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.

APPLICATION OF THE CONSUMER ATTORNEYS OF CALIFORNIA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

On Review of the Opinion of the Court of Appeals
Second Appellate District, Division Seven, Case B247672
On Appeal from the Judgment of the Superior Court
of the State of California, County of Los Angeles
The Honorable Raul A. Sahagun, Case No. VC059206

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(C.R.C. Rule 8.208)

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person who must be listed under (d)(1) or (2) of rule 8.208.

Dated: November 29, 2016 Respectfully submitted,

By: _____

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANTS WILLIAM LEE KIM, et al.

TO CHIEF JUSTICE TAMI CANTIL-SAKAUYE:

Amicus curiae Consumer Attorneys of California respectfully requests that the attached amicus brief in support of Appellants William Lee Kim, et al. be accepted for filing in this action.

INTEREST OF THE AMICUS

The Consumer Attorneys of California, founded in 1962, is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The Consumer Attorneys' membership consists primarily of attorneys representing individuals who have been subjected to personal injuries, adverse employment actions, and other harmful business and governmental practices. The Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

Because many of the Consumer Attorneys members represent consumers injured by defective products, the Consumer Attorneys has an abiding interest in the issue presented in this case, which is the admissibility of industry custom and practice evidence as a part of the balancing involved in the “risk-benefit” test in the trial of strict products liability actions.

NEED FOR FURTHER BRIEFING

Counsel for the Consumer Attorneys is familiar with all of the briefing filed by the parties in this action to date. Amicus believes its brief

will offer this Court valuable insights regarding the public policy issues presented and authorities not previously discussed or cited by the parties.

Specifically, this amicus brief will analyze the core principles in California law regarding the public policy expressed in *Greenman v. Yuba Power Products, Inc.* (1965) 59 Cal.2d 57, in implementing strict liability in products liability actions, and the plethora of cases exploring the implications of the "California" approach to strict products liability since then. A battle between competing interests has been waged at the core of the trial of products liability actions over what evidence is relevant and admissible for the jury's determination of the existence of an actionable "defect" in the at-issue product. Both sides of the case have attempted, at different times, to introduce and rely on evidence of government standards and industry standards and custom to bolster their arguments for, or against, non-compliance or compliance as evidence of the existence of a defect in the product.

In the instant case, the Court has limited its review to the admissibility of industry custom and practice as a part of the risk-benefit test for design defect.

Amicus argues that California courts have consistently and uniformly held that evidence of industry custom and practice is never admissible over the objection of either side to a trial, and that this consistent ruling is the best and proper ruling which upholds the public policy expressed in the California adoption of strict products liability and its commitment to keeping negligence considerations out of the litigation of strict products liability cases.

Amicus believes that the analysis presented in the accompanying brief will:

(1) promote sound judicial administration by reinforcing the state's public policy in this area of the law, thereby facilitating accurate trial court rulings, and minimizing the need for appeals and reversals,

(2) promote uniformity in the interpretation of the law by trial counsel and application of the law by the courts, and

(3) promote settlements by allowing opposing parties to develop a common perspective on the evidence which will be allowed at trial of strict liability actions.

Because these issues are so important to judges and counsel in litigation involving consumers throughout the State, amicus respectfully requests that the accompanying brief be accepted for filing.

DISCLOSURE UNDER RULE 8.520(F)(4) OF THE CALIFORNIA RULES OF COURT

No party or counsel for a party or any other person or entity has made a monetary contribution to fund the preparation and submission of the proposed brief.

Dated: November 29, 2016

_____

BRIAN D. CHASE, Esq.
Attorneys for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

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AMICUS BRIEF IN SUPPORT OF
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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA submits this Brief on the Merits of this action on behalf of Plaintiffs/Appellants WILLIAM JAE KIM, et al.

INTRODUCTION

The Court has posed the following question for its review of the Court of Appeal's ruling in this case:

> Did the trial court commit reversible error in admitting, as relevant to the risk/benefit test for design defect, evidence of industry custom and practice related to the alleged defect?

Amicus submits that the court of appeal erred in holding that trial court *did not* commit error in admitting evidence in this case "as industry custom and practice" as a part of the risk/benefit test. By allowing the evidence to be introduced, discussed, and argued to the jury as "industry custom and practice", or "this is how other manufacturers have done it", the court of appeal allowed the trial court to erroneously ***redirected the jury's focus*** in the case: from ***the existence of a defect in the at-issue 2005 Toyota Tundra*** pickup truck, toward ***the reasonableness of Toyota's conduct*** in making its design decisions in manufacturing the truck. Such a redirection is inconsistent with California decisions dating back to the birth of strict products liability in *Greenman v. Yuba Power Products, Inc.* (1965) 59 Cal.2d 57, in implementing strict liability in products liability actions, and the uniform results in cases exploring the implications of the "California" approach to strict liability since then.

These considerations remain important and as applicable today as they did in 1972 when this Court stated in *Cronin v J.B.E. Olson Corporation* (1972) 8 Cal.3d 121, 134, that the imposition of the burdens of negligence in a strict products liability case "represents a step backward in the area pioneered by this court." To permit a defendant to introduce evidence – categorized and presented as "industry custom" or "industry practice", as being what the members of an industry usually do or don't do – as a part of the "risk/benefit" test is to present the possibility, if not the probability, that the jury would adopt the behavior of members of an industry as determinative of whether the at-issue product is, or is not, defective. Not only does this evidence sound like a *standard of due care* and, therefore, *of negligence*, but it impermissibly admits the "testimony" of an industry as if it were a "given", a fact so established that a court could take judicial notice of it. This drift into negligence is the very event which this Court promised Amicus – in its opinion in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 434 – that the adoption of the risk/benefit test would not bring about the injection of negligence considerations into the trial of strict products liability cases.

Other jurisdictions which apply the "California approach" to strict products liability also exclude the admission of industry custom and practice evidence, including Pennsylvania, Missouri, Maryland, and Kansas.

This brief accepts the plain meaning of the phrase used by the Court to define the issue for review: "industry custom and practice". It does not include argument regarding the use of "standards" set either by governments or industry groups. Since the parties did not shape the discussion in the trial court or court of appeal as addressing industry or

government standards, such a discussion would be outside of the issues of this case.

Because of the public policy long adopted and protected by the courts in California, this Court should continue the rule that industry custom and practice is not admissible in the trial of a strict products liability action.

ARGUMENT

I. THE ACCEPTED FOCUS IN A STRICT PRODUCTS LIABLITY ACTION IS ON THE PRODUCT, NOT ON THE REASONABLENESS OF THE INDUSTRY'S AND MANUFACTURER'S CONDUCT RELATING TO THE PRODUCT.

In *Greenman v. Yuba Power Products, Inc.* (1965) 59 Cal.2d 57, this Court, as a matter of public policy in response to what it saw were the burdens and difficulties facing injured consumers to prevail under warranty or negligence theories, adopted strict liability as a theory of liability in actions against the manufacturer of defective products. This public policy was adopted to shift the financial burden of risk of injury by a defective product to the manufacturer. "The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Id.* at 63.)

In 1972, this Court made a principled stand against what it saw as the incursion of negligence standards into strict products liability actions. In *Cronin v J.B.E. Olson Corporation* (1972) 8 Cal.3d 121, this Court rejected the "unreasonably dangerous" phrase used in defining the

plaintiff's burden of proof of a defect in a product under section 402a of the Restatement Second of Torts:

> The result of the limitation, however, has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. *Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence.* As a result, if, in the view of the trier of fact, the 'ordinary consumer' would have expected the defective condition of a product, the seller is not strictly liable regardless of the expectations of the injured plaintiff. If, for example, the 'ordinary consumer' would have contemplated that Shopsmiths posed a risk of loosening their grip and letting the wood strike the operator, another Greenman might be denied recovery. *In fact, it has been observed that the Restatement formulation of strict liability in practice rarely leads to a different conclusion than would have been reached under laws of negligence.* (Rheingold, Proof of Defect in Product Liability Cases (1971) 38 Tenn.L.Rev. 325, 326, fn. 5; Keeton, Products Liability—Some Observations About Allocation of Risks (1966) 64 Mich.L.Rev. 1329, 1340—1341; Wade, Strict Tort Liability of Manufacturers (1965) 19 Sw.L.J. 5, 15; Prosser, Supra, 69 Yale L.J. 1099, 1119; Note, Products Liability and Section 402A of the Restatement of Torts (1966) 55 Geo.L.J. 286, 323; contra, Kessler, Products Liability (1967) 76 Yale L.J. 887, 901.) *Yet the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence* (Escola v. Coca Cola Bottling Co., Supra, 24 Cal.2d 453, 461—462, 150 P.2d 436) (Traynor, J., concurring) *and warranty* (Greenman v. Yuba Power Products, Inc., supra, 59 Cal.2d 57, 63, 27 Cal.Rptr. 697, 701, 377 P.2d 897, 901) *remedies*, and thereby 'to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . ..' (Id.; see Price v. Shell Oil Co., Supra, 2 Cal.3d 245, 251, 85 Cal.Rptr. 178, 466 P.2d 722.) [¶] Of particular concern is the susceptibility of Restatement section 402A to a literal reading which would require the finder of fact to conclude that the product is, first, defective and, second, unreasonably dangerous. (Note, Supra, 55 Geo.L.J. 286, 296.) A bifurcated standard is of necessity more difficult to prove than a unitary one. *But merely proclaiming*

> *that the phrase 'defective condition unreasonably dangerous' requires only a single finding would not purge that phrase of its negligence complexion.* We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden *and represents a step backward in the area pioneered by this court.* (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 132–34.) [Italics emphasis added.]

In *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, the Court first rejected the defense argument in holding that the Court's rejection of the Restatement requirement of "unreasonably dangerous" in *Cronin* applies to the proof of design defects, not just manufacturing defects. (*Id.* at 425.)

The second (and more consistently cited) holding in *Barker* addressed the struggle that the Court observed as "a number of thoughtful Court of Appeal decisions have wrestled with the problem of devising a comprehensive definition of design defect in light of existing authorities." (Barker, *supra*, 20 Cal.3d at 429.) It approved the use of two alternative tests to determine the existence of design defects—the consumer expectations test and the risk-benefit test. The *Barker* court proposed the tests in the following language:

> [A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. (*Id.* at 432)

The Court approved five criteria to be applied in risk benefit test:

> Our review of past cases indicates that in evaluating the adequacy of a product's design pursuant to this latter standard, 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. (*Barker, supra*, 20 Cal.3d at 431.)

While participating in the advocacy in *Barker*, Amicus CTLA (now CAOC) expressed concern that the "balancing" which would result in the proposed criteria for the risk/benefit test was tantamount to the reintroduction of "negligence" factors in a strict products liability trial. The Court assuaged those concerns, writing that:

> Finally, contrary to the suggestion of amicus CTLA, an instruction which advises the jury that it may evaluate the adequacy of a product's design by weighing the benefits of the challenged design against the risk of danger inherent in such design is not simply the equivalent of an instruction which requires the jury to determine whether the manufacturer was negligent in designing the product. (See, e. g., Wade, On the Nature of Strict Tort Liability for Products, supra, 44 Miss.L.J. 825, 835.) It is true, of course, that in many cases proof that a product is defective in design may also demonstrate that the manufacturer was negligent in choosing such a design. *As we have indicated, however, in a strict liability case, as contrasted with a negligent design action, the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct.* (See, e. g., Ault v. International Harvester (1974) 13 Cal.3d 113, 121, 117 Cal.Rptr. 812, 528 P.2d 1148; Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 453, 462, 150 P.2d 436 (Traynor, J. concurring).) [¶]Thus, *the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances*, while perhaps absolving the manufacturer of liability under a negligence theory, *will not*

> *preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders***.** (See Foglio v. Western Auto Supply, supra, 56 Cal.App.3d 470, 477, 128 Cal.Rptr. 545.) (*Barker, supra*, 20 Cal.3d at 434.) [Italics emphasis added.]

The *Barker* Court expressly rejected presentation of evidence for the jury's evaluation of the manufacturer's conduct – even if the manufacturer was acting as a reasonably prudent manufacturer under the circumstances – but instead held that the jury's focus is properly directed to whether the product was safe or unsafe.

This Court in the past has rejected reliance upon Restatement Second of Torts, section 402(a) in cases like *Cronin* and *Barker*, as reiterated in *Soule v. General Motors Corporation* (1994) 8 Cal.4th 548, 560-562, as being inconsistent with the California approach to strict products liability because of its shifting of the burden of proof to the plaintiff and because of the injection of negligence into that approach. The Court should also reject invitations that it rely on Restatement Third of Torts: Products Liability. The reasons for this are encapsulated in the American Law Institute's formulation of the definitions of a product "defective in design" in section 2(b) using language such as "foreseeable risks of harm" and "reasonable alternative design". This Court recently confirmed its recognition that Restatement Third's provisions are inconsistent with California law on design defect liability. (*Webb v. Special Elec. Co., Inc.* (2016) 63 Cal.4th 167, 184, fn. 8.) Such a reliance would be a decision outside of the single issue for review in this case, and could result in an extensive disruption to the body of case law in California and the practice of lawyers and trial courts in strict products liability cases.

II. BASED ON THE COURT'S HOLDING IN BARKER, THE COURTS OF APPEAL HAVE CONSISTENTLY HELD THAT EVIDENCE OF INDUSTRY CUSTOM AND PRACTICE IS NEVER ADMISSIBLE IN A STRICT LIABILITY TRIAL.

A. The Court of Appeal Accurately Cited What It Calls the *Titus/Grimshaw* Line of Cases Holding That Industry Custom and Practice is Never Admissible in a Strict Liability Case.

The *Kim* Court began its review of the trial court's admission of industry custom and practice existing case law by discussing what it referred to as the *Titus/Grimshaw* line of cases.

The *Kim* court acknowledged that these cases hold that evidence of industry standards, custom, and practices is ***never*** admissible in a strict products liability case on the issue of design defect, whether the plaintiff was proceeding under the consumer expectations test or the risk-benefit test. (*Kim* at *9-12.) The rulings hold "that evidence of industry custom and practice is irrelevant to the risk-benefit analysis and is inadmissible in a strict products liability design defect case involving the risk-benefit test." (*Ibid*.) The *Kim* court ends its discussion on these cases by stating that the cases hold that evidence of industry custom and practice is inadmissible as a matter of law because those customs and practice are not relevant to the risk-benefit factors set out by the Supreme Court in *Barker*. (*Kim* at *12, citing *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545.)

B. The Court of Appeal's Discussion of the Ruling in *Howard v. Omni Hotels Management Corp.* is not Relevant to the Question Which the Court has Posed for its Review

The *Kim* Court then discussed the ruling in *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, which the court cites as

holding that, “compliance with technical safety standards established by an industry trade association is an appropriate consideration under the risk-benefit test and is admissible.” (*Kim* at *12-13.)

If “industry standards” is not included in the review in this case, the *Kim* court’s discussion of *Howard* would not be of interest since it relates solely to industry standards. Should this Court include the existence of “standards” as being a part of an industry custom or practice, the holding in *Howard* should not be given the same standing and consideration as the cases in the *Titus/Grimshaw* line of cases.

In *Howard* both parties argued on summary judgment whether the subject bath tub surface was in compliance with “industry standards”, or what those standards should be, as creating a triable issue of fact for purposes of the ruling on the defendant manufacturer’s motion for summary judgment. The plaintiff in *Howard* had alleged in his strict products liability cause of action that the bathtub was defective because it was “so smooth, slippery, and slick as to have provided no friction or slip resistance because the coating of the bathtub did not comply with *applicable standards*.” (*Howard, supra,* 203 Cal.App.4th at 412. (Original Italics.)) Since Mr. Howard had not objected to the admission of industry standards, but had actually introduced and argued them, he could not be allowed to argue on appeal that the trial court’s consideration of industry standards was reversible error.

Therefore, the holding in *Howard* has no persuasive use in the consideration of the *Kim* case, since the *Kim* plaintiffs had objected to the introduction of industry custom and practice, either unwritten or included in a more definite statement that would be found in industry standards.

C. The Proposed "Middle Ground" Rule

The Court of Appeal in *Kim* proposed what it calls "a middle ground" where evidence of industry custom and practice *might be admissible* "depending on the nature of the evidence and the purpose for which the proponent seeks to introduce the evidence." (*Kim* at *17.)

D. The Proposed Application of the "Middle Ground" Rule Demonstrates the Error of this Rule

The court discussed several alternative pieces of evidence from the case which might, or might not, be admissible under its "middle ground" rule. (*Kim* at *18-19.) It mentions that the experience of competitors in "alternative designs" of the component or product at issue might be relevant to the risk benefit test. However, evidence and argument that "competing trucks did not offer ESC", or "competitive disadvantage", or "less marketable", or "no one else did it" would not be admissible under their test. (*Ibid.*)

Amicus submits that it is important to dissect these two threads, because it does not disagree with the claimed results: just with the stated rule being applied to get there.

1. The experience of other manufacturers – if properly authenticated and relating to products that are "substantially similar" (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521, *Evidence Code* § 403(a)(1)) to the at-issue product – could be proper ***"alternative design"*** evidence. This would not be presented as being what the industry does, or has decided to do, but as evidence of an alternative feasible design or the consequences of implementing a design so that the jury could evaluate the benefits and risks of that design. ***Amicus submits that to be admissible this evidence would not be presented as***

"industry custom or practice" evidence, but as one manufacturer's experience with an alternative design.

2. Evidence in the nature of "no one" (or "everyone") does it would clearly be an attempt to introduce "industry custom or practice" and would properly be rejected for the reasons discussed by the *Kim* court; and
3. Evidence and argument that the manufacturer would suffer a competitive disadvantage and lose market share because of a design would, as the *Kim* court stated, misdirect the view of the jury to the benefit or detriment to the manufacturer rather than on the safety of the consumer.

Again, the ***"alternative design"*** evidence would be admissible, even if it presented the experience of competitors related to "substantially similar" products, not as being "industry custom or practice" but because it was valid "alternative feasible design" evidence. The jurors could then evaluate the risks and benefits discussed and apply that evidence to the at-issue product.

Evidence that presents alleged group-wide conduct, and the manufacturer's conduct consistent with that group-wide conduct – that Amicus argues is truly "industry custom and practice" – would not be admissible because it would look at the ***reasonableness of the manufacturer's conduct***, i.e, negligence, rather than the design of the product itself.

The admission or exclusion of this evidence would not result from the discarding of the consistent historical line of cases and adoption of the *Kim* court's "middle way". It would maintain that historical line of cases and permit properly qualified and presented evidence to be admitted while excluding erroneously packaged evidence. The application of the historical

line of case law would prevent the effort to increase the persuasiveness of claimed evidence by presenting it as something adopted through the wisdom of practice or by the industry as a whole in the marketplace, rather than allowing the jury to evaluate and resolve the risks and benefits of a particular product design.

E. Toyota Misses the Point in its Argument that the "No-Competitor-Offered-ESC-Evidence", its Proffered "Proper" Industry Custom and Practice Evidence, was Properly Admitted.

Toyota Motor Company, in Section B of its Argument in the Answer Brief filed in this case, uses the testimony by its manager of product planning, Sandy Lobenstein, that none of Toyota's truck competitors offered ESC as a standard component in their vehicles in the 2005 model year, and that Toyota offered it as an option, as its example of evidence which would properly be admitted as a part of the risk/benefit test.

What Toyota misses is that while individual experience with alternative designs, shown to be "substantially similar" to the at-issue product, could be admissible to help the jury evaluate the risk/benefit elements, that same evidence presented as a group behavior – the "everyone does it" or "no one does it" testimony – is where this evidence crosses the line into inadmissible irrelevant territory. It is not the underlying evidence that violates California public policy on strict liability law, it is packaging it and presenting it to the jury as being the industry's "approved" or "adopted" or "common" or even "universal" approach to the product. The inclusion of the ***"standard of care"*** evidence label in "no one does it" is what improperly persuades the jury. That is the error in admitting evidence as being an industry custom or practice.

Toyota attempts to restate and broaden the elements of the risk/benefit test, and then Toyota argues that what it refers to as the "No-Competitor-Offered-ESC-Evidence" properly relates to these restated and expanded elements:

1. So-called "perceived benefit" to consumers is not one of the risk/benefit elements, and does not properly belong in the "adverse consequences to the product and to the consumer that would result from an alternative design" factor. Toyota argues that cost, alone, is a valid consideration in its design decisions because of "cost conscious" consumers. Toyota is arguing that the inclusion of a defect in one of its cars is acceptable just because it costs the consumer less to buy the defective product. This conflates two elements to create a single "perceived benefit to consumers" element, and cites to *Bell v. Bayerische Motoren Werke Aktiengeselleschaft* (2010) 181 Cal.App.4th 1108, 1131. In *Bell,* BMW argued that an impact on a vehicle's aesthetics was a valid factor in the risk/benefit test and obtained the trial court's modification of CACI No. 1204 adding aesthetics as an additional factor for the risk/benefit test. The plaintiff withdrew the instruction rather than allow the jury to be instructed on "aesthetics", then argued in its motion for new trial (granted for other reasons) and on appeal that the inclusion was in error. The Court of Appeal, relying on a comment to section 2 of the Restatement Third of Torts: Products Liability, said it was not error to include aesthetics as a factor. Since the *Bell* court had already determined that the trial court's grant of the motion for new trial was in error, this discussion was dicta, and is unsupported by any existing California case law.

2. The so-called “Phase in” element. Industry custom and practice has no relevance to Toyota’s decision to “phase in” the inclusion of ESC as a standard component in its full-sized trucks like the Tundra. Evidence regarding what the collective members of the industry had done, or not, improperly focuses on the behavior of the group, and not on the individual product.
3. The “overall weighing” factor is, again, a fiction proposed by Toyota. This so-called factor can be boiled down to present a pile it on argument – more is better. It can be rephrased as being “since this implies industry agreement and ‘best practice’, it will be very convincing to the jury and so the jury must hear it.”

In these factor discussions in its Answer, Toyota manipulates the optics of the evidence to mask the underlying inadmissibility of the evidence it wants packaged for the jury as an industry custom and practice. That manipulation must be discarded.

III. OTHER STATES WHICH APPLY THE “CALIFORNIA APPROACH” TO STRICT PRODUCTS LIABILITY ALSO EXCLUDE EVIDENCE OF INDUSTRY CUSTOM AND PRACTICE.

The states of Pennsylvania, Missouri, Maryland, and Kansas, follow the California approach to strict products liability cases – keeping considerations of negligence and the conduct of the manufacturer out of the presentation of the case – also exclude evidence of industry custom and practice.

Pennsylvania:

The Pennsylvania Supreme Court, in *Azzarello v. Black Brothers Company, Inc.* (1978) 480 Pa. 547, 391 A.2d 1020, had rejected the use of the term "unreasonably dangerous" in jury instructions regarding defects in products liability cases, just as this Court had ruled in *Cronin*. (*Id.* at 557, 391 A.2d at 1025.) It held that the strict liability case properly focuses on the product and negligence considerations have no place. (*Ibid.*)

In *Lewis v. Coffing Hoist Div. Duff-Norton Co., Inc.* (1987) 515 Pa. 334, 528 A.2d 590, the Pennsylvania Supreme Court reviewed evidentiary rulings made by the trial court *in limine* before the trial of a products liability action. The product at issue was a pendant control box for an overhead, electric chain-hoist the plaintiff was using to lift a large metal carriage assembly at work. (528 A.2d at 591.) The alleged defect in the control box was that the control buttons protruded from the surface of the box, and were unguarded, allowing plaintiff's thumb to activate the "down" button when he stumbled and fell, allowing the front end of the carriage assembly to swing forward and hit plaintiff in the legs, injuring him. (*Ibid.*)

The trial court excluded some evidence, including "the defendant could not present testimony, through its expert witness, that 'at least ninety percent' of the electric hoists made in this country had control boxes devoid of any type of guard around the activating buttons." (*Lewis, supra*, 528 A.2d at 591.) In making this ruling, "the court concluded that proof of the defendant's compliance with industry-wide standards, practices and customs would inject into the case concepts of negligence law" which "have no role in a case based entirely on strict liability." (*Ibid.*)

The manufacturer lost the trial, and appealed the court's exclusion of its industry-wide standards, practices and customs evidence. The Pennsylvania Supreme Court surveyed the holdings by various jurisdictions

on the admission of evidence of industry practices and customs, and because of the policy adopted in *Azzarello* that negligence principles have no place in a strict liability case, affirmed that such evidence is inadmissible since it is irrelevant to the trial of a strict products liability trial:

> Having reached the conclusion that evidence of industry standards relating to the design of the control pendant involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice, we further conclude that such evidence would have improperly brought into the case concepts of negligence law. We also conclude that such evidence would have created a strong likelihood of diverting the jury's attention from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design. For those reasons we conclude that the trial court correctly ruled the evidence to be irrelevant and hence inadmissible. It is well established that a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue. [Citations omitted.] (*Lewis, supra*, 528 A.2d at 594.)

The Pennsylvania Supreme Court overruled *Azzarello* on its formulation for proof of the existence of a defect by its opinion in *Tincher v. Omega Flex, Inc.* (2014) 628 Pa. 296, 104 A.3d 328. The *Tincher* court rejected the manufacturer's effort to convince the Court to adopt the Restatement (3d) of Torts: Products Liability (*Id.* at 415, [104 A.3d at 399]), and instead adopted the dual analytical structure formulated by this Court in *Barker* as alternative means to establish the existence of a defect in a product for strict liability purposes. (*Id.* at 419, [104 A.3d at 402].)

The Pennsylvania Superior Court, in *Webb v. Volvo Cars of North America, LLC* (2016) 2016 PA Super 203, ___ A3d. ____, 2016 WL 4721460, recently decided that the Supreme Court's decision in *Lewis* continues in effect after *Tincher*.

Missouri

In *Johnson v. Hannibal Mower Corp.* (1984) 679 S.W.2d 884, the plaintiff had lost two toes when his foot slipped while using the defendant's mower. Plaintiff argued that the mower lacked safety devices which would have prevented the injury; the trial court allowed the defense to present evidence that industry custom and practice (as encapsulated in ANSI design standards) did not require the use of those safety devices. (*Id.* at 885.) [1] The Court of Appeal ruled that because the Missouri Supreme Court had held that the sole subject of inquiry is the defective condition of the product and not the reasonableness of the conduct of the manufacturer, evidence regarding the manufacturer's compliance with industry custom and practice is irrelevant. (*Ibid.*)

Maryland

In *Banks v. Iron Hustler Corp.* (1984) 59 Md.App. 408, 475 A.2d 1243, a worker's hand was injured when it was caught in a conveyor belt at a scrap yard, and the worker sued the manufacturer of the conveyor under theories of negligence and strict liability. He alleged that the lack of guards at the "nip points" in the belt system was a design defect. During trial the defense made a motion for directed verdict, and the court granted that motion.

One of the issues on appeal was the trial court's rejection of testimony by the plaintiff's expert because he was unaware of industry custom and practice at the time of the system's manufacture for the design of conveyor belt systems for the scrap metal industry. (*Banks, supra*, 59

[1] While the *Johnson* court used the term "state of the art" to describe the evidence, it was addressing industry practice and custom. (See *Lane v. Amsted Industries, Inc.* (1989) 779 S.W.2d 754, 758, fn. 4.)

Md.App at 427-428, [475 A.2d at 1253].) The Court held that such evidence was irrelevant to the strict liability claims. (*Ibid.*)

Kansas

A worker injured by a laundry press sued the manufacturer of that press in the federal district court in Kansas and prevailed at trial. The manufacturer appealed several rulings by the trial court, including its claim of trial court error in its decisions to exclude evidence regarding the manufacturer's compliance with ANSI industry standards. *Rexrode v. American Laundry Press Co.* (1982) 674 F.2d 826, 831-832. The Court of Appeals for the Tenth Circuit held that under Kansas law, evidence relating to compliance with industry custom and practice is irrelevant in a strict liability case, but relates to a negligence theory of liability. (*Ibid.*)

Summary

These jurisdictions, which have made the policy decision to prevent the incursion of negligence principles into the litigation of strict liability actions, therefore exclude evidence of industry custom and practice at trial, just as California has done.

CONCLUSION

The Court of Appeal's ruling that evidence of industry custom and practice might be admissible as a part of a jury's application of the risk/benefit test was in error. The long-standing, consistent line of cases which holds that such evidence is never admissible is consistent with the public policy of the state, as established in *Greenman* and defined in *Cronin* and *Barker*. This Court should restate its commitment to that public policy of focus on the product in strict products liability cases, and not allow the focus to drift to the reasonableness of the behavior of the manufacturer.

Respectfully submitted,

Dated: November 29, 2016

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WORD COUNT

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the length of the foregoing Brief, including footnotes but excluding Caption, Tables of Contents and Authorities and the Proof of Service attached to the Brief, as measured by the word count macro of the computer program used to prepare the brief, contains 5,293 words.

Dated: November 29, 2016

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PROOF OF SERVICE

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1301 Dove Street, Suite 120, Newport Beach, CA 92660. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. On November 29, 2016, I served a correct copy of the within document(s): APPLICATION OF THE CONSUMER ATTORNEYS OF CALIFORNIA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS; APPLICATION FOR LEAVE TO FILE LATE BRIEF

(X) BY MAIL, by placing a true copy thereof, in a sealed envelope to the addressee(s) below, and depositing the same into the United States mail at the address located set forth herein above, with sufficient first-class postage thereon pre-paid: *****SEE ATTACHED LIST*****

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 29, 2016.

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EDWARD SPILSBURY

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