

Case No. S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM, et al.,
Plaintiffs and Appellants

vs.

TOYOTA MOTOR CORP, et al.,
Defendants and Respondents.

SUPREME COURT
FILED

OCT 18 2016

Second District Court of Appeal No. B247672

Los Angeles County Superior Court

The Honorable Raul A. Sahagun

Civil Case No. VC059206

Jorge Navarrete Clerk

Deputy

APPLICATION OF THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC., FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF
AND
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

John M. Thomas (SBN 266842)
jthomas@dykema.com
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
Telephone: (734) 214-7613
Facsimile: (734) 214-7696

Ashley R. Fickel (SBN 237111)
afickel@dykema.com
DYKEMA GOSSETT LLP
333 South Grand Avenue
Suite 2100
Los Angeles, CA 90071
Telephone: (213) 457-1800
Facsimile: (213) 457-1850

Counsel for Amicus Curiae The Product Liability Advisory Council, Inc.

Case No. S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM, et al.,
Plaintiffs and Appellants

vs.

TOYOTA MOTOR CORP, 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

APPLICATION OF THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC., FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF
AND
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

John M. Thomas (SBN 266842)
jthomas@dykema.com
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
Telephone: (734) 214-7613
Facsimile: (734) 214-7696

Ashley R. Fickel (SBN 237111)
afickel@dykema.com
DYKEMA GOSSETT LLP
333 South Grand Avenue
Suite 2100
Los Angeles, CA 90071
Telephone: (213) 457-1800
Facsimile: (213) 457-1850

Counsel for Amicus Curiae The Product Liability Advisory Council, Inc.

**APPLICATION OF THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC., FOR PERMISSION TO FILE *AMICUS
CURIAE* BRIEF IN SUPPORT OF RESPONDENTS**

To the Honorable Justices of the California Supreme Court:

The Product Liability Advisory Council, Inc., respectfully applies for permission to file the attached *amicus curiae* brief in support of the appellants.

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with approximately 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products.

PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 1075 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached as Appendix A.

As part of the regular product-design process, PLAC's members must routinely analyze and resolve questions about safety in product design. PLAC members who manufacture products with the potential to cause significant physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power-tools, and automobiles—have a particular interest in the legal implications of product design decisions. It is important to PLAC members that juries evaluating their design decisions have all of the information necessary to reach an informed and reliable conclusion.

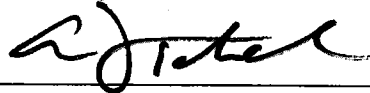
This case is important to PLAC because it involves the admissibility of industry practice, which often reflects the consensus of an industry with respect to the appropriate balance of safety, functionality, aesthetics, and cost. “[An] important indicia of reliability is industry practice—whether other manufacturers and consumers in the industry utilize the allegedly defective design or the proposed alternative.” *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 533 (D.N.J. 2001). Or, as the Nevada Supreme Court has recognized, “[t]he best way to determine if a defendant should have built a safer product is to let the jury hear all the evidence relating to

the course of conduct of both the industry, and the particular manufacturer.” *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 142-43, 808 P.2d 522, 527 (1991).

CONCLUSION

The application for permission to file the attached amicus curiae brief should be granted and the brief filed.¹

Respectfully submitted,



Ashley R. Fickel (SBN 237111)
afickel@dykema.com
DYKEMA GOSSETT LLP
333 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: (213) 457-1800
Facsimile: (213) 457-1850

Counsel for Amicus Curiae The Product Liability Advisory Council, Inc.

¹ This brief was not authored in whole or in part by any party or counsel to any party. No person or entity has made a monetary contribution to this brief other than PLAC and (through annual dues) PLAC members.

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF FACTS	3
ARGUMENT	6
I. THE COURT OF APPEAL CORRECTLY HELD THAT EVIDENCE OF INDUSTRY CUSTOM AND PRACTICE MAY BE RELEVANT TO RISK- UTILITY BALANCING DEPENDING ON THE NATURE AND PURPOSE OF THE EVIDENCE.	6
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECIDING THAT UNDER THE SPECIFIC CIRCUMSTANCES OF THIS CASE THE PROFFERED EVIDENCE OF INDUSTRY CUSTOM WAS RELEVANT AND ADMISSIBLE ON ISSUES RELATING TO RISK-UTILITY BALANCING.....	12
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Back v. Wickes Corp.</i> , 375 Mass. 633, 642-43, 378 N.E.2d 964, 970 (1978).....	9
<i>Barker v. Lull Eng'g Co.</i> , 20 Cal. 3d 413, 431 (1978)	3
<i>Bell v. Bayerische Motoren Werke Aktiengesellschaft</i> , 181 Cal. App. 4 th 1108 (2010)	14
<i>Boatland of Houston</i> , 609 S.W. 2d at 748.....	17
<i>Boatland of Houston, Inc. v. Bailey</i> , 609 S.W.2d 743 (1980).....	8, 13, 15, 16
<i>Bourjaily v. United States</i> , 483 U.S. 171, 179-80 (1987)	20
<i>Carter v. Massey-Ferguson, Inc.</i> , 716 F.2d 344, 348 (5th Cir. 1983)	20
<i>Coffey v. Shiomoto</i> , 60 Cal. 4th 1198, 1213 (2015).....	7, 20, 22
<i>Jaurequi v. Carter Mfg. Co.</i> , 173 F.3d 1076, 1084 (8th Cir. 1999)	10
<i>Kim v. Toyota Motor Corp.</i> , 243 Cal. App. 4 th 1366, 1370 (2016)	6
<i>McGee v. Evenflo Co.</i> , No. 5:02-CV-259-4 (CAR), 2003 U.S. Dist. LEXIS 25039, at *15 (M.D. Ga. Dec. 11, 2003)	11
<i>Milanowicz v. Raymond Corp.</i> , 148 F. Supp. 2d 525, 533 (D.N.J. 2001).....	2, 10, 18
<i>O'Neil; v. Novartis Consumer Health, Inc.</i> , 147 Cal. App. 4 th 1388 (2007)	8
<i>People v. Edwards</i> , 54 Cal. 3d 787, 826 (1991)	20
<i>People v. Merriman</i> , 60 Cal. 4th 1, 74 (2014); <i>Coffey</i> , 60 Cal. 4th at 1213.....	12, 22
<i>People v. Ochoa</i> , 26 Cal. 4th 398, 438 (2001); <i>see also People v. Snow</i> , 44 Cal. 3d 216, 228 (1987).....	21, 22

<i>Rager v. GE</i> , Civil Action No. 1:08-cv-1482, 2010 U.S. Dist. LEXIS 135402, at *45 (M.D. Pa. Dec. 22, 2010).....	10
<i>Robinson v. G.G.C., Inc.</i> , 107 Nev. 135, 142-43, 808 P.2d 522, 527 (1991)	2, 11
<i>Willis v. Besam Automated Entrance Sys.</i> , No. 04-CV-0913, 2005 U.S. Dist. LEXIS 26466, at *27 n.15 (E.D. Pa. Nov. 3, 2005)	11

STATUTES

Evid. Code § 351.....	6
Evid. Code § 352.....	11, 18, 19
Evid. Code. § 210.....	7

INTRODUCTION

This Court granted review in this case to determine whether the trial court committed reversible error in admitting, as relevant to the risk-utility test for design defect, evidence of industry custom and practice related to the alleged defect. The specific evidence at issue is evidence that no motor vehicle manufacturer provided a safety device known as “electronic stability control” or “ESC” on full-size pickup trucks.

The test for relevance is not demanding; rather, evidence is relevant if it has *any* tendency in reason to prove or disprove *any* disputed fact of consequence to the determination of the action. Analysis of the briefs filed by the parties reveals that there is no real dispute that the Court of Appeal correctly held as a general matter that some evidence that can be characterized as “industry custom and practice” evidence may be relevant to risk-utility analysis, depending on the nature of the specific evidence at issue and the purpose for which the proponent seeks to introduce the evidence. Plaintiffs themselves admit that evidence that has been characterized as “industry custom and practice” evidence can be relevant, including “technical standards,” “industry experience”—and even “industry

practice.” (Opening Brief at 21-28.) According to Plaintiffs, such evidence “may legitimately be cited as evidence of industry research or experience in balancing safety, feasibility, cost and functionality,” and can properly be admitted “to rebut a claim that a safety design was technologically possible and economically feasible.” (Opening Brief at 21-22, 27.) Plaintiffs’ position is thus consistent with the conclusion of the Court of Appeal, and the conclusions of most other courts, that industry custom may reflect legitimate independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.

Plaintiffs’ argument that the evidence at issue in this particular case was not relevant is very narrow and very case-specific. It is also very wrong, given their concession that the type of evidence at issue here can be relevant to rebut claims of both technological and economic feasibility. Plaintiffs’ case-specific argument is circular and amounts to this: the evidence at issue was not relevant to the cost-effectiveness or economic feasibility of ESC because, in Plaintiffs’ view, ESC was cost-effective and economically feasible. In other words, Plaintiffs simply assume away the very issues central to this case on which the evidence at issue was relevant.

The trial court's discretionary decision admitting the evidence in this case can be reversed only on a showing that the court acted in an arbitrary, capricious or patently absurd manner. Plaintiffs cannot—indeed have not even attempted to—make such a showing.

STATEMENT OF FACTS

The facts of this case are set forth in detail in Respondents' Answer Brief, but for purposes of the argument that follows PLAC would like to highlight certain facts particularly relevant to risk-utility analysis, i.e., facts relating to “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.”

Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431 (1978).

Plaintiffs in this case challenge the relevance of evidence that at the time Plaintiffs purchased their 2005 Toyota Tundra no full-size pickup truck was equipped with Electronic Stability Control (“ESC”) as a standard feature. ESC is a feature that is designed to assist a driver in maintaining directional control under adverse circumstances. (See Answer Brief at 5.) There is no debate that ESC was

“mechanically feasible” for use on full-size pickup trucks in 2005; in fact, ESC was standard on Toyota SUVs, and ESC was available as an option on the 2005 Toyota Tundra. There is also no dispute that ESC would provide an incremental safety benefit to drivers of full-size pickup trucks. And at least according to Plaintiffs, it would do so with no “adverse consequences” to the consumer *other than cost*.

(Reply Brief at 9.)

But cost in this case, along with the gravity and likelihood of harm, were significant risk-utility considerations. One of the principal questions that remained to be answered by the jury was whether *in 2005* the incremental reduction to the likelihood of harm from loss of control in the Tundra outweighed the financial cost of achieving that reduction. Toyota concluded that the answer to this question was “No,” and there was objective evidence other than “industry custom and practice” to support this conclusion. The 2005 Tundra received the highest safety rating from the Insurance Institute for Highway Safety for any full-size pickup, suggesting that the vehicle was already one of the safest pickups on the road, even without ESC. (RT 3379.) Toyota’s experts testified that the Tundra had *other* features that, like ESC, were designed to minimize the possibility of loss of

control, including antilock brakes and understeer, and that drivers “have to do unusual things” to lose control. (Answer Brief at 10-11.) Plaintiffs own expert, Gilbert, testified that he did not think that every vehicle without ESC was dangerous, he himself drove a Tundra without ESC, and he refused to testify that the Tundra was defective without ESC. (Answer Brief at 10.) Thus, the evidence supported a conclusion that the likelihood of injury from loss of control in the Tundra was already very low.

Further, any incremental reduction in that risk with respect to a vehicle that was already equipped with numerous safety features would come at the cost of hundreds of dollars per vehicle to consumers who were “really price sensitive.” (Answer Brief at 11.) Independent surveys showed that most of these consumers did not want ESC *even for free*. (Answer Brief at 11.) Toyota offered ESC as an option on the Tundra, and its brochures described ESC as an “electronic system designed to help the driver maintain vehicle control under adverse conditions”—and yet less than 5% of Toyota customers chose this option. (Answer Brief at 11; RT VIII 3315, 2255, 3359, 3370.)

This evidence *directly* supported Toyota’s position that in 2005 ESC was not economically feasible or cost-effective for owners of full-size pickup trucks, i.e., that in 2005 the incremental safety benefit provided by ESC to a vehicle that was already one of the safest on the road was outweighed by the financial cost to consumers concerned about cost. Evidence that no manufacturer equipped full-size pickup trucks with ESC as standard equipment was offered in *further* support of this conclusion, because it had some tendency in reason to show that Toyota’s balancing of the relevant risk-utility factors was correct.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT EVIDENCE OF INDUSTRY CUSTOM AND PRACTICE MAY BE RELEVANT TO RISK-UTILITY BALANCING DEPENDING ON THE NATURE AND PURPOSE OF THE EVIDENCE.

The Court of Appeal in this case expressly disapproved cases holding that evidence of “industry custom and practice” is *never* admissible in strict product liability cases. *Kim v. Toyota Motor Corp.*, 243 Cal. App. 4th 1366, 1370 (2016). It also expressly disapproved cases holding that such evidence is *always* admissible in strict product liability cases. *Id.* Instead, it held as follows:

[W]e hold that evidence of industry custom and practice may be admissible in a strict products liability action, depending on the nature of the evidence and the purpose for which the proponent seeks to introduce the evidence.

Id. There can be no serious question that this holding of the Court of Appeal was correct. No provision of the Evidence Code establishes a special rule for evidence of “industry custom and practice,” however that term might be defined. Rather, evidence relating to industry custom and practice is subject to the general rule that “all relevant evidence is admissible,” except “as otherwise required by statute.” Evid. Code § 351.

This Court has recognized that “the test for admissibility of evidence [under this rule] is not a strict one.” *Coffey v. Shiimoto*, 60 Cal. 4th 1198, 1213 (2015). Rather, “relevant evidence” is broadly defined to mean evidence “having *any* tendency in reason to prove or disprove *any* disputed fact that is of consequence to the determination of the action.” Evid. Code. § 210. Plaintiffs in this case quibble about the type of evidence that can properly be characterized as evidence of “industry custom and practice,” but this semantic debate is immaterial. The question is not whether the evidence at issue can be

characterized as evidence of industry custom and practice, but whether the evidence, however characterized, is relevant under § 210, i.e., whether it has any tendency in reason to prove or disprove a disputed fact.

And Plaintiffs agree that evidence that is occasionally referred to as evidence of industry custom and practice can be relevant to the risk-utility balancing issue in strict product liability cases, and therefore admissible, depending on the nature of the evidence and the circumstances of the particular case. For example, Plaintiffs concede that technical standards promulgated by government agencies can be “uniquely valuable as design criteria.” (Opening Brief at 24, citing *O’Neil; v. Novartis Consumer Health, Inc.*, 147 Cal. App. 4th 1388 (2007).) Plaintiffs concede that “technical standards” established by industry associations “may legitimately be cited as evidence of industry research or experience in balancing safety, feasibility, cost and functionality.” (Opening Brief at 21-22, , citing *Howard v Omni Hotels Mgmt. Corp.*, 203 Cal. App. 4th 403 (2012).) Plaintiffs also agree that evidence of “industry experience” and “industry practice” can be relevant “to rebut the claim that a safer design was technologically possible and economically feasible.” (Opening Brief

at 25, 28, emphasis added.) For this proposition, they cite *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (1980), which held that evidence that a safety device was not being used in an industry was in fact relevant to risk-utility analysis. (Opening Brief at 28.)

In other words, Plaintiffs have conceded that the Court of Appeal was correct when it held that “[i]ndustry custom may [in some cases] reflect legitimate independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.” *Kim*, 243 Cal. App. 4th at 1379. The holding of the Court of Appeal in this case echoes another decision that Plaintiffs cite with apparent approval:

In balancing all the pertinent factors, the jury made a judgment as to the social acceptability of the design, and this is the same judgment originally made by the designer of the product. Evidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury.

Back v. Wickes Corp., 375 Mass. 633, 642-43, 378 N.E.2d 964, 970 (1978) (cited by Plaintiffs at Opening Brief at 17). As Respondents

point out (Answer Brief at 35-37), this holding is consistent with most other decisions from most other jurisdictions.²

These holdings, and Plaintiffs' concession, reflect simple common sense. In the real world outside of the courtroom, anyone interested in designing a product would almost certainly begin by evaluating the existing designs of comparable products. If everyone in an industry has made the same decision with respect to any particular design feature, it is likely that there were good reasons for that decision. In the courtroom, therefore, "[an] important indicia of reliability [of expert testimony] is industry practice—whether other

² In addition to the decisions cited by Respondent, *see, e.g., Miller v. Yazoo Mfg. Co.*, 26 F.3d 81, 83-84 (8th Cir. 1994) ("Yazoo's evidence—testimony and documents asserting that a seven-second stopping period 'reflects the national consensus' and is the 'general agreement among maker, seller and user groups,'—helped the jury understand the condition of the Red Rider lawnmower and thus helped the jury determine whether the lawnmower was unreasonably dangerous."); *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1197 (4th Cir. 1982) (evidence of industry standards and customs was relevant where "it is clear that South Carolina does balance the utility of the risk inherent in the design of the product with the magnitude of the risk"); *Jones v. Nat'l Cart Co.*, No. 12-1186, 2015 U.S. Dist. LEXIS 158367, at *3-4 (C.D. Ill. Nov. 24, 2015) ("industry custom and practice is one of the risk-utility factors approved by the Illinois Supreme Court"); *Miles v. DESA Heating LLC*, Civil Action No. 4:10-00521-JMC, 2012 U.S. Dist. LEXIS 45433, at *15 (D.S.C. Mar. 27, 2012) ("With the risk-utility test, the state of the art and industry standards are relevant to show both the reasonableness of the design and that the product is dangerous beyond the expectations of the ordinary consumer."); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 814, 395 A.2d 843, 850 (1978) (in strict liability case requiring risk-utility balancing, evidence of "custom and usage standards of the lawn mower industry" was "relevant and correctly admitted")

manufacturers and consumers in the industry utilize the allegedly defective design or the proposed alternative.” *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 533 (D.N.J. 2001); *see also*, *e.g.*, *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1084 (8th Cir. 1999) (reliability of expert’s opinion was undermined by his failure to identify any manufacturer that incorporated his proposed safety feature into similar machinery); *Rager v. GE*, Civil Action No. 1:08-cv-1482, 2010 U.S. Dist. LEXIS 135402, at *45 (M.D. Pa. Dec. 22, 2010) (“Evidence of industry practice has been identified as helpful indicia of reliability [of expert testimony] in products liability cases.”); *Willis v. Besam Automated Entrance Sys.*, No. 04-CV-0913, 2005 U.S. Dist. LEXIS 26466, at *27 n.15 (E.D. Pa. Nov. 3, 2005) (“Industry practice is an important indicia of reliability.”); *McGee v. Evenflo Co.*, No. 5:02-CV-259-4 (CAR), 2003 U.S. Dist. LEXIS 25039, at *15 (M.D. Ga. Dec. 11, 2003) (“when an engineer offers an opinion with respect to a product defect or the existence of an alternative design, it is relevant to weigh ... whether the expert relied on applicable standards, industry practice, or professional publications.”). Or, as the Nevada Supreme Court has recognized, “[t]he best way to determine if a defendant should have built a safer

product is to let the jury hear all the evidence relating to the course of conduct of both the industry, and the particular manufacturer.”

Robinson v. G.G.C., Inc., 107 Nev. 135, 142-43, 808 P.2d 522, 527 (1991).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECIDING THAT UNDER THE SPECIFIC CIRCUMSTANCES OF THIS CASE THE PROFFERED EVIDENCE OF INDUSTRY CUSTOM WAS RELEVANT AND ADMISSIBLE ON ISSUES RELATING TO RISK-UTILITY BALANCING.

As in any case, the relevance of proffered evidence must be evaluated under the circumstances of each case, including the specific evidence proffered and the specific facts in dispute. In addition, even relevant evidence can be excluded in the discretion of the trial court if its probative value is outweighed by the potential for undue prejudice, confusing the issues, and misleading the jury. Evid. Code § 352.

Both the initial determination of relevance and the decision to admit or exclude relevant evidence under § 352 are matters that rest in the discretion of the trial court, and such decisions will be reversed only where the trial court acted in an arbitrary, capricious or patently absurd manner. *People v. Merriman*, 60 Cal. 4th 1, 74 (2014); *Coffey*,

60 Cal. 4th at 1213. No such abuse of discretion can be shown in this case.

Plaintiffs' argument on relevance is in fact quite narrow and case-specific. The specific evidence at issue is evidence that no manufacturer offered a safety device, ESC, as standard equipment on full-size pickup trucks. As noted above, Plaintiffs, citing *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (1980), conceded that such evidence can be relevant to the risk-utility analysis because it can serve to rebut a claim a safer design was "feasible." (Opening Brief at 27.) This case is different, they claim, because the safety device at issue, ESC, was indisputably feasible; it was actually in use on other vehicles and was actually being offered by Toyota as an option on the Tundra. (*See, e.g.*, Opening Brief at 28; Reply Brief at 9.) Further, Plaintiffs point out, there is no dispute that ESC provides an added safety benefit with no "adverse effect" on consumers other than cost. (Reply Brief at 9.) "In a case with abundant direct and uncontradicted *technical* evidence of the feasibility and effectiveness of ESC on the Tundra, the inference that the failure of other makers to put it in their trucks by 2005 undermined that evidence is a tacit admission of

defendant's inability to produce real evidence on risk-benefit”

(Reply Brief at 9, emphasis added.)

Plaintiffs thus concede, implicitly if not explicitly, that the absence of ESC on any other full-size pickup truck would be relevant to the following risk-utility factors, if they were disputed:

- Whether ESC was *technologically* feasible for use on full-size pickup trucks.
- Whether ESC would provide added safety benefits to drivers of full-size pickup trucks.
- Whether ESC, if installed on full-size pickup trucks, would have adverse *technological* effects that outweighed any safety benefit.

Plaintiffs even concede, implicitly if not explicitly, that the absence of ESC on full-size pickup trucks would be relevant on the issue of whether the advantages of ESC were outweighed by “aesthetic considerations,” if that were disputed. (See Reply Brief at 5, distinguishing *Bell v. Bayerische Motoren Werke Aktiengesellschaft*, 181 Cal. App. 4th 1108 (2010) from this case because the design choice at issue had an impact on “aesthetic considerations.”).

In other words, Plaintiffs have conceded that the judgment of an entire industry, as reflected in its uniform practice, has some tendency in reason to establish that the benefits of an alternative design do not outweigh the disadvantages, because the safer design is not technologically feasible, because the alternative design creates adverse technological effects, or because the alternative design detracts from the aesthetics of the product. Further, Plaintiffs repeatedly admit that cost, cost-effectiveness, and economic feasibility are also important factors in risk-utility analysis. (Opening Brief at 19, 21, 25, 27, 31, 35, 37; Reply Brief at 2.) And yet, they argue that the judgment of the industry is not admissible in this case because the disputed issues relate to cost and economic issues rather than technological and aesthetic issues.

Plaintiffs make this argument while simultaneously (and correctly) citing *Boatland of Houston* as an example of a case where evidence of an industry's failure to use a safety device was properly admitted to rebut a claim that "a safer design was technologically possible *and economically feasible*." (Opening Brief at 27, emphasis added.) In that case, as here, the evidence established that a safety device (in that case a "kill switch" designed to cut off a boat motor if

the driver is ejected) had been used for years in some vehicle types (racing boats.) 609 S.W.2d at 748. As here, the plaintiff alleged that the same device should have been used in his vehicle type (a recreational boat). The Texas Supreme Court recognized that “the defendant’s ability to rebut the plaintiff’s evidence [of feasibility] is not limited to showing that a particular alternative was impossible.” *Id.* **Error! Bookmark not defined.** Rather, “it is entitled to rebut the plaintiff’s evidence of feasibility with evidence of limitations on feasibility.” *Id.* In particular, “a suggested alternative may be available, but impractical for reasons such as greatly increased cost or impairment of the product’s usefulness.” *Id.* at 749. Therefore, “[w]hen the plaintiff has introduced evidence that a safer alternative was feasible because it was used, the defendant may then introduce contradictory evidence that it was not used.” *Id.*

Here, Plaintiffs assert that “the only ‘adverse effect’ on consumers identified by Toyota is a cost of a few hundred dollars.” (Reply Brief at 9.) They also admit that this cost must be “balanced against the improvements to safety.” *Id.* But they simply assume that it has already been established that the “improvements to safety” necessarily outweigh the “few hundred dollars” in cost, and that

economic feasibility and cost-effectiveness—like technological feasibility and aesthetic considerations—are not disputed. For example, Plaintiffs assert that “[n]o industry ‘experience’ with vehicles lacking ESC could overcome the fact that industry research had *proven its value and feasibility at such modest cost* that it was scheduled to be made standard equipment.” (Opening Brief at 32, emphasis added.) They argue that “there was no industry consensus that ESC was impractical or *cost-prohibitive*.” (Reply Brief at 1, emphasis added.) They assert that in this case “there is *no financial or technical justification* for failure to incorporate state-of-the-art safety technology” and that there is a “*total absence of technical or cost justification*.” (Opening Brief at 33, emphasis added.) In this fashion, Plaintiffs simply assume away the very issue central to this case on which the evidence at issue was relevant; according to Plaintiffs, the evidence was not relevant to issues of economic feasibility or cost effectiveness because (they say) ESC was economically feasible and cost-effective.

Plaintiffs assert that “[i]n not one instance does Toyota demonstrate that the inference of industry ‘balancing’ which is its justification for custom evidence cannot be far better served by

showing exactly how the ‘balance’ is the result of real risks and benefits rather than irrelevant competitive factors or mere lethargy.” (Reply Brief at 2.) This argument is misguided in two respects. First, the fact that there may be “better” evidence relating to the cost-effectiveness of ESC does not make otherwise relevant evidence irrelevant. In fact, it is the cumulative effect of *all* of the relevant evidence, from the weakest to the strongest, that can make the most impact. For example, direct testimony from a litigation expert that a safety device was not technologically feasible would become even stronger and more persuasive when combined with evidence that no one else in an industry used that safety device. *See, e.g., Boatland of Houston*, 609 S.W. 2d at 748; *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 533 (D.N.J. 2001) (“[An] important indicia of reliability [of expert testimony] is industry practice—whether other manufacturers and consumers in the industry utilize the allegedly defective design or the proposed alternative.”). The same is true with respect to economic feasibility or cost-effectiveness; direct evidence that a safety device is not cost-effective or economically feasible becomes stronger when combined with evidence that no other