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IN THE
SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM et al.,
Plaintiffs and Appellants,

v.

TOYOTA MOTOR CORPORATION et al.,
Defendants and Respondents.

SUPREME COURT
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ON REVIEW FROM A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN • CASE No. B247672

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF; AMICUS CURIAE BRIEF OF ALLIANCE OF
AUTOMOBILE MANUFACTURERS IN SUPPORT OF
RESPONDENTS TOYOTA MOTOR CORPORATION ET AL.

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**APPLICATION FOR LEAVE TO FILE AMICUS
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AUTOMOBILE MANUFACTURERS IN
SUPPORT OF RESPONDENTS TOYOTA
MOTOR CORPORATION ET AL.**

Pursuant to California Rules of Court, rule 8.520(f), the Alliance of Automobile Manufacturers (the Alliance) respectfully requests permission to file the attached amicus curiae brief in support of respondents Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Toyota Motor North America, Inc., Toyota Motor Engineering & Manufacturing North America, Inc., and Power Toyota Cerritos.

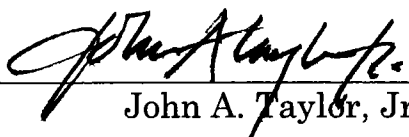
The Alliance is a nonprofit automotive trade association formed in 1999. Its members account for approximately 77 percent of all car and light truck sales in the United States, and include BMW of North America, LLC; FCA US LLC (comprising the Chrysler and Fiat companies); Ford Motor Company; General Motors Company; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motor Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota North America, Inc.; Volkswagen Group of America, Inc.; and Volvo Cars North America, LLC.

The Alliance's members are routinely subject to products liability litigation in California. Accordingly, the Alliance has an interest in the development of California's product liability jurisprudence, including whether evidence of industry custom and practice is admissible in evaluating plaintiffs' strict liability claims for product defect. Because the context for deciding that question here involves automotive technology, the Alliance can offer a unique perspective based on the collective experience of its membership, which should be helpful to this Court in resolving that question.

Accordingly, the Alliance respectfully requests that this Court accept and file the attached amicus curiae brief.

October 5, 2016

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AMICUS CURIAE BRIEF

INTRODUCTION

If a plaintiff claims that a product was defective because it did or did not incorporate certain design features, one might naturally wonder, how do other manufacturers design their products? Do they include those features? Are there competing pros and cons? In their merits briefing, plaintiffs here argue that plaintiffs in design defect cases should be allowed to offer answers to the jury regarding these questions when the answers favor plaintiffs, but defendant manufacturers like Toyota should be precluded from presenting precisely the same evidence of industry custom and practice. In this amicus brief, the Alliance explains why evidence of industry custom and practice should be admissible when used by *either* side in connection with the risk/benefit design defect analysis outlined by this Court in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432 (*Barker*).

As will be shown, plaintiffs' argument rests on the fallacy that evidence of industry custom should be admissible only when there is *direct* evidence of risk/benefit balancing by other manufacturers who omitted or included a design feature from their own products, and *not* when offered by defendants to indirectly support the same proposition. Plaintiffs' argument violates the bedrock principle, on which every California jury is instructed, that there is no legal difference between direct and indirect evidence. Juries may rely on

an inference arising out of indirect evidence, and reject direct evidence on the same point, or do the opposite.

Plaintiffs' argument also reveals a blatant double standard. Plaintiffs would allow custom and practice evidence of other manufacturers' designs if it indirectly shows that the defendant manufacturer departed from what some other manufacturers have done, to support an inference that a different design was, on balance, better overall. But they would not allow a defendant to introduce the same class of evidence to show the defendant followed a custom and practice, to support the fair inference that industry testing and experience confirm the design was a good one when all costs and benefits to consumers are weighed.

Plaintiffs' position further ignores that the type of industry custom evidence at issue here is helpful to jurors in evaluating consumer preferences, which are directly relevant as one factor under *Barker's* risk/benefit design defect test. The jurors were required to evaluate whether, as plaintiffs argue, defendant's 2005 pickup truck was defective for failure to require that all consumers purchase electronic stability control (ESC) with their vehicles. Plaintiffs would conceal from jurors evidence strongly corroborating that purchasers in that time frame rejected ESC as a desired option—something that manufacturers were entitled to consider in designing their vehicles.

Plaintiffs concede that whether a product is defective should be judged as of the time of its manufacture. But the exclusion of industry custom at the time of manufacturer would hinder juries from making an even-handed determination of that issue due to the

well-documented phenomenon of hindsight bias. It's only natural for jurors to think that what is generally understood and what is generally done at the time of trial should have similarly been understood and done previously, even many years earlier. But technologies and consumer preferences evolve, and experience with a design feature can confirm or rebut risks and benefits that initially are sketched out on the drawing board or tested only with dummies and computers. Manufacturers thus inevitably phase in new features—including safety features—over time. Jurors should be entitled to consider such evidence, without being under the misperception that—for example—a feature ubiquitous at the time of trial should immediately have been included as a required feature on all cars the moment it was technologically feasible.

Finally, to shore up their proposed exclusion of industry custom evidence in product defect cases, plaintiffs argue that its consideration would result in a “race to the bottom” by manufacturers whose goal would be to produce and sell vehicles incorporating no more safety features than minimally necessary, as measured by competitors’ designs. But competition, consumer preference, and corporate responsibility all drive the development of safety innovations. There’s no evidence that admitting evidence of industry custom in product liability litigation will impede such innovations. On the contrary, for reasons explained below, plaintiffs’ proposed approach is more likely to stifle innovation than promote it, to consumers’ ultimate detriment.

LEGAL ARGUMENT

I. THE ONE-WAY EVIDENTIARY RULE URGED BY PLAINTIFFS WOULD UNFAIRLY ALLOW INDUSTRY CUSTOM AND PRACTICE EVIDENCE TO PROVE A PRODUCT IS UNREASONABLY DANGEROUS, BUT NOT THAT IT'S REASONABLY SAFE.

A. Both sides in a design defect case should be entitled to present evidence of industry custom and practice.

In *Barker, supra*, 20 Cal.3d at page 432, this Court held that a product may be found defective in design if the product's design proximately caused injury and "on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." In evaluating the adequacy of a product's design under this test, "a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Id.* at p. 431.)

Plaintiffs concede that evidence of industry custom and practice can be relevant to these factors, but only when it is used by a plaintiff to prove the existence of a product defect, rather than by a defendant to show its absence. (See RBOM 13 [arguing "evidence of competing models which embody alternative designs" should be

admissible, while evidence that no competing model embodies the alternative design should be excluded].)

Plaintiffs' one-way approach to the handling of industry custom and practice evidence is carefully crafted. They attempt to justify their own presentation of such evidence at trial to assert that Toyota had no good reason for not making ESC standard on all its pickups in 2005, while simultaneously arguing on appeal that Toyota should have been precluded from defending itself based on the very same evidence.

Plaintiffs thus argue the *risk* side of the risk/benefit analysis by focusing exclusively on harms that might befall if a feature is omitted from a product, without acknowledging defendants' right to present evidence on the *benefit* side regarding industry practice that accounts for consumers' preferred experience and cost considerations. Such a "heads I win/tails you lose" approach is obviously unfair.

B. Plaintiffs' approach violates the rule that direct and indirect evidence are equally relevant and admissible.

Plaintiffs argue that evidence of "established technical standards" and "specific instances involving alternative designs" are "direct evidence of true *Barker* factors" that is admissible at plaintiffs' urging, and "[f]ailure to comply with minimal technical standards is especially probative of design deficiency." (OBOM 2, 22, fn. omitted; see also OBOM 31.) But according to plaintiffs, "only the details of design experience, and not the bare fact that a

design has or has not been implemented in the industry,” should be admissible in support of the defense. (OBOM 27-28.) As we now explain, plaintiffs’ carve-out allowing defendants to admit only “direct” evidence of design experience details finds no support in the law.

Under California law, both direct and indirect evidence of a fact is relevant and probative. The California Law Revision Commission’s comments to the Evidence Code state that “under [Evidence Code] Section 210, ‘relevant evidence’ includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred.” (Evidence Code With Official Comments (Aug. 1965) 7 Cal. Law Revision Com. Rep. (1965) p. 1034 <<http://www.clrc.ca.gov/pub/Printed-Reports/Pub064.pdf>>.)

Consequently, juries are commonly instructed that “[a]s far as the law is concerned, it makes no difference whether evidence is direct or indirect.” (CACI No. 202.) “[T]he fact that evidence is ‘circumstantial’ does not mean that it cannot be ‘substantial.’ Relevant circumstantial evidence is admissible in California. [Citations.] Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony.” (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 ; see also *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110 [“circumstantial evidence can provide the sole basis for a verdict and, in such a case, can meet the substantial evidence test on appeal”].)

Plaintiffs nonetheless argue that industry custom evidence is admissible only when it is in the form of *direct* evidence that other manufacturers have actually weighed the costs and benefits of implementing a safety feature. (See, e.g., OBOM 27-28 [“only the details of design experience, and not the bare fact that a design has or has not been implemented in the industry, will enhance the jury’s ability to weigh risks and benefits”]; RBOM 12 [arguing that industry-standard evidence should not be allowed to “undermine *direct actual evidence* of feasibility and cost effectiveness” of a safety feature because it invites “conjecture” by the jury about whether the failure to offer the product is due to “lack of feasibility or consumer rejection” (emphasis omitted)]; RBOM 17 [“evidence of *actual* [risk/benefit] balancing and the reason therefore are unobjectionable” (emphasis added)]; RBOM 17 [industry custom evidence should be admissible only when there is direct evidence that it “was the result of experience or a deliberative process”].)

Conversely, plaintiffs argue that defendants should *not* be able to rely on any “inference that the fact that nobody in the industry has adopted a given safety feature is the result of industry experience” or “that the industry has based its custom on a weighing of risks and benefits.” (RBOM 1.) According to plaintiffs, “in truth” such evidence “may reflect nothing more than industry inertia” or that “the manufacturer felt no competitive pressure to adopt the design.” (*Ibid.*)

But the fact that competing inferences can be drawn from indirect evidence does not make such evidence inadmissible: “Evidence is relevant if one reasonable inference from it is

relevant . . . even if other reasonable but nonrelevant inferences are more compelling.” (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2016) § 21.18.)

Here, one reasonable (indeed, most logical) inference is that no manufacturer other than Toyota offered ESC because, balancing all the pros and cons of implementing the design at that time, using the then-available technology, and the contemporaneous interests of consumers, the manufacturers concluded the balance favored that decision. Perhaps plaintiffs’ “inertia” inference is also reasonable, if one assumes manufacturers in the highly competitive automotive industry essentially forgot to keep striving to produce the most marketable product. The proper approach in such a situation is to admit the evidence and let the jury determine what inferences should be drawn after considering argument from counsel and appropriate limiting instructions from the court. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 (*Howard*) [“evidence of compliance with industry standards, while not a complete defense, is not ‘irrelevant,’ but instead properly should be taken into account through expert testimony as part of the design defect balancing process”].)

Plaintiffs further argue that they should not be required to “assume the burden of disproving the merits of industry practice and standards” in order to rebut an inference arising out of industry practice. (OBOM 34.) But when a plaintiff attempts to establish strict liability based on evidence that an omitted safety feature was incorporated in a competing product, they are likewise relying on the inference that the continued *inclusion* of the feature followed an

actual weighing of the risk/benefit factors by another manufacturer. And yet plaintiffs expect defendants to rebut that inference—which is precisely why it is important for defendants to be able to point to indirect evidence about industry custom that raises a contrary inference.

C. Industry custom and practice reflecting consumer acceptance of a design feature is relevant to the wide category of factors to be considered in a risk/benefit analysis under *Barker*.

Even if there were some basis for excluding all but direct evidence relevant to the *Barker* risk/benefit analysis, the type of industry custom and practice at issue here would be admissible, because it is directly relevant to appropriate risk/benefit factors—consumer demand, choice, and acceptance, based on affordability and other considerations. Plaintiffs argue that consumer acceptance or rejection of a design “is entitled to no weight at all” unless it reflects the actual weighing by consumers “of the decreased danger against the increased costs” of that design. (RBOM 5, 10.) But because consumer acceptance is an *independent* factor in the risk/benefit analysis, it should be considered regardless whether consumer demand (or lack thereof) reflects consumers’ explicit weighing of safety risks and costs.

In *Barker*, this Court articulated a list of risk/benefit factors, including “the financial cost of an improved design” and “adverse consequences . . . to the consumer that would result from an

alternative design.” (*Barker, supra*, 20 Cal.3d at p. 431; see ABOM 29.) Thus, it is important for juries to hear evidence inferentially showing, for example, that implementing for all cars a technology that is initially marketable only in the luxury vehicle class (e.g., autonomous emergency braking and other collision avoidance technology) could eliminate “economy” from the economy car price range, rendering that vehicle class far less marketable and depriving consumers of lower cost options. Consistent with that common sense fact, we have all seen the progression of technologies from specialty class vehicles to mainstream economy cars—such as certain hands-free blue tooth technology, air bags (and eventually side or curtain air bags), and so forth. Because adverse consequences to the consumer are an express *Barker* factor, this Court should not endorse an evidentiary rule driven by plaintiffs’ apparent notion that a safety technology made available in one car *must* be included in all, regardless of consumers’ desire to choose among products based on their individual price point and other values.

Courts have similarly held that consumer acceptance should be considered in the risk/benefit analysis because it is relevant to “feasibility,” a factor expressly listed in *Barker*: a design feature might be *technologically* feasible and yet not be *economically* feasible if consumers will resist purchasing a product incorporating that feature. (See *Glover v. BIC Corp.* (9th Cir. 1993) 6 F.3d 1318, 1331 [“the evidence must show that the suggested alternative is ‘not only feasible but also practicable in terms of cost and the over-all design and operation of the product’ ”]; *Rix v. General Motors Corp.*

(Mont. 1986) 723 P.2d 195, 202 [risk/benefit balancing should consider the “relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design”]; Owen, *Design Defects* (2008) 73 Mo. L.Rev. 291, 331 [“Feasibility requires at least technological capability, but it normally is viewed more broadly to include cost, commercial practicability (including practicable availability of materials and components), and even *the likelihood of consumer acceptance*” (emphasis added)].)

Moreover, while *Barker* identified several factors (including those described above) that were applicable in the context of that case, this Court described the listed considerations as being “among other relevant factors”—clearly indicating that the list in *Barker* was non-exhaustive. (*Barker, supra*, 20 Cal.3d at p. 432.) Thus, CACI No. 1204, in addition to instructing juries to consider the factors specifically listed in *Barker*, includes “[f] [*Other relevant factor(s)*.]”—to be inserted in the standard instruction as appropriate.

Among the additional factors to be considered beyond those listed in *Barker* are the “aesthetics” of a product, when “there is evidence that appearance is important in the marketability of the product.” (Directions for Use to CACI No. 1204 (2016) p. 659.) As the court held in *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131, “much of the perceived benefit of a car lies in its appearance. . . . We believe that a jury properly may consider aesthetics in balancing the benefits of

a challenged design against the risk of danger inherent in the design.”

The aesthetic characteristic of a product insofar as appearance affects its marketability is just one variation of consumer acceptance in the risk/benefit analysis. As explained in the latest Restatement of Torts, “a plaintiff must introduce evidence from which the jury can find not only that the proposed alternative would have afforded greater safety, but also that it would not have substantially impaired the function, utility, economy, convenience, *and other features that drive consumer demand for and acceptance of the product.*” (Rest.3d Torts, Products Liability (1998) § 2, com. f, emphasis added; see also Knaier, *Are Cigarettes Defective in Design? California and New York Diverge in Approach and Result* (2009) N.Y. St. B.J., 10, 15 [“in some circumstances, ‘consumer acceptance’ is a crucial factor to consider in evaluating whether a proposed alternative design unacceptably sacrifices *utility*”]; see *Goodner v. Hyundai Motor Co., Ltd.* (5th Cir. 2011) 650 F.3d 1034, 1041 [“consumer preference is a consideration in the risk-utility analysis”].)

Put another way, consumers may legitimately decide that an uncomfortable or unattractive design is unacceptable, even if the design is marginally safer *and costs no more to make*. (See Rest.3d Torts, Products Liability (1998) § 2, com. f [“[A]n alternative design may impose significant nonmonetary costs on product users and consumers. It may deprive a product of important features which make it desirable and attractive to many users and consumers.”].) Broadly speaking, the “benefits” of some designs may be aesthetic or

ergonomic, or otherwise reflect consumers' desire to have choices among products, even when those choices negatively implicate safety concerns. (Ultra-lightweight motorcycle helmets come to mind.)

That is why plaintiffs here are wrong to grant “no weight at all” to such factors absent affirmative evidence that consumers consciously engaged in a cost-to-risk ratio analysis. Defendants must have the chance to introduce all evidence—including industry custom—bearing directly or indirectly on the question of consumer acceptance. (See, e.g., *Singleton v. International Harvester Co.* (4th Cir. 1981) 685 F.2d 112, 115 [regarding the jury issue of liability for defective design, the evidence should show “the chances for consumer acceptance” of the alternative design].) For at least some drivers, the ESC feature at issue in this case detrimentally affects utility because it impinges on a skilled driver's direct control of the vehicle, especially during critical situations or aggressive driving. (Fed. Motor Veh. Safety Standards: Electronic Stability Control, 72 Fed.Reg. 17236, 17250 (Apr. 6, 2007) [noting consumer objections to proposal by the National Highway Traffic Safety Administration (NHTSA) requiring ESC on various vehicles based on consumer “concerns that it inappropriately may wrest vehicle control from the driver during critical situations”]; *Tough Crowd: Four Countries, 12 Sports Cars, One Winner*, MotorTrend <<https://goo.gl/ZK51oY>> [as of Sept. 22, 2016] [expressing car reviewer's frustration and indignation with ESC until it was deactivated: “‘I was bored 10 minutes into driving it on the street’ ”].)

But even if an alternative design does not severely restrict a product's utility, "it still may not be sufficient for defective-design liability if it overly restricts consumer choice." (*Hernandez v. Tokai Corp.* (Tex. 1999) 2 S.W.3d 251, 259.) In *Hernandez*, the defendant made lighters with and without child-resistant devices, and the court held that "[w]hether adult users of lighters should be deprived of this choice of product design because of the risk that some children will obtain lighters that are not child-resistant and cause harm is the proper focus of the common-law risk-utility test" because "[c]onsumer preference . . . is one consideration" in that test. (*Id.* at p. 260; see also *Flock v. Scripto-Tokai Corp.* (5th Cir. 2003) 319 F.3d 231, 242 ("the risk and harm . . . factors should be weighed by the finder of fact against the consumer's preference for non-child resistant utility lighters"].)

Here, the evidence established that pickup purchasers are quite price sensitive and that the ESC option added \$300 to \$350 per vehicle. (ABOM 11.) Independent surveys showed that less than 15 percent wanted ESC *even at no additional cost.* (*Ibid.*; see OBOM 13.) In fact, when ESC was offered as an option in 2005 on the Tundra model at issue here, less than five percent of purchasers chose it. (OBOM 12.) Plaintiffs' position would deprive consumers of the choice—based on cost, utility or subjective driving experience preferences—to forego a safety design feature. (See ABOM 12 [citing testimony that ESC cannot counteract most loss of control].)

To sum up, industry custom and practice evidence of the type at issue here is admissible in design defect litigation because it is directly relevant to several of the factors a jury must consider in the