered to it in San Diego. The insurer was located in Maryland. The plaintiff performed painting work at Sea World in Florida and was sued in Florida for alleged defects in its work. The plaintiff brought a successful action against its insurance carrier in California on the ground the carrier was required to defend the action in Florida. The issue before the Court of Appeal was whether California, Florida, or Maryland law should control plaintiff's eligibility to recover attorneys' fees. (*McMullan, supra*, 103 Cal.App.3d at p. 201.) There was authority that Florida

would allow recovery of attorneys' fees, while California would not. Maryland apparently had no law on the issue. (*Id.* at p. 202.) Although the Court of Appeal noted that Maryland would apply the rule of *lex loci contractus* (*id.* at p. 204), this appears to have been dicta. The court based its decision affirming application of California law on the ground that there were no significant contacts with Maryland and California had a substantial interest in application of its law to a contract made between a California resident and a corporation doing business in California. (*Id.* at p. 205.)

Plaintiffs cite five cases for the proposition that *renvoi* should be part of the governmental interests analysis in this case: *Forsyth v. Cessna Aircraft Co.* (9th Cir. 1975) 520 F.2d 608 (*Forsyth*); *Tramontana v. S.A. Empresa De Viacao Aerea Rior Grandense* (D.C. Cir. 1965) 350 F.2d 468, 473-475 (*Tramontana*); *Paxton v. Washington Center Corp.* (D.D.C. 2013) 991 F.Supp.2d 29 (*Paxton*); *Danziger v. Ford Motor Co.* (D.D.C. 2005) 402 F.Supp.2d 236 (*Danziger*); *Phillips v. General Motors Corp.* (Mont. 2000) 995 P.2d 1002 (*Phillips*); *Sutherland v. Kennington Truck Service, Ltd.* (Mich. 1997) 562 N.W.2d 466 (*Sutherland*). (Ans. Br. 57-58.) It is questionable whether any of these cases applied the government interests analysis as articulated by Professor Currie and adopted by this Court. In many cases, it can be difficult to sort out which choice-of-law theory is being applied. (See Smith, *Choice of Law in the United States* (1987) 38 Hast. L.J. 1041, 1042 [courts have "shown a distinct inability to distinguish" between different choice-of-law theories and "often say they are using one theory when their opinions clearly show that they are using another."].) But none of the cases

cited by plaintiffs appears to have employed California's version of the governmental interests approach as explained by the Court in *Reich* and *Bernhard.*

In *Forsyth,* the Ninth Circuit applied the choice-of-law rules of Oregon. The Ninth Circuit acknowledged some ambiguity whether Oregon follows the most significant relationship approach of the Restatement Second of Conflict of Law (1971) or a governmental interest type of analysis. (*Forsyth, supra,* 520 F.2d at p. 611; see *Myers v. Cessna Aircraft Corp.* (Ore. 1976) 553 P.2d 355, 366 ["Both parties recognize that the applicable test for resolving choice of law questions in this jurisdiction is that set forth in [citation], which adopts the 'most significant relationship' approach embodied in the Restatement Second of Conflict of Law (1971)."].)[2]

The federal district courts in *Danziger* and *Paxton* applied the choice-of-law rules of the District of Columbia. The district court in *Danziger* explained the District of Columbia employs "a two-step 'modified governmental interest analysis' " and acknowledged the District of Columbia Circuit Court looks to the Restatement Second factors. (*Danziger, supra*, 402 F.Supp.2d at p. 239, [citing *Hitchcock v. United States* (D.C. Cir. 1981) 665 F.2d 354, 360-361]; see also *Paxton, supra*, 991 F.Supp.2d at p. 31 [noting that District of Columbia courts consider the Restatement Second factors].)

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[2] The Restatement Second was intended to contain rules, not policies, although it did incorporate some policy analysis. (*Kay, supra*, 34 Mercer L.Rev. at pp. 552-553, 555 [noting Restatement Second "was thus promulgated with two vastly different conceptions about how a choice of law problem should be addressed."].) The Restatement Second was criticized by Professor Kay as an awkward attempt to create "an umbrella for traditionalist and modern theorist alike." (*Id.* at p. 562.)

Similarly, the circuit court in *Tramontana* cited the Restatement Second factors. (*Tramontana, supra*, 350 F.2d at p. 476.)

In *Phillips, supra*, 995 P.2d 1002, the Montana Supreme Court employed the most significant relationship approach of the Restatement Second. (*Id.* at p. 1007 ["We now hereby adopt the 'most significant relationship' approach to determine the applicable substantive law for issues of the tort."].) The Michigan Supreme Court in *Sutherland, supra*, 562 N.W.2d 466, discussed the various approaches to choice of law that led to the general rejection of the *lex loci delicti* rule. (*Id.* at pp. 468-471.) It adopted what appears to be a hybrid approach that includes both a review of governmental interests and a determination of significant contacts similar to the most significant relationship test under the Restatement Second. (*Id.* at pp. 471-472.) The circuit court in *Sheldon, supra*, 135 F.3d 848, quoted from and relied on *Sutherland* in applying Michigan's choice-of-law rules. (*Id.* at p. 852.)

None of the cases cited by plaintiffs applied the California approach to governmental interests articulated by Professor Currie and adopted by this Court. None considered the objections to use of *renvoi* as part of the governmental interests analysis.

Plaintiffs close their *renvoi* argument with a quotation from Professor Paul Freund: "There is no need to be more Roman than the Romans." (Ans. Br. 63 [quoting Freund, *Chief Justice Stone and the Conflicts of Laws* (1946) 59 Harv. L.Rev. 1210, 1220.) There are several problems with plaintiffs' reliance on Professor Freund's article to support application of *renvoi* in this case. First, his article was published in 1946, prior to the development of the governmental

interest approach to choice of law by Professor Currie and its adoption by the Court in *Reich*.[3] Second, application of another state's choice-of-law rule may have made sense where both states applied the mechanical rule of *lex loci delicti*. Third, a similar reference to "more Roman than the Romans" by Professor Weintraub in an article cited by plaintiffs to the Court of Appeal (Pls. Reply Br. to Court of Appeal at p. 18), was followed by his admonition that a state's application of *lex loci delicti* should not be viewed as a disclaimer of interest in application of its substantive law. (Weintraub, *supra*, 65 Tex. L.Rev. at p. 228.)

V. ANY ERROR BY THE TRIAL COURT WAS NOT PREJUDICIAL.

Plaintiffs contend application of Indiana law resulted in prejudicial error. (Ans. Br. 64-68.) This claim rests on their argument that application of Indiana law removed California's risk-benefits test for a design defect from the jury's consideration. (Ans. Br. 65-67.) Although Buswest submits the Court should not reach this issue because the trial court did not commit error, there are strong reasons why – if it does – plaintiffs' argument should be rejected.

First, plaintiffs repeatedly took the position below that they would pursue the consumer-expectations test to establish product liability for a design defect if, based on their argument that Indiana's

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[3] The history of Professor Currie's development of the governmental interest approach to choice of law in a series of law review articles between 1958 and his death in 1965 is described by Professor Kay in her Mercer Law Review article. (Kay, *supra*, 34 Mercer L.Rev. at pp. 538-540 & fns. 100-116.) The Court described the evolution of Professor Currie's views on resolution of apparent true conflicts in *Bernhard, supra*, 16 Cal.3d at pp. 319-320.

unreasonably dangerous standard is reasonably identical to California's consumer-expectations test, the trial court chose to apply California law. (3 AA 21:618-619; RA 4:62, 67-68.) Their false-conflict argument was based on plaintiffs' contention the case should go to the jury under the consumer-expectations test. Plaintiffs should have been subject to judicial estoppel if, having secured selection of California law, they tried to change course and pursue the risk-benefits test. (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 525.)

Second, it is implausible that plaintiffs would have pursued the risk-benefits test. Plaintiffs usually prefer the consumer-expectations test because it reduces the role of expert testimony and may limit the ability of the defendant to explain the pros and cons of a product's design. (See, e.g., *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [the consumer-expectations test may be met without expert opinion regarding the merits of the product's design]; *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1119, 1123 [plaintiffs sought application of consumer-expectations test; Honda argued it was not applicable to issue of defect in side airbag]; Peters, *Products-liability jury instructions: Blurred lines* (Nov. 2013) www.plaintiffmagazine.com, p. 1 [explaining why plaintiffs generally prefer the consumer-expectations test in a design defect case].)

There was also a significant risk to plaintiffs that, if they had pursued the risk-benefits theory, it would have opened the door to

evidence of industry custom and government standards.[4] They argued prejudicial error based on their claim that, under California law, they could have excluded this evidence. (Pls. O.Br. to Court of Appeal 59.) But it appears likely this evidence would have been admissible under California's risk-benefits test. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426-428; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1391, 1393-1395.) This issue may be impacted by a case currently before the Court. (*Kim v. Toyota Motor Corp.* (2016) 243 Cal.App.4th 1366, review granted April 13, 2016 (No. S232754).)

The trial court did not err in applying Indiana law. But even if it did, any error was not prejudicial to plaintiffs.

VI. CONCLUSION

Choice of law should be based on the underlying facts of a dispute, not on the parties' strategic litigation decisions. The relevant policy interests should not be impacted by a party's decision whether to add, dismiss, or settle with one of multiple defendants or cross-defendants. The decision of the Court of Appeal would open the door to strategic manipulation that would undermine the governmental interest approach to choice of law. The Court should affirm the rule

[4] The fact plaintiffs submitted a risk-benefits jury instruction (CACI No. 1204) after the trial court rejected their attempt to change its choice-of-law ruling (Ans. Br. 32) seems more consistent with an attempt to preserve error than an indication plaintiffs would have pursued a risk-benefits theory if the trial court had decided to apply California law.

of *Reich* and reject the attempt by the Court of Appeal and plaintiffs to consign it to the narrow issue of the parties' residences.

Dated: June 13, 2017

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By: _____
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CERTIFICATE OF WORD COUNT

The foregoing Reply Brief on the Merits contains 7,883 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 13th day of June, 2017, at Irvine, California.

Frank C. Rothrock

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1600, Irvine, California 92614.

On June 13, 2017, I served on the interested parties in said action the within:

REPLY BRIEF ON THE MERITS

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 13, 2017, at Irvine, California.

Deborah Hohmann
(Type or print name)

D. Hohmann
(Signature)

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