S232754

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM JAE KIM, ET AL.,

Plaintiffs and Appellants,

v.

TOYOTA MOTOR CORPORATION, ET AL.,

Defendants and Respondents.

Second District Court of Appeal, Division Seven
Case No. B247672

Los Angeles County Superior Court, Case No. VC059206,
Judge Raul A. Sahagun

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under California Rule of Court 8.520(f), the International Association of Defense Counsel (IADC) requests permission to file the attached *Amicus Curiae* Brief in support of Defendants and Respondents Toyota Motor Corporation, et al. (Toyota).

Interest of *Amicus Curiae*; How the *Amicus Curiae* Brief Will Assist the Court

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC maintains an abiding interest in the fair and efficient administration of product liability actions. The IADC's Product Liability Committee consists of more than 900 members, publishes regular newsletters and journal articles, and presents education seminars both internally and to the legal community at large. The IADC has also participated as *amicus curiae* in several cases involving product liability issues, including *Ramos v. Brenntag Specialties, Inc., et al.*, California Supreme Court Case No. S218176, and *Tincher v. Omega Flex, Inc.*, Pennsylvania Supreme Court Case No. 17 MAP 2013.

In this case the Court has agreed to determine whether evidence of industry custom is relevant to the risk-benefit test for design defect, an issue that implicates broader policy concerns applicable to plaintiffs and defendants in all such actions. As we explain in the accompanying brief, the IADC supports Toyota's position that industry custom plays an important role in the design defect analysis that this Court promulgated in *Barker*,[1] because it provides jurors with insight into the feasibility and marketability of the alternative design features proposed by plaintiffs. By enabling jurors to view allegedly deficient products in context—i.e., relative to competing products on the market—industry custom makes the design defect analysis more realistic, and eliminates the need for jurors to decide cases in a theoretical vacuum. When used in this way, evidence of industry custom can aid both defendants and plaintiffs. We explain why this is the case. We also urge the Court to make clear that earlier decisions holding industry custom evidence to be irrelevant, such as the opinion in *Grimshaw*,[2] have misinterpreted *Barker*.

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[1] *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431.

[2] *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803.

The arguments we present are complementary to, but not duplicative of, the briefing submitted by Toyota.

No Party or Counsel for a Party Authored or Contributed to This Brief

The IADC provides the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amicus curiae* or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

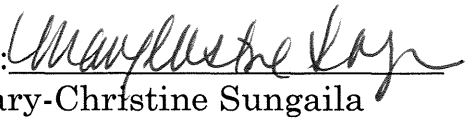
Conclusion

For the foregoing reasons, the IADC requests that the Court permit the filing of the attached *amicus curiae* brief in support of Toyota.

DATED: October 5, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP
Mary-Christine Sungaila
Martin M. Ellison

By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

In this appeal of a product liability verdict in favor of Defendants and Respondents Toyota Motor Corporation, et al. (Toyota), Plaintiffs and Appellants (the Kims) contend that the trial court should not have allowed, and the Court of Appeal should not have approved, the presentation of industry custom evidence to a jury tasked with determining whether a 2005 Toyota Tundra had been defectively designed. The Kims argue

that industry custom evidence—which they define as evidence that everyone in an industry does or does not do something—can never be relevant to the risk-benefit test for a design defect. The Kims are wrong: industry custom evidence provides important context that aids jurors in their analysis of the feasibility and marketability of a plaintiff's chosen alternative design. This Court should reject the Kims' attempt to keep this information from jurors as both impractical and unwise.

BACKGROUND[3]

William Kim crashed his 2005 Toyota Tundra pickup truck while driving down a curving mountain road. (RT 1536-37, 1561.) The road was wet from a light rain, the tires on Kim's truck had low tread, and he was travelling 15-20 mph over the 30 mph speed limit. (RT 1547, 1861, 2758.) Kim's truck spun out after he allegedly swerved to avoid an oncoming vehicle that had drifted into his lane,[4] and his car rolled off the road and down a 75-foot

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[3] The record in this case is extensive, and has been thoroughly briefed by Toyota. The IADC refers the Court to Toyota's recitation of the facts, and offers the following summary only to give context to the arguments in this Brief.

[4] The Kims' expert on accident reconstruction found no evidence of an oncoming vehicle, and neither Kim's nor a passing witness's testimony indicates that such a vehicle existed. (ABOM 13 [citing RT 1554-1555, 1884-1885, 3964-3975].)

embankment, seriously injuring Kim. (OBOM 3; ABOM 4 [citing RT 2106, 3967, 3970, 3973].)

The Kims sued Toyota, blaming the accident on the truck's lack of Electronic Stability Control (ESC) (also known as Vehicle Stability Control (VSC)), a then-emerging technology that assists drivers in loss-of-control situations by automatically applying brakes to certain wheels to keep the vehicle headed in the driver's chosen direction. (RT 3756-57, 2124-25.) The Kims contended that the accident never would have occurred if the vehicle had been equipped with ESC. (ABOM 5.)

The matter proceeded to trial, where a theme of the Kims' opening statements was that Toyota knew the value of ESC, but omitted it from the Tundra because no other competing auto manufacturers had included ESC in their pick-up trucks. (RT 1235-36, 1240, 1243.) Then, in presenting their case, the Kims repeatedly elicited testimony from a witness that "[n]o one else had V.S.C. at the time in a full-size truck." (ABOM 7-9 [citing RT 3328, 3338-3339, 3356].) It is this type of statement that the Kims now challenge as being irrelevant to the risk-benefit test for

design defect. (OBOM 28.)[5] Toyota introduced no evidence of industry custom other than having the same witness that the Kims already questioned repeat the testimony. (ABOM 9 [citing RT 3404-3406].)[6]

The case was submitted to the jury on the Kims' strict product liability claim, and the jury was given an instruction on the design defect risk-benefit test in accordance with California Civil Jury Instruction (CACI) No. 1204. (Typed Opn. at p. 6.) The jury returned a verdict in favor of Toyota after just three hours of deliberation. (ABOM 18; RT 4578, 4580-4584; AA 550.)

The Kims unsuccessfully moved for a new trial, and the Court of Appeal affirmed the trial court's decision. (Typed Opn. at p. 6.) Addressing the Kims' contention that industry custom evidence should never have been admitted by the trial court, the

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[5] The Kims alternatively define industry custom evidence as "evidence that 'nobody does it,' that 'everybody does it,' or that the defendant's product is no more dangerous than others on the market." (OBOM 28.) We address the first two definitions in this brief. We reject the third as argument concerning the first two, and not a type of evidence in its own right.

[6] Toyota's counsel also mentioned that "no pickups had standard VSC in 2005" during closing arguments. (OBOM 16; RT4506].) But an attorney's statements during closing arguments are not evidence, and the Kims did not object to the comments when they were made. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 11 ["It is axiomatic that the unsworn statements of counsel are not evidence."].)

Court of Appeal held that "evidence of industry custom may be relevant and, in the discretion of the trial court, admissible in a strict products liability action, depending on the nature of the evidence and the purpose for which the party seeking its admission offers the evidence." (*Id.* at p. 13.)

The Court of Appeal identified two ways that industry custom evidence can be relevant to the risk-benefit test: to show "the feasibility of a safer alternative design," and to demonstrate "the consequences that would result from an alternative design." (Typed Opn. at p. 14.) The Court explained that the ESC evidence here was relevant in both of those ways (*id.* at 18-19), and further noted that the Kims themselves conceded that "[o]ne might use other vehicles for purposes of showing alternative design or the feasibility of a given improvement." (*Id.* at pp. 14, 18.)

Finally, the Court held that the industry custom evidence here also became relevant to the proceedings as a means of rebutting an argument advanced by the Kims during opening statements. (Typed Opn. at 19.) The Kims told the jury that trucks and SUVs shared similar "controllability problems," and explained that all SUVs came equipped with ESC in 2005 while trucks did not. (*Ibid.*) The Court understood the obvious

implication of this argument—the Kims wanted jurors to believe that Toyota's truck was defective because it lacked a feature (ESC) that had been installed in an entire set of vehicles with identical "controllability problems"—and the Court concluded that evidence that no other trucks had ESC provided relevant context in rebuttal.[7] (*Ibid.*)

This Court granted review on a single issue: 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?

LEGAL DISCUSSION

A. The risk-benefit test laid out in *Barker* envisions a reasonable and practical assessment of competing design considerations—an analysis that counsels in favor of juries receiving more, not less, information about the products they are evaluating.

This Court in *Barker* set forth five nonexclusive factors for juries to consider when assessing the adequacy of a manufacturer's product design: "[1] the gravity of the danger posed by the challenged design, [2] the likelihood that such

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[7] Evidence that "no other trucks had ESC" created two relevant inferences for rebuttal purposes: (1) SUVs and trucks may not have similar controllability problems after all; and (2) trucks may not have controllability problems that require ESC.

danger would occur, [3] the mechanical feasibility of a safer alternative design, [4] the financial cost of an improved design, and [5] the adverse consequences to the product and to the consumer that would result from an alternative design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 426, 431.) The evaluation of these factors necessarily entails "the balancing or weighing of competing considerations," with the aim of achieving "reasonable and practical safety under a multitude of varying conditions." (*Id.* at p. 434 [quoting *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7] [internal quotations omitted].)

This Court's stated goal of "reasonable and practical safety" implies that the design defect determination should not be conducted in a vacuum. It also implies that juries should not be forced to operate with a closed set of information, which is why this Court expressly stated that the *Barker* factors were non-exclusive, and why the California Civil Jury Instructions authorize the addition of "[o]ther relevant factor(s)" to the directions given to jurors. (*Barker*, *supra*, 20 Cal.3d at p. 431; CACI No. 1204 (Dec. 2013).)

B. In order to fulfill their role as "hypothetical manufacturers," jurors must be able to consider the practices of the relevant industry, or else their analysis will inevitably be untethered to reality.

As the Kims concede, the *Barker* weighing process "posits a hypothetical manufacturer which has made the best choice for consumers among the available options based upon *Barker* criteria." (OBOM 37.) Any juror assessing the risks and benefits of various product designs as part of a "hypothetical manufacturer" analysis would need to refer to industry custom. After all, no rational manufacturer would create a product without knowing how it measures up against the features and overall cost of the competing products on the market. Jurors assigned the hypothetical task of designing a safer automobile might re-think their choices when they learn that the proposed product—although outclassing the existing one in crash safety—also costs hundreds of thousands of dollars more.[8]

A hypothetical analysis must therefore be anchored in reality. That is why this Court in *Barker* mandated that juries consider "the adverse consequences to the product and to the

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[8] This point carries particular significance here, considering Kim's testimony that he purchased his Toyota Tundra because it cost less than other trucks on the market. (RA 006-007.)

consumer that would result from an alternative design," and why other courts have deemed a product's marketability to be a valid consideration in a design-defect case. (*Barker*, *supra*, 20 Cal.3d at p. 431; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131.)

The anchoring value of industry custom becomes apparent when viewed in a fact-specific context. Take, for instance, the alleged design defect in *Bell*: a rollover protection system in a convertible roadster that failed to prevent the driver's head from contacting the ground during an accident. (181 Cal.App.4th at p. 1113.) A plaintiff untethered to reality might suggest the easiest rollover solution: simply adding a permanent hard-top roof. But this design choice would flout industry custom, which is that convertibles do not have permanent hard-top roofs.

The Kims would contend that this example, like the facts of *Bell* itself, presents a different circumstance, because the suggested alternative design has an actual impact on the vehicle's perceived utility, and a consumer can readily appreciate that difference when they make a purchase. (RBOM 5-6.) For the Kims, marketability can only be relevant when consumers appreciate the value of the benefits they are receiving (be that in

the form of a nicer looking car, or a safer one). When the alternative design consists of technology "virtually unknown to consumers," however, the designs of other manufacturers are irrelevant to the question of cost of implementation. (RBOM 6, 8 ["Whether or not anyone else delayed in phasing in ESC is not evidence that . . . it was unreasonably costly in view of the safety benefits."]; *ibid.* ["The proper comparison is an ESC-equipped Tundra with a non-ESC equipped Tundra, and if ESC was essential to reduce the risk on the Tundra (as it was), it was immaterial whether any other manufacturer even had the capacity to install ESC on trucks."].)

But this argument does not make sense, particularly when viewed in combination with the statement in the Reply Brief that "[i]f Toyota were the only one in the industry with the technology [ESC], it was required by the risk-benefit test to adopt it." (RBOM 8.) Under the Kims' vision of product liability, a manufacturer that invents a revolutionary but costly new safety feature will be mandated to implement it in all future products. The problem with this formulation is that when consumers do not know how much good a product feature will do them, they will not spend their hard-earned money to obtain it. A product

bearing a revolutionary new feature may appear to the uninformed consumer as an identical, yet inexplicably more expensive version of its competition, and the consumer, unappreciative of the feature that makes the product more expensive, will purchase from the competition instead.

Indeed, this very concern drove, at least in part, the decision to make ESC an optional feature in the Tundra. Toyota's market research showed that buyers were price sensitive, and ESC's added cost of $300-350 per vehicle risked pricing Toyota "outside of the competitors." (RT 3390-91, 3423-24.) Kim himself purchased the Tundra because it was the cheapest of all available options. (RA 006-007.) A manufacturer should not be forced to run itself out of business merely because it came up with a technology for making its vehicles safer. Indeed, requiring manufacturers to incorporate new safety technology into their products or face liability for defective design will incentivize manufacturers to stop innovating, or at least give them reason to slow down their progress and withhold rolling out new safety features until they can be incorporated into every applicable product in a cost-effective way.

The use of marketability as a factor cannot be so limited. This would force jurors to engage in the very kind of unrealistic analysis that the Barker factors seek to guard against. (*Barker*, *supra*, 20 Cal.3d at p. 433.) Rather, marketability should be a part of the consideration in every design defect case, a point made by the court in *Bell* when it stated that "consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics. . . ." (*Bell*, *supra*, 181 Cal.App.4th at p. 1131.) And to properly determine marketability (and the disadvantages inherent in a proposed design), a jury must be aware of the status of the proposed design relative to that of its competing products.

C. Admitting industry custom evidence at trial will not compromise the tenets of strict liability, nor will it impact the burden-shifting that this Court's precedent establishes.

The Kims contend that industry custom diverts juror attention away from the risk-benefit factors and towards a "standard of care," effectively shifting a strict liability claim to one sounding in negligence. (OBOM 2.) This shift from strict liability to negligence, the Kims argue, can be avoided by forcing manufacturers to rely on established technical standards or

specific instances of successful/failed alternative designs. (*Ibid.*; see also OBOM 27-28 [stating that specific instances of alternative designs are important because they provide "the details of design experience, and not the bare fact that a design has or has not been implemented in the industry"].)

The problem with this argument is that it makes an impossible distinction. Industry custom—a term that the Kims define as evidence that everyone does (or does not) do a thing (OBOM 28)—cannot be distinguished from specific instances of alternative designs when an entire industry has chosen to use (or omit) the same product feature. There is no meaningful distinction between evidence that "no other trucks offered ESC" and evidence that the truck designs from Ford, Chevy, Dodge, GMC, etc., did not incorporate ESC. The former is shorthand for the latter.

The Kims argue that substituting industry custom for a more detailed explanation of the design process "eviscerates" burden-shifting in design defect cases, relieving manufacturers of their duty to prove that the benefits of their design outweighed the dangers, and forcing plaintiffs to show that the "customs" of the industry are unsound. (OBOM 33-34 [citing *Soule v. General*

Motors Corp. (1992) 8 Cal.4th 548, 571-572, fn. 8].) The evidence is too easy to introduce and too difficult to refute, they contend, and so it compromises one of the principal purposes of strict liability: easing plaintiffs' evidentiary burden. (OBOM 34 [citing *Barker*, *supra*, 20 Cal.3d at pp. 426, 431].)

This Court stated in *Barker* "that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action." (*Barker*, *supra*, 20 Cal.3d at p. 431.) This policy was designed to place the burden on the party who created the product and who was therefore most likely to control the relevant evidence to prove that it was not defectively designed. (*Barker*, *supra*, 20 Cal.3d at pp. 431-432.)[9]

Admitting evidence of industry custom does not subvert this goal. Industry custom by itself does not satisfy a manufacturer's burden to show there was no feasible safer

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[9] See also *Horn v. General Motors* Corp. (1976) 17 Cal.3d 359, 374 [Clark, J., dissenting] ["This court's pioneering effort in product liability was never intended to abolish considerations of fault; rather, it 'was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty. . . .'"] [quoting (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 133.)].

alternative design.[10] Nonetheless, as the Court of Appeal here recognized, industry custom "may be relevant" to determining whether the manufacturer's burden has been satisfied. (Typed Opn. at p. 14.) How relevant, the Court explained, depends upon the evidence and arguments presented by the parties. (*Id.* at pp. 13-14 ["The parties in a strict products liability action probably will dispute whether and to what extent industry custom actually reflects [legitimate, independent research and practical experience] and whether it strikes the appropriate balance."].)

Thus, the Kims' burden-shifting argument is unavailing. Industry custom evidence does not make plaintiffs' task in design defect litigation any more difficult. Plaintiffs' sole obligation after establishing harm and causation remains the same: to refute or undermine manufacturers' evidence that the benefits of the product's design outweigh its risks. (See CACI No. 1204.)

The argument and reasoning required to show that a design is defective does not change if the design belongs to a single manufacturer or is uniform across an industry. Take the

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[10] The Kims allege that Toyota "carr[ied] its burden on alternative design" by doing nothing more than "claim[ing] that virtually all other trucks are equally dangerous." (OBOM 34.) But nothing in the record supports this assertion, and the Kims do not offer any proof that this took place.

facts of *Horn v. General Motors*: The plaintiff's argument that a horn cap should have been secured by screws instead of sharp prongs does not change if other auto manufacturers used prongs as well. (17 Cal.3d at p. 367.) Regardless of the number of competing products that use a similar design, the plaintiff's contention that a safer alternative was well within reach does not lose any of its force. At the same time, supplying jurors with knowledge of the extent to which the alleged defect appears throughout the industry can provide important perspective. (See Abraham, *Custom, Noncustomary Practice, and Negligence* (2009) 109 Colum. L. Rev. 1784, 1803, fn. 60 ["[Custom evidence is necessarily grounded in experience and therefore is always concrete and educative. In contrast, when risk-benefit evidence is hypothetical and abstract rather than concrete and experience based, it is likely to have much less educational value than custom evidence."].)

The Kims' argument also overlooks the ways that industry custom evidence can ease the burden of plaintiffs. Just as evidence that an allegedly defective product deviates from a competing product can establish the feasibility of an alternative design, evidence that the product deviates from the practices of

an *entire industry* establishes that the alternative design was eminently feasible. The difference in degree carries a probative value that can be just as useful for plaintiffs as for defendants.

D. The Court should make clear that the holdings in *Grimshaw* and other cases in which industry custom evidence has been deemed irrelevant are no longer good law.

The court's determination in *Grimshaw* that "industry custom or usage is irrelevant to the issue of defect" is based upon two flawed premises: (1) "[t]he *Barker* court's enumeration of factors which may be considered under the risk-benefit test . . . fails to mention custom or usage in the industry," and (2) "the court [in *Barker*] otherwise makes clear by implication that they are inappropriate considerations." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803.)[11]

First, the *Grimshaw* court of appeal should not have deemed industry custom to be irrelevant to a design defect determination simply because it did not appear on the list of factors enumerated in *Barker*. The Supreme Court in *Barker*

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[11] Toyota has argued why the cases that the *Grimshaw* court relied upon in its decision do not support a conclusion that industry custom is always irrelevant. (ABOM 44-48.) It has also criticized the *Grimshaw* court's failure to consider the Evidence Code when assessing the relevance of industry custom evidence. (ABOM 46-47.) We do not repeat those arguments here.

expressly stated that its list of factors was non-exclusive. The California Civil Jury Instructions reflect this, authorizing consideration of "[o]ther relevant factor(s)" in addition to the five specified in *Barker*. (*Barker*, *supra*, 20 Cal.3d at p. 431; CACI No. 1204.) Moreover, when the *Barker* court enumerated these factors it was not commenting on the relevance of specific pieces of evidence. (*Barker*, *supra*, 20 Cal.3d at p. 431.) To be relevant, a given piece of evidence must tend to prove or disprove one of the *Barker* factors; it does not have to definitively establish one of the *Barker* factors.

Second, the *Grimshaw* court was incorrect that *Barker* "makes clear by implication" that industry custom is irrelevant. *Grimshaw* cites to the language in *Barker* that "the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 803 [quoting *Barker*, *supra*, 20 Cal.3d at p. 434].) But the point of this statement is that the manufacturer's design *process* should not weigh on liability. In other words, it should make no difference whether a manufacturer engaged in a careful and deliberate design process that took all possible harms into account and thought deeply

about how to prevent them; if the final product caused harm and could have been designed better, the manufacturer may be just as liable as one who slapped a product together without thinking about the issues at all. (See *Barker*, *supra*, 20 Cal.3d at p. 434 ["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."].)

Thus, while a manufacturer's design *process* may be irrelevant in strict liability, its design *choices* are not. Indeed, design choices are at the heart of the inquiry. The confusion between the two arises out of the Court's attempt in *Barker* to differentiate the condition of the product from the reasonableness of the manufacturer's conduct. (*Ibid.*) When it comes to design *choices*, the "condition of the product" cannot be distinguished from "the reasonableness of the manufacturer's conduct," because

the manufacturer's actions (i.e., design choices) determine the condition of the product.

Design defects differ substantially from manufacturing defects, because they involve conscious decisions. They involve manufacturers weighing competing factors and making choices about how to build and market a product. Jurors in these types of cases must assess the wisdom of those choices. Whether they do so by evaluating the particular manufacturer's design choices or considering a design decision themselves from the position of the "hypothetical manufacturer," the resulting analytical framework is the same. In both analyses, jurors must decide: "Is this feature something that should have been added to or omitted from the product here?"

In answering this question, a jury should be armed with all of the information that a manufacturer would be, including evidence of industry custom. Anything less would prevent jurors from truly assessing the risks and benefits of the product design.

CONCLUSION

For the foregoing reasons, and those expressed by Toyota in the merits briefing, this Court should affirm the decision of the Court of Appeal.

Dated: October 5, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP
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By: 
Mary-Christine Sungaila

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CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 3,988 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

DATED: October 5, 2016

Respectfully submitted,

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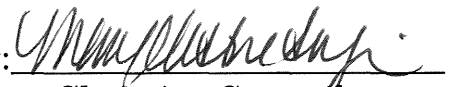
By: 
Mary-Christine Sungaila

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PROOF OF SERVICE

(CCP § 1013(a) and 2015.5)

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. I am employed with the law offices of Haynes and Boone, LLP and my business address is 600 Anton Blvd., Suite 700, Costa Mesa, California 92626.

On October 5, 2016, I served the foregoing document entitled **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS AND RESPONDENTS** on all appearing and/or interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows and in the manner so indicated:

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☒ **[BY MAIL]** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2016, at Costa Mesa, California.

Breean Cordova