Case No. S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM, et al.,

Plaintiffs and Appellants,

vs.

TOYOTA MOTOR CORPORATION, et al.,

Defendants and Respondents.

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

ANSWER TO PETITION FOR REVIEW

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I. ADDITIONAL ISSUES FOR REVIEW IF REVIEW IS GRANTED

If the Court grants review, it should also decide:

1. Whether plaintiffs' motion in limine preserved for appeal an objection to evidence or argument comparing the subject vehicle's design to other vehicles' designs, where (i) before decision on the motion, plaintiffs told the court what they were asking for was a limiting instruction if the evidence came in, were invited to propose a limiting instruction, but never did; (ii) before decision on the motion, plaintiffs used evidence of other vehicles' designs to assert that Toyota knew the subject vehicle needed a similar design, but did not include it because competitors did not have it; (iii) plaintiffs made that same assertion in opening statement; (iv) plaintiffs introduced evidence comparing the Tundra to other vehicles' and competitors' designs in their case-in-chief to try to support that assertion; (v) at trial plaintiffs never objected to or moved to strike evidence of other vehicles' or competitors' designs; and (vi) the evidence was relevant for reasons not addressed in plaintiffs' in limine motion?

2. Whether any error prejudiced plaintiffs.

II. FACTS

Plaintiffs' petition asserts supposed facts without citation, despite Rules of Court 8.504(a) and 8.204(a)(1). Plaintiffs rely on purported "facts" found nowhere in the Court of Appeal's Opinion, despite Rule of

Court 8.500(c)(2). They did not point any purported omissions or misstatements out in their petition for rehearing. Plaintiffs misstate many of the facts, including the description of the accident (Pet.-4)[1], and statistics on ESC (Pet.-6).

Under Rule 8.500(c)(2), we take the facts from the Court of Appeal opinion ("Opinion" or "Op."), supplemented by omitted facts pointed out in Toyota's petition for rehearing.

A. **<u>Slippery Road, Excessive Speed.</u>**

In April 2010, plaintiff Kim was driving his 2005 Toyota Tundra pickup on a mountain highway. Op.-2; RT-III-1536-37, IX-3604, IX-3661. Kim's front tires had low, barely-adequate tread. Op.-4; RT-IV-1857, IV-1901, IV-1960, V-2161.

The roadway was wet from rain, gravelly, and laden with debris. Op.-2, 5; RT-III-1561, III-1572, III-1602-03, III-1647, IX-3606-07. Edgar Fuentes, driving shortly after Kim, "found gravel, running water on the road"; his car "skidded kind of getting off the road"; at 45 mph he "started to slide." Op.-5; RT-IX-3648, IX-3655.

Kim descended a curve at 45-50 mph, which was 15-20 mph over both the speed advised by the sign even for uphill oncoming traffic and the

[1] "Pet." is plaintiffs' petition, "Op." is the Court of Appeal opinion, "RT" is the reporters' transcript, "AA" is the appellants' appendix, "RA" is the Respondents' Appendix, "DPH is Defendants' Petition for Rehearing in the Court of Appeal, "RB" is Toyota's respondents' brief in the Court of Appeal and "ARB" is appellants' reply brief in the Court of Appeal.

maximum comfortable speed. Op.-2, 5; RT-III-1547, III-1567, III-1612, IV-1838-39, IX-3616-20, IX-3661, IX-3689-90.

B. Loss of Control.

Kim lost control and drove over an embankment. Op.-3; RT-IX-3662, IX-3720-21. He suffered severe injuries. Op.-3; RT-VI-2459.

Kim told police he swerved to avoid a vehicle. Op.-2-3; RT-V-2106. He "steered to the right and that put [him] on the gravel ... to the right of the roadway." Op.-3; RT-X-3967. He then "steered to the left." Op.-3; RT-X-3970. He then "lost control," and went "off the road." Op.-3; RT-X-3973.

The CHP officer found that the "collision occurred when [Kim] attempted to negotiate a right-hand curve in the roadway at a speed in excess of a speed safe for the conditions present (wet roadway)." DPR-5; RT-IV-1804. "Due to his speed the rear of [Kim's vehicle] skidded towards the outside of the curve" and "[Kim] attempted to counter to correct by veering [his vehicle] hard to the left, at which point [Kim] lost control as [his vehicle] spun around in a counterclockwise motion and skidded off the west roadway edge ...." DPR-6; RT-IV-1804. The officer determined that Kim violated Vehicle Code 22350 (Basic Speed Law) and 22107 (improper turning). DPR-6; RT-IV-1805-06.

In the past decade, the curve where Kim crashed had only one other crash; that was on snow or ice. DPR-9; RT-IX-3610-11.

C. **Plaintiffs' Defect Theory: Lack of ESC.**

Plaintiffs claimed the Tundra should have had a then-emerging technology called electronic stability control ("ESC"), also known as vehicle stability control ("VSC"). Op.-3, 32. ESC helps the vehicle go where the driver aims the steering wheel. Op.-4; RT-IX-3756-57. If the vehicle turns more or less than the steering wheel input, ESC brakes a wheel to counteract the rotation. Op.-4; RT-V-2124-25, VI-2478-79.

Not even plaintiffs' experts testified that absence of ESC made the Tundra unsafe or defective. DPR-6. Plaintiffs' ESC expert, Gilbert, agreed he had never "said a word about defect" in the 2005 Tundra. DPR-6; RT-V-2207. He owned a Tundra, drove it "very hard" and had no maneuverability complaints. DPR-6; RT-V-2206-07. He disclaimed the idea that every vehicle without ESC is "dangerous." DPR-6, 8; RT-V-2231. Plaintiffs' reconstructionist admitted the Tundra's brakes and tires were well capable of handling forces on the vehicle. DPR-6; RT-IV-1995-96. Toyota's witnesses testified the Tundra "has features that will make it unlikely that this kind of crash will occur," and was safe with or without ESC. DPR-6-7; AA-IV-840; RT-VIII-3381, VIII-3410, IX-3780-81.

ESC added at least $300-$350 per vehicle. Op.-5; RT-VIII-3423-24. In surveys of over 12,000 full-sized pickup owners, less than 15% wanted ESC *even for free*. DPR-7; RT-VIII-3316, VIII-3350-51, VIII-3373. Less than 5% of Tundra customers chose the ESC option. Op.-22; DPR-7; RT-

VIII-3315.

In 2005, the Tundra was the only pickup that offered ESC; it was offered optionally. Op.-3, 5; RT-VIII-3355, VIII-3369-70. Offering new safety features optionally, before they become standard, is common. Op.-23, 24 n. 10; RT-VIII-3404.

D. The Weak Causation Evidence.

Plaintiffs' causation evidence was weak.

1. Papelis' Generic Simulations Showing It Was More Likely Than Not That ESC Would *Not* Prevent A Given Accident.

Plaintiffs relied on simulations done for another purpose by computer engineer Papelis. In his simulations and the National Highway Traffic Safety Administration's figures, ESC reduced "loss of control by approximately 28 or 30 percent." Op.-29; DPR-12; RT-VI-2477. Thus, ESC prevents *less than half* of losses of control. Papelis provided no sound reason to think this accident would fall in that minority. He nevertheless opined based on his simulations that "if this vehicle had ESC, we just wouldn't be here today." Op.-4; RT-VI-2487.

Both sides' experts agreed that such simulations are not a sound basis for a causation opinion. For a simulator to accurately represent a vehicle's ESC response, it must match the particular vehicle – including its suspension, size, weight, track width, electronic throttle control, sensors, ESC algorithm, and tires. DPR-13; RT-VI-2566-68, VI-2572-74. Papelis'

simulations were of a Ford SUV and Olds sedan with new tires – not Kim's Tundra with worn tires. DPR-13; RT-VI-2513, VI-2602. He did not simulate this curve with a 7% grade or water flowing on the roadway. DPR-13; RT-VI-2513, VI-2575. Papelis had never heard of anyone "relying on any generic simulation … to express an opinion regarding the outcome of a specific accident"; that was not his simulations' "intent." DPR-12-13; RT-VI-2559-60.

Plaintiffs' ESC expert Gilbert did not "like simulations" because computers cannot properly "capture every variable." DPR-13; RT-V-2252.

Toyota's human-factors expert testified that applying simulations "to one particular instance at one particular time" is "far beyond what the science will allow." DPR-13; RT-VIII-3445, VIII-3448.

2. Gilbert's Speculation About Four Steers and a Phantom Driver With "No Evidence."

Plaintiffs' ESC expert Gilbert also opined that ESC would have averted this accident. Op.-4; RT-V-2146. Gilbert, however, relied on incorrect assumptions. He assumed Kim swerved to avoid an encroaching SUV preceding the Archers, witnesses driving the opposite way. DPR-13; RT-III-1536, III-1590-91, V-2148-51. But plaintiffs' reconstructionist found no physical evidence of such a car, the Archers did not see another vehicle, and Kim saw only one oncoming vehicle – necessarily the Archers. DPR-13; RT-III-1554-1555, IV-1884-85; X-3964-3975.

Gilbert also assumed Kim steered *four* times: "right, then left, then right, then left." DPR-13; RT-V-2149. Both sides' reconstructionists, however, found "evidence only of two steers." DPR-13-14; RT-IX-3740; IV-1891. Kim only described two or three steers. Op. 2-3; DPR-13-14; RT-X-3967-70.

3. Toyota's Actual Testing of ESC.

Toyota's reconstructionist and ESC expert, Carr, tested two 2005 Tundras identical to Kim's vehicle and each other, one with ESC and one without. DPR-14; RT-IX-3758-61. He tested them on both a wet surface and one with water accumulated. DPR-14; RT-IX-3762. ESC did not make a difference in either scenario.

On the "wet" roadway, even without ESC, the Tundra would not spin even with extreme steering or brakes and even well above Kim's speed. DPR-14; RT-IX-3764-67. Even "turning the steering wheel and slamming on the brakes won't make it spin." DPR-7-8; RT-IX-3781.

On the surface with accumulated water, the Tundra spun with or without ESC. DPR-14. Without ESC, at speeds in the mid-40 mph, it "start[ed] to slide." DPR-7-8, 14; RT-IX-3769. At higher speeds, "you cannot control the vehicle" because "there isn't enough ... traction." DPR-7-8, 14; RT-IX-3770-71. To spin the Tundra, he had to travel 47 mph and make quick linked turns "right on top of one another." DPR-7-8, 14; RT-IX-3772-73.

With ESC, at 49 mph he went "across the center line." DPR-7-8, 14; RT-IX-3773; Exhibit 29, RA 001. When he turned the wheel, the vehicle did not initially respond; it then shot to the right when it slowed and regained traction. DPR-7-8, 14; RT-IX-3774. Then it kept "going to the right even though I turn the wheel … back to the left." DPR-7-8, 14; RT-IX-3775. He concluded, "there won't be enough traction with worn front tires, a slippery road, and that travel speed for V.S.C. to change your path quickly enough to keep you from going across the center." DPR-7-8, 14; RT-IX-3774. "[W]ith or without V.S.C. … you are still going to go off the cliff." Op.-5; RT-IX-3777.

In terms of this accident, when Kim turned to the left to reenter the road, ESC would have helped it go left. Op.-5; RT-IX-3757. Kim's vehicle would have gone left "extremely quickly," crossed the roadway and gone off the cliff in about one second. Op.-5; RT-IX-3757.

E. Trial-Court Proceedings

1. Plaintiffs' Motion in Limine.

Before trial, plaintiffs moved in limine to exclude any evidence comparing the Tundra's design to its competitors' and argument that the design was not defective because it was equivalent or superior to the competitors'. Op.-3-4; AA-I-84-92; RT-II-310-12. Before the court ruled, plaintiffs told the court that Toyota's SUVs all had ESC by 2001, SUVs are "like trucks," and Toyota did not put ESC on trucks "because their

competitors didn't do it." Op.-19; RT-II-310. Perhaps realizing that his own argument relied on evidence of other vehicles, counsel for plaintiffs said "what I'm asking for is that if and when this evidence is received, it be for a limiting instruction as to a reason why it's being offered." Op.-24; RT-II-311. The Court accordingly denied the motion in limine and invited him to propose a limiting instruction. Op.-24; RT-II-312. Plaintiffs never proposed one. Op.-24.

2. Trial

Plaintiffs told the jury in opening statement that Toyota made ESC standard on its SUVs, understood that SUVs and pickups have similar "controllability problems," intended to make ESC standard on 2005 trucks until it learned that Ford was not going to, and did not put ESC on its trucks because competitors weren't doing it. Op.-19; RT-II-1235-36, II-1238, II-1243.

To try to prove this, in their case-in-chief, plaintiffs introduced evidence that Toyota made ESC standard on all its SUVs by 2004. Op 5, 22; RT-VIII-3307, VIII-3338-39, VIII-3355-56. They also introduced evidence that Toyota's competitors did not have ESC on their pickups. Plaintiffs called Toyota Motor Sales' manager of product planning, Sandy Lobenstein, as an adverse witness, and asked him about Toyota's understanding of its competitor's design:

Q. *You understood*, did you not, that ... *Ford in year 2000*

announced that all SUV and pickups would have their version of E.S.C. by model year 2005; right?

A. I don't recall that announcement by Ford. I do know that at the time of this discussion, no other full-size pickup had V.S.C. except Tundra.

DPR-10; RT-VIII-3328.

Plaintiffs' counsel continued:

Q: Was there any surprise to you that the take rate on VSC was so low ...?

A: No other full-size pickup was offering VSC at the time, so –

Q: I know that's your mantra. *You want to talk about competitors. I'll ask you about that in just a second.*

[Sustained objection]

A: No one else had VSC at the time in a full-size truck, so we didn't have any expectations. We made the option available to consumers and we wanted to see what the demand was. So I don't believe that I was surprised at the take rate at the time.

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

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

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

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

Op.-21-22; RT-VIII-3338-40 (emphasis added). Plaintiffs' counsel kept at it:

> Q. ... *[B]ecause none of your competitors did* and V.S.C. wouldn't drive sales, you decided to make it optional rather than standard; is that right?
>
> [Sustained objection]
>
> Q.... Well, *your competitors weren't doing it;* right?
>
> A. Competitors on full-size pickups were not offering V.S.C.

Op.-21-22; RT-VIII-3356 (emphasis added).

Counsel did not object to his own questions, move to strike the answers, or request a limiting instruction. Op.-21-22.

After plaintiffs' counsel questioned Lobenstein, Toyota elicited that in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. Op.-23-24, RT-VIII-3403-04. The questions were asked in connection with showing why new safety technologies are phased in, first as an option and then as standard equipment. Op.-23-24, n.10; RT-VIII-3403-04. Plaintiffs' counsel did not object, move to strike, or request a limiting instruction. Op.-24.

3. Jury Instructions

The jury was instructed on the risk/benefit test for design defect under *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430. Under this test, it was told that plaintiffs had the burden to prove that defendants sold the Tundra, that plaintiffs were harmed, and that "the Tundra's design

was a substantial [factor] in causing harm to plaintiff." Op.-6; DPR-10; RT-X-4242. "If plaintiffs have proved these three facts, then your decision on this claim must be for plaintiffs unless defendants proved that the benefits of the Tundras design outweigh the risk of the design." DPR-10; RT-X-4242. In assessing whether Toyota carried its burden, the jury was instructed to consider the five *Barker* risk/benefit factors. Op.-6; DPR-10-11; RT-X-4242-43. Plaintiffs' counsel emphasized in closing that this instruction, including plaintiffs' initial burden to prove the design caused their harm, was "the definition of defective design." DPR-11; RT-X-4289-90.

Plaintiffs proposed an instruction on the consumer-expectation test for design defect. Op.-6; AA I-155. Plaintiffs conceded that "consumers don't have any idea with regard to what is electronic-stability control." DPR-11; RT-X-4027, X-4032; pp. 27-28 below. After the evidence was in, the court refused the instruction. Op.-6; RT-X-4201.

4. Verdict and Judgment.

The jury deliberated only three hours, unanimously finding that the Tundra contained no design defect. Op.-6; DPR-14-15; RT-XI-4578, XI-4580-84; AA-III-550.

F. <u>Appeal</u>

The Court of Appeal affirmed the judgment.

G. Petitions for Rehearing

Both sides petitioned for rehearing, though plaintiffs neglect to mention it. *See* Cal. R. Ct. 8.504(b)(3). Defendants' petition for rehearing ("DPR") agreed with the outcome, but pointed out omissions and perceived misstatements to preserve them under Rule of Court 8.500(c)(2). Besides correcting an error in counsel listing, both petitions were denied.

III. REVIEW IS UNWARRANTED

A. Admissibility of Industry-Standard Evidence Does Not Warrant Review, And This Case Would Be A Poor Vehicle.

Plaintiffs try to interest the Court in a supposed conflict over admissibility of "industry standards or practices" in a risk/benefit case. Pet.-1, 8-17. The conflict is illusory, and is not presented by this case.

Plaintiffs' petition argues that evidence that competitors used a similar design – what plaintiffs call "industry standard" evidence – is not relevant or admissible to show that a product is not defective. The Opinion creates no conflict on that issue. It *agrees* that the evidence was not admissible for that purpose. Op.-19. It holds the evidence relevant and admissible for unremarkable reasons that plaintiffs mostly ignore, create no conflict, and are of no general interest.

1. The Opinion Affirmed Admission Of Evidence That Other Pickups Lacked ESC For Unremarkable, Case-Specific Reasons.

The Opinion held that evidence that no other 2005 pickup had ESC

was *not* relevant or admissible to show that the Tundra was not defective because its design was similar to other vehicles':

> Toyota also argues that evidence that the pickup trucks of its competitors did not have ESC was relevant ... because "[i]f the Tundra was defective because it lacked ESC, then every other pickup in 2005 was defective," which "made [the Kims'] claims of danger less credible." This is actually a prime example of when industry custom and practice *would not be admissible. The fact that all of the manufacturers in an industry make the product the same way is not relevant because it does not tend to prove the product is not dangerous: All manufacturers may be producing an unsafe product.*

Op.-19.[2]

The Opinion affirmed admission for unremarkable reasons plaintiffs mostly do not address. It held that "evidence about pickup trucks manufactured by [Toyota's] competitors was relevant to rebut some of the Kims' arguments." Op.-19. There was nothing radical about that. "Rebuttal evidence is relevant and thus admissible if it 'tend[s] to disprove a fact of consequence on which the [adversary] has introduced evidence.'" *People v. Nunez* (2013) 57 Cal.4th 1, 27 (quoting *People v. Clark* (2011) 52 Cal.4th 856, 936). That is this case. Plaintiffs argued that Toyota made ESC standard on SUVs, supposedly understood pickups were like SUVs,

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[2] The Court of Appeal's reasoning that all manufacturers may be producing an unsafe product overlooks the evidence. Plaintiffs' design expert did *not* think all vehicles without ESC were dangerous. *See* DPT-8; RT-V-2231. Regardless, this passage makes clear that the published opinion does *not* authorize trial courts to admit evidence that other products are made the same way to show that defendant's product is not dangerous.

therefore understood pickups needed ESC, but did not make ESC standard because its competitors didn't. Pp. 8-11 above. That vehicles *even more similar to the Tundra* (other pickups) did not have ESC tended to rebut that inference.

The Opinion also explained that most of the evidence about competing vehicles was elicited by *plaintiffs* and was relevant to *plaintiffs'* theory of the case. Op.-21-23. It held that plaintiffs' questions to Lobenstein, eliciting that no other full-size pickup had ESC and asking whether Toyota did not include ESC because competitors were not offering it (Part II.E.2 above), "were proper and sought information that was relevant" to plaintiffs' claim; because plaintiffs' questions "were designed to show that Toyota was making VSC optional on its trucks, rather than standard as the engineers had suggested, because Toyota's competitors were not making VSC standard" and to try to "show the jury that Toyota was ignoring the advice of its engineers and putting profit over safety." Op.- 22-23. They elicited this evidence before Toyota introduced it. *See* RT-VIII-3328, VIII-3338-40, 3356 (plaintiffs' questioning), RT-VIII-3403-04 (Toyota's questioning).

The questions and answers about competitors elicited by Toyota simply brought out again that no other 2005 pickup had ESC standard and the Tundra was the first to offer it optionally. Op.-23. The Opinion suggested they were relevant for an additional reason. Toyota elicited that

in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. Op.-23-24. The questions were asked in connection with showing why new safety technologies are phased in, first as an option and then as standard equipment. Op.-24. The Opinion explained that the advantages of such phase-in are relevant to the risk/benefit analysis. Op.-24 n.10. Plaintiffs' petition does not dispute that.

The Opinion also made clear that plaintiffs had not preserved any objections. Plaintiffs did not object to their own questions or Toyota's questions, move to strike the answers, or request a limiting instruction. Op.-22-24. Though their motion in limine had claimed that comparison to other vehicles was flatly inadmissible (AA-87), at the hearing on their motion they told the judge "what I'm asking for" was a limiting instruction; the judge invited them to propose one; they never did. Pp. 8-9 above. Plaintiffs' failure to object or request a limiting instruction precluded their claims of error: "In the absence of a specific objection or a request for a limiting instruction, we cannot conclude that the court erred by admitting Lobenstein's testimony." Op.-24; *see* Op.-24-25 (similar).

2. The Opinion's Reasons For Finding No Error Do Not Conflict With Other Opinions.

These reasons for finding no error do not conflict with the cases cited in plaintiffs' petition.

Plaintiffs incorrectly say "most cases have strictly prohibited

'industry standard' evidence in products cases." Pet.-10. Not so. Plaintiffs' cases either are off point or hold that similarity to competitors' designs does not indicate that defendant's product is not defective. They do not hold such evidence categorically inadmissible for all purposes.

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 803 affirmed denial of a jury instruction allowing consideration of the extent to which defendant's design conformed to the industry norm, on the ground that industry custom is not a *Barker* factor and is an inappropriate consideration. It did not address whether the evidence was admissible, let alone for another purpose.[3] *Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 376-79 reversed denial of an instruction defining "product defect." Where the only use of industry-custom evidence was to show that defendant's product was not defective because it was like other products, the opinion said industry-custom evidence would be inadmissible in a new trial. It did not address whether the evidence was admissible for another purpose. *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477 reversed a jury instruction authorizing consideration of defendant's reasonable care. It did not address whether the jury can consider industry custom or whether the evidence was admissible. *Heap v. General Motors*

[3] Separately, *Grimshaw* held that the trial court did not abuse its discretion under section 352 in excluding statistical evidence that the vehicle there was no more dangerous than other vehicles. It held statistics unreliable, not irrelevant. 119 Cal.App.3d at 792. This case presents no reliability issue.

Corp. (1977) 66 Cal.App.3d 824, 831 stated that deviation from industry norm is not necessarily the test for defect. It did not address admissibility of evidence. *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 208-10 held that the jury should have been instructed that compliance with government specifications was not a defense. It did not suggest that compliance was inadmissible, and in fact the evidence there was admitted without objection. *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 543-46 held that the trial court did not abuse its discretion in excluding evidence that defendant's vehicle's rollover rates were superior to peer vehicles, on the ground that it "improperly sought to show that it met industry standards or custom for rollovers" and that the statistics were unreliable.

The Opinion *agreed* that other-vehicle evidence was inadmissible to show that the Tundra was not defective because other products were similar. Op.-19. It affirmed admission because of the evidence's relevance to other issues and plaintiffs' failure to object. Part III.A.1 above. That was correct. "The rule is well settled that if evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose." *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal. 2d 655, 665-66; *People v. Bryant* (2014) 60 Cal.4th 335, 405, as modified on denial of reh'g (Oct. 1, 2014), *cert. denied* (2015) 135 S. Ct. 1841; Evid. Code § 351 ("Except as provided by statute, all relevant evidence is

admissible"). Such evidence is limited to its proper scope by requesting a limiting instruction. Evid. Code § 355 ("When evidence is admissible ... for one purpose and is inadmissible ... for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."). The trial judge has no duty to give a limiting instruction sua sponte. *See* Evid. Code § 355 (instruction "upon request"); *Daggett,* 48 Cal.2d at 665-66. Plaintiffs never proposed a limiting instruction. Op.-22, 24. Similarly, they did not object to the closing argument they quote (Pet. 8-10), which also is not mentioned in the Opinion. *See* Cal. R. Ct. 8.500(c)(2).

Plaintiffs' parade of horribles is consequently misplaced. The Opinion does not mean "jurors are allowed to assume that the industry has competently weighed the *Barker* factors," "are induced to rely on industry practice and custom," or receive other manufacturers' "hearsay conclusion as to risk and benefits." Pet.-16. The Opinion holds the evidence *inadmissible* and *irrelevant* for such purposes: "The fact that all of the manufacturers in an industry make the product the same way is not relevant because it does not tend to prove the product is not dangerous...." Op.-19.

Plaintiffs have also foresworn any quarrel with the cases on the other side of their supposed conflict. Plaintiffs note that *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403 allowed evidence of industry technical standards. Pet.-11. Plaintiffs conceded that this was