Supreme Court Case No. S232754
2nd Civil No. B 247672
LASC Case No. BC VC059206

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM JAE KIM, et al. Plaintiffs and Appellants, vs. TOYOTA MOTOR CORPORATION, et al., Defendants and Respondents.	2nd Civil No. B 247672 LASC Case No. VC 059206

From a Decision of the Second District
Court of Appeal – Division Seven
[2nd Civil No. B 247672]

REPLY TO ANSWER TO PETITION FOR REVIEW

Ian Herzog [Bar No. 41396]
Thomas F. Yuhas [Bar No. 78679]
Evan D. Marshall [Bar No. 82444]
LAW OFFICES OF IAN HERZOG
11400 West Olympic Boulevard, Suite 1150
Los Angeles, CA 900064
Telephone: (310) 458-6660
Fax: (310) 458-9065

Attorneys for Appellants WILLIAM JAE KIM and HEE JOON KIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

1. INTRODUCTION

While Toyota's *Answer* seeks to justify the opinion herein, it does not disprove the existence of a conflict among the opinions of the intermediate courts requiring review by this Court, nor demonstrate that the issues presented herein do not represent a serious quandary for courts and litigants in any case involving advanced safety technology and consumer products. Indeed, the *Answer* reiterates those very issues, and in an effort to avoid review engages in more than a little revision of what the *Kim* court itself said.

2. THE *KIM* OPINION LEAVES NO MEANINGFUL DISTINCTION BETWEEN USE OF INDUSTRY-STANDARD EVIDENCE FOR DESIGN DEFECT AND FOR STANDARD OF CARE

Toyota suggests that the *Kim* opinion is consistent with prior decisions because it affirms as a general concept that the mere fact that other manufacturers do not incorporate a particular safety device is not *per se* evidence that the product is not defective. The Opinion, however, does in effect allow "industry-standard" evidence for that very purpose in so far as it holds that industry practice may indeed be indicative of a sound product design because it may reflect industry research and experience bearing on safety, practicality, technical or financial feasibility. (Opinion 13) Hence, "industry-standard" evidence can be admitted so long as the defendant manufacturer claims that the reason "nobody does" it is because in the judgment of the industry it is unnecessary or impractical.

Thus, the opinion for all practical purposes *does* allow "industry-standard" evidence – "no body does it" – to be used as a proxy for specific technical

evidence as to cost, feasibility etc., so long as some industry figure will testify that the industry standard reflects industry experience which indicates the absence of any need for the design alternative. The reality of the opinion is that it allows industry-standard evidence in *every case* because in *every case* a manufacturer can make a *prima facie* claim that industry experience reflects the absence of any need for the alternative design.

In terms of the admissibility of evidence and the impact on the jury, there is no distinction. Jurors are told that "nobody does it" or that the industry has rejected the alternative design, and are encouraged to rely upon that conclusory statement as a proxy for technical evidence as to *why* safety, feasibility or cost justify nobody doing it. In other words, jurors are encouraged to substitute the industry's supposed conclusion as to risk/benefit for their own considered weighing of evidence of the product's objective characteristics and design benefits and deficiencies.

Jurors are induced to rely upon industry practice as evidence of safe design in exactly the same way they would in a negligence or standard of care case, rather than themselves evaluating the design based upon *Barker* factors.

The *Kim* opinion accordingly leaves only an illusory distinction between the use of industry-standard evidence as standard of care evidence and as design defect evidence. In either case, the jury is led to look at the manufacturers behavior as compared with other manufacturers, rather than to look at the objective characteristics of the product and technical merits of the design alternatives.

Nor is it tenable to suggest that the *Kim* opinion is not in conflict with prior decisions which hold it ***reversible error*** to allow evidence that, for example,

competing designs are equivalent or safer, in light of the extremely tenuous probative value of such evidence as "industry experience," its doubtful bearing on *Barker* factors, and its inevitable tendency to divert jurors attention from evaluation of the design towards evaluation based on standard of care. It is for this reason that *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, and similar decisions are flatly in conflict with *Kim*'s position that such evidence is admissible at the discretion of the trial judge.

Toyota also argues that plaintiffs themselves elicited evidence to the effect that other truck manufacturers did not have ESC on their 2005 models, notably to show that Toyota decided it did not have to accelerate the introduction of ESC on the Tundra once it discovered that Ford was not going to do so. But that evidence (which was not in fact true "industry standard" evidence) was adduced to demonstrate that the failure to make ESC standard on the Tundra was driven by marketing and not cost-effectiveness or feasibility, and was introduced only after the trial court had denied plaintiffs' motion *in limine* to keep out industry standard evidence. Hence, Toyota was not justifiably allowed to use such evidence for "rebuttal" by arguing to the jury that the Tundra was safe because otherwise every other truck on the road would have been defective.

Plaintiffs were required to act defensively on this subject after the trial court overruled a strenuous objection supported by the *Grimshaw* line of authority. "No waiver can be predicated on this course of action." *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 299 fn.17. And plaintiff never introduced or offered evidence that every other 2005 pick-up lacked ESC. Toyota – like the Court of Appeal – confuses particular evidence of a design decision with the general "industry standard" concept which Toyota urged on the jury.

Plaintiffs' *in limine* objection was similar to that in *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, reversing where "before the jury was impaneled, the court ruled it would permit Sikorsky to present evidence of military specifications on the issue of defect."

> Plaintiffs objected and, only in response to this ruling, introduced evidence of military plans and specifications to prove a defect existed. In compliance with the court's ruling and in anticipation of Sikorsky's evidence, plaintiffs were entitled to refer to military specifications as a necessary and proper trial tactic without waiving the error. "An attorney who submits to the authority of an erroneous adverse ruling, after making appropriate objections, does not waive the error in the ruling by introducing responsive evidence to offset or explain the erroneously admitted evidence so far as possible." . . . Plaintiffs neither invited nor waived the error.
> [148 Cal.App.3d at 209]

Plaintiffs' motion *in limine* objected to exactly the evidence and argument at issue, that the Tundra was "equivalent or superior to those of its competitors" (App. 84), and specifically Toyota's claim

> that it was the first to make electronic stability control standard on its SUVs by the 2004 model year and that no other full size pickup truck had ESC standard in the 2005 model year. Toyota may contend that it had no competitive or market pressure to make ESC standard, or that Toyota in fact did more in terms of making ESC available as an option then other manufacturers.
> [App. 86:10-15]

Plaintiffs did not acquiesce in the theory that such evidence was admissible on risk-benefit or the adequacy of design, but only showed that Toyota's design decision was unrelated to legitimate *Barker* design considerations and rested solely on the marketing department's conclusion that since customers didn't understand ESC, they didn't want it. (RT 3337-3340, 3354-3356)

3. TOYOTA'S ATTEMPT TO RECONCILE PREVIOUS CASES WITH THE KIM OPINION'S RULE OF DISCRETIONARY ADMISSION TO PROVE DESIGN SAFETY REINFORCES THE NEED FOR REVIEW BY THIS COURT

At pages 16 to 20 of the *Answer*, Toyota asserts that there never has been a rule prohibiting introduction of industry-standard evidence for purposes of assessing risk and benefit. The *Kim* opinion itself does not make this claim; rather, it acknowledges a distinct split between the authorities and attempts to find a middle way. And it articulates its rule so broadly as to plainly contradict the rule of prohibition in other cases

> Evidence of compliance with industry custom may tend to show that a product is safe for its foreseeable uses, while evidence of noncompliance with industry custom may tend to show that a product is unsafe for its foreseeable uses.
> [Opinion 14]

Grimshaw v. Ford Motor Co. is quite specific as to the irrelevance and impropriety of such evidence in design defect cases because it diverts the jury's attention from the question of whether the risks of the design outweigh the benefits

– the objective characteristics of the design and the behavior of the product itself – towards the issue of manufacturer compliance with the industry standard of care.

> In a strict products liability case, ***industry custom or usage is irrelevant to the issue of defect.*** (*Titus v. Bethlehem Steel Corp.*, 91 Cal.App.3d 372; *Foglio v. Western Auto Supply*, 56 Cal.App.3d 470, 477; see *Cronin v. J. B. E. Olson Corp.*, 8 Cal.3d 121, 133-134.) The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication ***that they are inappropriate considerations***. *Barker* contrasts the risk-benefit strict liability test with a negligent design action, stating 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 803, emphasis added]

"A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety. . . . In fact, admission of such evidence is reversible error." *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545. *Buell-Wilson* affirmed exclusion of evidence comparing Explorer rollover rates to that of other SUVs: "That was evidence that improperly sought to show that it met industry standards or custom for rollovers."

A similar rule of absolute prohibition is expressed in 1 Witkin, *Cal. Evidence 5th, Circumstantial Evidence* §75, and 50A Cal.Jur.3d, *Products Liability,* §123, which states:

> Admission of evidence that manufacturer met industry customs or standards on safety is reversible error in products liability actions . . .

No decision before *Kim* held that a trial court has discretion to admit evidence with such inherent tendency to divert jurors' attention from objective characteristics of the design towards the industry standard of care simply because industry practice *may* arguably be influenced by technical or financial considerations which are legitimately considered under *Barker*.

Toyota's contention that *Grimshaw* and similar cases must each be read as *sui generis* decisions governing very particular and limited circumstances, while *Kim* establishes a general rule consistent with those cases, is a re-writing of the *Kim* Opinion itself. In fact, Kim has been received as a clear departure from earlier law:

> Until last week, most California courts have held parties in a strict product liability action can never use a competitor's product to prove or deny that the challenged product is defective. A few courts, on the other hand, suggested parties can always use such evidence. *Kim v. Toyota Motor Corp.* offers a new rule in favor of case-by-case admissibility. . .
> [*New Test for Strict Liability Lawsuits*, Los Angeles Daily Journal, January 27, 2016 page 1]

No one can seriously doubt that *Kim* radically changes the landscape for industry-standard evidence in products liability cases, and that trial and appellate courts alike will have to struggle with the vague standards for admissibility set out

therein. Whether *Kim* is irreconcilable with previous decisions which seem to plainly articulate a rule of absolute preclusion of such evidence in strict liability cases is a question that is not apparent from the face of the *Kim* decision, which will undoubtedly generate controversy over the very arguments advanced in Toyota's *Answer*, and which ultimately will have to be answered by this Court.

Toyota's effort to reconcile or distinguish earlier cases thus raises issues for review, rather than setting them to rest.

4. THE *ANSWER* CONFIRMS THE CONFUSION CREATED BY KIM AS TO THE NATURE OF ADMISSIBLE "INDUSTRY STANDARD" EVIDENCE

In the Petition for Review, plaintiffs pointed out the confusion inherent in the *Kim* opinion insofar as the particular instances cited therein for holding admissible "industry-standard evidence" in fact were particular instances of the implementation or non-implementation of alternative designs, and hence are not true industry-standard evidence, but rather particularized evidence of technical or financial feasibility.

That same confusion underlies the argument at pages 20 to 21 of the *Answer* that plaintiffs abandoned any argument that evidence of industry-standard is inadmissible for all purposes. The critical point for purposes of review is that the *Kim* opinion articulates a rule under which any "industry-standard" evidence is allowed if the "industry standard" arguably reflects experience with feasibility or cost, yet justifies this conclusion with examples which do not reflect industry standards but the particular technical feasibility or cost effectiveness of alternative designs - individualized evidence of *Barker* factors. The examples do not support

this broad departure from the *Grimshaw* rule, nor the evidence and arguments to which plaintiffs took exception in this case which allowed Toyota to argue that the Tundra must be safe because otherwise every other pick-up was defective.

What this demonstrates is the importance of a fine discrimination between evidence with direct relevance to the objective technical factors enumerated in *Barker* and the evidence and arguments objected to by plaintiffs – e.g., the claim that every truck on the road was defective if the absence of ESC was a design defect, and Toyota's examination of plaintiffs' experts about the failure of other manufacturers to offer ESC:

> With respect to peer vehicles and peer-vehicle manufacturers, are you aware of any other pickup truck in the '05 years as far as domestic producers that had ESC technology in pickup trucks?
> [RT 2706]

And elicited from its own witnesses:

> . . . Were any other trucks, pickup trucks, available in the market in 2005 with standard VSC?
> A No. There Were None.
> Q And to your knowledge was the Tundra the first that had it as an option?
> A Yes. Tundra was the first full-size truck to have VSC as an option.
> [RT 3403]

And which Toyota made the centerpiece of its defense:

Well, we know that the truck could be driven safely at even higher speed based on the testing of Mr. Carr. But we also know that no pickups had standard VSC. in 2005. We also know that no pickups had VSC in any way before that, before 2004. So we know that literally hundreds, if not thousands of pickups, Toyota, Ford, G.M.'s, and other types of vehicles without VSC have driven that stretch of road countless times over the last 10 years.

But Toyota did what none of the other big three pickup makers did in 2005. They gave the customer the choice. They made it optional equipment. That black Ford F150 that Mr. Herzog has got there, if it's a 2005, it's defective. If you believe the plaintiffs' position in this case, that 2000 Ford F150 is defective because it doesn't have standard V.S.C. It doesn't even have optional V.S.C.. available. Toyota gave customers the choice.

The plaintiffs would have you penalize Toyota for making it an option and then for putting it in standard six years ahead of when the government said it was required. That is not fair and that's not justice.
[RT 4507-4510]

Nor does the *Answer* refute the probable impact of the Kim Opinion's extraordinary statement as to the erosion of the distinction between negligence and strict liability.

In short, the *Kim* opinion makes a broad statement about admissibility of evidence of industry practice based on examples which do not justify the statement; without examination of the policy reasons for the *Grimshaw* rule of prohibition; without discriminating between particularized evidence bearing on design alternatives and evidence "everybody does it" without justifying *why* every body does it; and without due consideration of the effect that such a broad statement has in undermining strict product liability's focus on the objective properties of the product and safety enhancement. Nothing in the *Answer* disproves the need for review to address these issues.

5. THE *ANSWER* CONFIRMS THE NEED FOR THIS COURT TO CLARIFY THE NATURE OF THE "EXPECTATIONS" PERTINENT TO APPLICATION OF THE CONSUMER EXPECTATIONS TEST

As did the Court of Appeal, Toyota argues that the consumer expectations test was inapplicable because consumer have no knowledge of ESC and hence no expectation as to how it would operate. Yet no case proceeding *Kim* interprets the term "expectation" to refer to the consumer's understanding or expectation as to the operation of a particular component in a product. Rather, the expectation has always been understood to apply to the consumer's understanding or experience as to how a product – considered as a whole and not component by component – should or would behave in particular circumstances.

The *Answer* restates the issue without acknowledging or resolving the divergence between *Kim* and other opinions. As observed in the *Petition*, it is particularly inappropriate to require the consumer to have any expectation as to the behavior of a particular component or design alternative in the context of ESC,

since the whole point of ESC is to make the vehicle behave as the consumer expects and directs. This is accordingly the perfect case for defining precisely what sort of "expectations" the consumer must have in order to apply the test.

The *Answer* likewise illustrates the need for this court to reinforce the point made in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 569, that technical complexity of the design or the need for expert testimony as to the mode of failure is no barrier to application of the consumer expectations test

> The fact that expert testimony was required to establish legal causation for plaintiffs' injuries does not mean that an ordinary user of the product would be unable to form assumptions about the safety of the products. . . In *Soule*, the court expressly rejected the contention that the consumer expectations test is improper whenever "technical questions of causation are at issue," stating that "ordinary consumer expectations are not irrelevant simply because expert testimony is required to prove . . . that a condition of the product as marketed was a `substantial,' and therefore `legal,' cause of injury." (Id. at pp. 568-569 & fn. 6) [*Sparks v. Owens–Illinois, Inc.* (1995) 32 Cal.App.4th 461, 465, 469]

In focusing on the consumer's knowledge or expectations *about ESC*, the *Kim* opinion departs from the principle expressed in previous decisions that it is only necessary that consumers "may form minimum safety assumptions in the context of a particular accident," following which the fact-finder employs its "own

sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence.'" *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120, citing *Soule*, 8 Cal.4th at 563, and *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126. Toyota's *Answer* does not address or resolve this conflict.

Nor does the *Answer* refute the fact that the *Kim* opinion indicates that the consumer expectations test will never be applicable in the case of new, complex or advanced technology intended to make a product behave more closely to the user's expectations and commands.

Similarly, the *Answer* confirms that the *Kim* opinion places a new gloss on the nature of consumer experience relevant to consumer expectations. Toyota suggests that consumers have no experience "making sudden turns while speeding on balding tires on a steep wet gravelly road." In fact, the record indicates that Kim was going approximately the speed of other vehicles, many of whom fish-tailed but successfully navigated the curve. (See Petition for Review pages 4-5) There are few consumers with significant driving history who have not had the experience of having tires go off the edge of the road, or slip, or handling a vehicle at high speed on a sharp turn. The claim that consumers cannot form expectations as to the Tundra's behavior in this case is contrary to the evidence, and to innumerable cases applying the consumer expectations test to vehicular behavior in emergency or unusual circumstances, such as those resulting in roll-overs – circumstances more extreme than the instant case.

In an effort to avoid the obvious weakness of this argument, Toyota claims that plaintiffs' case was not that consumers have experience with evasive maneuvers because otherwise plaintiffs would never have mentioned ESC. But

reference to technical components or design does not negate the existence of a reasonable expectation as to product behavior, as *Soule* and the above quotation from *Sparks v. Owens–Illinois, Inc.*, *supra*, 32 Cal.App.4th 461, demonstrate.

Toyota claims that the plaintiffs' legal theory was that the Tundra should have had ESC because consumers expect manufacturers to incorporate all available important safety devices. In fact, plaintiffs advanced the consumer expectations theory on *both* the grounds that "Drivers Are Capable of Forming Reasonable Expectations as to the Behavior of a Vehicle in an Evasive Maneuver" (*Appellant's Opening Brief*, page 34) and that they expect mature available safety technology to be used. And the Opinion plainly rejects it on the basis that consumers have no expectations as to how ESC works - a ground that goes to "expectations" as to vehicle behavior and thus conflicts with *Soule* and the many cases involving vehicle roll-overs, for example.

Of course, plaintiffs were entitled to consumer expectations instructions if *any theory* they presented was supported by the evidence. The issue presented as to *what sort of consumer expectations* are relevant to availability of the test is raised under the facts of the case and either theory advanced by plaintiffs.

Similarly, nothing in Toyota's Answer refutes the fact that the *Kim* opinion is in conflict with other decisions vesting the trial court with only a preliminary foundational determination that the product is one about which ordinary consumers can form a reasonable minimum safety expectations, leaving it to the jury "to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case . . ." *McCabe v. American Honda Motor Co.*, *supra*, 100 Cal.App.4th 1111, 1125, citing *Soule*.

6. THE ANSWER CONFIRMS THE NEED TO CLARIFY THE APPLICATION OF NEW EVIDENTIARY RULES TO THE CASE IN WHICH THEY ARE ANNOUNCED

As discussed above, the "*Kim* rule" undermines a lengthy line of decisions establishing a rule of prohibition as to true industry-standard evidence and argument. While Toyota suggests that plaintiff should have offered sought a limiting instruction, there was no case authority whatever anticipating the approach adopted in *Kim*, and hence no basis upon which a trial court could have given a limiting instruction in accordance with the rule announced on appeal. The trial court in fact refused instructions implementing the *Grimshaw* rule.

Toyota argues that the plaintiffs should be required to propound instructions or limiting instructions which were not in accordance with the existing case law. Yet even under their proposed standard for application of new legal standards, Toyota concedes that law which constitutes a "clear break" with prior decisions should not be applied retroactively to case in which it is newly announced. If the *Kim* opinion is itself correct in announcing a "middle" ground not articulated by any prior decision, then it is unclear why this is not a "clear break" with precedent.

Put differently, it is unfair and unreasonable to expect parties to offer instructions in accordance with evidentiary rules which do not in fact exist at the time of trial. That is precisely the issue which this court should address.

Plaintiffs accordingly concur with Toyota that the Court should also review the motion *in limine* in which the industry standard issue was raised.

7. CONCLUSION

The *Answer* raises additional issues without resolving the conflicts posed by the Kim opinion or demonstrating the absence of issue which will be critical in innumerable product liability cases to come. Review should be granted.

Respectfully Submitted,

Dated: March 31, 2016

LAW OFFICES OF IAN HERZOG

By:_____
Evan D. Marshall
Attorneys for Plaintiffs and Appellants
William Jae Kim and Hee Joon Kim

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(c)(4) of the California Rules of Court, the enclosed Reply to Answer to Petition for Review is produced using 13-point Roman type including footnotes and contains approximately 3,996 words, which is less than the 4,300 words permitted by Rule 8.504(c). Counsel relies on the word count of the computer program used to prepare this Reply.

Dated: March 31, 2016

Evan D. Marshall

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On March 31, 2016, I served the attached ***REPLY TO ANSWER TO PETITION FOR REVIEW*** on the parties in this action by placing a true copy in a sealed envelope with proper postage in the U.S. mail at Los Angeles, California, addressed as follows

Daniel R. Villegas, Esq. Rogan, Leherman, LLP 12121 Wilshire Blvd. Suite 1300 Los Angeles, CA 90025	Atty for Respondents Toyota Motor Sales, USA; Toyota Motor Corporation; Toyota Motor North America; Toyota Engineering and Manufacturing North America; Power Toyota Cerritos
Patrick Goode Rogan Patrick G. Rogan, P.C. 20406 Seaboard Rd. Malibu, CA 90265	Atty for Respondents
Robert A. Brundage Morgan, Lewis & Bockius LLP One Market, Spear Street Tower San Francisco, CA 94105-1596	Atty for Respondents
Nicolette Leilani Young Morgan, Lewis & Bockius LLP One Market, Spear Street Tower San Francisco, CA 94105-1596	Atty for Respondents
Clerk for Hon. Raul A. Sahagan, Judge Los Angeles Superior Court 12720 Norwalk Blvd., Dept. D Norwalk, CA 90650	Trial Court
Clerk Second District Court of Appeal Division Seven 300 S. Spring Street, 2nd Floor, North Tower Los Angeles, CA 90013	Court of Appeal

I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on March 31, 2016.

_____