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

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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