

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.

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

SUPREME COURT
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I. INTRODUCTION

Plaintiff William Kim – driving too fast on worn tires – crashed his 2005 Toyota Tundra pickup on a steep, wet, gravelly mountain curve. Kim asserts his Tundra was defectively-designed because it did not have electronic stability control (“ESC” or “VSC”), a then-emerging technology offered optionally on the Tundra and not yet offered by other pickup manufacturers.

The jury found no defect, with good reason. Plaintiffs’ ESC expert refused to say the Tundra was defective. He had no problems with the Tundra’s controllability and denied that vehicles without ESC were necessarily dangerous. Plaintiffs’ accident reconstructionist testified the Tundra’s tires and brakes were well capable of handling forces on the vehicle. Toyota’s experts testified the Tundra was safe with or without ESC. They backed that testimony with tests showing it was very difficult to make the Tundra spin even on wet pavement, explaining how the vehicle’s features made it difficult to spin. Toyota’s experts ran tests under Kim’s accident conditions showing he would have crashed even with ESC. Plaintiffs ran no tests. Their causation experts’ theories relied on speculation about an additional vehicle that no one saw and plaintiffs’ own reconstructionist denied existed, and on admittedly unrepresentative computer simulations.

Plaintiffs seek to overturn the verdict by claiming it was wrongly

influenced by industry-custom evidence. That effort faces three insurmountable hurdles.

First, plaintiffs did not preserve their objection. The evidence at issue here is testimony that no other full-sized pickup offered ESC. Plaintiffs acknowledged in the trial court that the evidence might be admissible depending on its purpose. They said what they were asking for was a limiting instruction, were invited to propose one, but never did. At trial, plaintiffs themselves introduced nearly all the evidence they now challenge (before Toyota introduced any). Their motion in limine to exclude the evidence failed to deal with all of the reasons the evidence was relevant at trial, and they did not renew their objection at trial. On all three counts, they forfeited any claim of error.

Second, the evidence was admissible. Plaintiffs claim the evidence was irrelevant and prejudicial. But they never come to grips with the relevant Evidence Code provisions or the trial court's broad discretion over relevance and prejudice. The evidence easily satisfies Evidence Code section 210's¹ definition of relevance. For example, the Court of Appeal explained that plaintiffs introduced it as relevant to their theory that Toyota did not install ESC *because competitors did not*. The evidence that competitors did not install ESC was obviously relevant to this theory. As discussed below, it was also relevant to every stage of the risk/benefit

¹ All further undesignated references are to the Evidence Code

inquiry – causation, the factors governing risks and benefits, and the decision whether the design embodied excessive preventable danger. Because relevant, the evidence was admissible except as provided by statute. § 351. Plaintiffs identify no statute making it inadmissible.

Plaintiffs' contrary arguments are unpersuasive. They assert such evidence should be inadmissible under public policy, but section 351 abolishes such non-statutory grounds to exclude evidence. Their purported policy arguments are, moreover, unpersuasive. Plaintiffs also cite a handful of cases saying industry-custom evidence is inadmissible. Most of those cases have no reasoning. None address the Evidence Code provisions governing relevance and admissibility, have this case's record establishing relevance, or identify any statutory basis to exclude the evidence.

Last, any claimed error is harmless. The other-pickups-did-not-have-ESC evidence was a small fragment of a large trial. It paled next to the other evidence showing the Tundra was not defective and absence of ESC did not cause this accident. The case was not close, and the jury verdict was quick and unanimous.

The Court should affirm.

II. FACTS

A. The Accident.

In April 2010, Kim was driving his 2005 Toyota Tundra pickup on a

narrow mountain highway. RT-III-1536-37,² IX-3604, IX-3661. Kim's tires had low tread. RT-IV-1857, IV-1960-61, V-2161. The roadway was wet, gravelly, and laden with debris. RT-III-1561, III-1572, III-1577, III-1602-03, III-1647, V-2107, IX-3606-07, IX-3648, IX-3655.

Kim descended a curve at 45-50 mph, 15-20 mph over the safe speed even for dry conditions. RT-III-1547, III-1567, III-1612, IV-1838-39, IX-3616-20, IX-3661, IX-3689-90. He lost control and drove over an embankment. RT-IX-3661-62, IX-3720-21.

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

The CHP officer found the "collision occurred when [Kim] attempted to negotiate a right-hand curve ... at a speed in excess of a speed safe for the conditions" RT-IV-1804. "Due to his speed the rear of [Kim's vehicle] skidded towards the outside of the curve" and "[Kim] attempted ... 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" RT-IV-1804. The

² We abbreviate the Reporter's Transcript "RT-X-Y"; X is the volume and Y the page. The Appellant's Appendix is "AA," the Respondent's Appendix "RA," the Court of Appeal Opinion "Op." and plaintiffs' Opening Brief "OB."

officer determined that Kim violated Vehicle Code 22350 (Basic Speed Law) and 22107 (improper turning). RT-IV-1805-06, IV-1809.

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

B. Plaintiffs' Defect Theory.

Plaintiffs claimed the Tundra should have had ESC. ESC helps a vehicle go where the driver aims the steering wheel. RT-IX-3756-57. If the vehicle turns more or less than the steering-wheel input, ESC brakes a wheel to counteract the vehicle's rotation. RT-V-2124-25, VI-2478-79.

C. Trial.

1. Plaintiffs' Motion In Limine.

Plaintiffs moved in limine to exclude "any" evidence or argument "comparing the Toyota Tundra to competitor's [sic] vehicles and designs," or "that defendants' design choices were not defective ... because they were equivalent or superior to those of its competitors." AA-I-84-92; RT-II-310-12. The stated grounds were relevance and section 352. AA-I-85.

Toyota's counsel argued the evidence was relevant to both risk/benefit and the consumer-expectation test. RT-II-308-09; AA-I-242-45.

Plaintiffs acknowledged that admissibility would depend on the purpose for which the evidence was offered. Op.-19, 24. Indeed, plaintiffs said the jury could "t[ake] into consideration under the risk benefit doctrine

that they [Toyota] made a calculation not to take the risk and to ignore the benefit because their competitors didn't do it." RT-II-310-11. Plaintiffs also told the court Toyota's sport-utility vehicles (SUVs) all had ESC, SUVs are "like trucks," and Toyota did not put ESC on trucks "because their competitors didn't" RT-II-310-11.

Having acknowledged the evidence might be relevant, counsel for plaintiffs said what he wanted was a limiting instruction that it was offered to explain Toyota's motivation under the risk/benefit doctrine: "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 is to explain why they did or didn't do what they did under the risk benefit doctrine." RT-II-311.

The court accordingly denied the motion in limine, inviting plaintiffs to propose a limiting instruction. RT-II-312. Plaintiffs never proposed one.

2. Evidence That Other Pickups Did Not Have ESC.

At trial, plaintiffs' theme was that Toyota knew pickups needed ESC, but didn't make it standard because competitors didn't.

Opening statement: Plaintiffs told the jury Toyota's competitors did not install ESC: "Their competition wasn't doing it So why should they do it?" RT-II-1240. They said Toyota made ESC standard on SUVs, understood that SUVs and pickups have similar "controllability problems," intended to make ESC standard on 2005 trucks until it learned Ford was not going to, and did not put ESC on its trucks because "competitors" weren't.

RT-II-1235-36, II-1243.

Evidence: Plaintiffs called Toyota Motor Sales' manager of product planning, Sandy Lobenstein, as an adverse witness. They introduced evidence that Toyota made ESC standard on all SUVs by 2004. RT-VIII-3308, VIII-3355-56.

Plaintiffs asked Lobenstein about competitors' designs, repeatedly eliciting that competitors did not have ESC:

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.

RT-VIII-3328.

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

A: No other full-size pickup was offering V.S.C 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.*

...

A: No one else had V.S.C 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 V.S.C, you didn't want to lose your competitive advantage by incurring the extra cost for V.S.C* 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 V.S.C 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.

RT-VIII-3338-39 (emphases added; objections omitted).

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.

RT-VIII-3356 (emphases added). Plaintiffs' counsel did not object to his own questions, move to strike, or request a limiting instruction.

After plaintiffs' counsel questioned Lobenstein, Toyota asked him two questions that reiterated what plaintiffs had already elicited: in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. RT-VIII-3403. Plaintiffs' counsel made no objection relevant here, *see* § 353(a); he did not move to strike, or request a limiting instruction. These questions were asked in connection with showing why new safety technologies are phased in. RT-VIII-3403-06.

Plaintiffs wrongly suggest Toyota elicited industry-custom evidence from plaintiffs' expert Papelis. OB-40-41. The Court of Appeal found plaintiffs' argument on this point "is not based on a fair representation of the record." Op.-20. As the Court of Appeal explained, "Toyota's questioning of Papelis did not elicit any testimony about Toyota's competitors or industry custom and practice because there were no substantive answers to counsel's questions," a fact plaintiffs' brief glossed over by using ellipses to skip the answers. Op.-21. The only question even arguably related to industry custom was a single, non-leading question as to whether Papelis knew of any domestic pickup producers with ESC in 2005. RT-VII-2706. Papelis said his knowledge was irrelevant. RT-VII-2706.

Plaintiffs complain he was asked if it would surprise him that Toyota was an earlier developer of ESC. OB-41. He said it would not. RT-VII-2705. The other questions concern government standards, which plaintiffs had conceded “would be admissible.” RT-II-304. The jury was instructed that lawyers’ questions are not evidence (RT-X-4229), and no evidence about industry custom came in as a result of the questions to Papelis. Op.-21.

3. Holes In Plaintiffs’ Defect Case.

Plaintiffs incorrectly assert “[t]he defense case was devoted almost entirely to causation, not defect,” and that virtually Toyota’s only defense on defect was that other pickups also did not have ESC. OB-11. Nothing could be further from the truth.

Plaintiffs’ ESC expert, Gilbert, told the jury he had never “said a word about defect.” RT-V-2207. He owned a first-generation Tundra (the same series as Kim’s) drove it “very hard” and had “no problems” with maneuverability or anything else. RT-V-2206-07. Respecting controllability, it “performed at least equally well with other trucks [he has] owned.” RT-V-2207. He did *not* think every vehicle without V.S.C. was dangerous. RT-V-2231.

Plaintiffs’ reconstructionist, Meyer, testified the Tundra’s brakes and tires were “well capable” of handling forces on the vehicle. RT-IV-1995-96.

At least three Toyota witnesses testified, and provided compelling

evidence, that the Tundra was safe with or without ESC. AA-IV-840 (Nagae); RT-VIII-3381, VIII-3410 (Lobenstein), IX-3780-81 (Carr). Carr opined: “[The Tundra] does not possess problems by design that make it unsafe. In fact, it has features that will make it unlikely that this kind of crash will occur if you use them.” RT IX-3780. These include antilock brakes and understeer “purposely there to make it unlikely that you can make it spin.” RT-VIII-3401-02, IX-3780-81. In tests, even “[t]urning the steering wheel and slamming on the brakes won’t make it spin,” even on wet pavement. RT-IX-3781. It’s a “very effective design” to prevent spins, and you “have to do unusual things” to lose control. RT-IX-3781.

Meanwhile, ESC had significant downsides. ESC added at least \$300-\$350 per vehicle. RT-VIII-3423-24. Market research showed pickup buyers are “really price sensitive,” so “[w]e couldn’t price ourselves outside of the competitors.” RT-VIII-3390-91, VIII-3406. Even Kim bought the Tundra because it was the “cheapest purchase,” a “low price,” and “discounted.” RA-006-007. And consumers did not want ESC. In large independent surveys of thousands of pickup owners, less than 15% wanted ESC *even for free*. RT-VIII-3316, VIII-3350-51. In 2005, when the Tundra offered ESC optionally, less than 5% of Tundra customers chose it. RT-VIII-3315, VIII-3355, VIII-3370.

Offering new safety features optionally, before they become standard, is common. RT-VIII-3403-04. Such phase-ins promote

consumer acceptance. RT-VIII-3375. Indeed, “all manufacturers” phase in improvements. RT-VIII-3374. Typically new features, including safety features, start at upper-level models where customers are less price-sensitive, and are phased in on lower-end models as customers learn about them and they become more popular. RT-VIII-3375. The federal regulations requiring ESC were themselves phased in. 49 C.F.R. § 571.126 S3, S8 (ESC required on 55% of major manufacturers’ Model Year 2009 cars and trucks, 75% for 2010 and so on, up to 100% of 2012 vehicles). Even today, “new safety technologies ... are being implemented and phased into Toyota and other vehicles.” RT-VIII-3403-04.

4. Holes In Plaintiffs’ Causation Case.

Plaintiffs’ causation case was even less persuasive.

a. Papelis’ Generic Simulations Showing ESC Does *Not* Prevent Most Losses Of Control.

Plaintiffs’ first causation expert was computer engineer Papelis. He said his simulations of ESC on other vehicles and National Highway Traffic Safety Administration figures suggested ESC reduced “loss of control by approximately 28 or 30 percent.” RT-VI-2477. In other words, ESC prevents only a minority of losses of control.

Based on his simulations of vehicles with ESC, he opined “if this vehicle had E.S.C., we just wouldn’t be here today.” RT-VI-2487. But for a simulation to be accurate, it must match the “particular vehicle,”

including suspension, size, weight, ESC algorithm, tires, and other characteristics. RT-VI-2566-68, VI-2572-74 (Papelis). Papelis did not simulate ESC in a Tundra, let alone with worn tires; he simulated ESC in an SUV and in a sedan with new tires. RT-VI-2466-71, VI-2480-81, VI-2513, VI-2564, VI-2602. He did not simulate the steep and wet roadway. RT-VI-2513, VI-2575. He never intended his simulations to predict the outcome of a specific accident, and had never heard of anyone relying on such generic simulations for a causation opinion. RT-VI-2559-60. Plaintiffs' ESC expert Gilbert and Toyota's human-factors expert Young agreed such simulations were not a valid way to determine causation. RT-V-2252, VIII-3445, VIII-3448.

b. Gilbert's Mistaken Assumptions.

Gilbert said ESC would have averted this accident. RT-V-2146. He relied on incorrect assumptions rebuffed by both sides' witnesses. He assumed Kim swerved to avoid an encroaching SUV that preceded the Archers (witnesses who had been driving an oncoming vehicle and witnessed the accident). RT-V-2148-51. But plaintiffs' reconstructionist found no physical evidence of such an additional vehicle, the Archers did not see one, and Kim saw only one oncoming vehicle – necessarily the Archers. RT-III-1554-1555, IV-1884-85, X-3964-3975. Gilbert's causation opinion also assumed Kim steered right and left four times. RT-V-2149-50. But Kim only described 2-3 steers. RT-X-3967-71. Neither

side's reconstructionist found evidence of four steers. RT-IX-3740, IV-1890-91.

c. **Toyota's Actual Testing Of ESC.**

In contrast to Papelis' generic computer simulations of ESC on other vehicles, Toyota's reconstructionist and ESC expert, Carr, actually tested two 2005 Tundras, one with ESC and one without. RT-IX-3758-61. The vehicles' tires and other characteristics matched Kim's vehicle. RT-IX-3759-61. He "recreated the curvature of the roadway" where Kim crashed. RT-IX-3763. He drove the Tundras on both a wet surface and one with accumulated water. RT-IX-3762. In these actual tests, ESC did not make a difference.

On the wet roadway, the Tundra without ESC would not spin, even with extreme steering and well above Kim's speed. RT-IX-3764-67, IX-3781.

On the roadway with accumulated water, he lost control at 49 mph even with ESC. RT-IX-3773; RA-001 (Exh.29). When he turned the wheel, the vehicle did not initially respond; then it shot to the right when it regained traction; then it kept "going to the right even though I turn the wheel ... back to the left." RT-IX-3774-75.

These results meant "with or without V.S.C. ... you are still going to go off the cliff with those same travel speeds and with those same steering choices." RT-IX-3777.

As Carr explained, ESC responds to the driver's steering inputs. RT-IX-3751, IX-3756-61. When Kim turned to the left to reenter the road, ESC would have helped him go left. ESC "can't change [Kim's] command It will obey Mr. Kim's command to turn to the left." RT-IX-3757. Given Kim's speed, the Tundra would then have gone off the cliff in about one second. RT-IX-3757-58.

Trying to buttress their causation case, plaintiffs cite testimony from Toyota's PMK on stability control, Nagae, regarding ESC's generic effectiveness and the decision to make it optional. OB-11. Nagae, however, knew nothing about Kim's accident and his testimony does not concern causation.

5. **Instructions And Verdict Form.**

Before trial, plaintiffs requested a jury instruction on the consumer-expectation test for design defect, in addition to the risk/benefit test. AA-I-155. Toyota responded, *inter alia*, "there is no consumer expectation regarding [ESC] essentially because ... [ESC] was in no trucks at the time." RT-X-4022. The court refused the instruction after the evidence closed. RT-X-4201.

The jury was instructed on the risk/benefit theory of design defect. The instructions stated that the jury "must" find for plaintiffs if plaintiffs carried their burden of proof and Toyota did not prove the design's benefits outweighed its risks, enumerating the *Barker* risk/benefit factors. RT-X-

4242-43.

Plaintiffs requested four special instructions saying it was “no defense” that the Tundra complied with industry standards or federal standards, or that such compliance did not satisfy Toyota’s asserted duty to design a safe product. AA-III-545-48. The trial court denied both sides’ special instructions as argumentative. RT-X-4218.

Plaintiffs’ brief now claims the verdict form put questions in the wrong order, with defect first. OB-18, 50. Plaintiffs’ counsel told the trial court, however, he was “good with” the form and had “no objection” to it. RT-X-4202-03.

6. Closing.

Plaintiffs wrongly claim the “core” of Toyota’s defense was that other pickups did not have ESC. They quote material from Toyota’s closing that in total comprises about one page of Toyota’s 81-page closing argument. OB-2, 41-42; p. 60 below. Other pickups were not the focus of Toyota’s closing. Toyota relied on the extensive evidence refuting defect and causation, emphasizing the refusal of plaintiffs’ own witness to say the Tundra was defective.

Toyota emphasized that “the 2005 Tundra is a safe, nondefective vehicle with or without V.S.C.” RT-X-4308. Toyota argued there was no evidence “that the 2005 Tundra is somehow unsafe without V.S.C.” RT-X-4308. It emphasized that even plaintiffs’ experts said the Tundra was not

defective and Gilbert agreed it was not. “[I]f we look at the very first question of the court’s charge, ‘did the Toyota Tundra contain a design defect when it left Toyota’s possession,’ even Mr. Gilbert agrees it’s not defective. You didn’t hear defect come out of his mouth one time on the stand in the context of the Tundra.” RT-X-4338. “Mr. Gilbert in a moment of candor said in his answer about whether he thought there were problems with the Tundra ... he said, ‘I didn’t. In fact, I haven’t said a word about defect to anybody.’” RT-XI-4503. “And that I think is a word that you have not heard other than in this context in this trial from any of plaintiffs’ witnesses.... [Gilbert] thought it should have V.S.C., but he did not equate that to a defect. Nor did Dr. Papis. He never said it was a defect nor is he qualified to say that.” RT-XI-4503. “[T]he bottom line is you’ve heard no evidence in this case that there was any sort of defect, design or otherwise, in the Toyota Tundra.” RT-XI-4503. *See also* RT-X-4329 (plaintiffs’ failure to test); XI-4511-12 (phase-in), XI-4516-17 (testing).

Toyota’s counsel also emphasized there was no good evidence of causation, and the evidence disproved it. Papis’ simulations involved very different vehicles, tires, and roadway conditions. Gilbert’s opinion relied on a phantom vehicle all other witnesses agreed did not exist. Carr’s testing showed that given Kim’s high speed, low-tread tires, and sudden swerving, he would have skidded off the cliff even with ESC. That this curve had seen almost no crashes confirmed the problem was Kim’s

driving. *See, e.g.*, RT-X-4307-09, X-4313-14, X-4316-17, X-4342, XI-4503-07, XI-4518-22, XI-4527-30, XI-4533-4538.

Plaintiffs' closing emphasized the risk/benefit instruction. Plaintiffs told the jury the risk/benefit instruction, including causation, is "the definition of defective design. If we prove one, two, three, and they can't prove A, B, C, D, or E, then the law says your decision in this claim must be for plaintiffs." RT-X-4289-90.

7. Verdict And Judgment.

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

D. Court Of Appeal Opinion.

The Court of Appeal affirmed. It held industry-custom evidence can be admissible depending on its nature and purpose, subject to the trial court's discretion under section 352. Op.-2, 13-18. Industry custom, it explained, "may reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality." Op.-13. That the parties dispute whether custom strikes the appropriate balance "does not make the evidence inadmissible." Op.-14. "[W]hether offered by the plaintiff or the defendant, such evidence may be relevant in a strict products liability action in determining whether a product embodies excessive preventable danger, which is the ultimate question under the risk-benefit test." Op.-14. It may also be relevant to