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]

OPENING BRIEF ON THE MERITS

Ian Herzog [Bar No. 41396]
Thomas F. Yuhas [Bar No. 78679]
Evan D. Marshall [Bar No. 82444]
LAW OFFICES OF IAN HERZOG
11400 West Olympic Blvd., Suite 1150
Los Angeles, CA 90064
Telephone: (310) 458-6660
Fax: (310) 458-9065

Attorneys for Appellants WILLIAM JAE KIM and HEE JOON KIM

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1. ISSUES FOR REVIEW

Pursuant to the Court's order of May 11, 2016, the issue to be briefed is:

> Did the trial court commit reversible error in admitting, as relevant to the risk/benefit test for design defect, evidence of industry custom and practice related to the alleged defect?

2. INTRODUCTION

Almost since the inception of strict products liability, the decisions have recognized that evidence of customary industry practice is inappropriate since it shifts the jury's attention away from the objective features of the product and the relative benefits of alternative designs towards the manufacturer's behavior, and hence a negligence standard: *i.e.,* the product must be safe because "everybody in the industry does it." The effect is not just to divert juror attention from risk/benefit factors, but to undermine product improvement by ratifying designs that are "no worse" than what others are selling, and to undermine the burden-shifting function of product liability doctrine.

A few cases seem to have departed from this strict rule, suggesting that a defendant's reliance on industry custom and practice is a legitimate consideration in risk-benefit cases. The *Kim* Opinion attempts to reconcile the cases by a "middle ground" which jettisons the heretofore strict preclusion of "reasonable manufacturer" evidence in favor of a "discretionary" standard which, judging by the Opinion, allows such evidence whenever it is arguably the result of industry research and experience – in other words, almost anytime.

This new standard, and the *Kim* Opinion's view that the evidentiary divide between negligence and strict liability actions is outmoded, rests in part on confusion between industry custom – the equivalent of "standard of care" evidence – and evidence of established technical standards or of specific instances involving alternative designs whose success or failure might demonstrate feasibility or refute claims of cost-effectiveness. These latter instances represent direct evidence of true *Barker*[1] factors, and can most usefully be shown without regard to industry custom. The *Kim* Opinion thus seeds confusion and undermines burden-shifting and safety enhancement for a completely illusory benefit.

3. STATEMENT OF THE CASE

This case presents a classic example of the ordinary driver who, faced with a sudden threat, tries to maneuver his vehicle back to the intended direction of travel. Since the 1990s, the automotive industry has had the technology to assist drivers by correcting over-steer and under-steer (*i.e.*, vehicle failure to respond as expected to steering input) and traction slippage. That technology, known as Electronic Stability Control (ESC) or Vehicle Stability Control (VSC) – was standard on many vehicles by the late 1990's or early 2000's, and was ultimately made mandatory by federal regulation on all vehicles under 10,000 pounds. It was absent from Mr. Kim's truck because it had been only an option in his model year, although it was the most important safety innovation in decades.

The verdict in this case turned exclusively on the issue of defect, and the core of Toyota's argument was not that the absence of ESC was justified by technical concerns or cost-effectiveness, but that every other light truck lacked such stability control, and hence Kim's Tundra must have been safe even without

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[1] *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413.

the technology most certain to have avoided this accident.

A. The Accident

William Kim was returning home north on Angeles Forest Highway when he was forced by an on-coming vehicle into an evasive right swerve, causing his two right side tires to enter the gravel shoulder. He steered to the left to regain the roadway led to a series of oscillations resulting in his 2005 Tundra pickup leaving the highway and rolling 75 feet down a canyon, rendering him quadriplegic.

Kim had purchased the Tundra because it was the last year of that model line so he figured that Toyota had any recall issues worked out and the price would be good. (RT 2752-2753) He was influenced by Toyota's advertising that it produced-top quality vehicles, but knew nothing about ESC. (RT 2752-2753) The salesman told him nothing about safety features, and he learned of ESC only post-accident. (RT 2753) Kim used the Tundra in his construction/property rehab business. (RT 2754)

On April 20, 2010, Kim was returning home to Palmdale from Montebello, a route he took about every other day, with only some supplies in the truck. (RT 2755) It was just starting to sprinkle. (RT 2758) As he descended Angelus Forest Highway just before 6 p.m., Kim saw an on-coming blue SUV about a quarter of the way into his lane: he reacted by steering right then, feeling the right wheels were on the gravel edge, steered leftward back onto the lane, thinking he had just barely avoided collision. (RT 2756; 3912-3914) Kim recalled fighting the wheel to get back into his lane, then starting to panic as the Tundra didn't respond. (RT 2757) Reentering the roadway by a right steer just as it entered a curve, the Tundra began to lose traction, turning too far left and the rear sliding out. (RT

3914–3915, 3973; App. 856-882, 895, 922) He then lost control. (RT 2756, 3915)

Both the CHP Officer who interviewed him in the hospital (RT 2106) and Kim's surgeon (RT 2535) confirmed that Kim had reported swerving to evade a car or SUV which had crossed the center line.

Fiona Archer and her husband Anthony were traveling south – uphill – toward Sunland when she noticed the Tundra coming around a bend, apparently out of control "because the back end of his vehicle came across the line" in a clockwise motion (RT 1537-1539) The rear of the truck was over the line just slightly (RT 1539:20-25), and was at a distance of six or seven car lengths when she first saw it. (RT 1539:26-1540:1) Because the truck's driver seemed to straighten out and regain control, Mrs. Archer didn't have to break or swerve. (RT 1540-1542) But looking in her rearview mirror, she saw the truck airborne as it went off the highway and over the cliff – for no apparent reason. She was shocked because the skid had not looked big and Kim seemed to have regained control as he passed. (RT 1543:3-25)

Mrs. Archer said that the road was damp in places and there was a rivulet of water trickling off the rocks in a cut-away in the mountainside. (RT 1544:1-23) She was traveling 30 to 35 mph entering the curve (RT 1546–1547) and thought Kim was going about 50. (RT 1547:17-21)

Anthony Archer testified the Archers were traveling 35 to 40 mph and that Kim's truck was three car lengths away when he first saw it. (RT 1590-1591) He had observed many cars coming around the bend do "a bit of a drift" but then straighten out; Kim also drifted a bit, but then his rear end began to come around clockwise. In what Archer described as an over-correction, it then turned counter-

clockwise, with the rear in front, and went into an uncontrolled spin. (RT 1591-1593) Archer told the CHP that it appeared that Kim had overcorrected or corrected too quickly, and spun out of control in an effort to bring the truck out of the turning motion. (RT 1595-1597) From the time he first saw it until Kim passed him, the truck had stayed on Kim's side of the road. (RT 1595)

Archer had seen a series of other vehicles pass by this location traveling northbound very fast, like "a bunch of race cars," and about three of seven cars did a slight wiggle or drift. (RT 1598–1600) All had the same sort of slippage and then straightened out, whereas Kim wiggled a bit, straightened out, but then went the other way, counter-clockwise. (RT 1600:1-23) When he returned to the accident site, Archer saw a number of other cars start to slip at the accident curve. (RT 1611:2-27) Archer thought that Kim was going about 50 mph when he left the road. (RT 1612-1613)

Edgar Fuentes stopped at the accident scene. (RT 3646) Fuentes saw gravel and a "little bit" of running water in the roadway: "not a lot" of water, not even a stream. (RT 3656:27-3657:2; 3658:9-19) Fuentes' car had "kind of skidded" about three curves before on conditions that were not optimal (RT 3647-3648, 3651, 3657, 3659) so he reduced his speed of 45 mph after the curve. (RT 3655-3656)

The CHP officer who first responded to the scene (RT 1575-1576) found just a trickle of water across the roadway south of the curve; he reported it was not a hazard. (RT 1578) He had been patrolling this area since 2003, but knew of no other loss of control incident at the accident location, though cars often went through at 55 mph plus. (RT 1583–1584)

Accident investigation Officer Ann Marie Strachan concluded from skid

marks that the Tundra had spun around and gone off the cliff right-rear wheel first, with the truck facing south-west, the opposite direction of Kim's travel. (RT 1678-1679) She found no evidence of violations pertaining to the truck tires. (RT 1803)

Strachan believed that Kim was going 45 to 50 mph, and that when he tried to negotiate the right-hand curve, the rear of the Tundra skidded to the outside of the curve; he tried to correct by steering hard to the left, at which point he lost control. The truck spun around counter-clockwise and skid off the roadway edge, striking a dirt embankment which deflated the right tires and knocked off the right wheel rims. (RT 1804-1805) The Tundra rolled onto its roof as it went down the embankment, coming to rest on its wheels. (RT 1805) Strachan thought Kim's turning movement contributed to the loss of control. (RT 1805:16-21)

B. **Plaintiff's Expert Testimony**

Plaintiff's reconstruction expert Steven Meyer calculated Kim's speed at the point of the earliest tire marks at 42 mph (RT 1838), making his speed around the curve – where he experienced a clock-wise yaw – a few miles faster. (RT 1838-1839) The initial roadway "yaw marks" indicated the tires were still rotating (by contrast with skid marks left by locked tires), signifying the counter-clockwise yaw. (RT 1838-1839) The marks then went in the other direction, showing a counter-clockwise yaw resulting from Kim's steering maneuvers. (RT 1843)

The Archer's description of the initial clockwise yaw was consistent with these marks (RT 1840:4-1841:4), and with Kim effectively catching the first clockwise yaw as he came around the corner by turning the wheel into the slide, straightening out as the Archers testified. Kim's turn to the left reversed the yaw into a counter-clockwise motion, allowing him to safely pass the Archers,

apparently having straightened out the initial yaw. (RT 1844-1845) As he passed the Archers, the yaw reversed and Kim went off to the left. (RT 1845:14-19)

Vehicle speeds, locations and visibility corroborated the conclusion that the Archers had first observed Kim as he steered the Tundra out of the first yaw, apparently with his direction corrected, and that the counter-clockwise motion began only when he passed the Archers, explaining their surprise when they saw Kim go off the road behind them. (RT 1854-1855, 1860-1862)

Meyer examined the truck tires and found them all of the same size and appropriate to the Tundra, though different brands and tread patterns. Tread depth on the front tires was 3/32 to 5/32, and on the rear 6/32 to 10/32 of an inch. (RT 1857-1858) Toyota's manual recommended replacement when tires got to 2/32, and Meyer found no indication the tires made any difference. (RT 1857, 1859)

Engineer Michael Gilbert had worked in automotive dynamics for over 20 years, publishing on vehicle design and dynamics, and roll-over and limits maneuver testing, and taught driving. (RT 2110-2123) Gilbert described ESC as a system to correct for driver error in extraordinary maneuvers. ESC senses, for example, when tires start slipping or when the vehicle is in over-steer (*e.g.* fish-tailing) and corrects vehicle movement to align it in situations which are counter-intuitive or beyond the capacity of the driver. In the instant case, when the back end started coming out, ESC would have detected the motion within hundredths of a second, before the driver noticed, and put brake input into the wheels to keep the back-end from sliding out, then readjusting according to the yaw rate. (RT 2124-2125) Once the truck was back in alignment, ESC would release the brake pressure and the vehicle would proceed straight as the driver expected. (RT 2125-2126) Similarly, on wet pavement, ESC detects the slippage of front tires and

adjusts rear braking to eliminate over-steer and improve cornering. (RT 2133-2134; 2141) Because ESC takes into account both vehicle movement and driver input, it adjusts vehicle direction according to the driver's intent. (RT 2141-2142)

The instant accident presented the typical scenario in which the driver's reaction lags behind the vehicle movement. A driver who needs to steer into the slide will input too much steer by the time the rear end comes around, causing it to swing around in the other direction, as happened with Kim. ESC instantly adjusts to the driver's overreaction and calculates how fast the rear is coming back before rear tires begin slipping, so that the driver doesn't have to overcompensate and can keep the car aligned with fewer steering maneuvers. (RT 2126–2129)

ESC practically eliminated spins in some vehicles and speed ranges (RT 2129-2130) and reduced single vehicle accident anywhere from 30% for passenger vehicles to 88% for passenger trucks. (RT 2130:13-2131:5)

Gilbert opined that this accident would not have happened had the Tundra been equipped with ESC. (RT 2146) ESC would have cut in to brake the right front tire when slippage began as Kim tried to steer back to the road. (RT 2154-2156) By slipping tire contact with the road slightly, ESC would have kept the vehicle straight, kept the back-end from coming around, and eliminated the need for the third and fourth steering maneuvers. (RT 2156)

The evidence supported the conclusion that Kim had encountered another vehicle, leading to an evasive maneuver and a series of steering inputs before he came into the Archers' view. (RT 2148) This was evident from the Archers' view of the Tundra's rear coming around as it rounded the curve, indicative of a prior emergency avoidance. (RT 2148-2149) Of Kim's four steering movements, the

Archers had seen the third, a right corrective steer which resulted in a clockwise movement, and the last was the left corrective steer before the truck left the road. (RT 2149-2150) This was corroborated by tire abrasions showing a hard clockwise slip where Kim steered hard to the right, leading to the rear slip (RT 2161-2166), and by yaw marks where multiple steering maneuvers nearly brought Kim out of the skid, until the last steer which ESC would have made unnecessary. (RT 2167-2168)

Gilbert testified that the two wet areas described by witnesses were insufficient to have caused loss of control or create a disturbance to the truck; the water was too far down the road to explain the motion seen by the Archers or to have caused slippage by the time they saw Kim. (RT 2138-2139, 2150-2151) Only a large amount of water would have affected the Tundra's control (RT 2152), and the absence of an accident history for the curve indicated there was no drainage issue. (RT 2153-2157) Nothing in the environment would have defeated a properly functioning ESC system. (RT 2157–2160)

Test runs of a Tundra on a wet surface showed it able to corner on the same radius at up to 64 mph without loss of control, making it likely that Kim had lost control because of an earlier evasive maneuver, not because he was cornering too fast. (RT 2162-2173) Toyota's own testing had achieved loss of control only by flooding the test surface (RT 2170, 2173), and even then the truck often didn't slip with ESC, but required the driver to make a number of different steers. (RT 2173)

Yiannis Papelis, Ph.D., a Professor of Computer Engineering (RT 2462-2463), spent 18 years researching driver behavior and interaction with automotive systems such as anti-lock braking, collision warning, and ESC. (RT 2463-2480) Papelis has led research projects studying the effectiveness of ESC and the

response of hundreds of drivers with and without ESC. (RT 2480-2485) His findings on the effectiveness of ESC were referenced by the Department of Transportation in its notice of proposed rule making that now requires ESC on all vehicles weighting less than 10,000 pounds. (RT 2508, 2719-2720)

Based on the accident site, witness depositions, accident conditions and environment, the accident scenario was very close to that experienced in simulation and reconstruction research (RT 2480-2486) – exactly the kind of loss of control ESC was signed to prevent. (RT 2486-2488) Papelis found that the traces of water would not have made the truck slip out of control or interfered with ESC, which is "perfectly capable of working on the wet pavement." (RT 2488-2489) The evidence indicated that some event before the Archers' first observation of Kim had caused his sudden steering, and like drivers studied in simulations, he had over-reacted in steering back to the left. (RT 2491-2493) This was typical where, after an initial sudden stimulus, a second steer to regain the road comes too late, and as the number of steers increases the vehicle oscillates. (RT 2504-2506; 2726)

Papelis found sufficient traction for ESC to work (RT 2494-2496), and wet pavement studies had show the effectiveness of ESC in such conditions. (RT 2484-2485) He noted that Toyota's expert Carr couldn't make the Tundra spin on very wet pavement, indicating that it had good traction even with much more water. (RT 2494-2495)

Automotive engineer Murat Okcuoglu (RT 3421) testified that there was a working ESC system by 1993, and by 2000 the technology was fully mature and well understood. (RT 3423) For a company like Toyota, the incremental cost of putting ESC on the Tundra was $300 to $350 per vehicle. (RT 3424)

C. Toyota Engineering and Marketing

The defense case was devoted almost entirely to causation, not defect.

Toyota's PMK on stability control, Project Manager Akira Nagae (RT 307-3008; App. 827-828, 831), worked on development of ESC for cars and trucks from 1997 to 2003, having oversight for the 2004 and 2005 model Tundra by the time he left. (App. 828-830) Development was complete for the 2004 model (App. 830), with work to adjust to a new engine and brake actuator for the 2005 model complete by August 2004 when it was put on the market. (App. 830) ESC was first put on a Toyota for the Japanese market in 1995. (App. 841)

Nagae said ESC was designed to suppress side sliding and thereby support driver steering efforts so that the vehicle would go in a direction of the driver's input in unstable conditions (App. 831), so that "even the average driver would be able to handle the vehicle appropriately" to recover its path. (App. 835-836) Using sensors that measure yaw rate, wheel speed and steering angle, ESC intervenes when there is excessive slide, updating every 24 milliseconds or so and applying brake pressure in 1/10 or 2/10 of a second. (App. 837) ESC would work where tires were within legal tread depth, absent hydroplaning. (App. 837-838)

A Toyota study reported that ESC eliminated spin-outs and vastly reduced drift where drivers entered a curve at a speed beyond their driving ability, and was "obviously effective for ordinary drivers" in preventing spinning. (App. 841-842) It also found ESC effective in sudden movements or cornering in slippery road conditions (App. 842-843), with a 70% reduction in serious single car accidents. (App. 844) Toyota had promoted ESC on the Sequoia SUV as offering cornering stability where there was poor traction, dirt or pooled water on the road, or when

too much steering input was applied. (App. 844)

Nagae could identify no benefit from not having ESC on the 2005 Tundra (App. 845-846); the "consensus" decision to make it optional was based on market conditions, user demand, and the trend in competitors' vehicles. (App. 847)

Sandy Lobenstein, Corporate Manager for Product Planning with Toyota Motor Sales USA (RT 3304-3305) testified that Toyota had ESC on the Lexus in the 1990's. As of 2001 it was on the Sequoia and 4Runner SUVs as standard equipment. It was standard in the Highlander SUV in 2004, and in the FJ Cruiser SUV in 2007. (RT 3307-3309)

ESC was optional in the Tundra for 2004 to 2006 models (RT 3309-3311), and became standard when the second generation Tundra appeared in 2007. (RT 3366) With the 2005 model, ESC was an option available only as part of a package which included traction control, brake assist, daytime running lights and limited slip differential, which retailed at $950. (RT 3369-3370; App. 938)

Lobenstein had recommended for 2005 to 2007 model years that ESC be made optional, a recommendation made without regard to the extent to which it enhanced safety, and despite the recommendation of the engineering department that it immediately be made standard on the Tundra and Tacoma. (RT 3310-3313, 3314-3315, 3328) The reason for not making it standard was lack of customer interest: less than 5% of customers chose ESC though there was no evidence that they understood the safety enhancement it offered.[2] (RT 3315) The percentage of

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[2] Lobenstein had no idea who at Toyota had responsibility to determine whether consumers understood the benefits of ESC. (RT 3361)

customers electing the option was just a few percent: ten out of almost 7,000 V-6 Tundras sold in 2005 (RT 3347), and ten out of more than 9600 V-8 Tundras. (RT 3347-3348) Payload, towing and engine performance were the critical sales factors. (RT 3317, 3350; 3327:16-19) Lobenstein cited market research – including figures indicating that even at no cost customer interest in ESC was low – as the basis for recommending against making it standard. (RT 3316, 3327, 3350) "No one else had VSC at the time in a full-size truck, so we didn't have any expectations." (RT 3338:13-17)

D. **Defense Experts**

Kinesiologist Douglas Young (RT 3437) claimed that no conclusion could be drawn from driving simulators because of the artificial conditions under which drivers react (RT3445-3448), and that studies of driving behavior could not predict an individual driver's actions. (RT 3449-3450)

Accident reconstructionist Lee Carr testified that Kim was traveling at 45 to 50 mph, that the combination of speed and road moisture led to control problems leading Kim to turn right and then left, and to ski off the roadway; that the Tundra had features that would have prevent the accident had Kim used them, and that even with ESC, Kim still would have gone over the cliff given his control commands. (RT 3661-3662)

Carr agreed that the tires were not a fundamental cause of the accident. (RT 3662:18-24) Rather, the basic cause was Kim's inappropriate steer to the left. (RT 3757-3758) Carr said that the Tundra could sustain high sideways forces – 7/10 or 8/10 of a G on a dry surface – when turning, and at a cautionary speed of, *e.g.*, 30 mph it would have negotiated the curve. (RT 3664-3665) He had tested two 2005

Tundras on a surface with a water flow - one with, one without ESC – and found that both performed safely unless there was extreme steering or braking on a slippery ("not just wet") surface. (RT 3758-3768)

Carr claimed that manufacturers didn't want to make too many changes at once because they were "taking chances with the safety of customers," and that it was more difficult to put ESC in a truck, which was exposed to a range of conditions, than a passenger car. (RT 3676-3677) Over objection, Carr said that it was common to propagate new technology from the most to the least expensive product lines. (RT 3677:6-19)

Carr said that ESC would not rescue a driver from an irreparable situation; its effectiveness could be diminished by road surface or tire conditions, and it would not work where input was too late. (RT 3678-3680, 3692) The narrowness of the roadway, the limited and unimproved shoulder, made the accident curve an "unforgiving" area for high speed accidents. (RT 3682-3685) Carr believed that a safe speed for the decreasing radius curve was in the low 30s, and that approaching it at 50 mph even in dry conditions would put 6/10 of a G sideways force, which was uncomfortable for most people, and require 3,000 pounds translated through the tires to keep on the road. (RT 3689-3690)

Carr concluded that the Archers' observation of Kim slipping as he came into view demonstrated that the road was slippery and that Kim had exceeded vehicle limits. (RT 3694) He claimed it was impossible at 40 mph to prevent the truck from going over the cliff once it started laying down tire marks (RT 3718-3720), denied there was any evidence of the four steering inputs described by Meyer (RT 3737-3740, 3750), claimed that any "phantom vehicle" would have had to have been right in front of the Archer vehicle (RT 3749), and that ESC becomes

less effective or even increases spin as yaw rate increases. (RT 3754-3756)

Carr said it was unlikely VSC would have intervened in this accident had the roadway been dry based on his testing. (RT 3740-3741) Were the road slippery, VSC would have helped Kim steer to the right. (RT 3742) His test runs in standing water demonstrated that a specific combination of slippery road, flowing water, worn tires and a particular timing of right and left steers by Kim – "steering other than to follow the path of the road" – was necessary to make the Tundra spin. (RT 3681, 3759-3768)

Engineer Dale Dunlap (RT 3463-3465) testified that the swerving Angelus Forest Highway could not be driven at a constant 55 mph even in dry conditions. Unlike freeways, it lacked shoulders, exit ramps or pull-outs; it did not have freeway-standard drainage and experienced runoff from the mountain slope, especially after the Station Fire destroyed most foliage. (RT 3604-3607) Dunlap said that apart from Kim, SWITRS showed one prior accident at this location nine years previous when the roadway was covered with snow or ice (RT 3610-3611), and eight other accidents within roughly a mile over a ten year period.[3] (RT 3611)

Dunlap did not find that the accident site presented a roadway hazard (RT 3611-3613) He testified that the roadway was banked to help drivers in the curve (RT 3613-3614), and according to national design guidelines the design speed for the accident curve radius was 34 mph, or rounded down to 30 mph, for dry conditions (RT 3617-3619), which speed would have to be moderated for vehicle

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[3] Dunlap agreed the other accident was a "non-event' so far as Kim's accident was concerned (RT 3628:2-3629:1), and stated at deposition that he "didn't have a problem with trying to navigate this curve up to 50 [or 55 miles] an hour even on a dry surface" in a car. (RT 3632)

characteristics and tire condition. (RT 3620)

E. Trial and Post-Trial Motion

Plaintiffs' motion *in limine* 4 sought to preclude argument or testimony comparing the Tundra's performance to competing vehicles lacking ESC, or suggesting that the Tundra was not defective because it was equivalent or superior to competing models. (App. 84-92) Their motion *in limine* 9 sought to foreclose any claim that compliance with Federal Motor Vehicle Safety Standards (FMVSS) satisfied Toyota's design obligations or demonstrated that the Tundra was safe for its intended use. (App. 410-420) The court denied both motions. (RT 312)

The Court also refused plaintiffs' special instructions 19, 20, 21 and 22 (App. 545-548) which advised the jury that industry and federal motor vehicle standards did not establish that the truck was not defective, and that the jury must follow the risk-benefit test as set forth in the instructions rather than evidence of industry standards or compliance with federal standards. (RT 4218:19-21)

Toyota never offered a technological reason not to make ESC standard in every vehicle, nor denied its extraordinary benefit in emergency maneuvers. Rather, it argued that no federal regulation required ESC, that Toyota was the "industry leader," and that since no other manufacturer had made ESC standard on light trucks, the Tundra could not be defective.

> Well, we know that the truck could be driven safely at even higher speed based on the testing of Mr. Carr. But we also know that no pickups had standard VSC in 2005. We also know that no pickups had VSC in any way before that, before 2004. So we know that

literally hundreds, if not thousands of pickups, Toyota, Ford, G.M.'s, and other types of vehicles without VSC have driven that stretch of road countless times over the last 10 years.

But Toyota did what none of the other big three pickup makers did in 2005. They gave the customer the choice. They made it optional equipment. That black Ford F150 that Mr. Herzog has got there, if it's a 2005, it's defective. If you believe the plaintiffs' position in this case, that 2000 Ford F150 is defective because it doesn't have standard V.S.C. It doesn't even have optional V.S.C. available. Toyota gave customers the choice.

. . . .

But what the plaintiffs would have you do in this case is force standard VSC on all vehicles back in 2004/2005 time period. Well, that's something the government has done after considerable study in model year 2013.

The plaintiffs would have you penalize Toyota for making it an option and then for putting it in standard six years ahead of when the government said it was required. That is not fair and that's not justice. [RT 4507-4510]

Tundra is a safe pickup with or without VSC. Excellent scores in the new car assessment program that's done by the NHTSA. . . The International Institute for Highway Safety, which is a private organization, sort of a watchdog organization that does

> all sorts of testing on vehicles. Tundra was rated best in its test. J.D. Power, customer satisfaction and reliability. Consumer Reports, if any of you seen consumer reports, they love to do hatchet jobs on vehicles. They love to criticize vehicles. Consumer Reports said it was the best pickup in its class. It complied with all Federal Motor Vehicle Safety Standards and there are a bunch of them. You've only heard about maybe one or two is the new standard. That doesn't take effect until 2013, but it complied with all the other standards.
> [RT 4517-4518]

Toyota did ***not*** argue that the increased risk posed by the absence of ESC was outweighed by cost or any design benefit.

The jury was given defendant's proposed verdict form, on which the initial question was "Did the Toyota Tundra contain a design defect when it left Toyota's possession?" (App. 554) The second question asked if the defect was a substantial factor in causing the accident, and the remainder dealt with comparative fault and damages. (App. 554-557) The jury answered only the first question, in the negative. (App. 554)

Plaintiffs moved for new trial on grounds of error in instructions, admission of "industry standard" evidence, prejudicial termination of rebuttal argument, and other grounds. (App. 569-631) The motion was denied. (App. 808)

On appeal, the Court of Appeal rejected the majority view holding that evidence of "industry standard" or custom is irrelevant and immaterial in a risk-benefit case. The Opinion attempted to construct a "middle ground" which

rejected a rule of strict preclusion in favor of a discretionary standard which seems to allow such evidence whenever it is purportedly the result of industry research or experience. In formulating this new standard, the Opinion adopted the view that the strict evidentiary divide between negligence and strict liability is outmoded, and that negligence or "standard of care" concepts may be freely imported into product liability cases.

4. CALIFORNIA DECISIONS UNIFORMLY CONDEMN INTRODUCTION OF EVIDENCE OF INDUSTRY CUSTOM OR PRACTICE UNDER THE RISK-BENEFIT TEST

As the Opinion observes, most California cases have strictly prohibited "industry standard" evidence in products cases. *See Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803; *Foglio v. Western Auto* Supply (1976) 56 Cal.App.3d 470, 477; *Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 831; *Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372; *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203; *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545. These cases regard industry custom or practice as inconsistent with the risk/benefit test's focus on technical feasibility, cost effectiveness, availability of alternative designs, etc., rather than on what other manufacturers are doing. 1 Witkin, *Cal. Evidence 5th* "Circumstantial Evidence" §111; 6 Witkin, *Summary Cal. Law 10th* "Torts" §1456. A typical statement is found in 50A *Cal.Jur.3d* "Products Liability" §123:

> Admission of evidence that manufacturer met industry customs or standards on safety is reversible error in products liability actions; issue is not whether manufacturer exercised reasonable care, but whether the product fails to perform as the ordinary consumer

would expect.

Grimshaw summarizes:

> In a strict products liability case, industry custom or usage is irrelevant to the issue of defect. . . . The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate considerations.
> [*Grimshaw*, *supra*, 119 Cal.App.3d at 803]

There are two competing California cases. *Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, reviewed a summary judgment in a strict liability and negligence action where plaintiff had framed his case in terms of due care and both sides offered expert opinion based on ASTM standards for friction. *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, involved FDA standards for pharmaceutical manufacturing and affirmed admissibility of regulatory compliance in light of the unique role of the FDA as described in *Ramirez v. Plough* (1993) 6 Cal.4th 539, 556, which acknowledged room for a compliance defense in such cases "where the evidence shows only the ordinary situation contemplated by the statute or administrative rule." (*Id.* 547–548)

The *Kim* Opinion, attempting to construct a "middle ground," asserts that industry standards may be the result of research or reflect practical experience in balancing safety, feasibility, cost and functionality. (Opinion 13)

> Evidence of compliance with industry custom may tend to show that a product is safe for its foreseeable

> uses, while evidence of noncompliance with industry custom may tend to show that a product is unsafe for its foreseeable uses.
> [Opinion 14]

Conceding that the probative value of "industry standards" for such purposes is debatable, the court decided "that does not make it inadmissible." The Opinion, however, offers little guidance as to how such evidence should be used or when its value is outweighed by its tendency to undermine product liability principles. Rather, it offers examples. As explained below, those examples do not illustrate the industry custom to which Plaintiffs objected and which Toyota exploited at trial, do not justify admission of industry custom, and do not justify the broad departure from product liability doctrine advocated by the Opinion.

A. What Is And Isn't "Industry Custom" Evidence

This Court's formulation of the issue as one of "industry custom and practice" aptly distinguishes the type of evidence and argument proffered by Toyota from the other varied types of evidence discussed in the *Kim* Opinion and other cases. While such matter has been generically described as "industry standard" evidence, the distinct categories of evidence cited in the Opinion have very different probative uses and pose different evidentiary risks. They need to be distinguished at the outset.

(1) Technical Standards

Evidence of technical standards – especially when developed by neutral institutions such as the ASTM or SAE – may legitimately be cited as evidence of industry research or experience in balancing safety, feasibility, cost and

functionality. (Opinion 13) Because they bear on the objective characteristics of products rather than the behavior of manufacturers, they have relatively little tendency to divert juror attention from the quality and behavior of the product towards a standard of care judgment based on the notion that "everybody does it so it must be O.K." They are not mere custom and practice.

Technical standards can genuinely educate jurors as to the functional properties of a device, as to the range of design alternatives, and as to the limits of practicality or technology. Used for such purposes, they can usefully focus juror attention on the bottom-line *Barker* factors. Failure to comply with minimal technical standards is especially probative of design deficiency. *Rest.3rd Torts: Products Liability* (1998) §4 explains:

> In connection with liability for defective design or inadequate instructions or warnings:
>
> (a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and
>
> (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

This is not to say that all "technical" standards are created equal. An

industry trade association which colludes to restrain the introduction of technical or safety improvements, or which is little more than an industry booster, may adopt standards which aim at not rocking the boat. Judges must take care to assess the value of such evidence, and whether it reflects an effort to establish best practices and rests on rigorous testing or research, or merely recapitulates industry practice.

The ASTM standards cites in *Howard v. Omni Hotels* seem a legitimate instance of independently developed technical standards enlightening jurors as to an measurable aspect of bath tub design. They focused juror attention on the objective characteristics of the product, and reflected a studied judgment as to slipperiness. They are not presented as the bare conclusion that the industry norm must be safe because it is the industry norm. Indeed, *Howard* affirms that the risk-benefit test must rest on technical evaluation.

> "In such a case, the jury considers if `the benefits of the . . . design outweigh the risk of danger inherent in such design' [citation]. But this determination involves technical issues of feasibility, cost, practicality, risk, and benefit [citation] which are `impossible' to avoid [citation.] In such cases, the jury must consider the manufacturer's evidence of competing design considerations [citation], and the issue of design defect cannot fairly be resolved by standardless reference to the `expectations' of an `ordinary consumer.' " (*Ibid.*, italics added; *Barker*, *supra*, 20 Cal.3d at p. 430 . . . [*Howard*, *supra*, 203 Cal.App.4th at 425]
>
> There are two alternative ways to prove a design defect, each appropriate to its own circumstances: (1) the consumer expectations test, or (2) *a theory of*

> *design defect, citing to technical and mechanical details in obscure components of a mechanism or complex circumstances of an accident.* (*Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370-1371, fn. 6 (*Stephen*), citing *Soule* [*v. General Motors Corp.* (1994)] 8 Cal.4th 548, 567-570, and *Barker, supra*, 20 Cal.3d 413, 430.)
> [*Howard,* 203 Cal.App.4th at 423, emphasis added.]

Howard nowhere suggests that industry custom *per se* has any value in assessing optimal design.

O'Neill v. Novartis likewise involves objective technical standards, though promulgated by government and having the force of law. The neutrality of such standards, and the fact they are enacted only after an extensive regulatory review and comment, makes them uniquely valuable as design criteria, although never definitive or immune from political influence or bureaucratic inertia.[4] Moreover, in the case of pharmaceuticals and medical devices, FDA regulations play more than an advisory role, sometimes furnishing a definitive design and a complete defense through preemption.[5] *Ramirez v. Plough, supra*, 6 Cal.4th 539, 556.

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[4] The history of federal regulations for SUV design, which were long classified as trucks rather than passenger vehicles, provides a good example. of shortcomings in the regulatory process. See *Rest.3d Torts: Prod. Liab.* §4 comm. d and e ,noting that the deliberative process leading to a safety standard may be "tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard," in which case it is entitled to little or no weight.

[5] Only by a strained construction of the *Howard* opinion does it support admission of industry custom evidence, as opposed to technical standards. In large measure, *Howard* turns on the fact that plaintiff pursued not only consumer expectations and design defect but also negligence, making "Kohler's reliance on

No industry technical standards were at issue in the present case, since there were no standards or design benefits supporting exclusion of ESC.

(2) **Industry Experience**

The *Kim* Opinion suggests that "industry standards" may reflect industry experience bearing on the feasibility or cost effectiveness of a design alternative. Such would be the case if competitors tried to produce a safer alternative design but the design malfunctioned, imposed unsustainable costs, or made the product less efficient. There was no such evidence or contention by Toyota in this case.

Evidence of industry experience which reflects the limits of science or technology is akin to "state of the art" evidence in the strictest sense of that term, *i.e.* the "level of pertinent scientific and technical knowledge existing at the time"

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industry standards . . . a factor legitimately to be considered in the summary judgment." (*Id.* 225) Following on this remark, *Howard* acknowledges that federal regulations may have a broader impact:

> Properly read, the rule that a manufacturer is not entitled to a complete defense that it complied with industry standards applies to negligence cases and also, to some extent, applies to product liability cases. (Compare 50A *Cal.Jur.3d*, "Products Liability," §§90, pp. 676–677, on federal preemption issues ["The California courts of appeal have split on the issue of whether a manufacturer's compliance with federal motor vehicle safety standards, as set by the National Traffic and Motor Vehicle Safety Act, is a defense in a products liability action."].)
> [*Id.* 425]

Howard nowhere suggests that the fact that other products are no safer than the defendant's has any significance in a products case.

the product was designed and manufactured. *Wiska v. St. Stanislaus Social Club, Inc.* (Mass.App. 1979) 390 N.E.2d 1133, 1138 n. 8, 3 A.L.R.4th 480, citing 1 Frumer & Friedman, *Products Liability* (1978) §6.05(15). See also *Chown v. USM Corp.* (Iowa 1980) 297 N.W.2d 218, 221 ("a distinction exists between custom of the industry and state of the art. Custom refers to what was being done in the industry; state of the art refers to what feasibly could have been done."); *Vermeulen v. Superior Court* (1988) 204 Cal.App.3d 1192, 1202; *Balido v. Improved Mach., Inc.* (1973) 29 Cal.App.3d 633, 640 ("the unreasonableness of the danger must necessarily be derived from the state of the art at the time of design"); and *McLaughlin v. Sikorsky Aircraft, supra*, 148 Cal.App.3d 203, 210, holding that industry custom and usage is irrelevant in a products liability case, but noting that "The distinction between what are the capabilities of an industry and what practice is customary in an industry must be kept in mind."[6]

Industry experience with particular designs is not the equivalent of a standard, nor of industry custom and practice. It is evidence of specific experience and the feasibility or cost of *particular design alternatives* which were actually

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[6] On the frequent misuse of "state of the art," see Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing* (1983) 58 N.Y.U.L.Rev. 734, 750–751, Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 Nw.U.L.Rev. 1 (1982), and *Rest.3d Torts: Product Liability* §4, comm. d., stating:

> Defendants often seek to defend their product designs on the ground that the designs conform to the "state of the art." The term "state of the art" has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge. The confusion brought about by these various definitions is unfortunate.

implemented or could not be implemented. Such evidence can usefully illuminate the technical and financial issues posed by specific alternative designs, focusing jurors on the functionality of design alternatives, and thus on the factors cited in *Barker*. For this purpose, the probative evidence is the particularized design experience that make a design untenable – not whether a design is prevalent in the industry, but the details of feasibility that justified its exclusion or inclusion.

A similar point is made by the Texas Supreme Court in *Boatland of Houston, Inc. v. Bailey* (1980) 609 S.W.2d 743, which held that since standard of care is irrelevant in a products liability action, evidence that the manufacturer complied with industry practice is irrelevant for the purpose of showing reasonable care in design of the product, but may be relevant to rebut the claim that a safer design was technologically possible and economically feasible. *Boatland* observes that "the state of the art with respect to a particular product refers to the technological environment at the time of its manufacture. This technological environment includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured." (609 S.W.2d at 748) While evidence that boat manufacturers had been unable to implement kill switches at the time of manufacture was thus properly admitted,

> We would be presented with a different question if the state of the art in 1973 with respect to kill switches had not been disputed *and Boatland had attempted to avoid liability by offering proof that Bailey's boat complied with industry custom.*
> [*Boatland*, 609 S.W.2d at 749, emphasis added.]

Evidence that "everybody does it" in the industry is both unhelpful and entirely unnecessary, since only the details of design experience, and not the bare

fact that a design has or has not been implemented in the industry, will enhance the jury's ability to weigh risks and benefits.

In *this case*, industry experience has no valid role since the technology was mature and available to every manufacturer, and Toyota already offered ESC as an option on the Tundra and had scheduled its inclusion as standard equipment in the near future. Its absence from the Tundra reflected – as Toyota admitted – only marketing considerations. The bare fact that no other manufacture had placed ESC on its pickup trucks was an appeal to standard of care, not to the weighing of risk and benefits.

(3) Industry Custom and Practice

True industry custom evidence – the kind condemned by the *Grimshaw* line of cases – is evidence that "nobody does it," that "every body does it," or that the defendant's product is no more dangerous than others on the market.

In *Grimshaw*, industry custom was raised in a rejected instruction telling the jury to consider "the extent to which [the Pinto's] design and manufacture matched the average quality of other automobiles and the extent to which its design and manufacture deviated from the norm for automobiles designed and manufactured at the same point in time." (119 Cal.App.3d at 803) This is exactly how Toyota used such evidence at trial: the Tundra un-equipped with ESC is as safe as other trucks on the road since they are also unequipped.

A similar instruction allowing consideration of whether "the defendant conformed to a custom or practice that had grown up in a given business at the time" the lawnmower was manufactured was denied in *Foglio v. Western Auto*

Supply, 56 Cal.App.3d at 477. *Heap v. General Motors, supra,* 66 Cal.App.3d at 830, reversed the trial court's determination that there was no defect because an accelerator pedal design was "operating in tens of thousands of automobiles without incident," finding this immaterial to the question of whether the design could cause preventable injury in an accident.

McLaughlin v. Sikorsky Aircraft, supra, 148 Cal.App.3d 203, held that compliance with government specifications was not a defense to a products claim, and that evidence of compliance was irrelevant to the issue of defect. Recognizing the relevance of feasibility and cost of alternative designs, and hence of the state of the art, the Court held evidence of industry custom and usage inadmissible, noting that "[t]he distinction between what are the capabilities of an industry and what practice is customary in an industry must be kept in mind." (*Id.* 210)

In *Titus v. Bethlehem Steel, supra*, 91 Cal.App.3d 372, involving an oil pump, defendant "throughout the trial and in final argument, maintained that it was custom and practice in the industry that manufacturers offered security guards as optional equipment." This was held error "because custom and usage is not a defense to a cause of action based on strict liability." Finding that plaintiff had been erroneously denied instructions defining "defective product," the Court stated:

> In view of the fact that the jury was permitted to consider this evidence, it is quite probable that they believed the pump was not defective without safety features if it was customary to sell the product without such equipment. Just to counter this erroneous concept required the giving of one of plaintiff's requested instructions or a modification thereof.
> [*Id.* 379]

Buell-Wilson v. Ford, *supra*, 141 Cal.App.4th at 545, held comparative data of SUV rollover rates inadmissible. "A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety." The court rejected Ford's contention that comparative rollover rates were relevant to the risk/benefit analysis, finding that it bore on none of the factors enumerated in *Barker*.

> The court properly excluded evidence whereby Ford sought to prove that the Explorer's rollover rate was comparable to other vehicles on the road. That was evidence that improperly sought to show that it met industry standards or custom for rollovers.
> [*Buell-Wilson*, 141 Cal.App.4th at 544-546]

In short, California decisions considering true industry custom or practice – that the defendant's product is comparable to or no worse than competitive models – uniformly reject such evidence.

Because exclusion of ESC from the accident Tundra resulted from no pertinent industry experience, offered no technical or safety benefit, and complied with no technical standard, Toyota proffered an exclusively "industry custom" defense – that all the other models on the road lacked ESC and hence all those trucks would be "defective" were Toyota found liable. Because this evidence did nothing to educate jurors as to *Barker* factors, or to inform their judgment as to the relative benefits of ESC versus non-ESC trucks, this case presents the purest possible form of the "industry standard" defense condemned by the *Grimshaw/ Titus* line. It was nothing but "our product is no worse than others."

5. THE PUBLIC POLICY UNDERLYING THE RISK-BENEFIT TEST DEMANDS EXCLUSION OF ARGUMENT AND EVIDENCE BASED ON INDUSTRY CUSTOM

As noted, the *Kim* Opinion conflates the industry custom evidence which was the subject of plaintiffs' motion *in limine* and the centerpiece of Toyota's argument with evidence of standards or experience which is actually probative of feasibility, cost effectiveness, and other ultimate facts legitimately considered under *Barker*. The examples given in the Opinion as grounds for "industry-standard" evidence do not require evidence of prevailing practice or custom in the industry, but rather go to issues that can and should be proven with evidence of specific instances in which the design alternative is either implemented or has proven impossible to implement. The consequence of the Opinion and the rather indefinite rule of admissibility which it proposes is to substantially undermine the public policies underlying product liability.

A. Industry Custom and Practice Inevitably Diverts Jury Attention from Weighing the Risks and Benefits Towards Due Care, Without Improving the Decisional Process

Underlying the *Grimshaw/Titus* rule is the considerations that true "industry standard" evidence is inherently prejudicial. Because it is indistinguishable from standard-of-care evidence, it guarantees that jurors will be distracted from the details of feasibility, cost and relative safety to a "reasonable manufacturer" standard, allowing defendants to successfully argue that the product must be safe because "everybody does it." "Every body does it" sheds no light on whether they *should* do it under *Barker* criteria.

This undermines the objective of improving product safety by allowing existing custom and practice to displace evaluation of the best feasible design, encouraging the *status quo* in safety. *Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 696.

Admitting industry custom under the nebulous claim that it ***might be*** a result of industry research or practical experience allows it to be placed before the jury anytime an expert is willing to testify that the industry norm is the result of experience and research, without enlightening the jury as to what the research or experience what might be, and whether it has any scientific or economic validity. It serves merely to imply that the defendant is a "reasonable manufacturer." Were there really research or development experience justifying the manufacturer's design choice, that research or result is what the jury needs, not a bare industry practice of ambiguous or no probative value with respect to *Barker* factors.

An industry "custom" of omitting ESC has no value in balancing risks and benefits where it is undisputed that every truck on the road with ESC is substantially safer in a loss-of-control situation than the same vehicle without ESC. No industry "experience" with vehicles lacking ESC could overcome the fact that industry research had proven its value and feasibility at such modest cost that it was scheduled to be made standard equipment.

To the degree that industry custom represents a conclusion as to what is an acceptable design, that conclusion has no more value than the data and precise experience justifying the custom. This is reflected in the rule that an expert opinion is no more valuable that the underlying reasoning and evidence. *Cates v California Gambling Control Comm'n* (2007) 154 Cal.App.4th 1302, 1309. The level of generality offered by custom does not assist the jury in weighing the merits

of the design, but substitutes custom for reason. Expert testimony to the unedifying conclusion that industry custom is a result of technical or safety experience, without supporting that opinion in detail, is of no value at all. *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110; *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 762; *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1235-1236 (expert opinion "based upon inferences flowing from . . . generalities" had no evidentiary value.)

As this case abundantly illustrates, where there is no financial or technical justification for failure to incorporate state-of-the-art safety technology, industry custom substitutes for a total absence of technical or cost justification under *Barker* factors, and thus preempts the weighing of risk and benefit in favor of a standard of practice. Because jurors are allowed to assume that the industry has competently weighed *Barker* factors, and that it knows feasibility, safety and cost/effectiveness better than anyone, they are induced to rely on industry practice and custom without themselves analyzing and balancing the design evidence.

B. Evidence of Industry Custom Undermines Burden-Shifting

The *Kim* approach to industry custom undermines the rule shifting the burden with respect to alternative design to manufacturers[7] in so far as it allows the manufacturer not merely to divert attention from technical and financial factors, but to meet its burden with evidence that "everybody does it." This eviscerates the

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[7] "[O]ne of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action." *Barker v. Lull Engineering*, *supra*, 20 Cal.3d at 426, 431; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 119-120; *CACI* 1204.

manufacturer's duty of showing that "given the inherent complexities of design, the benefits of the chosen design outweigh the dangers" (*Soule v. General Motors*, *supra*, 8 Cal.4th at 571-572, fn. 8), leaving plaintiff with the obligation to show that what is ostensibly a "standard" based on assumed research or experience is in fact unsound, the result of industry inertia, or just a habitual practice with a historical basis but no real scientific foundation.

Allowing evidence that nobody in the industry has adopted a device which unquestionably offers dramatic improvements in safety to serve as a proxy for evidence justifying in technical detail the failure to adopt that design, or *why* they should not be required to adopt that design, subverts the rationale for burden shifting, that the feasibility and cost of alternative designs are technical matters peculiarly within the manufacturer's knowledge and competence. (*Barker*, 20 Cal.3d at 431) Defendants no longer need offer technical justifications; instead plaintiffs must assume the burden of disproving the merits of industry practice and standards. If Toyota can carry its burden on alternative design (as it did) by no more that the claim that virtually all other trucks are equally dangerous, the case is no different from a negligence action, placing the burden on plaintiff to demonstrate the existence and benefits of design alternatives and to show that ***all manufacturers*** were unreasonable in not putting ESC on their trucks.

This is particularly pernicious given that "industry custom" evidence is no more than a hearsay conclusion as to risks and benefits, not an explanation. *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894-895 (expert may not introduce hearsay opinions in the guise of reasons for his opinion.) *Kim*'s "middle ground" thus allows and encourages manufacturers to offer evidence which will influence jurors without enlightening them, diminishing their burden of showing the lack of a safer alternative design.

C. Industry Custom Evidence Undermines the Manufacturer's Responsibility for Design Choices

Product liability law not only aims to diminish the burden of proof on the plaintiff based on the manufacturer's superior knowledge (*Barker*, Cal.3d at 431), but places on the manufacturer the duty to make design choices. This duty is particularly acute where a feature offering dramatic safety improvements – but as to which consumers are in no position to evaluate relative risks and benefits – is omitted from the standard product and offered as an option. As Toyota conceded, consumers really had no idea as to the safety advantages of ESC, and Toyota was not promoting the option precisely because there was minimal consumer interest. Yet this was an instance where "consumers cannot accurately rate the products for themselves." *American Home Products Corp. v. F.T.C.* (3rd Cir. 1982) 695 F.2d 681, 698. Underlying the risk-benefit test is the fact that users have no role in design decisions, and that product liability is intended to protect "injured persons who are powerless to protect themselves." *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.

Allowing industry custom evidence diminishes the responsibility of each manufacturer to assure the design best optimizing safety, feasibility and cost. Evidence of industry custom or practice which is indistinguishable from "standard of care evidence" not only guarantees that jurors' evaluation of the risk and benefits will be diverted away from the technical aspects of feasibility, cost, and relative safety to a "reasonable manufacturer" standard, but implies that the consumer is responsible for the choice of design because the commercial success of the less safe design demonstrates its adequacy. If the industry can successfully sell the truck without ESC, then the custom or practice becomes evidence of lack of defect simply because it has met with consumer acceptance. This was the

substance of Toyotas's argument to the jury. And it was the very issue addressed in *Titus v. Bethlehem Steel, supra*, 91 Cal.App.3d at 378-379, which held that it was essential to instruct the jury that the fact that it was customary to sell the product without optional safety equipment was not evidence of lack of defect.

6. THE *KIM* OPINION'S EFFORT TO BLUR THE DISTINCTION BETWEEN STRICT LIABILITY AND NEGLIGENCE IS UNNECESSARY AND COUNTER-PRODUCTIVE

The usual argument advanced for industry standard or custom evidence in strict liability cases is that "a product's compliance with trade standards is admissible evidence of the reasonableness of the product's current design in that such standards make it 'more probable' that 'all possible care was exercised in the preparation and marketing of the product.'" *Covell v. Bell Sports, Ins.* (3rd Cir. 2011) 651 F.3d 357, 366–67 (quoting *Fed.R.Evid.* 401 and *Rest.3rd Torts: Product Liability* §2(a)) – *i.e.* it reflects due care. This is also evident in the *Kim* Opinion's effort to justify such evidence by blurring the line between strict liability and negligence, and shifting the focus towards manufacture conduct rather than product performance. This Court, however, while allowing negligence-type factors such as knowability to serve as a limitation on liability, has steadfastly refused to allow due care concepts to intrude into the notion of "defect."

A. Industry Custom Evidence Is Incompatible with California's Determination that the General Concept of "Reasonableness" Detracts from the Efficacy of Product Liability Law

The *Kim* Opinion cites foreign authorities indicating that industry custom

may be admissible, summarized by *Rest 3d Torts: Products Liability* §2, comm. d: "industry practice may also be relevant as to whether the omission of an alternative design rendered the product not reasonably safe." (Opinion 15) Many foreign cases do indeed import "reasonableness" into their products law, in contrast with California, which firmly rejects "reasonably safe" as a criterion under the risk-benefit test. *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134 (rejecting "unreasonably dangerous" language); *Barker*, *supra*, 20 Cal.3d at 430-431.

As *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1515, observes, "*Cronin*'s holding – that a plaintiff need only prove a defect and need not also prove the defect made the product 'unreasonably dangerous' – was based on two reasons: (1) requiring a consumer to prove the 'defect' caused the product to be 'unreasonably dangerous' 'rings of negligence;' and (2) such a requirement would permit a manufacturer to escape liability simply because of the low expectations the ordinary consumer might have for the product."

The risk-benefit test defines the type of "reasonableness" contemplated by the risk-benefit test. Because feasibility, cost-effectiveness and safety are all balanced under *Barker*, the weighing process incorporates a defined rationality – just not that which equates "reasonable" with the conduct of other manufacturers. Rather, it posits a hypothetical manufacturer which has made the best choice for consumers among the available options based upon *Barker* criteria. The indiscriminate introduction of what others in the industry do as an alternative standard undercuts *Cronin*'s rejection of a ill-defined "reasonableness" based on objective design criteria.

B. The Suggestion That Negligence Concepts Can Be Liberally Imported into Products Cases Is Unjustified and Unsound

As discussed, there is no need to use industry custom in a risk-benefit case since, where custom is actually the result of research or valid design considerations or experience, that actual research or experience can be introduced to enlighten the jury in technical detail as to these factors without the risk of jurors improperly relying upon the industry norm.

The *Kim* Opinion attempts to justify the use of such evidence by decreeing a general trend away from the premise that products liability should exclude negligence notions, claiming that this Court "continue[s] to incorporate negligence concepts" into product liability doctrine. It cites *Daly v. General Motors* (1978) 20 Cal.3d 725, which applied comparative fault to products cases, and *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, allowing defendants in failure to warn cases to show that the particular risk was neither known nor knowable by application of available scientific knowledge.

> Following the Supreme Court's direction in this area, we depart from those cases stating that evidence of industry custom is irrelevant to the risk benefit analysis and always inadmissible in a strict products liability case involving the risk-benefit test . . . We conclude that evidence of industry custom may be relevant to the risk-benefit analysis and admissible in a strict products liability action, depending upon the nature of the evidence and the purpose for which it is offered. [Opinion 17]

Having announced this nebulous departure, the Opinion then gives

examples which *do not in fact illustrate industry custom*, but particular alternative design or technical experience, as described above.

The Opinion erodes the doctrinal basis of strict liability in suggesting that the heretofore strong prohibition against introduction of negligence-type evidence into strict liability cases is an antiquated approach, and that negligence concepts should be more freely allowed because they have been applied to issues like comparative fault and failure to warn.

Fault allocation under Proposition 51 does not mean that fault is a factor in evaluating design defect. Allocation is based on modification of the rule of joint and several liability and on comparative fault, not on any feature pertaining to product safety. It is a part of damages law, not products liability law.

Similarly, decisions holding that state of the art or "knowability" limits strict liability for failure to warn – to avoid making strict liability into absolute liability – do not support industry custom evidence. The requirement that a danger be known or knowable has nothing to do with fault or custom and practice in the industry, but is an element in the definition of "defect" for purposes of failure to warn. *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1239. It is a limitation flowing from the state of human knowledge so as to avoid imposing absolute liability. Put differently, scientific knowability is an ultimate fact on which failure to warn liability rests: "It is now settled that "knowledge or knowability [of the danger] is a component of strict liability for failure to warn." *Hufft v. Horowitz* (1992) 4 Cal.App.4th 8, 13.

Carlin v. Superior Court (1996) 13 Cal.4th 1104, while imposing a knowability limitation on prescription drugs, affirms that industry practice cannot

serve as a defense: "a manufacturer could not escape liability under strict liability principles merely because its failure to warn of a known or reasonably scientifically knowable risk conformed to an industry-wide practice of failing to provide warnings that constituted the standard of reasonable care." (*Id.* at 1351)

The proposition that exclusion of negligence concepts is "out-moded" implies that fault plays a role in determining design defect, eroding the core principle that defect rests on the objective characteristics of the product, not the conduct of the manufacturer. *Campbell v. General Motors*, *supra*, 32 Cal.3d 112, 127. "[A]lthough mixing negligence and strict liability concepts is often a game of semantics, the game has more than semantic impact – it breeds confusion and inevitably, bad law." Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn* (1991) 65 N.Y.U.L.Rev. 265, 278.

7. ARGUMENT AND ADMISSION OF INDUSTRY CUSTOM WAS REVERSIBLE ERROR

To appreciate the effect of the trial court's ruling, Toyota' argument quoted above needs to be seen in light of a trial strategy that placed industry custom before the jury at every opportunity, as with plaintiff's expert Yannis Papelis:

> With respect to peer vehicles and peer-vehicle manufacturers, are you aware of any other pickup truck in the '05 years as far as domestic producers that had ESC technology in pickup trucks?
> [RT 2706]
>
> Q And do you have any working knowledge or understanding of the Federal Motor Vehicle Safety Standards?

. . .

Q And you don't have any quarrel with the fact that the '05 tundra complied with and exceeded all the requirements in the FMVSS?
[RT 2705]

Q And do you know anything about when the Federal Motor Vehicle Safety Standards first addressed ESC?
. . . .
Q . . . Would it surprise you to know that Toyota was one of the earlier developers of ESC technology also known in Toyota as VSC?
[RT 2705]

It was elicited from Lobenstein:

Q. . . . Were any other trucks, pickup trucks, available in the market in 2005 with standard VSC?
A No. There Were None.
Q And to your knowledge was the Tundra the first that had it as an option?
A Yes. Tundra was the first full-size truck to have VSC as an option.
[RT 3403]

Toyota made this the centerpiece of its defense:

. . . we also know that no pickups had standard VSC. in 2005. We also know that no pickups had VSC in any way before that, before 2004. So we know that literally hundreds, if not thousands of pickups, Toyota, Ford, G.M.'s, and other types of vehicles without VSC have driven that stretch of road countless times over

the last 10 years.

But Toyota did what none of the other big three pickup makers did in 2005. They gave the customer the choice. They made it optional equipment. That black Ford F150 that Mr. Herzog has got there, if it's a 2005, it's defective. If you believe the plaintiffs' position in this case, that 2000 Ford F150 is defective because it doesn't have standard V.S.C. It doesn't even have optional V.S.C.. available. Toyota gave customers the choice.

But what the plaintiffs would have you do in this case is force standard V.S.C. on all vehicles back in 2004/2005 time period. Well, that's something the government has done after considerable study in model year 2013.

The plaintiffs would have you penalize Toyota for making it an option and then for putting it in standard six years ahead of when the government said it was required. That is not fair and that's not justice.
[RT 4507-4510]

While the *Kim* Opinion suggests that the Papelis's response was innocuous and uninformative (Opinion 20-21), the point is that the industry practice of omitting ESC from trucks in 2005 was dragged before the jury again and again.

A. Plaintiff's Motion *in Limine* Specifically Identified Industry Custom as Distinguished from Industry Standards and Technical Experience, and Correctly Sought its Exclusion

While the Court of Appeal criticized plaintiffs for failing to continually pose objections to particular evidence and argument, plaintiff's motion *in limine* clearly identified industry custom as the problem, without confusing it with technical standards or the evidence of specific industry experience which occupies the Opinion, thus affording the trial court a precise basis for formulating a ruling based on the irrelevance of industry custom. (App. 84) The Kims objected specifically to "any argument, evidence or testimony comparing the Toyota Tundra to competitor's vehicles and designs, and any evidence or argument that defendants' design choices were not defective under either consumer expectations or design defect tests for product liability because they were equivalent or superior to those of its competitors." (App. 84:26-28) They sought to preclude argument that "no other full size pickup truck had ESC standard in the 2005 model year" and that Toyota "did more in terms of making ESC available as an option then other manufacturers. (App. 86:10-15) See also Motion *in limine* 9, made on similar grounds. (App. 410-418, especially 411:1-5, 417:19-21)

Toyota's opposition, by contrast, clouded the issue by confusing industry custom with "standards," although without actually identifying any standard that called for omission of ESC (App. 240-249), asserting Toyota's right to introduce both custom and the unidentified industry "standards," noting that the federal regulation requiring ESC was phased in only in 2010. What Toyota argued primarily was compliance with FMVSS standards, which were not the subject of the motion. (RT 307:25-310:9) Plaintiffs made very clear that the objection was to custom ("nobody had ESC"), not to FMVSS standards. (RT 310:13-312:16) The

objection to industry custom was reasserted during the course of Carr's testimony. (RT 3943:28-3944:25)

Plaintiff's objections were right on target: they were directed at a defined body of evidence and made on grounds supporting a ruling on custom. *Evidence Code* §353; *People v. Carpenter* (2000) 21 Cal.4th 1016, 1053 (objections to evidence showing defendant was a "criminal" and "bad person" sufficient to preserve *Evidence Code* §1101 claim); *Elsner v. Uveges* (2004) 34 Cal.4th 915, 939 (*in limine* order excluding industry custom and practice at odds with Cal–OSHA provisions.)

The trial court did not deny the motion conditionally or with the admonition that the relevance of custom could not be pre-determined, but absolutely, only remarking that plaintiffs could offer a limiting instruction. But the problem was not with limiting instructions but with the admission of evidence which was irrelevant and prejudicial. Having rejected the central premise that industry custom was immaterial to risk-benefit and prejudicial, the court would have not have given any instruction that could have cured the introduction of industry custom evidence and argument.

B. No Possible Limiting Instruction Could have Cured the Trial Court Error or Anticipated A New Rule of Law

The Court of Appeal criticized plaintiffs for not offering a "limiting instruction" which plaintiffs had mentioned. (RT 311) The assumption that some limiting instruction could have redressed the admission of industry custom rests entirely on the premise that industry custom was relevant to *some* issues, and an instruction could have focused the jury on those issues. That premise rests on the

Opinion's confusion of industry custom, standards, experience, etc, discussed above – *i.e.*, on the notion that "custom" is sometimes relevant. That confusion was not found in plaintiff's motion.

Moreover, the Court of Appeal's criticism ignores the fact that Plaintiffs would have had to proffer a limiting instruction formulated according to the "middle ground" first announced in the *Kim* Opinion itself. Expecting plaintiffs to proffer instructions or move *in limine* to anticipate a "middle way" which no court had articulated is unreasonable and inconsistent with due process. *People v. Kitchens* (1956) 46 Cal.2d 260, 264, held that where the case was tried before a change in the law, "the prosecution was no more at fault for objecting to defendant's questions in this respect than defendant was for not objecting to the introduction of the evidence in the first instance. Fairness to both parties compels that they be given an opportunity to litigate the issue of the legality of the search and seizure on the basis of all of the facts."

Trial courts should not be burdened by objections to settled points of law, nor should parties be penalized for failing to object if settled law is overturned or entirely new law announced. "A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule . . . would be changed on appeal." *People v. Kitchens, supra,* 46 Cal.2d at 263.

See also *Robinson v. Heilman* (9th Cir. 1977) 563 F.2d 1304, 1307 ("No exception is required when it would not have produced any results in the trial court because a solid wall of Circuit authority then foreclosed the point."); *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 106–107, 92 S.Ct. 349, 355 (identifying factors

in deciding whether to apply decision retroactively: (1) whether case "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed," (2) whether, on balance, retroactive operation will further or retard the announced rule, and (3) whether retroactive application would impose substantial inequities); *Canada Dry Corp. v. Nehi Beverage Co., Inc. of Indianapolis* (7th Cir. 1983) 723 F.2d 512, 525 ("We do not think that Canada Dry should be required to anticipate a change in the law and object specifically on the ground that the burden of proof was misstated in order to preserve its right to argue the point now."); *People v. Nigri* (1965) 232 Cal.App.2d 348, 351; and *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1681, noting that a challenge is "usually waived unless timely raised in the trial court, [unless] the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."

The *Kim* Opinion overruled Second District decisions applying an absolute bar to "industry custom" evidence. It is unreasonable to expect that even where there are diametrically opposed decisions on a point of law, a party should offer instructions on "middle ways" whose contours cannot be known, which would be unsupported by the existing case authority, and which therefore would be rejected by a trial court itself bound to follow and not rewrite the law.

Nor was any further objection required where the trial court had definitively rejected the contention that custom was irrelevant and prejudicial, rendering further objection futile. *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 355-357.

C. Plaintiffs Properly Proposed Instructions Pertaining to Industry Custom

The Opinion claims that plaintiff's plaintiffs' special instructions 19, 20, 21 and 22 (App. 545-548) were insufficient in not anticipating the new rules announced therein, and argumentative in stating that "industry standard" is not a "defense." What plaintiffs offered was a correct statement of law.

> You must determine whether the Tundra's design is defective under the instructions I have given for the "risk-benefit" and "consumer expectations" requirement of California law.
>
> Since those legal standards govern the issue of product defect, it is no defense that the design of the Tundra complied with Federal Motor Vehicle Safety Standards, or that the design met the standards of the motor vehicle industry at the time the Tundra was produced, or that Toyota's competitors sold vehicles that were no safer than the Tundra, or had the same design defects, or lacked the same safety equipment. [App. 545]
>
> Evidence that the Tundra met industry design standards, or that Toyota's competitors produced vehicles which had the same design features or lacked the same safety equipment, does not demonstrate that the Tundra was safe for its intended use or that Toyota has met the "risk benefit" or "consumer expectations" requirements of California law. [App. 547]

The rule against industry standard evidence stated in *Buell-Wilson v. Ford Motor Company*, *supra*, 141 Cal.App.4th 525, expressed the point in terms of a "defense" to liability: "[A] manufacturer ***cannot defend*** a product liability action with evidence it met its industry's customs or standards on safety." (Emphasis added.) That was the state of the law under *Grimshaw, supra*, 119 Cal.App.3d 757, 803, *Foglio, supra*, 56 Cal.App.3d 470, 477, and other cases. Plaintiff's instructions followed the rule in *Grimshaw*:

> In *Foglio*, we held that an instruction permitting the jury in a strict products liability case to consider industry custom or practice in determining whether a design defect existed constituted error.
> [*Grimshaw*, 119 Cal.App.3d at 803]

It is not erroneous to assert that compliance with industry norms are not a defense. See *Buell-Wilson*, *supra*, 141 Cal.App.4th at 562-563, noting that 49 *U.S.C.* §30103(e), expressly provides that compliance with federal standards is *not* a defense to state common law products liability; *LaPlante v. Wellcraft Marine Corp.* (2001) 94 Cal.App.4th 282, 290; Haning, Flahavan, et al., *Cal. Practice Guide: Personal Injury* (Rutter 2012) ¶2:343 ("compliance with industry customs or standards is not a defense to strict product liability," citing *Grimshaw*.)

D. Reference to Toyota's Decision to Not to Make ESC Standard Because of Ford's Delay Was Not "Industry Custom" Evidence and Did Not Open the Door

The Opinion claims that the Kims acquiesced in the admissibility of industry custom evidence when they elicited from Toyota marketing official Sandy

Lobenstein that Toyota did not make ESC standard because of lack of customer interest. Lobenstein had recommended for 2005 to 2007 model years that ESC be made optional, a recommendation made without regard to the extent to which it enhanced safety, and despite recommendation by the engineering department that ESC immediately be made standard on the Tundra and Tacoma. (RT 3310-3313, 3314-3315, 3328)

This occurred only after the court allowed testimony as to such matters and allowed Toyota to make custom part of its defense. More importantly, the testimony elicited by Plaintiffs was not "industry custom" evidence since it had nothing to do with design criteria, but served only to establish that the decision not to make ESC standard was *unrelated to legitimate design considerations* and rested solely on marketing department's conclusion that since customers didn't understand ESC, they didn't want it. (RT 3337-3340, 3354-3356)

The proper rebuttal to this questioning was not "industry custom" evidence on the assumption that the prevailing practice was indicative of product safety, but evidence that the decision to delay ESC had a technical, cost or safety justification. But that evidence did not exist.

E. The Record Establishes the Prejudicial Effect of the Court's Rulings

The jury answered only one question; was the Tundra defective when it left the factory. (App. 554) Causation was thus not a factor, and no technical or financial justification for omission of ESC was offered by Toyota. The "no defect" verdict thus could only rest on Toyota's argument that the Tundra was no worse than every other passenger truck, and customers had not demanded ESC.

The prejudicial effect of custom was aggravated by the verdict form, drafted by Toyota, which posed the issue of "defect" as the first question. (App. 554) Toyota urged jurors to reach the "defect" issue without addressing question 2, the substantial factor issue (RT 4540-4542), and thus to decide without shifting the burden on alternative design to defendant.

This case presented a uniquely simple answer to the issue of "industry custom" evidence. Feasibility and cost/effectiveness were not in dispute. There was no history of industry attempts and failures to adopt ESC to trucks. And it was clear that ESC would be standard equipment on light trucks within a few years. This was not a case where product-related accident costs could be eliminated only by excessively sacrificing features that made the product useful and desirable. There was no justification for any evidence of industry custom. Admission of industry custom, with the omission of instructions that custom did not demonstrate the adequacy of the design, meant that jurors were misled as to an essential aspect of the risk-benefit test. *McLaughlin*, *supra*, 148 Cal.App.3d at 209; *Titus*, *supra*, 91 Cal.App.3d at 379.

Given that this court must assume the jury might have believed plaintiffs' evidence and, with proper instructions and rulings, might have decided in plaintiffs favor (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 773), and given a record establishing that a Tundra equipped with ESC was far safer in the accident circumstances than one without, it is unavoidable that Toyota's "industry custom defense" was the cause of the verdict. *Soule*, *supra*, 8 Cal.4th 548, 580-581.

8. CONCLUSION

That industry custom and practice has a pernicious effect on the risk-benefit test is no better illustrated than by the instant case, in which not one *Barker* factor supported the conclusion that the Tundra was not defective as regards stability control. In permitting such evidence, the Court of Appeal undermined the policies underlying products liability law without benefit to the decisional process or product safety.

The judgment should accordingly be reversed.

Respectfully Submitted,

Dated: June 3, 2016

LAW OFFICES OF IAN HERZOG

By:_____
Evan D. Marshall
Attorneys for Plaintiffs and Appellants
WILLIAM JAE KIM and HEE JOON KIM

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(4) of the California Rules of Court, the enclosed Opening Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 13,840 words, which is less than the 14,000 words permitted by Rule 8.204©. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: June 3, 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 June 3, 2016 I served the attached **OPENING 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
Nicolette Leilani Young Morgan Lewis and Bockius LLP One Market, Spear Street Tower San Francisco, CA 94105-1596	Atty for Respondents
Patrick Goode Rogan Patrick G. Rogan PC 20406 Seaboard Road Malibu, CA 90265	Atty for Respondents
Clerk for Hon. Raul A. Sahagan, Judge Los Angeles Superior Court 12720 Norwalk Blvd., Dept. D Norwalk, CA 90650	Trial Court
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 June 3, 2016.

_____

Linda Barber