No. S240245

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HAIRU CHEN, et al.,
Plaintiffs and Appellants,

vs.

L.A. TRUCK CENTERS, LLC,
Defendant and Respondent.

FROM A DECISION OF THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DIVISION, DIVISION EIGHT, NO. B265304,
LOS ANGELES COUNTY SUPERIOR COURT NO. BC469935
(HON. J. STEPHEN CZULEGER AND HON. HOLLY E. KENDIG)

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs are the surviving members and relatives of a Chinese tour group that traveled to California and other states on vacation. They chartered a tour with a California touring company in a bus it had purchased from a California bus dealership—which had imported the bus for sale in California from an Indiana bus manufacturer. While the bus was being operated by a California driver and a California tour guide who were employed by the California touring company, it was involved in a rollover accident in Arizona on a trip to the Grand Canyon. Seven of the 11 members of the tour group were totally ejected from the bus, one was partially ejected, two suffered fatal injuries, and the rest suffered serious injuries. Seatbelts would have prevented the ejections, fatalities, and serious injuries.

The case ultimately went to trial in a California courtroom before a California jury solely against one defendant—the California dealership that made the fateful decision not to order seat belts for the rear seats when it imported the bus into California for sale in California. Even though the Indiana manufacturer had settled out of the case, and the only remaining defendant was the California dealership responsible for the decision not to order rear passenger seatbelts, the trial court instructed the jury under Indiana's law of products liability. Indiana does not recognize strict products liability and has no counterpart to California's risk-benefit theory of design

defect. The jury reached a defense verdict.

The Court of Appeal correctly ruled that the trial court committed reversible error by applying Indiana law at trial. First, applying California's governmental-interest test, the trial court was way off in ruling that California had "no interest" in applying its own law of strict products liability. California had a vital interest in applying its law to deter the sale of unsafe vehicles in California, advance the policies behind California's doctrine of strict products liability, and adjudicate a California dealership's liability for choosing, in California, not to order rear seat belts for a tour bus it imported into California and later sold to a California bus touring company for use on the roads and highways of California.

Second, the Court of Appeal correctly found that after the Indiana manufacturer had settled out of the case, and the only remaining defendant was the California dealership, Indiana had no interest in having its law applied. BusWest cites no authority supporting its claim that a choice-of-law ruling is inalterable once made, no matter what may occur later in the litigation to alter the respective interests of the relevant jurisdictions in having their laws applied.

In making the case for this immutable approach, BusWest confuses *historic facts* with *litigation facts*. It is true that a post-accident change in the *historic facts*—such as a party's move from one state to another—does not alter the court's choice-of-law analysis

because the historic facts must be frozen at the time of the underlying events. Otherwise, a party would be able to move to a different state after an event to take advantage of more favorable laws in that state. Just as obviously, however, the relevant *litigation facts* (such as the parties to the case and the claims asserted) cannot feasibly be determined as of the time of the underlying events, before the litigation has even been filed. Instead, a court must take account of the operative litigation facts at the time of trial to assess what law to apply *to the claims that are ultimately sent to the jury at trial*. Any other outcome would lead to absurd and arbitrary results.

Finally, even assuming that a court must blind itself to new litigation facts altering the relevant interests of the states, the trial court's initial ruling to apply Indiana law was still incorrect. Indiana *never* had a significant interest in having its law applied to this action—even when the Indiana manufacturer was still in the case. Unlike California, Indiana is a traditional *lex loci delicti* jurisdiction that applies the substantive law of the state where the harm occurred in all but rare and exceptional cases. Because even Indiana courts would not apply Indiana law to a case involving a vehicle accident that occurred on a highway outside Indiana's borders, Indiana had no interest in having its law applied by a California court. Thus, the trial court should have applied the law of California as the forum state—with a strong interest that was never outweighed by the interests of any other jurisdiction. The judgment of the Court of Appeal should be affirmed.

STATEMENT OF FACTS

A. The Dealer Agreement Between Forest River and BusWest

BusWest is a California corporation and bus dealership. It sells buses to retail clients, including the State of California. (1.AA.5,135,141; 8.RT.3420-3421,3428.)

Forest River, Inc. ("Forest River") is an Indiana corporation. Forest River manufactures recreational vehicles, buses, and boats, and sells its products in California and elsewhere. One of its divisions, Starcraft, manufactures tour and shuttle buses. Starcraft manufactured the 2006 Starcraft bus involved in this accident.[1] (1.AA.5,47-48,130,135; 7.RT.3002-3004,3030.)

Forest River does not have its own dealerships in California. It sells its buses in California solely through independent dealerships. (7.RT.3006.) In 2005-2006, BusWest was the only authorized dealer for Forest River's Starcraft fleet in California. (7.RT.3012-3013; 8.RT.3428.) California sales constituted a "good-size portion" of Starcraft's business. (7.RT.3010.)

The relationship between Forest River and BusWest was governed by a written Dealer Agreement of January 2004. Under its

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[1]Plaintiffs will refer to Forest River and Starcraft collectively as "Forest River."

terms, BusWest was required to promote and sell Starcraft buses in California and neighboring states, and had the "exclusive" right to discount pricing on Starcraft products for sale in the region. (7.RT.3022-3031; 4.AA.987-991.) Among other things, the Dealer Agreement required BusWest to (i) maintain and prominently display a minimum inventory of eight Starcraft buses at any given time; (ii) take delivery of and resell a minimum of 132 Starcraft buses each year; and (iii) advertise, promote, and display Starcraft products throughout the covered territory. (4.AA.987.)

The 2004 Dealer Agreement listed an address for BusWest in Santa Fe Springs, California. (4.AA.987.) It also listed addresses for eight BusWest "DEALERSHIP locations subject to this agreement." Seven were in California and one in Las Vegas, Nevada. (4.AA.989.)

B. Sale of Bus to California Bus Dealership

On September 26, 2005, pursuant to the terms of the Dealer Agreement, BusWest ordered from Forest River the 2006 Starcraft 16-seat tour bus involved in this accident. Under "Dealer Information," the Forest River Pricing & Order form listed a dealership address for BusWest in Santa Fe Springs, California. (1.AA.130,132; 4.AA.970.)

BusWest used Forest River's standard Pricing and Order Form to order the bus. (7.RT.3037-3038; 4.AA.964-967.) The form offered dealerships a number of different passenger seatbelt options,

including $12 per seat for non-retractable lap belts and $45 per seat for retractable lap/shoulder belts. (4.AA.967.) BusWest chose to order the bus without any passenger seatbelts. (7.RT.3045-3046,3058; 8.RT.3430,3439-3440; 4.AA.970-971.)

BusWest ordered the bus for its own inventory, not for any specific customer. (7.RT.3056; 8.RT.3444.) During this time period, BusWest had a standard practice of not ordering passenger seatbelts for its inventory of stock tour and charter buses. It only ordered passenger seatbelts for buses that were intended for use in the healthcare field. (8.RT.3438-3439.)

Starcraft manufactured the bus using a Ford Econoline cab and chassis. The driver's seat and front passenger seat of the Ford cab came already equipped with lap/shoulder belts. (7.RT.3020, 3052, 3059; 8.RT.3445-3446;10.RT.3964-3966.) Because BusWest chose not to order passenger seatbelts for the other seats, the 14 rear passenger seats had no seatbelts. (5.RT.2416-2419.) The applicable federal motor vehicle safety standard did not mandate passenger seatbelts for buses with a gross vehicle weight rating over 10,000 pounds.[2] (7.RT.3067-3068; 8.RT.3447.)

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[2]By definition, a federal motor vehicle safety standard is only a "minimum standard" (49 U.S.C. § 30102(a)(9)), and the federal statute's savings clause states that compliance "does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).) Under California law, a vehicle manufacturer or seller may be liable for defective design even if it complied with the federal standards. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298,

Starcraft manufactured the bus in Goshen, Indiana. (1.AA.130.) According to its general manager, David Wright, "F.O.B. was Goshen, Indiana." (*Ibid.*) The term "FOB" is "a shipping term which indicates the supplier pays the shipping costs (and usually also the insurance costs) from the point of manufacture to a specified destination, at which the buyer takes responsibility." (1.AA.25,fn. 2; 2.AA.279,fn. 2.) In early 2006, BusWest contracted with a third party to pick up the bus and bring it from Goshen, Indiana to its dealership in Santa Fe Springs, California. (8.RT.3449-3451.)

C. Sale of Bus by California Bus Dealership to California Bus Touring Company

The bus sat on the lot in BusWest's California inventory for over two years. (8.RT.3451.) In the meantime, BusWest moved its Santa Fe Springs dealership to Carson, California. (8.RT.3421.)

In March 2008, BusWest sold the bus from its Carson dealership to TBE International, Inc. ("TBE"), a California corporation and bus touring company operating out of the City of Industry, California. TBE offered bus tours in California and neighboring states. (1.AA.4; 2.AA.355,357,420-432; 5.RT.2404; 8.RT.3425-3426,3451-3452.)

1321; see also *Williamson v. Mazda Motor of America, Inc.* (2011) 562 U.S. 323 [California tort claim alleging Mazda should have installed lap/shoulder belt was not preempted by federal standard permitting lap-only belt].)

TBE had a Class B certificate to operate as a charter-party carrier of passengers pursuant to California Public Utilities Code section 5383. (2.AA.357.) The certificate, issued by the California Public Utilities Commission, identified the home terminal as TBE's address in the City of Industry. (*Ibid.*) The Class B certificate authorized TBE to carry passengers "from any point within the territory of origin specified in the certificate to any points in the state, or territory of origin." (Pub. Util. Code, § 5383.) The certificate itself stated that it "authorize[d] the transportation of passengers by motor vehicle over the public highways of the State of California." (2.AA.357.)

Betty Qi was the owner of TBE. (5.RT.2405.) She ran the business out of TBE's office in City of Industry, California, and before that in Hacienda Heights, California. She was a regular customer of BusWest. Before purchasing the Starcraft bus involved in this accident, she had purchased multiple other buses from BusWest in California. (8.RT.3425-3426,3436,3467-3482; 2.AA.328.)

BusWest sold the 2006 Starcraft bus to TBE for approximately $44,000. TBE traded in an older model Starcraft bus for a credit as part of the transaction. (2.AA.338-339; 4.AA.980-981; 8.RT.3451-3452.) The new bus was registered as a commercial vehicle in California, had California license plates, and was operated out of TBE's headquarters in California. (2.AA.344,350-353,379,387,390.)

The invoice for the sale included the dealership address for

BusWest in Carson, California and stated that payment was to be remitted to a BusWest P.O. Box address in Los Angeles. The invoice listed the customer address for TBE in City of Industry, California. (2.AA.338; 4.AA.977.)

The Purchase Agreement between BusWest and TBE also listed TBE's City of Industry address as the customer address. However, it stated that the purchase price "[i]ncludes delivery to Las Vegas." (4.AA.980.) The purpose of delivering the bus to Las Vegas was so that TBE could obtain "apportioned" license places, which meant that the vehicle could be used in interstate commerce and TBE did not have to pay California sales tax. (8.RT.3453; 2.AA.342; 4.AA.980.) TBE submitted a signed statement to the California Board of Equalization stating under penalty of perjury that the vehicle was being purchased for use outside California. (2.AA.342.) Thus, BusWest did not charge TBE any sales tax on the $44,000 purchase. (2.AA.338-339; 4.AA.980.) On the line for sales tax, the Purchase Agreement stated: "n/a out of St." (4.AA.980.)

The Board of Equalization form submitted by TBE stated that the vehicle was to be delivered to TBE at 3701 Freightliner Drive in Las Vegas. (4.AA.934.) This was the address of the BusWest dealership in Las Vegas. (4.AA.989.) BusWest sales manager Don Cox personally drove the bus to Las Vegas for pickup by TBE. (8.RT.3454-3455.) TBE had no office or storage yard of its own in Las Vegas. (5.RT.2446.)

TBE paid for the bus by check. The check showed TBE's address in the City of Industry, California and was made out to BusWest at its address in Carson, California. (2.AA.340.)

At the time of the accident, the bus still had "apportioned" California license plates. (4.AA.954.) TBE painted its logo in large letters on the side of the bus. (4.AA.953.) In smaller letters beneath the logo, TBE painted its full name and identified its location as "HACIENDA HEIGHTS, CA." (4.AA.953.)

D. The Accident

Zhi Lu is a California resident who was employed as a tour bus driver for TBE out of City of Industry. He had a California commercial driver's license. Lu primarily drove tourists to destinations in southern California, Las Vegas, and the Grand Canyon. (2.AA.362,379,387-388,414; 4.AA.993; 5.RT.2403-2406.)

On October 16, 2010, the day before the accident, Lu drove the Starcraft bus from Los Angeles to Las Vegas for TBE. According to the pre-printed portions of his "Driver's Daily Log," TBE's "Main Office Address" was in City of Industry, California, and its "Home Terminal Address" was a location in Rosemead, California. Lu picked up the 11 members of the Chinese tour group at their hotel in Los Angeles before driving them to Las Vegas. Lu was working with Qiang Du, another tour guide employed by TBE, who was also a resident of California. They spent the night in Las Vegas. They

were scheduled to drive the tour group back to Los Angeles after visiting the Grand Canyon the next day. (2.AA.362-363,381,388,421; 4.AA.946; 5.RT.2408-2414.)

The next morning, Lu was driving the Starcraft bus with the Chinese tour group en route from Las Vegas to visit the Grand Canyon. Du was seated in the front passenger seat. Lu and Du were both wearing their lap/shoulder seatbelts in the front seats, but the 11 rear passengers had no seatbelts to wear. While negotiating a turn in Mohave County, Arizona, Lu lost control of the vehicle. (2.AA.386-392,405,414,416; 5.RT.2416-2425,2436.)

The bus left the highway and rolled over twice. It was going approximately 54 miles per hour when it left the road. (9.RT.3707, 3720,3727-3728.) The daytime speed limit on the highway was 55 miles per hour, but there was a posted "advisory" speed limit of 35 miles per hour for the turn. (9.RT.3699.)

All three of the large panoramic windows on the passenger side of the tour bus broke out in the rollover, and the passenger door broke into pieces. (5.RT.2432; 6.RT.2770,2779; 9.RT.3718; 11.RT.4345-4350.) Seven of the rear passengers were totally ejected from the vehicle, and one was partially ejected. (5.RT.2466; 6.RT.2762.) Keer Huang was fully ejected and suffered fatal injuries. (6.RT.2791-2793; 9.RT.3675-3679.) Qin Peng was partially ejected and suffered a fatal head and brain injury when she was impaled by a mechanism above the door opening. (6.RT.2788-2790; 9.RT.3682-3685.) The other rear

passengers survived, but suffered serious injuries. (6.RT.2773-2805.) Because Lu and Du were both wearing their lap/shoulder seatbelts in the front seats, they were not ejected and suffered only very minor injuries. (5.RT.2425-2426,2436; 6.RT.2772,2781.)

E. Expert Testimony

Carley Ward is a biomechanical engineer with expertise in seatbelt performance and rollover accidents. (6.RT.2742-2754.) In her opinion, rear passenger seatbelts would have prevented the two fatalities and the serious injuries suffered by the other rear passengers. If the rear passengers had been wearing seatbelts, they would have suffered no injuries or only minor injuries. (6.RT.2764,2805-2808.)

Based on accident statistics that have been available for decades, it is well-known that seatbelts are by far the most effective device in preventing injuries in a rollover accident. (6.RT.2754-2760.) Without seatbelts, bus passengers are thrown around inside the vehicle and can be partially or completely ejected. (6.RT.2766-2767.) Seatbelt use virtually eliminates the risk of complete ejection, and reduces the risk of partial ejection. (6.RT.2804-2805.)

William Broadhead is a restraint system engineer and expert consultant on automotive safety. (10.RT.3497-3498.) According to publicly available accident statistics, the accidents with the highest fatality rates are rollovers of SUVs, minivans, and buses, due to

passenger ejection during the rollover event. (10.RT.3973.) The most important safety device for preventing injuries in rollover accidents is a seatbelt, because it virtually eliminates the risk of complete ejection. (10.RT.3975.)

In Broadhead's opinion, the bus was unsafe because it did not have seatbelts for the rear passengers. There was nothing to protect the passengers in a rollover accident. The bus was unreasonably dangerous, especially in a rollover event. The large size of the tour bus windows made passenger ejection even more likely. Seatbelts would have prevented the passenger ejections. Moreover, seatbelts were economically and technically feasible to install. (10.RT.3987-3999,4002,4020.)

Defense expert Eddie Cooper is an engineer specializing in restraint systems. (12.RT.4502.) He admitted that the number one most important factor for reducing ejection risk in rollover accidents is seatbelts. (12.RT.4602-4603.) There is no better countermeasure for keeping occupants in their seats in rollover accidents. (12.RT.4556.) Seatbelts are one of the best safety devices around in terms of occupant protection. (12.RT.4590.) Fatality rates are higher for unrestrained passengers in rollover accidents. (12.RT.4590.) 70 percent of all deaths in bus accidents involve a rollover event. (12.RT.4575,4602.) Cooper agreed that decades of data from the fatal analysis reporting system ("FARS") show a high fatality rate for bus rollover events. (12.RT.4578,4582.)

Between 1968 and 1973, the National Traffic Safety Board ("NTSB") made three recommendations to mandate passenger seatbelts for buses. These recommendations were met with industry opposition. (10.RT.4018.) In 1973, the National Highway Traffic Safety Administration ("NHTSA") issued a notice of proposed rule-making to mandate seatbelts in the passenger seats of buses. However, no such federal regulation had been adopted by the time BusWest sold the bus to TBE in 2008. (10.RT.3993-3995.) In a 1999 special report, the NTSB listed seatbelts for tour buses as one of its "most wanted" safety recommendations. (10.RT.3985-3986.) Although the federal motor vehicle safety standards did not mandate seatbelts for buses in 2008, these regulations are only "minimum" standards for vehicle safety. (10.RT.3959.)

The 1999 NTSB special report cited examples of unrestrained bus passengers being ejected and killed in rollover accidents. (12.RT.4574.) It stated: "The Safety Board became concerned that motor coach passengers are not adequately protected in collisions." (12.RT.4577.) "From 1968 through 1973, the Safety Board issued 11 recommendations to the Federal Highway Administration, NHTSA, or both, concerning restraints, including requiring that seat belts be installed in buses. These recommendations have not been implemented by either NHTSA or the FHWA." (12.RT.4578.) "As with school buses, the board has found that those occupants seated within the direct line of impact are often the most severely injured. However, unlike school buses, the Board has found that fatal injuries

in motor coach accidents are often the result of passenger ejection from the coach." (12.RT.4576.)

STATEMENT OF THE CASE

A. The Operative Complaint

Plaintiffs and appellants, the surviving members and relatives of the Chinese tour group, filed this lawsuit against Forest River, BusWest, TBE, and Lu in 2011. The operative Second Amended Complaint alleged the following causes of action: (1) wrongful death; (2) negligence; (3) strict products liability;[3] (4) loss of consortium; and (5) negligent infliction of emotional distress. (1.AA.1-16.)

The Second Amended Complaint alleged that BusWest was liable for failing to order seatbelts for all passenger seats in the Starcraft bus, and for selling the bus to TBE without seatbelts installed in all passenger seats. (1.AA.5-7.)

Plaintiffs settled their claims against TBE and its driver, Lu. However, the remaining defendants continued to assert comparative

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[3]The heading of the strict liability claim inadvertently omitted BusWest as a defendant. (1.AA.10.) As explained in the opening brief in the Court of Appeal, however, plaintiffs made clear in the text of the complaint and throughout the proceedings that they were asserting this claim against BusWest, and BusWest repeatedly acknowledged this in the trial court. (AOB 24,fn.1.) BusWest also did not dispute this point in the Court of Appeal either.

fault defenses based on Lu's allegedly negligent driving in Arizona. (See, e.g., 1.AA.55-56,58; 12.RT.5196-5197.)

B. The Initial Choice-of-Law Ruling

In December 2013, defendants Forest River and BusWest filed a single motion to apply the substantive law of Indiana law to the adjudication of plaintiffs' claims against all remaining defendants. Invoking California's governmental-interest approach to choice-of-law decisions, they argued that Indiana's products liability and wrongful death laws were more favorable to defendants than California law in multiple ways. (1.AA.29-31.) They further asserted that "California has no interest in the outcome of this action" and Indiana "has the predominant interest in protecting the economic well-being of the manufacturers who do business in the state." (1.AA.41.)

Plaintiffs filed a written opposition to the motion. (2.AA.271-294.) They agreed that California applies the governmental interests test and "that there are substantive differences between the laws of Indiana and California, as summarized in the DEFENDANTS' motion." (2.AA.282:3-4.) They also pointed out that California and Indiana law differ on the risk-benefit theory of design defect. They quoted directly from this Court's holding "'that a manufacturer who seeks to escape liability for an injury proximately caused by its product's design *on a risk-benefit theory* should bear the burden of persuading the trier of fact that its product should not be judged

defective.'" (2.AA.288:26-28, emphasis added & quoting *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 433.) Plaintiffs noted that "Indiana law has no similar burden-shifting." (2.AA.289:1; see also 2 AA.292:27-28 [noting that Indiana "does *not* shift the burden of proof to the manufacturer"].)

Plaintiffs also pointed out other material differences between California and Indiana law: (1) California imposes joint and several liability on all defendants in the chain of distribution, whereas Indiana applies principles of comparative fault in products liability cases; and (2) Indiana's definition of a defective product requires it to be "unreasonably dangerous," whereas California has explicitly rejected this requirement. (2.AA.287-288,292-293.) Plaintiffs argued that Indiana's more defense-oriented "rules are fundamentally incompatible with the public policies of California's strict liability doctrine." (2.AA.293.)

On the merits of the choice-of-law issue, plaintiffs asserted that: (i) Indiana had no genuine interest in applying its own law because Indiana is a traditional *lex loci delicti* jurisdiction that presumptively applies the law of the state where the harm occurred (here Arizona), and thus even the Indiana courts would not apply Indiana law to this case; (ii) California had a strong interest in applying its own laws to deter the sale of defective vehicles by licensed California dealerships to California consumers for use on the California roads; (iii) there was no "true conflict" because