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. BC VC059206

ANSWER TO PETITION FOR REVIEW

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I. ADDITIONAL ISSUES FOR REVIEW IF REVIEW IS GRANTED

If the Court grants review, it should also decide:

1. Whether plaintiffs' motion in limine preserved for appeal an objection to evidence or argument comparing the subject vehicle's design to other vehicles' designs, where (i) before decision on the motion, plaintiffs told the court what they were asking for was a limiting instruction if the evidence came in, were invited to propose a limiting instruction, but never did; (ii) before decision on the motion, plaintiffs used evidence of other vehicles' designs to assert that Toyota knew the subject vehicle needed a similar design, but did not include it because competitors did not have it; (iii) plaintiffs made that same assertion in opening statement; (iv) plaintiffs introduced evidence comparing the Tundra to other vehicles' and competitors' designs in their case-in-chief to try to support that assertion; (v) at trial plaintiffs never objected to or moved to strike evidence of other vehicles' or competitors' designs; and (vi) the evidence was relevant for reasons not addressed in plaintiffs' in limine motion?

2. Whether any error prejudiced plaintiffs.

II. FACTS

Plaintiffs' petition asserts supposed facts without citation, despite Rules of Court 8.504(a) and 8.204(a)(1). Plaintiffs rely on purported "facts" found nowhere in the Court of Appeal's Opinion, despite Rule of

Court 8.500(c)(2). They did not point any purported omissions or misstatements out in their petition for rehearing. Plaintiffs misstate many of the facts, including the description of the accident (Pet.-4)[1], and statistics on ESC (Pet.-6).

Under Rule 8.500(c)(2), we take the facts from the Court of Appeal opinion ("Opinion" or "Op."), supplemented by omitted facts pointed out in Toyota's petition for rehearing.

A. Slippery Road, Excessive Speed.

In April 2010, plaintiff Kim was driving his 2005 Toyota Tundra pickup on a mountain highway. Op.-2; RT-III-1536-37, IX-3604, IX-3661. Kim's front tires had low, barely-adequate tread. Op.-4; RT-IV-1857, IV-1901, IV-1960, V-2161.

The roadway was wet from rain, gravelly, and laden with debris. Op.-2, 5; RT-III-1561, III-1572, III-1602-03, III-1647, IX-3606-07. Edgar Fuentes, driving shortly after Kim, "found gravel, running water on the road"; his car "skidded kind of getting off the road"; at 45 mph he "started to slide." Op.-5; RT-IX-3648, IX-3655.

Kim descended a curve at 45-50 mph, which was 15-20 mph over both the speed advised by the sign even for uphill oncoming traffic and the

[1] "Pet." is plaintiffs' petition, "Op." is the Court of Appeal opinion, "RT" is the reporters' transcript, "AA" is the appellants' appendix, "RA" is the Respondents' Appendix, "DPH is Defendants' Petition for Rehearing in the Court of Appeal, "RB" is Toyota's respondents' brief in the Court of Appeal and "ARB" is appellants' reply brief in the Court of Appeal.

maximum comfortable speed. Op.-2, 5; RT-III-1547, III-1567, III-1612, IV-1838-39, IX-3616-20, IX-3661, IX-3689-90.

B. Loss of Control.

Kim lost control and drove over an embankment. Op.-3; RT-IX-3662, IX-3720-21. He suffered severe injuries. Op.-3; RT-VI-2459.

Kim told police he swerved to avoid a vehicle. Op.-2-3; RT-V-2106. He "steered to the right and that put [him] on the gravel ... to the right of the roadway." Op.-3; RT-X-3967. He then "steered to the left." Op.-3; RT-X-3970. He then "lost control," and went "off the road." Op.-3; RT-X-3973.

The CHP officer found that the "collision occurred when [Kim] attempted to negotiate a right-hand curve in the roadway at a speed in excess of a speed safe for the conditions present (wet roadway)." DPR-5; RT-IV-1804. "Due to his speed the rear of [Kim's vehicle] skidded towards the outside of the curve" and "[Kim] attempted to counter 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 ...." DPR-6; RT-IV-1804. The officer determined that Kim violated Vehicle Code 22350 (Basic Speed Law) and 22107 (improper turning). DPR-6; RT-IV-1805-06.

In the past decade, the curve where Kim crashed had only one other crash; that was on snow or ice. DPR-9; RT-IX-3610-11.

C. Plaintiffs' Defect Theory: Lack of ESC.

Plaintiffs claimed the Tundra should have had a then-emerging technology called electronic stability control ("ESC"), also known as vehicle stability control ("VSC"). Op.-3, 32. ESC helps the vehicle go where the driver aims the steering wheel. Op.-4; RT-IX-3756-57. If the vehicle turns more or less than the steering wheel input, ESC brakes a wheel to counteract the rotation. Op.-4; RT-V-2124-25, VI-2478-79.

Not even plaintiffs' experts testified that absence of ESC made the Tundra unsafe or defective. DPR-6. Plaintiffs' ESC expert, Gilbert, agreed he had never "said a word about defect" in the 2005 Tundra. DPR-6; RT-V-2207. He owned a Tundra, drove it "very hard" and had no maneuverability complaints. DPR-6; RT-V-2206-07. He disclaimed the idea that every vehicle without ESC is "dangerous." DPR-6, 8; RT-V-2231. Plaintiffs' reconstructionist admitted the Tundra's brakes and tires were well capable of handling forces on the vehicle. DPR-6; RT-IV-1995-96. Toyota's witnesses testified the Tundra "has features that will make it unlikely that this kind of crash will occur," and was safe with or without ESC. DPR-6-7; AA-IV-840; RT-VIII-3381, VIII-3410, IX-3780-81.

ESC added at least $300-$350 per vehicle. Op.-5; RT-VIII-3423-24. In surveys of over 12,000 full-sized pickup owners, less than 15% wanted ESC *even for free.* DPR-7; RT-VIII-3316, VIII-3350-51, VIII-3373. Less than 5% of Tundra customers chose the ESC option. Op.-22; DPR-7; RT-

VIII-3315.

In 2005, the Tundra was the only pickup that offered ESC; it was offered optionally. Op.-3, 5; RT-VIII-3355, VIII-3369-70. Offering new safety features optionally, before they become standard, is common. Op.-23, 24 n. 10; RT-VIII-3404.

D. The Weak Causation Evidence.

Plaintiffs' causation evidence was weak.

1. Papelis' Generic Simulations Showing It Was More Likely Than Not That ESC Would *Not* Prevent A Given Accident.

Plaintiffs relied on simulations done for another purpose by computer engineer Papelis. In his simulations and the National Highway Traffic Safety Administration's figures, ESC reduced "loss of control by approximately 28 or 30 percent." Op.-29; DPR-12; RT-VI-2477. Thus, ESC prevents *less than half* of losses of control. Papelis provided no sound reason to think this accident would fall in that minority. He nevertheless opined based on his simulations that "if this vehicle had ESC, we just wouldn't be here today." Op.-4; RT-VI-2487.

Both sides' experts agreed that such simulations are not a sound basis for a causation opinion. For a simulator to accurately represent a vehicle's ESC response, it must match the particular vehicle – including its suspension, size, weight, track width, electronic throttle control, sensors, ESC algorithm, and tires. DPR-13; RT-VI-2566-68, VI-2572-74. Papelis'

simulations were of a Ford SUV and Olds sedan with new tires – not Kim's Tundra with worn tires. DPR-13; RT-VI-2513, VI-2602. He did not simulate this curve with a 7% grade or water flowing on the roadway. DPR-13; RT-VI-2513, VI-2575. Papelis had never heard of anyone "relying on any generic simulation … to express an opinion regarding the outcome of a specific accident"; that was not his simulations' "intent." DPR-12-13; RT-VI-2559-60.

Plaintiffs' ESC expert Gilbert did not "like simulations" because computers cannot properly "capture every variable." DPR-13; RT-V-2252.

Toyota's human-factors expert testified that applying simulations "to one particular instance at one particular time" is "far beyond what the science will allow." DPR-13; RT-VIII-3445, VIII-3448.

2. Gilbert's Speculation About Four Steers and a Phantom Driver With "No Evidence."

Plaintiffs' ESC expert Gilbert also opined that ESC would have averted this accident. Op.-4; RT-V-2146. Gilbert, however, relied on incorrect assumptions. He assumed Kim swerved to avoid an encroaching SUV preceding the Archers, witnesses driving the opposite way. DPR-13; RT-III-1536, III-1590-91, V-2148-51. But plaintiffs' reconstructionist found no physical evidence of such a car, the Archers did not see another vehicle, and Kim saw only one oncoming vehicle – necessarily the Archers. DPR-13; RT-III-1554-1555, IV-1884-85; X-3964-3975.

Gilbert also assumed Kim steered *four* times: "right, then left, then right, then left." DPR-13; RT-V-2149. Both sides' reconstructionists, however, found "evidence only of two steers." DPR-13-14; RT-IX-3740; IV-1891. Kim only described two or three steers. Op. 2-3; DPR-13-14; RT-X-3967-70.

3. Toyota's Actual Testing of ESC.

Toyota's reconstructionist and ESC expert, Carr, tested two 2005 Tundras identical to Kim's vehicle and each other, one with ESC and one without. DPR-14; RT-IX-3758-61. He tested them on both a wet surface and one with water accumulated. DPR-14; RT-IX-3762. ESC did not make a difference in either scenario.

On the "wet" roadway, even without ESC, the Tundra would not spin even with extreme steering or brakes and even well above Kim's speed. DPR-14; RT-IX-3764-67. Even "turning the steering wheel and slamming on the brakes won't make it spin." DPR-7-8; RT-IX-3781.

On the surface with accumulated water, the Tundra spun with or without ESC. DPR-14. Without ESC, at speeds in the mid-40 mph, it "start[ed] to slide." DPR-7-8, 14; RT-IX-3769. At higher speeds, "you cannot control the vehicle" because "there isn't enough ... traction." DPR-7-8, 14; RT-IX-3770-71. To spin the Tundra, he had to travel 47 mph and make quick linked turns "right on top of one another." DPR-7-8, 14; RT-IX-3772-73.

With ESC, at 49 mph he went "across the center line." DPR-7-8, 14; RT-IX-3773; Exhibit 29, RA 001. When he turned the wheel, the vehicle did not initially respond; it then shot to the right when it slowed and regained traction. DPR-7-8, 14; RT-IX-3774. Then it kept "going to the right even though I turn the wheel … back to the left." DPR-7-8, 14; RT-IX-3775. He concluded, "there won't be enough traction with worn front tires, a slippery road, and that travel speed for V.S.C. to change your path quickly enough to keep you from going across the center." DPR-7-8, 14; RT-IX-3774. "[W]ith or without V.S.C. … you are still going to go off the cliff." Op.-5; RT-IX-3777.

In terms of this accident, when Kim turned to the left to reenter the road, ESC would have helped it go left. Op.-5; RT-IX-3757. Kim's vehicle would have gone left "extremely quickly," crossed the roadway and gone off the cliff in about one second. Op.-5; RT-IX-3757.

E. Trial-Court Proceedings

1. Plaintiffs' Motion in Limine.

Before trial, plaintiffs moved in limine to exclude any evidence comparing the Tundra's design to its competitors' and argument that the design was not defective because it was equivalent or superior to the competitors'. Op.-3-4; AA-I-84-92; RT-II-310-12. Before the court ruled, plaintiffs told the court that Toyota's SUVs all had ESC by 2001, SUVs are "like trucks," and Toyota did not put ESC on trucks "because their

competitors didn't do it." Op.-19; RT-II-310. Perhaps realizing that his own argument relied on evidence of other vehicles, counsel for plaintiffs said "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." Op.-24; RT-II-311. The Court accordingly denied the motion in limine and invited him to propose a limiting instruction. Op.-24; RT-II-312. Plaintiffs never proposed one. Op.-24.

2. Trial

Plaintiffs told the jury in opening statement that Toyota made ESC standard on its SUVs, understood that SUVs and pickups have similar "controllability problems," intended to make ESC standard on 2005 trucks until it learned that Ford was not going to, and did not put ESC on its trucks because competitors weren't doing it. Op.-19; RT-II-1235-36, II-1238, II-1243.

To try to prove this, in their case-in-chief, plaintiffs introduced evidence that Toyota made ESC standard on all its SUVs by 2004. Op 5, 22; RT-VIII-3307, VIII-3338-39, VIII-3355-56. They also introduced evidence that Toyota's competitors did not have ESC on their pickups. Plaintiffs called Toyota Motor Sales' manager of product planning, Sandy Lobenstein, as an adverse witness, and asked him about Toyota's understanding of its competitor's design:

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.

DPR-10; RT-VIII-3328.

Plaintiffs' counsel continued:

Q: Was there any surprise to you that the take rate on VSC was so low …?

A: No other full-size pickup was offering VSC 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.*

[Sustained objection]

A: No one else had VSC 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. *S*o you are saying that *because Ford and Dodge weren't offering VSC, you didn't want to lose your competitive advantage by incurring the extra cost for VSC* 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 VSC 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.

Op.-21-22; RT-VIII-3338-40 (emphasis added). Plaintiffs' counsel kept at it:

> 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.

Op.-21-22; RT-VIII-3356 (emphasis added).

Counsel did not object to his own questions, move to strike the answers, or request a limiting instruction. Op.-21-22.

After plaintiffs' counsel questioned Lobenstein, Toyota elicited that in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. Op.-23-24, RT-VIII-3403-04. The questions were asked in connection with showing why new safety technologies are phased in, first as an option and then as standard equipment. Op.-23-24, n.10; RT-VIII-3403-04. Plaintiffs' counsel did not object, move to strike, or request a limiting instruction. Op.-24.

3. Jury Instructions

The jury was instructed on the risk/benefit test for design defect under *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430. Under this test, it was told that plaintiffs had the burden to prove that defendants sold the Tundra, that plaintiffs were harmed, and that "the Tundra's design

was a substantial [factor] in causing harm to plaintiff." Op.-6; DPR-10; RT-X-4242. "If plaintiffs have proved these three facts, then your decision on this claim must be for plaintiffs unless defendants proved that the benefits of the Tundras design outweigh the risk of the design." DPR-10; RT-X-4242. In assessing whether Toyota carried its burden, the jury was instructed to consider the five *Barker* risk/benefit factors. Op.-6; DPR-10-11; RT-X-4242-43. Plaintiffs' counsel emphasized in closing that this instruction, including plaintiffs' initial burden to prove the design caused their harm, was "the definition of defective design." DPR-11; RT-X-4289-90.

Plaintiffs proposed an instruction on the consumer-expectation test for design defect. Op.-6; AA I-155. Plaintiffs conceded that "consumers don't have any idea with regard to what is electronic-stability control." DPR-11; RT-X-4027, X-4032; pp. 27-28 below. After the evidence was in, the court refused the instruction. Op.-6; RT-X-4201.

4. Verdict and Judgment.

The jury deliberated only three hours, unanimously finding that the Tundra contained no design defect. Op.-6; DPR-14-15; RT-XI-4578, XI-4580-84; AA-III-550.

F. <u>Appeal</u>

The Court of Appeal affirmed the judgment.

G. Petitions for Rehearing

Both sides petitioned for rehearing, though plaintiffs neglect to mention it. *See* Cal. R. Ct. 8.504(b)(3). Defendants' petition for rehearing ("DPR") agreed with the outcome, but pointed out omissions and perceived misstatements to preserve them under Rule of Court 8.500(c)(2). Besides correcting an error in counsel listing, both petitions were denied.

III. REVIEW IS UNWARRANTED

A. Admissibility of Industry-Standard Evidence Does Not Warrant Review, And This Case Would Be A Poor Vehicle.

Plaintiffs try to interest the Court in a supposed conflict over admissibility of "industry standards or practices" in a risk/benefit case. Pet.-1, 8-17. The conflict is illusory, and is not presented by this case.

Plaintiffs' petition argues that evidence that competitors used a similar design – what plaintiffs call "industry standard" evidence – is not relevant or admissible to show that a product is not defective. The Opinion creates no conflict on that issue. It *agrees* that the evidence was not admissible for that purpose. Op.-19. It holds the evidence relevant and admissible for unremarkable reasons that plaintiffs mostly ignore, create no conflict, and are of no general interest.

1. The Opinion Affirmed Admission Of Evidence That Other Pickups Lacked ESC For Unremarkable, Case-Specific Reasons.

The Opinion held that evidence that no other 2005 pickup had ESC

was *not* relevant or admissible to show that the Tundra was not defective because its design was similar to other vehicles':

> Toyota also argues that evidence that the pickup trucks of its competitors did not have ESC was relevant … because "[i]f the Tundra was defective because it lacked ESC, then every other pickup in 2005 was defective," which "made [the Kims'] claims of danger less credible." This is actually a prime example of when industry custom and practice *would not be admissible. The fact that all of the manufacturers in an industry make the product the same way is not relevant because it does not tend to prove the product is not dangerous: All manufacturers may be producing an unsafe product.*

Op.-19.[2]

The Opinion affirmed admission for unremarkable reasons plaintiffs mostly do not address. It held that "evidence about pickup trucks manufactured by [Toyota's] competitors was relevant to rebut some of the Kims' arguments." Op.-19. There was nothing radical about that. "Rebuttal evidence is relevant and thus admissible if it 'tend[s] to disprove a fact of consequence on which the [adversary] has introduced evidence.'" *People v. Nunez* (2013) 57 Cal.4th 1, 27 (quoting *People v. Clark* (2011) 52 Cal.4th 856, 936). That is this case. Plaintiffs argued that Toyota made ESC standard on SUVs, supposedly understood pickups were like SUVs,

[2] The Court of Appeal's reasoning that all manufacturers may be producing an unsafe product overlooks the evidence. Plaintiffs' design expert did *not* think all vehicles without ESC were dangerous. *See* DPT-8; RT-V-2231. Regardless, this passage makes clear that the published opinion does *not* authorize trial courts to admit evidence that other products are made the same way to show that defendant's product is not dangerous.

therefore understood pickups needed ESC, but did not make ESC standard because its competitors didn't. Pp. 8-11 above. That vehicles *even more similar to the Tundra* (other pickups) did not have ESC tended to rebut that inference.

The Opinion also explained that most of the evidence about competing vehicles was elicited by *plaintiffs* and was relevant to *plaintiffs*' theory of the case. Op.-21-23. It held that plaintiffs' questions to Lobenstein, eliciting that no other full-size pickup had ESC and asking whether Toyota did not include ESC because competitors were not offering it (Part II.E.2 above), "were proper and sought information that was relevant" to plaintiffs' claim; because plaintiffs' questions "were designed to show that Toyota was making VSC optional on its trucks, rather than standard as the engineers had suggested, because Toyota's competitors were not making VSC standard" and to try to "show the jury that Toyota was ignoring the advice of its engineers and putting profit over safety." Op.- 22-23. They elicited this evidence before Toyota introduced it. *See* RT-VIII-3328, VIII-3338-40, 3356 (plaintiffs' questioning), RT-VIII-3403-04 (Toyota's questioning).

The questions and answers about competitors elicited by Toyota simply brought out again that no other 2005 pickup had ESC standard and the Tundra was the first to offer it optionally. Op.-23. The Opinion suggested they were relevant for an additional reason. Toyota elicited that

in 2005 no other pickups had standard ESC and the Tundra was the first full-sized pickup to offer it as an option. Op.-23-24. The questions were asked in connection with showing why new safety technologies are phased in, first as an option and then as standard equipment. Op.-24. The Opinion explained that the advantages of such phase-in are relevant to the risk/benefit analysis. Op.-24 n.10. Plaintiffs' petition does not dispute that.

The Opinion also made clear that plaintiffs had not preserved any objections. Plaintiffs did not object to their own questions or Toyota's questions, move to strike the answers, or request a limiting instruction. Op.-22-24. Though their motion in limine had claimed that comparison to other vehicles was flatly inadmissible (AA-87), at the hearing on their motion they told the judge "what I'm asking for" was a limiting instruction; the judge invited them to propose one; they never did. Pp. 8-9 above. Plaintiffs' failure to object or request a limiting instruction precluded their claims of error: "In the absence of a specific objection or a request for a limiting instruction, we cannot conclude that the court erred by admitting Lobenstein's testimony." Op.-24; *see* Op.-24-25 (similar).

2. The Opinion's Reasons For Finding No Error Do Not Conflict With Other Opinions.

These reasons for finding no error do not conflict with the cases cited in plaintiffs' petition.

Plaintiffs incorrectly say "most cases have strictly prohibited

'industry standard' evidence in products cases." Pet.-10. Not so. Plaintiffs' cases either are off point or hold that similarity to competitors' designs does not indicate that defendant's product is not defective. They do not hold such evidence categorically inadmissible for all purposes. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803 affirmed denial of a jury instruction allowing consideration of the extent to which defendant's design conformed to the industry norm, on the ground that industry custom is not a *Barker* factor and is an inappropriate consideration. It did not address whether the evidence was admissible, let alone for another purpose.[3] *Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 376-79 reversed denial of an instruction defining "product defect." Where the only use of industry-custom evidence was to show that defendant's product was not defective because it was like other products, the opinion said industry-custom evidence would be inadmissible in a new trial. It did not address whether the evidence was admissible for another purpose. *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477 reversed a jury instruction authorizing consideration of defendant's reasonable care. It did not address whether the jury can consider industry custom or whether the evidence was admissible. *Heap v. General Motors*

[3] Separately, *Grimshaw* held that the trial court did not abuse its discretion under section 352 in excluding statistical evidence that the vehicle there was no more dangerous than other vehicles. It held statistics unreliable, not irrelevant. 119 Cal.App.3d at 792. This case presents no reliability issue.

Corp. (1977) 66 Cal.App.3d 824, 831 stated that deviation from industry norm is not necessarily the test for defect. It did not address admissibility of evidence. *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 208-10 held that the jury should have been instructed that compliance with government specifications was not a defense. It did not suggest that compliance was inadmissible, and in fact the evidence there was admitted without objection. *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 543-46 held that the trial court did not abuse its discretion in excluding evidence that defendant's vehicle's rollover rates were superior to peer vehicles, on the ground that it "improperly sought to show that it met industry standards or custom for rollovers" and that the statistics were unreliable.

The Opinion *agreed* that other-vehicle evidence was inadmissible to show that the Tundra was not defective because other products were similar. Op.-19. It affirmed admission because of the evidence's relevance to other issues and plaintiffs' failure to object. Part III.A.1 above. That was correct. "The rule is well settled that if evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose." *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal. 2d 655, 665-66; *People v. Bryant* (2014) 60 Cal.4th 335, 405, as modified on denial of reh'g (Oct. 1, 2014), *cert. denied* (2015) 135 S. Ct. 1841; Evid. Code § 351 ("Except as provided by statute, all relevant evidence is

admissible"). Such evidence is limited to its proper scope by requesting a limiting instruction. Evid. Code § 355 ("When evidence is admissible … for one purpose and is inadmissible … for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."). The trial judge has no duty to give a limiting instruction sua sponte. *See* Evid. Code § 355 (instruction "upon request"); *Daggett*, 48 Cal.2d at 665-66. Plaintiffs never proposed a limiting instruction. Op.-22, 24. Similarly, they did not object to the closing argument they quote (Pet. 8-10), which also is not mentioned in the Opinion. *See* Cal. R. Ct. 8.500(c)(2).

Plaintiffs' parade of horribles is consequently misplaced. The Opinion does not mean "jurors are allowed to assume that the industry has competently weighed the *Barker* factors," "are induced to rely on industry practice and custom," or receive other manufacturers' "hearsay conclusion as to risk and benefits." Pet.-16. The Opinion holds the evidence *inadmissible* and *irrelevant* for such purposes: "The fact that all of the manufacturers in an industry make the product the same way is not relevant because it does not tend to prove the product is not dangerous…." Op.-19.

Plaintiffs have also foresworn any quarrel with the cases on the other side of their supposed conflict. Plaintiffs note that *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403 allowed evidence of industry technical standards. Pet.-11. Plaintiffs conceded that this was

correct: an "industry technical standard … may be relevant in assessing the suitability of a given design." ARB-6. Plaintiffs assert *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388 conflicts with the supposed "strict" approach, but they never say how. They deny *O'Neill* addresses industry standards and call it "sui generis." Pet.-11, 12.

This case is also not a suitable vehicle to decide whether similarity to other products' designs is admissible to show a product is not defective by reason of the similarity. The answer to that question does not affect admissibility of the evidence in this case since the Opinion held it inadmissible for that purpose, and held that the trial court did not err for other reasons.

3. Plaintiffs Disclaimed Below Any Argument That Evidence of Competing Vehicles Is Inadmissible For All Purposes.

Plaintiffs cannot claim in this Court that evidence of other products' similar designs is inadmissible regardless of its purpose. They took the opposite position in the courts below.

Plaintiffs told the Court of Appeal they "have never asserted that evidence of other vehicles or of technical standards is categorically inadmissible in a strict liability case." ARB-6; Op.-4 n.3. They admitted that "other vehicles" were relevant to prove "alternative design or the feasibility of a given improvement" – and, necessarily, to disprove them. ARB-6; Op.-14, 18. They admitted that an "industry technical standard …

may be relevant in assessing the suitability of a given design." ARB-6.

In the trial court, plaintiffs also "acknowledged that the admissibility of this evidence would depend on the purpose for which Toyota offered it." Op.-24. And plaintiffs introduced evidence of other vehicles' designs – those of both Toyota SUVs and competitors' pickups – in their case-in-chief, to try to prove their theory that Toyota put profits over safety. Op.-19; Part II.E.2 above. Having made other vehicles' designs a centerpiece of their case, plaintiffs cannot plausibly contend that it is inadmissible. And if it can be relevant to prove an element of plaintiffs' case, it can be relevant to undermine that same element.

Plaintiffs also cannot avoid their concessions below by claiming that evidence about other vehicles differs from the industry standard/practice/custom evidence plaintiffs condemn. The *only* industry standard/practice/custom evidence in this case concerns the design of other vehicles, specifically the facts that Toyota made ESC standard on SUVs and that other pickups did not have ESC. *See* Part II.E.2 above.

4. The Opinion's Rule Is Correct.

The "middle ground" adopted by the Opinion is that admissibility depends on "the nature of the evidence and the purpose for which the party seeking its admission offers the evidence." Op.-13. This rule is correct.

First, nothing in plaintiffs' cases makes evidence of competing designs inadmissible for all purposes. Evidence admissible for one purpose

must normally be admitted, even if inadmissible for a different purpose. *Daggett,* 48 Cal.2d at 665-66; *Bryant,* 60 Cal.4th at 405. That is this case: Plaintiffs repeatedly conceded that evidence of other vehicles' designs and industry standards is relevant and admissible for some purposes, they introduced it themselves, and the Court of Appeal affirmed its admission here for purposes *other* than proving that the Tundra was not defective because other vehicles were similarly designed.

Second, under Evidence Code section 351, all relevant evidence is admissible unless provided "by statute." Section 351 prohibits a non-statutory, judge-made rule barring evidence of other vehicles' designs or "industry standards" when such evidence is relevant to another issue in the case. The remedy to prevent improper use of such evidence is not barring its admission. It is a limiting instruction, which plaintiffs were invited to propose but never did.

5. Plaintiffs' Claims That The Opinion Injected Negligence Into Strict Liability Are Mistaken And Beside The Point.

Plaintiffs' theme is that comparison to other vehicles goes to negligence and not strict liability, and diverts from the "technical" merits under risk/benefit. Pet.-10, 16. They incorrectly criticize the Opinion for observing that this Court "has rejected the argument that rules derived from negligence law are incompatible with strict products liability, and has incorporated negligence principles into strict products liability doctrine."

Op.-16; Pet.-17-18. These assertions do not warrant review.

First, plaintiffs themselves put in issue comparison with other vehicles and Toyota's state of mind. They argued that Toyota understood that ESC was needed on pickups because it had made ESC standard on SUVs and pickups were supposedly like SUVs, and that it did not make ESC standard because "competitors" did not. Pp. 9-11 above. Their argument related to other vehicles and Toyota's state of mind, not "the technical evidence of *Barker* factors." Pet.-16. Plaintiffs cannot introduce state-of-mind and comparison-to-other-vehicle evidence, then cry foul if defendant responds in kind.

Second, comparison with other vehicles' designs does *not* go only to negligence. Here, Toyota's appellate brief identified other issues to which the evidence was relevant, even beyond those mentioned in the Opinion. Evidence that no other full-size pickup had ESC was also admissible here to demonstrate that ordinary pickup-truck consumers did not expect ESC, refuting plaintiffs' claim that absence of ESC violated the consumer-expectation test for design defect. P. 26 below; RB-30. That thousands of pickups – all without ESC – had navigated that same stretch of highway without problem for a decade, in all weather conditions, was relevant to show that absence of ESC was not a major cause of plaintiff's accident and to support Toyota's argument that, if liability were found, more fault should be allocated to Kim's negligent driving and less fault allocated to the

absence of ESC. RB-30-31. In contrast, the Opinion holds the evidence *inadmissible* for the purpose that plaintiffs equate to a negligence argument, *i.e.* saying defendant's product is non-defective because others are similar. Op.-19.

Third, the Opinion was correct. "[W]e have incorporated a number of negligence principles into the strict liability doctrine, including *Barker's* risk/benefit test." *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 480 ; *see also* Op.-16-17 (citing additional Supreme Court cases). Plaintiffs' counsel told the trial court that "the risk/benefit theory is a hybrid negligence theory." RT-X-4032.

6. Plaintiffs' Issues Presented Are Not Capable of Resolution And Proceed From A False Premise.

For reasons already described, plaintiffs' substantive arguments do not warrant review. Their issues presented are also not suitable for review.

Plaintiffs' first issue asks "under what circumstances" a "defendant" is "entitled" to introduce or argue about industry-standard evidence. But this Court cannot in this case foresee all of the circumstances in which such evidence or argument would be offered and opine hypothetically on whether they would be proper. Any such advisory opinion would go far beyond the Court's traditional role. The particular reasons for affirming admission *in the circumstances of this case* are unremarkable, do not conflict with other cases, and are of no general interest. (Part III.A.1

above).

Moreover, plaintiffs' question – limited to the circumstances in which "defendants" can introduce such evidence – would create a double-standard. As this case illustrates, plaintiffs often try to introduce evidence of other vehicles' designs for a variety of reasons. Part III.A.3 above. Plaintiffs' say *plaintiffs* should be able to introduce evidence of other vehicles as relevant to multiple *Barker* issues, including feasibility of alternative designs. Pet.-14-15. Limiting the question to "defendants" would let plaintiffs use other-vehicle evidence as they saw fit but constrain defendants.

Plaintiffs' second issue is not presented in this case. It posits that defendant introduces the evidence "on the premise it reflects industry research and experience bearing on safety, practicality, technical or financial feasibility." Pet.-1. That was not the premise on which the Opinion affirmed admission.

Plaintiffs' issues also proceed from a false premise. They ask whether evidence of industry standards is admissible in a risk/benefit case. Pet.-1, Issues 1 and 2. But at the time plaintiffs' motion in limine was denied and the parties introduced the evidence, it was also a consumer-expectation case. Plaintiffs sought an instruction on the consumer-expectation test. *See* Op.-31-33. This instruction was not denied until the end of trial, long after the court had denied plaintiffs' motion in limine and

the parties had introduced the evidence that other full-size pickups did not have ESC. *See* RT-X-4201 (refusing instruction); DPR-9. Whether the consumer-expectation test is met depends on the expectations of the product's consumers. *Soule v. Gen. Motors Corp.* (1994) 8 Cal.4th 548, 567. Evidence that other pickups did not offer ESC was directly relevant to whether pickup-truck consumers expected ESC. Toyota pointed this out during arguments on motions in limine and the consumer-expectation instruction, and in the Court of Appeal. RT-II-308, X-4022 ("[T]here is no consumer expectation regarding it essentially because it's not in virtually any vehicle, and it was in no trucks at the time"); RB-29-30; DPR-15.

B. Refusal of the Consumer-Expectation Instruction Does Not Warrant Review, And This Case Would Be A Poor Vehicle.

Plaintiffs fare no better in seeking review on the consumer-expectation test. They pose two questions: (1) whether drivers are "capable of forming" expectations about how a vehicle performs in an emergency, such that the court should instruct on consumer expectations "where it is alleged that a vehicle lacks a stability control system designed to conform the vehicle's behavior to the driver's expectations," and (2) whether "reasonable expectations" refers to the vehicle's behavior or to whether it contains stability control technology. Pet.-1, 18-29.

This case presents no conflict or issue of general importance. The consumer-expectation test does not apply.

As *Soule* explains, the consumer-expectation test is made for cases where "'ordinary knowledge ... as to ... [the product's] characteristics'" permits "an inference that the product did not perform as safely as it should." *Soule*, 8 Cal.4th at 566 (citing Restatement (Second) Torts § 402A cmt. i). The test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." *Id.* at 567. As a result, "expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." *Id.*

> Further, the test does not apply when ordinary consumers have no basis to know how the product should behave under the circumstances or to know "how safe it should be made":[A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, *the ordinary consumer of an automobile simply has "no idea" how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.*

Id. at 566-67 (emphasis added). "In such cases, the jury *must* consider the manufacturer's evidence of competing design considerations [citation], and the issue of design defect cannot fairly be resolved by standardless reference to the 'expectations' of an 'ordinary consumer.'" *Id.* at 567.

In affirming denial of the consumer-expectation instruction, the Opinion merely applied this straightforward law. First, ordinary consumers

concededly had "no idea" about ESC, did not expect pickups to have it, know how pickups behaved with it, or expect pickups to behave as if they had it. Without dispute, ESC was not on other pickups. At trial, plaintiffs emphasized that consumers "consumers don't have any idea with regard to what is electronic-stability control." RT-X-4027, 4032. "[T]he motoring public did not understand E.S.C. or V.S.C." RT-II-1236. *See also* RT-VII-3316-17, 3357, 3359, 3361, 3362, 3365, 3415, 3416 (all suggesting that consumers did not know what ESC was or its benefits). Instead, plaintiffs used experts to tell the jury what ESC was and how it made the vehicle perform, and explained its technical benefits. RT-VI-2477-80, 2509 (Papelis), RT-V-2123-26 (Gilbert).

Because plaintiffs acknowledged that the ordinary consumer was unfamiliar with ESC and used expert testimony to describe the "merits of the design," *Soule,* 8 Cal.4th at 567, the consumer-expectation test did not apply. Op.-32-33; *accord, Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1379-80 (expert testimony could not support application of the consumer-expectation test); *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370 n.6 ("The consumer expectation test applies only when the defect can be determined by common knowledge regarding minimum safety expectations, not where (as here) an expert must balance the benefits of design against the risk of danger."); *Howard,* 203 Cal.App.4th at 424-25; *Pannu v. Land Rover N. Am., Inc.* (2011) 191

Cal.App.4th 1298, 1310; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1129.

Second, plaintiffs' no-ESC theory sought to examine how an obscure component unknown to consumers (ESC) would have performed under the esoteric circumstances of a particular accident. Op.-32. As the Opinion explained, such a claim must be evaluated under the risk/benefit test. Op.-32-33; *Soule,* 8 Cal. 4th at 567, 570 (only risk/benefit applied to theory "of technical and mechanical detail" that "sought to examine the precise behavior of several obscure components … under the complex circumstances of a particular accident"). Where "both parties assume[] that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters," giving a consumer-expectations instruction is "improper." *Soule*, 8 Cal.4th at 570.

Third, consumers have no experience under the circumstances of this accident. "[T]he consumer expectations test does not apply when the degree of safety a product should exhibit *under particular circumstances* is a matter *beyond the common experience* and understanding of its ordinary users." *Id*. 568 n.5 (emphasis added). As plaintiffs' own case explains, application of the consumer-expectation test depends on whether consumers have everyday experience under the circumstances of the purported failure. *McCabe v. Am. Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1122. Even plaintiffs do not assert that consumers have

experience making sudden turns while speeding on balding tires on a steep, wet, gravelly road.

Plaintiffs' contrary arguments present no ground for review. Plaintiffs ask the Court to decide whether consumers are "capable of forming" expectations about the performance of a vehicle in an evasive maneuver. Pet.-1. *Soule* answers that question. "[E]xpert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." *Soule*, 8 Cal.4th at 567. The expectation must be based on "everyday experience of the product's users" and exist "regardless of expert opinion about the merits of the design." *Id.* at 567. In 2005, everyday experience of the product's users was with pickups *without* ESC. Plaintiffs sought to "form" expectations in the courtroom, by having *experts* tell the jury what ESC was and why it was beneficial, which *Soule* forbids. Op.-32-33.

Plaintiffs ask whether the consumer-expectation test applies to a device that ostensibly "conform[s] the vehicle's behavior to the driver's expectations." Pet.-1, 26-29. This issue is case-specific and presents no ground for review under Rule 8.500. Plaintiffs do not identify any conflict in the lower courts, or even another case, addressing this supposed question.

Plaintiffs also ask the Court to decide whether consumers can "form" expectations about how a vehicle performs in emergency

maneuvers. Pet.-26-28. This question is not presented by this case. Citing nothing, plaintiffs say their "case was that vehicle performance in evasive maneuvers is a matter as to which consumers unquestionably have expectations…." Pet.-25. The Opinion does not say that was plaintiffs' case, *see* Cal. R. Ct. 8.500(c)(2), and it was not. Plaintiffs' theory at trial was *not* that the Tundra performed less safely than consumers' everyday experience led them to expect – for example, that ordinary consumers would not have expected a pickup to skid in this situation. If that had been their theory, they need never have mentioned ESC. It would have been a weak theory. Consumers know vehicles can skid – especially swerving at 50 mph on a wet, gravelly road. Fuentes skidded going about Kim's speed on the same stretch of road at about the same time. Op.-5; RT-IX-3648, IX-3655.

Rather, plaintiffs' theory in support of the consumer-expectations instruction was specifically that the Tundra should have had ESC because consumers expect manufacturers to incorporate "all available important safety devices." RT-X-4017, X-4020 ("expectancy that this vehicle had the latest and greatest"), X-4026-28, X-4032 (all similar). *Soule* dictates that such a case must be tried under the risk/benefit theory. *Soule*, 8 Cal.4th at 567 n.4 (rejecting argument that consumer-expectation test holds manufacturers to expectations of hypothetical "reasonable consumer who is fully informed about what he or she *should* expect," a function served by

risk/benefit). Experts cannot be used to tell the jury what the reasonable consumer would or should expect. *Id.* at 567.

Still straining to identify a review-worthy issue, plaintiffs say that "the need for technical explanations as to *how* a product failed is no barrier." Pet.-20. They posit a conflict between *Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480 and *McCabe*, 100 Cal.App.4th at 1122 on an amorphous issue about whether the consumer-expectation test applies if the "mode of operation or failure is complex or evaluation of the alternative designs requires technical explanation," or if there is "technical trade-off." Pet.-22. This case presents no such conflict. The Opinion did not hold the consumer-expectation test inapplicable because of a complex "mode of operation or failure" or the need for technical explanations about *how* the vehicle supposedly failed. It held the test inapplicable because ordinary pickup consumers in 2005 had no experience with ESC, no expectation that a pickup would have it, and no idea how ESC would affect its safety. Plaintiffs used experts to explain what ESC is, how it functions and why it should be on a vehicle. That is what *Soule* forbids. Op.-32-33.

C. The Opinion Does Did Not Apply A "Previously Unknown Evidentiary Rule" And It Does Not Warrant Review.

Plaintiffs' third issue asks whether a new trial is required to let plaintiffs object to evidence based on a "previously unknown evidentiary rule." Pet.-1. Plaintiffs assert that they should not be charged with offering

instructions and objections anticipating what they claim was the Opinion's unforeseeable adoption of the "middle ground," Pet.-29-31, that industry-custom evidence may be admissible depending on its nature and purpose. Op.-13-18. Plaintiffs do not explain how this issue meets the criteria for review; it does not. *See* Cal. R. Ct. 8.504(b)(2).

First, plaintiffs' profession of surprise relies on their misinterpretation of prior case law and the Opinion. As detailed above, previous case law did not prohibit all evidence of competitors' designs. Plaintiffs' cases at most prohibited use of those designs for a particular purpose: to show that defendants' design was similar to others and non-defective by reason of the similarity. Part III.A.2 above. The Opinion agreed, holding the evidence here inadmissible and irrelevant for that purpose. Op. 19. It held the evidence admissible for other reasons: plaintiffs changed from requesting the evidence's exclusion to requesting a limiting instruction, they introduced it in their case-in-chief on an issue to which it was undisputedly relevant, they acknowledged that its admissibility would depend on the purpose for which Toyota offered it (Op. 24), it was relevant to rebut their evidence, and they did not object or propose a limiting instruction. Part III.A.1 above. Nothing in plaintiffs' cases made those reasons unforeseeable or extraordinary. To the contrary, plaintiffs obviously could and did foresee that the evidence might be admissible, since they said what they wanted was a limiting instruction.

Op.-24. This case is thus nothing like *People v. Kitchens* (1956) 46 Cal.2d 260, 264 or *People v. Nigri* (1965) 232 Cal.App.2d 348, where post-trial Supreme Court opinions overturned long-established rules of law.

Second, plaintiffs do not identify any disuniformity of decision or other ground for review. Cal. R. Ct. 8.504(b)(2). They do not, for example, identify any conflict between the Opinion and others on the standard for applying a supposedly-new rule. The law is settled. Appellate decisions normally apply to the case in which they are announced. *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023; *Grafton Partners L.P. v. Super. Ct.* (2005) 36 Cal.4th 944, 967. Ordinarily the "only" exception to this rule occurs when a decision "constitutes a 'clear break' with decisions of this court or with practices we have sanctioned by implication, or when we 'disapprove[] a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities.'" *Grafton,* 36 Cal.4th at 967; *Rose v. Hudson* (2007) 153 Cal.App.4th 641. That is not this case. As detailed above, the previous law did *not* deem the evidence inadmissible for the purposes for which the Opinion held it admissible, and plaintiffs *did* foresee that the evidence might be admissible since they said that what they wanted was a limiting instruction.

IV. IF THE COURT GRANTS REVIEW, IT SHOULD REVIEW TWO ADDITIONAL ISSUES.

If the Court grants review, it should review two additional issues:

1. Failure to Preserve Objection To "Industry Standard" Evidence.

Toyota argued in the Court of Appeal that plaintiffs had not preserved any objection to "industry standard" evidence, even beyond their failure to object at trial or request a limiting instruction. RB-26-27. Toyota's petition for rehearing pointed out the Opinion's omission of this issue. DPR-15.

First, "[i]f a party introduces inadmissible evidence over objection, and later the opposing party offers the same kind of evidence, the opposing party waives the prior objection and loses the right to complain of error." 3 Witkin, *Evidence* § 385 (2012); *e.g., Romeo v. Jumbo Market* (1967) 247 Cal.App.2d 817, 823 (plaintiff initially objected to evidence, but objection was waived when plaintiff later introduced evidence "contain[ing] the same objectionable material"); *Ganiats Constr., Inc. v. Hesse* (1960) 180 Cal.App.2d 377, 389-90; *Heiman v. Mkt. St. Ry. Co.* (1937) 21 Cal.App.2d 311, 315-16 (after plaintiff's objection to evidence was overruled, she waived objection by causing the evidence to be exhibited again to the jury). Here, plaintiffs relied on evidence about other vehicles, including competitors' lack of ESC, even before the trial court denied their motion in limine; discussed it in opening statement; and introduced it in their case-in-chief when they called Lobenstein. Only later did Toyota introduce such evidence, also through Lobenstein. P. 11 above.

In response to this argument, plaintiffs cited case law holding that a party who objects to evidence and loses may then introduce the evidence to anticipate the adversary's use of it. *E.g., McLaughlin*, 148 Cal.App.3d at 209; *Elec. Equip. Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857.

Second, to preserve an objection, a denied motion in limine must be "made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." *People v. Morris* (1991) 53 Cal.3d 152, 188-90, *overruled on other grounds, People v. Stansbury* (1995) 9 Cal.4th 824, 830, n. 1; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1675. Plaintiffs' motion here was made pretrial, on the ground that a manufacturer cannot defend a design-defect claim by saying its product complied with industry standards. AA-I 84-90. But as discussed above, the evidence was relevant to other issues raised at trial and not addressed in plaintiffs' pretrial motion, including (1) to rebut plaintiffs' inference that Toyota "understood" pickups needed ESC, based on their evidence that Toyota installed ESC in SUVs; (2) to show that pickup-truck consumers did not expect ESC, making the consumer-expectation test inapplicable; and (3) to apply to ESC the undisputedly-relevant testimony that new technologies are phased in. Thus the motion in limine did not present the question in its appropriate factual context.

The Court should review whether plaintiffs preserved their objection

because preservation is a prerequisite to appellate review, and to resolve the conflict between the *Romeo* and *McLaughlin* lines of cases. The preservation question is fairly included in plaintiffs' issues for review 1-2 and qualifies for review in its own right to secure uniformity of decision. *See* Cal. R. Ct. 8.500(b)(1).

2. Absence of Prejudice From Claimed Errors

A judgment cannot be reversed unless the court concludes, after examining the record, that the error caused a miscarriage of justice. Cal. Const. Art. VI, § 13; Evid. Code § 353(b); *Soule*, 8 Cal.4th at 574. Toyota's brief pointed out that plaintiffs made no attempt to show prejudice from the supposed evidentiary and instructional errors. Toyota argued that given the weakness of plaintiffs' defect and causation evidence, short deliberations and unanimous verdict, it was not reasonably probable that plaintiffs would have received a better outcome absent the alleged errors. RB-33-34, 54-56. Because the Opinion found no error, it did not evaluate prejudice. Toyota's petition for rehearing pointed the omission out. DPR 16-17. Because a judgment cannot be reversed absent prejudice, and prejudice is fairly included in plaintiffs' questions whether the trial court erred, any grant of review should include whether any error was prejudicial.

V. CONCLUSION

The Court should deny review.

Dated: March 21, 2016

MORGAN, LEWIS & BOCKIUS LLP

By 

Robert A. Brundage
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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

CERTIFICATE OF WORD COUNT

I certify that this answer contains 8,397 words, as counted by the Microsoft Word 2010 software used to generate it.

Dated: March 21, 2016 Robert A. Brundage

By: Robert A. Brundage
Robert A. Brundage

CERTIFICATION OF SERVICE

I, Jennifer Gray, certify and declare as follows:

I am a citizen of the United States and a resident of the State of California. I am over eighteen years of age, not a party to this action, and am employed in San Francisco County, California at One Market Street, Spear Tower, San Francisco, California 94105. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited that same day in the ordinary course of business.

On March 21, 2016, I served the following document via U.S. Mail on the parties set forth below:

ANSWER TO PETITION FOR REVIEW

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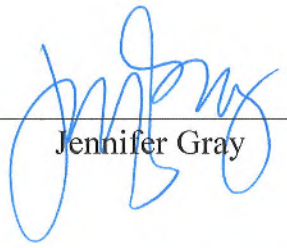
I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed on March 21, 2016, at San Francisco, California



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