Lexis® Context Report

Mark Russell Cannon P.E.,C.F.E.I.

Workplace Injuries, Safety Engineering, Machine Safety, Product Failure Analysis, Design Engineering, Transportation Accident Investigation &

User Name:

Jasen Abrahamsen

Date and Time:

Jun 4, 2025 11:51

Job Number:

254473092

Mark Russell Cannon P.E.,C.F.E.I.
Workplace Injuries, Safety Engineering, Machine Safety, Product Failure Analysis, Design Engineering, Transportation Accident Investigation & Reconstruction, Mechanical Engineering

Overall Challenges Outcome Analysis(8)

Trial Level Challenges

Cases	Methodology	Qualification	Relevance	Procedural	Outcome
Updike v. Am. Honda Motor Co.					✓
Updike v. Am. Honda Motor Co.		●		●	✓
Garcia v. Mine Safety Appliances Co.	●				✗
Bombardier Serv. Corp. v. Tronair, Inc.					✓

Appellate Level Challenges

Cases	Methodology	Qualification	Relevance	Procedural	Outcome
Stafford v. Magruder	●				✗

Updike v. Am. Honda Motor Co.

United States District Court for the District of Arizona

September 23, 2024, Decided; September 23, 2024, Filed

No. CV-21-01379-PHX-DJH

Reporter
2024 U.S. Dist. LEXIS 170962 *; 2024 WL 4266593

Steven Updike, Plaintiff, v. American Honda Motor Company Incorporated, et al., Defendants.

Prior History: *Updike v. Am. Honda Motor Co., 2024 U.S. Dist. LEXIS 165035, 2024 WL 4182232 (D. Ariz., Sept. 13, 2024)*

Core Terms

misuse, roll, hole, modifications, cage, crossbar, argues, summary judgment, aftermarket, injuries, tubes, alteration, Consumer, warnings, rear, roof, unreasonable danger, design defect, foreseeable, rollover, reasonably foreseeable, proximate cause, collapsed, genuine, stress, strict product liability, installation, crossmember, proximate, fracture

Counsel: For Steven Updike, surviving son, for himself and on behalf of all statutory beneficiaries under *A.R.S. §12-612(A)* **[*1]** , deceased, James Updike, Plaintiff: Jorge Franco, Joseph Andrew Brophy, LEAD ATTORNEYS, Jennings Haug Keleher McLeod Waterfall LLP - Phoenix, Phoenix, AZ.

For American Honda Motor Company Incorporated, a California corporation, Defendant: Paul G Cereghini, William Francis Auther, LEAD ATTORNEYS, Sarah Brunswick, Bowman & Brooke LLP - Phoenix, AZ, Phoenix, AZ.

Judges: Honorable Diane J. Humetewa, United States District Judge.

Opinion by: Diane J. Humetewa

Opinion

ORDER

This case arises from a roll-over accident Mr. James Updike, Sr. ("Decedent") was involved in while driving his 2019 Honda Talon utility terrain vehicle ("Talon"). (Doc. 1-2 at ¶ 4; Doc. 83 at 2). Plaintiff Steven Updike ("Plaintiff") and Defendant American Honda Motor Company Incorporated ("Defendant") have each filed motions for summary judgment. (Docs. 83 & 84). Plaintiff seeks partial summary judgment on Defendant's misuse affirmative defense. (Doc. 83 at 1). Defendant seeks summary judgment on Plaintiff's products liability claim. (Doc. 84). These Motions are fully briefed. (Docs. 100, 107, 112, 113). The Court denies both parties' Motions for the following **[*2]** reasons.[1]

I. Background[2]

Plaintiff, Decedent's son, has brought this wrongful death action on behalf of Decedent and Decedent's statutory beneficiaries. (Doc. 1-2 at 13). On February 7, 2020, Decedent was driving his Talon in the Imperial Sand Dunes in Glamis, California. (*Id.* at ¶¶ 10-15). Decedent was driving approximately twenty to twenty-five miles per hour when he drove over a soft sand dune and became airborne as he reached its crest. (Doc. 83 at 2; Doc. 84 at 2).

During its descent, the Subject Talon pitched forward, rolled end-over-end, and came to rest on its wheels. (Docs. 83 at 2; Doc. 84 at 2). Plaintiff alleges that the Talon's rollover protection system ("ROPS") failed when the rear cross bar at the top of the roll cage directly behind and above the driver's head "snapped"[3] and

---

[1] Defendant has requested oral argument in this matter. (Doc. 84). The Court denies this request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* *Fed. R. Civ. P. 78(b)* (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

[2] The following facts are undisputed, unless stated otherwise.

[3] Defendant disputes that the cross bar "snapped," and argues

several other parts of the roll cage buckled and injured Decedent. (Doc. 1-2 at ¶¶ 16-17). Decedent added several aftermarket modifications to the Talon, including a "Quick Lite whip and a Rugged Radio aerial antenna" to the cross bar that fractured. (Doc. 84 at 3; Doc. 100 at 16-17). He also added an aftermarket Pro Armor restraint harness. (Doc. 84 at 3; Doc. 100 at 6). There is much dispute as **[*3]** to whether these aftermarket accessories can be attributed to the failure of the ROPS and Decedent's injuries. (*See* Doc. 84 at 3; Doc. 100 at 17). Defendant denies that the Talon's ROPS contained a defect or that this defect was the proximate cause of Decedent's injuries, as Plaintiff alleges. (Doc. 84 at 7).

Stemming from this roll-over accident, Plaintiff has brought claims for negligence (Doc. 1-2 at ¶¶ 20-30), strict product liability (*id.* at ¶¶ 31-44), breach of express/implied warranty (*id.* at ¶¶ 45-48) and punitive damages[4] (*id.* at ¶¶ 49-52) against Defendant. Defendant has asserted the affirmative defense of misuse and contends that Plaintiff "materially altered" the Talon and that this alteration was not foreseeable. (Doc. 84 at 12). Plaintiff argues that there is no evidence that Decedent's aftermarket modifications to the Talon caused it to roll over or caused the ROPS to fail. (Doc. 100 at 17).

To support its claims against Defendant, Plaintiff has retained several experts in this case. (Doc. 123 at 3). He has retained Dr. Michael Markushewski to opine on the crashworthiness of the Talon; Dr. Andrew Rentschler to opine on the "mechanism" of Decedent's injury; and Dr. James **[*4]** Mason to "assess the pre-drilled design of the ROPS bar and tubing that failed during [Decedent's] rollover." (*Id.* at 7, 12, 15). Relevant here, Dr. Markushewski concludes that the Talon's roll cage failed and that the roof panel and roll cage tubing collapsed downward toward the driver occupant space. (*Id.* at 4). Dr. Rentschler opines that "[t]he injury mechanism responsible for [Decedent's] C2 nondisplaced type II/III fracture of the dens involves localized hyperextension with associated compression. This injury mechanism resulted from the contact between [Decedent's] helmeted head and the intruding roof structure/roll cage during the subject incident." (*Id.* at 12). Finally, Dr. Mason concludes that "[t]he ROPS was defective in design due to the introduction of a hole in the underside of the rear cross bar and due to the use of thin-walled tubes in its construction, i.e. tubes with too large of a diameter and too small of a wall thickness" and that "[t]he aftermarket components attached to the rear crossmember were foreseeable and likely increased the stress around the hole in the crossmember by approximately 3-4%, much less than the hole itself." (*Id.* at 16). The Court recently **[*5]** declined to exclude these experts as Defendant requested. (*Id.* at 11, 15 and 18).

II. Legal Standard

A court will grant summary judgment if the movant shows there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "genuine" when a reasonable jury could return a verdict for the nonmoving party. *Id.* Courts do not weigh evidence to discern the truth of the matter; they only determine whether there is a genuine issue for trial. *Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1131 (9th Cir. 1994)*. This standard "mirrors the standard for a directed verdict under *Federal Rule of Civil Procedure 50(a)*, which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson, 477 U.S. at 250*. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id. at 250-51* (citing *Wilkerson v. McCarthy, 336 U.S. 53, 62, 69 S. Ct. 413, 93 L. Ed. 497 (1949)*).

The moving party bears the initial burden of identifying portions of the record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, that show there is no genuine factual dispute. *Celotex, 477 U.S. at 323*. Once shown, the burden shifts to **[*6]** the non-moving party, which must sufficiently establish the existence of a genuine dispute as to any material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Where the moving party will have the burden of proof on an issue at trial, the movant must "affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984*

---

that it "fractured but did not snap cleanly through." (Doc. 107 at 3 n.4 (citing Doc. 84-3 at 15 ("The rear cross member of the ROPS fractured approximately 4 inches left of center.")).

[4] Plaintiff has stipulated to the entry of judgment in Defendant's favor on his punitive damages claim. (Doc. 84 at 5 n. 4).

(9th Cir. 2007). On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail "merely by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* (citing Celotex Corp., 477 U.S. at 323).

If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or otherwise as provided in Rule 56, "specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250; Fed. R. Civ. P. 56(e). The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322. The summary-judgment stage is the " 'put up or shut up' moment in a lawsuit, when the nonmoving party must show what evidence it has that would convince a trier of fact to accept its version of events." Arguedas v. Carson, 2024 U.S. Dist. LEXIS 11322, 2024 WL 253644, at *2 (S.D. Cal. Jan. 22, 2024) (citation omitted). In fact, the non-moving party "must come forth with evidence from which a jury could reasonably **[*7]** render a verdict in [its] favor." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. *See* T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. Defendant's Motion for Summary Judgment

Defendant seeks summary judgment on Plaintiff's product liability claim. (Doc. 84).

Federal district courts apply state law to products liability claims brought in federal court pursuant to diversity jurisdiction. Adams v. Synthes Spine Co., 298 F.3d 1114, 1117 (9th Cir. 2002). "The doctrine of strict products liability is a public policy device to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and have the know-how to remove its defects before placing it in the chain of distribution." State Farm Ins. Companies v. Premier Manufactured Sys., Inc., 213 Ariz. 419, 142 P.3d 1232, 1234 (Ariz. Ct. App. 2006) (internal citations omitted). Strict products liability "does not rest on traditional concepts of fault." Id. at 1236. For instance, a strict products liability plaintiff "does not have to prove the defendant was negligent." Id. at 1235 (citations omitted). However, the Arizona Supreme Court has "made clear that proof of the defect alone is not sufficient for liability." Sw. Pet Prod., Inc. v. Koch Indus., Inc., 273 F. Supp. 2d 1041, 1051 (D. Ariz. 2003) (citing Readenour v. Marion Power Shovel, 149 Ariz. 442, 719 P.2d 1058, 1063 (Ariz. 1986)). "Instead, **[*8]** '[s]trict liability in tort is found only where the defective condition *causes* the product to be unreasonably dangerous.' " *Id.* (emphasis added).

In Arizona, to establish a *prima facie* case of strict products liability, a plaintiff must show that: (1) the product is defective and unreasonably dangerous; (2) the defective condition existed at the time it left defendant's control; and (3) the defective condition is the proximate cause of the plaintiff's injuries and property loss. Dietz v. Waller, 141 Ariz. 107, 685 P.2d 744, 747 (Ariz. 1984); Bonar v. GMC, 2009 Ariz. App. Unpub. LEXIS 127, 2009 WL 44872, * 4 (Ariz. Ct. App. 2009). Under element one, three types of defects can result in an unreasonably dangerous product: (1) manufacturers defects, (2) design defects, and (3) informational defects. Dillon v. Zeneca Corp., 202 Ariz. 167, 42 P.3d 598, 603 (Ariz. Ct. App. 2002).

In its Complaint, Plaintiff alleges two types of defect theories: a design defect theory and an informational defect theory. (Doc. 1-2 at ¶ 35 ("the 2019 Honda Talon was defective as to design"), ¶ 43 (Defendant "failed to warn of the potential risks or hazards associated with riding a 2019 Honda Talon with a ROPS that was not capable of protecting the driver when using the Talon as expected and intended")). In its Motion, Defendant does not address Plaintiff's failure to warn theory and limits its arguments to Plaintiff's design defect **[*9]** theory. (Doc. 84).

Defendant specifically argues that Plaintiff's design defect claim cannot survive summary judgment because: (1) Plaintiff has failed to show that the Talon was defective or unreasonably dangerous; (2) he has not shown that a defect was present when it left Defendant's control; (3) there is no evidence that a defect proximately caused Decedent's injuries; and (4) Decedent misused the Talon by making material alterations to it, which were not foreseeable.[5] (Doc. 84

[5] Defendant also argues that, if the Court were to grant one of its six *Daubert* Motions, that Plaintiff will not have the proof he needs and it will be entitled to summary judgment. (Doc. 84 at 17). The Court did not grant any of Defendant's Daubert Motions and instead declined to exclude any of his experts, so, this argument is moot. (*See* Doc. 123).

at 6, 12, 16).[6]

1. Design Defect

Defendant first argues that Plaintiff cannot meet his burden of demonstrating the existence of a defect present in the Talon because his expert, Dr. Mason, has not done any testing on the amount of force required to deform the Talon's ROPS or to break its cross bar. (Doc. 84 at 8). It further argues that Dr. Mason has not done *any* case-specific testing, so, Plaintiff has failed to show that the Talon suffered from a defect. (*Id.*) Plaintiff argues, in response, that it has set forth sufficient evidence that the Talon contained a design defect through evidence that the cross bar failed where Defendant intentionally drilled a hole in it, which significantly increased **[*10]** the stress on the crossbar and made its tubing easier to rip. (Doc. 100 at 11).

A defectively designed product is "one that is made as the manufacturer intended it to be but that is unreasonably dangerous." *St. Clair, 2011 U.S. Dist. LEXIS 128842, 2011 WL 5331674, at *4*. A design defect claim "begins with the assertion that a manufacturer produced a product that fails to meet 'the purpose for which it is designed.' " *Jones v. Medtronic Inc., 411 F. Supp. 3d 521, 531 (D. Ariz. 2019)* (quoting *Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1194 (9th Cir. 2007)*). In Arizona, two tests may be used in determining whether a product is defectively designed: the Consumer Expectation Test or the Risk/Benefit Analysis Test. *See Martinez v. Terex Corp., 241 F.R.D. 631, 641 (D. Ariz. 2007)*.

Under the Consumer Expectation Test, "the fact-finder determines whether the product 'failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonable manner.' " *Golonka v. General Motors Corp., 204 Ariz. 575, 65 P.3d 956, 962 (Ariz. Ct. App. 2003)* (quoting *Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 709 P.2d 876, 879 (Ariz. 1985)*). Expert testimony is not needed to establish a design defect under the Consumer Expectation Test because the test "focuses on the safety expectations of an ordinary consumer rather than those of an expert." *Long v. TRW Vehicle Safety Sys., Inc., 796 F. Supp. 2d 1005, 1010 (D. Ariz. 2011)* (citation omitted). The Consumer Expectation Test finds that a defective product is unreasonably dangerous when "its inherent danger exceeds the expectation of the ordinary user or consumer." *Id.* (citing *Gomulka v. Yavapai Mach. & Auto Parts, Inc., 155 Ariz. 239, 745 P.2d 986, 989 (Ariz. Ct. App. 1987)*).

When application of the Consumer Expectation **[*11]** Test is "unfeasible or uncertain" courts additionally or alternatively employ the risk/benefit analysis to determine "whether a design is defective and unreasonably dangerous." *Golonka, 65 P.3d at 963*. The riskbenefit analysis test asks the fact-finder to decide, in light of relevant factors, whether "the benefits of [a] challenged design . . . outweigh the risk of danger inherent in [the] design." *Dart, 709 P.2d at 879*. If not, the design was defective and unreasonably dangerous. *Id.*

Courts apply the Consumer Expectation Test when an ordinary customer through use of a product develops "an expectation regarding the performance safety of the product." *Brethauer v. GM Corp., 221 Ariz. 192, 211 P.3d 1176, 1183 (Ariz. Ct. App. 2010)*. Indeed, this Court has previously held, as Plaintiff notes, that "the ordinary consumer could reasonably expect, similar to a seatbelt, that [a] ROPS should restrain a passenger body within the confines of the vehicle during a rollover crash." *Thompson v. Polaris Indus., 2019 U.S. Dist. LEXIS 83665, 2019 WL 2173965, at *2 (D. Ariz. May 17, 2019)* (citing *Nance v. Toyota Motor Sales USA, Inc., 2014 U.S. Dist. LEXIS 132601, 2014 WL 4702781, at *2 (D. Ariz. Sept. 22, 2014)*.

Here, Plaintiff has set forth sufficient evidence for a jury to find that the Talon's crossbar failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonable manner through his experts. *See Long, 796 F. Supp. 2d at 1010*. First, Dr. Markushewski conducted an "inversion test" with a new Pro Armor 3-inch wide, 4-point restraint **[*12]** system in a machine which allows for testing of full-size vehicles in a rotational manner under a 1G environment. (Doc. 100-3 at 31). He concluded that "the seat belt provided the restraint necessary to prevent [Decedent's] neck injury in this protectable rollover incident if the roll cage d[id] not collapse." (*Id.* at 34). Markushewski concluded, in sum, that (1) the roll cage failed and the roof panel and roll cage tubing collapsed downward toward the driver occupant space, (2) Decedent's helmet was impacted by the collapsing roof and roll cage structure creating a

[6] The Court notes that Defendant seeks "summary final judgment in its favor and against the plaintiff." (Doc. 84 at 1). Defendant's arguments only attack Plaintiff's strict products liability claim and do not address Plaintiff's negligence claim or his breach of warranty claim. (*See* Doc. 1-2 at ¶¶ 20-30, 45-48).

mechanism for his ultimately fatal injuries, and (3) the roll cage structure is defectively designed and unreasonably dangerous and not suited for its intended purpose. (*See id.* at 33-34).

Next, Dr. Andrew Rentschler concluded that "[t]he intruding roof structure/roll cage contacted [Decedent's] helmet . . . [causing] type III fracture of the dens in combination with failure of the anterior longitudinal ligament and widening of the C1-2 articulations as noted in the available diagnostic studies." (Doc. 123 at 13). He also testified at his deposition that "absent deformation or crush damage to the ROPS, [Decedent] would not **[*13]** have sustained the cervical injuries that he did as a result of the incident." (*Id.* at 14).

Finally, Dr. Mason concluded in his report that "[t]he ROPS was defective in design due to the introduction of a hole in the underside of the rear cross bar and due to the use of thin-walled tubes in its construction, i.e. tubes with too large of a diameter and too small of a wall thickness" and that "[t]he aftermarket components attached to the rear crossmember were foreseeable and likely increased the stress around the hole in the crossmember by approximately 3-4%, much less than the hole itself." (Doc. 123 at 16).[7]

Reviewing this evidence collectively, the Court finds that Plaintiff has set forth sufficient evidence form which a jury could concluded that the Talon suffered from a defect which caused Decedent's injuries. *See* Matsushita Elec. Indus. Co., 475 U.S. at 585-86. Under the Consumer Expectation Test, Plaintiff has set forth facts to show that the Talon's ROPS failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonable manner. Golonka, 65 P.3d at 962. Indeed, consumers have developed a reasonable expectation that a vehicle's ROPS should restrain a passenger's body within the confines of the vehicle during a **[*14]** rollover crash. Thompson, 2019 U.S. Dist. LEXIS 83665, 2019 WL 2173965, at *2 ("the ordinary consumer could reasonably expect, similar to a seatbelt, that ROPS should restrain a passenger body within the confines of the vehicle during a rollover crash.").

Defendant argues this case is akin to Kostic v. Autozone Parts Inc., 2021 U.S. Dist. LEXIS 24827, 2021 WL 461939 (D. Ariz. Feb. 9, 2021). It is not. Kostic dealt with an informational defect theory, not a design defect theory. *See* 2021 U.S. Dist. LEXIS 24827, [WL] at *2. As well, unlike the plaintiff in Kostic, Plaintiff has furnished evidence of a defect here. In Kostic, the court found that the plaintiff failed to provide "any evidence" that the product lacked warnings and instructions ordinarily included with it when it left the manufacturers hands. *See id.* Here, Plaintiff has furnished evidence which demonstrates that the ROPS failed due to its defective design. (Doc. 100 at 11). Plaintiff's expert, Dr. Mason concluded that the Talon's ROPS was defective in design because of the introduction of a hole in the underside of the rear cross bar." (Doc. 123 at 16). Plaintiff also advances that Defendant's own expert, Mr. Cooper, admitted in his deposition that "[a] hole of any kind creates a stress concentration . . . So the contribution to the strength of that particular member is an increase in the localized stress by a factor of 3." (Doc. 100-2 **[*15]** at 69-70). In simpler terms, Dr. Cooper explained that "by looking at the little tabs that are on almost every package that you want to get into these days [there] are a stress concentration, which is a point where you can rip the top of the bag open." (*Id.* at 70). The experts in this case agree that the hole in the cross bar of the Talon's ROPS weakened it, so, Plaintiff has set forth evidence that the Talon contained a defect—unlike the plaintiff in *Kostic. Cf.* Kostic, 2021 U.S. Dist. LEXIS 24827, 2021 WL 461939 at *2.

Because Plaintiff has set forth evidence that the ROPS collapsed downward toward Decedent during the roll-over and that this collapse caused his injuries, contrary to what a reasonable consumer would expect, Plaintiff has satisfied the Consumer Expectation Test. Martinez, 241 F.R.D. at 641. Furthermore, the fact that Decedent added aftermarket parts to the roof of his Talon does not prevent Plaintiff from satisfying this test because he has set forth credible evidence that the modifications he installed were foreseeable and only increased the stress to the crossmember by three to four percent, so, he has, at the very least, shown that a genuine dispute of fact exists as to this issue. Celotex Corp., 477 U.S. at 322-23.

---

[7] While Dr. Mason did not perform any of his own testing, the Court found that "the admissibility of expert testimony 'does not depend on the expert personally performing testing.' " (Doc. 123 at 18 (citing Speaks v. Mazda Motor Corp., 118 F. Supp. 3d 1212, 1219 (D. Mont. 2015)). The Court also concluded that "Dr. Mason is qualified to testify on the failure of the Talon's crossbar generally and [it] will not exclude him from testifying" and noted that his testimony is "is ripe for rigorous cross-examination, not exclusion." (*Id.* (citing ***Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)*** ("Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.")).

2. Whether the Defective Condition Existed at the Time it Left [*16] Defendant's Control

Defendant next argues that Plaintiff cannot show that a defect was present when the Talon left its control. (Doc. 84 at 14 n.8).

A plaintiff is not required to show that a defendant "*caused* a specific defect while in control of the product," they must only show that "some *defect* existed when the product passed from defendant's control to plaintiff." *Dietz, 685 P.2d at 747* (emphasis in original). "[N]o specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect." *Id.*

Here, Plaintiff has put forth evidence that the Talon's ROPS suffered from a defect which existed when it left Defendant's control. Dr. Mason concluded that the introduction of a hole in the underside of the rear cross bar resulted in a defect to the Talon's ROPS. (Doc. 123 at 16). He also stated that "[t]he introduction of the hole made the cross bar three times weaker than it was without the hole. The logical alternative designs include eliminating the hole or moving the hole to the top or side of the tube. This is basic engineering." (Id. at 17; Doc. 84-10 at 6). And Dr. Markushewski concluded that the roll cage failed and the roof panel and roll **[*17]** cage tubing collapsed downward toward the driver occupant space. (Doc. 123 at 4).

Furthermore, changes to a product have not prevented a showing that a defect existed where, as here, it could be reasonably inferred that the defect was the result of a structural problem. *See Dietz, 685 P.2d at 747*. Dr. Mason's testimony establishes as much. (*See* Doc. 123 at 17). While "reasonable minds could differ over the conclusions to be drawn from the evidence presented," *see Anderson, 477 U.S. at 250*, this evidence could allow a reasonable jury to infer that the Talon's ROPS suffered from a defect. *Dietz, 685 P.2d at 747*. Thus, Plaintiff has set forth specific facts showing that there is a genuine issue for trial as to this element. *Anderson, 477 U.S. at 250*; *Fed. R. Civ. P. 56(e)*.

3. Proximate Cause

Defendant finally argues that Plaintiff cannot show that the alleged defect was the proximate cause of Decedent's injuries. (Doc. 84 at 7).

"The proximate cause of an injury is defined in Arizona as 'that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces and injury, and without which the injury would not have occurred.' " *Long, 796 F. Supp. 2d at 1011* (quoting *Shelburg v. City of Scottsdale Police Dep't, 2010 U.S. Dist. LEXIS 93670, 2010 WL 3327690, at *9 (D. Ariz. Aug. 23, 2010)*). "Ordinarily, what constitutes the proximate cause of any injury is a question of fact. However, the jury is not entitled to make a decision **[*18]** absent a proper evidentiary foundation." *D'Agnese v. Novartis Pharms. Corp., 952 F. Supp. 2d 880, 890 (D. Ariz. 2013)* (quoting *Gebhardt v. Mentor Corp., 191 F.R.D. 180, 184 (D. Ariz. 1999)*). In other words, "there must be some evidentiary foundation of proximate cause before the question may be turned over to the jury." *Walsh v. LG Chem Am., 2021 U.S. Dist. LEXIS 215678, 2021 WL 5177864, at *5 (D. Ariz. Nov. 8, 2021)* (citation omitted).

Here, there is, at the very least, some evidence that a defect in the Talon's design proximately caused Decedent's injuries and death. *Id.* As stated above, Dr. Markushewski concluded, in sum, that (1) the roll cage failed and the roof panel and roll cage tubing collapsed downward toward the driver occupant space, (2) Decedent's helmet was impacted by the collapsing roof and roll cage structure creating a mechanism for his ultimately fatal injuries, and (3) the roll cage structure was defectively designed and unreasonably dangerous and not suited for its intended purpose. (*See* Doc. 100-3 at 33-34). Dr. Rentschler further concluded that "[t]he intruding roof structure/roll cage contacted [Decedent's] helmet . . . [caused] type III fracture of the dens in combination with failure of the anterior longitudinal ligament and widening of the C1-2 articulations as noted in the available diagnostic studies." (Doc. 123 at 13). He also testified at his deposition that "absent deformation or crush **[*19]** damage to the ROPS, [Decedent] would not have sustained the cervical injuries that he did as a result of the incident." (*Id.* at 14). This evidence sets forth specific facts showing that there is a genuine issue for trial as to the proximate cause element. *Dietz, 685 P.2d at 747*; *Anderson, 477 U.S. at 250*.

In sum, Plaintiff has set forth sufficient facts to establish a *prima facie* case of strict products liability as he has shown that a reasonable juror could find that (1) the Talon was defective and unreasonably dangerous; (2) the defective condition existed at the time it left Defendant's control; and (3) the defective condition was the proximate cause of Decedent's injuries and death. *See Dietz, 685 P.2d at 747*; *Anderson, 477 U.S. at 250* (stating that the nonmoving party must set forth, by

affidavit or otherwise as provided in Rule 56, "specific facts showing that there is a genuine issue for trial."). So, Defendant is not entitled to judgment as a matter of law on Plaintiff's strict products liability claim.

4. Defendant's Affirmative Defense of Misuse

Defendant also argues that it is entitled to summary judgment because Plaintiff materially altered the Talon and that this alteration was unforeseeable, which would establish its misuse defense. (Doc. 84 at 12-13). Defendant essentially **[*20]** argues that Plaintiff misused the Talon by installing the Quick Lite whip and a Rugged Radio aerial antenna to the cross bar and improperly installing and/or using the aftermarket harness. (*Id.* at 14). Defendant specifically argues that these modifications proximately caused Decedent's injuries because (1) the harness failed to properly restrain Decedent during the roll over and (2) the mislocated whip "applied a concentrated load to the cross member during the ROPS-to-ground contact that likely ***contributed*** to its fracture." (*Id.*) (emphasis added).

Arizona law provides that a defendant in a strict products liability action shall not be liable ***if it proves*** that "[t]he proximate cause of the incident giving rise to the action was an alteration or modification of the product that was not reasonably foreseeable, made by a person other than the defendant and subsequent to the time the product was first sold by the defendant." A.R.S. § 12-683(2). Similarly, a defendant can also shield themselves from liability by proving that the proximate cause of the plaintiff's injury was (1) "a use or consumption of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable **[*21]** ***or*** [(2)] was contrary to any express and adequate instructions or warnings appearing on or attached to the product . . ." A.R.S. § 12-683(3) (emphasis added); *see also Monje v. Spin Master Inc.*, 2015 WL 13648554, at *6 (D. Ariz. July 24, 2015), *aff'd*, 679 Fed. Appx. 535 (9th Cir. 2017). Arizona law defines a reasonably foreseeable use as one "that would be expected of an ordinary and prudent purchaser, user or consumer and that an ordinary and prudent manufacturer should have anticipated." A.R.S. § 12-681(8). "[S]ome abnormal, or unintended uses will not constitute a legal misuse of the product, if they are reasonably foreseeable." Kavanaugh v. Kavanaugh, 131 Ariz. 344, 641 P.2d 258, 263 (Ariz. Ct. App. 1981) (citations omitted). As a general rule, whether misuse, modification, or alteration of a product is reasonably foreseeable is a question of fact for the jury. *See id.* (misuse); Piper v. Bear Med. Sys., 180 Ariz. 170, 883 P.2d 407, 412-13 (Ariz. Ct. App. 1993) (alteration or modification).

Here, Defendant has not "affirmatively demonstrate[d]" that a reasonable jury could *only* find for it on the defense of misuse, in large part, because of the opinions of Dr. Mason as well as concessions its own expert, Mr. Eddie Cooper, made during his deposition. *See* Soremekun, 509 F.3d at 984. Dr. Mason concluded in his expert report that:

> The ROPS was defective in design due to the introduction of a hole in the underside of the rear cross bar and due to the use of thin-walled tubes in its construction, i.e. tubes with **[*22]** too large of a diameter and too small of a wall thickness. ***The aftermarket components attached to the rear crossmember were foreseeable*** and likely increased the stress around the hole in the crossmember by approximately 3-4%, much less than the hole itself.

(Doc. 123 at 16). This opinion essentially rebuts the conclusion that the modifications were the cause of the cross member snapping or fracturing because the modifications only increased the stress to it by three or four percent—"***much less***" than the predrilled hole. (*See id.*)

Dr. Mason further states that "[t]he aftermarket components attached to the rear crossmember were foreseeable." (Doc. 123 at 16). As well, Mr. Cooper admitted in his deposition that Decedent was using the Talon as it was intended and foreseeable. (Doc. 83-7 at 4). This evidence prevents a finding that Decedent was misusing the Talon because, to prove misuse, Defendant must affirmatively demonstrate that no reasonable trier of fact could find other than for it. *See* A.R.S. § 12-683(3); Soremekun, 509 F.3d at 984.

Furthermore, Plaintiff has also set forth evidence that Decedent's modifications were not contrary to any express instructions or warnings appearing on or attached to the product—which also undermines **[*23]** Defendant's entitlement to judgment on its misuse defense. A.R.S. § 12-683(3). Another of Plaintiff's experts, Mr. Mark Cannon, was engaged to "evaluate and comment on the reports submitted by [Defendant's experts] Dr. Fowler and Dr. Dorris on behalf of [Defendant]" and "address the issue of information and warnings provided on the Honda Talon and the contrast

between the findings in Drs. Fowler's and Dorris' reports." (Doc. 123 at 15). Mr. Cannon concluded in his rebuttal report[8] that the "[a]ntenna and flagpole bracket mounting are not addressed in these warnings and the information about the bracket, as cited by Dr. Fowler, does not comport with the warnings format extolled by Dr. Dorris." (*Id.* at 15-16). Mr. Cannon also noted that "[i]f the flagpole mounting information is as critical as Dr. Fowler describes, then it needs to follow Dr. Dorris' recommended format regarding warnings relative to safety. And by Dr. Dorris' reckoning, the flagpole bracket information in the manual is deficient and not reasonable nor appropriate." (*Id.* at 18). These opinions support Plaintiff's contentions that (1) the ROPS' failure was due to a product defect, not the installation of aftermarket parts; (2) the installation **[*24]** of these aftermarket parts was foreseeable; and (3) the warnings against such modification were deficient. (*See id.* at 15-18). A misuse defense is only available when an alteration or modification of the product is concerned if the modification was "[t]he ***cause*** of the incident giving rise to the action." A.R.S. § 12-683(2) (emphasis added). The opinions of Plaintiff's experts demonstrate that there are genuine issues of material fact regarding the cause of the incident here.

Moreover, "[d]etermining the credibility of witnesses, resolving evidentiary conflicts, and drawing reasonable inferences from proven facts" falls within the exclusive province of the jury. *Taylor v. Cnty. of Pima, 2023 U.S. Dist. LEXIS 51815, 2023 WL 2652602, at *3 (D. Ariz. Mar. 27, 2023)* (quoting *United States v. Lukashov, 694 F.3d 1107, 1116 (9th Cir. 2012)*). Defendant's experts and Plaintiff's experts each establish facts for and against misuse. For the Court to find one way, or the other, on this issue, the Court would necessarily have to make credibility determinations or weigh conflicting evidence—which, again, the Court cannot do at the summary judgment stage. *See T.W. Electric Service, 809 F.2d at 630-31*. Indeed, whether the misuse, modification, or alteration of a product is reasonably foreseeable is generally a question of fact for the jury—and this question should be decided by the jury in this case—not the Court. **[*25]** *See Kavanaugh, 641 P.2d at 263*.

In sum, Defendant has not demonstrated that it is entitled to judgment as a matter of law on Plaintiff's strict product liability claim because there are genuine issues of material fact showing that this claim is ripe for trial. *Fed. R. Civ. P. 56(a)*; *Celotex, 477 U.S. at 322-23*

IV. Plaintiff's Motion for Summary Judgment

Next, the Court will address Plaintiff's Motion for Partial Summary Judgment. Plaintiff seeks judgment on a narrow issue: Defendant's affirmative defense of misuse. (Doc. 83 at 1). Plaintiff argues that, although misuse is an available affirmative defense under *A.R.S. § 12-683(3)*, it is not available in this case because the Talon's rollover was foreseeable. (*Id.* at 6 (citing *Cota v. Harley Davidson, 141 Ariz. 7, 684 P.2d 888 (Az. Ct. App. 1984)*). Defendant argues that Arizona law provides for a misuse defense here because Decedent acted contrary to the express and adequate Talon instructions and his misuse was not reasonably foreseeable. (Doc. 107 at 8). Interestingly, even though Defendant also moved for summary judgment on this ground, it argues that there are genuine issues of material fact which prevent judgment as a matter of law on the issue of misuse. (*Id.* at 7).

As stated above, Arizona law provides that a defendant in a strict products liability action shall not be liable ***if it proves*** **[*26]** that "[t]he proximate cause of the incident giving rise to the action was an alteration or modification of the product that was not reasonably foreseeable, made by a person other than the defendant and subsequent to the time the product was first sold by the defendant." A.R.S. § 12-683(2). A defendant can also shield themselves from liability by proving that the proximate cause of the plaintiff's injury was (1) "a use or consumption of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable ***or*** [(2)] was contrary to any express and adequate instructions or warnings appearing on or attached to the product . . ." A.R.S. § 12-683(3) (emphasis added); *see also Monje*, 2015 WL

---

[8] The Court found in its Order dismissing Defendant's Motions to Exclude Plaintiff's Experts that "since Mr. Cannon is designated as a rebuttal expert, he cannot testify in Plaintiff's case-in-chief or at all unless and until Defendant's experts testify as to the opinions for which he has been designated as a rebuttal expert." (Doc. 123 at 21). The Court will consider this evidence because "[t]o survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of *Federal Rules of Civil Procedure 56*." *Savage v. City of Whittier, 689 F. Supp. 3d 781, 794 (C.D. Cal. 2023)* (citation omitted). "[W]hen evidence is not presented in an admissible form in the context of a motion for summary judgment, but it *may* be presented in an admissible form at trial, a court may still consider that evidence." *Id.* (emphasis added).

13648554, at *6. As a general rule, whether misuse, modification, or alteration of a product is reasonably foreseeable is a question of fact for the jury. *See id.* (misuse); *Piper, 883 P.2d at 412-13*.

Here, the Court agrees with Defendant that Plaintiff cannot show he is entitled to judgment as a matter of law on misuse because Defendant has set forth evidence that Decedent's modifications to the Talon could have caused the cross bar to fracture. The proposed expert testimony shows that the proximate cause of Decedent's injuries, whether it was the modifications or a defect, is ripe for trial. For example, Defendant's expert, Dr. Michael Carhart, noted that "the original equipment restraint system of the [Talon] had been removed prior to the subject pitch-over crash and replaced with an aftermarket fourpoint restraint ***that was not properly installed or adjusted*** at the time of the crash." (Doc. 107-9 at 12) (emphasis added). Dr. Fowler also opines that Decedent's installation of a "Quick Lite mounting bracket" which was "bolted and welded to the center roof attachment tab . . . applied a concentrated **[*27]** load to the rear cross member during the ROPS-to-ground contact." (Doc. 107-3 at 15). Fowler further states that "[t]he Quick Lite whip mounted to the rear roof bracket and the base of the Rugged Radio aerial antenna would have applied a concentrated load to the cross member ***during the ROPS-to-ground contact***." (*Id.* at 26) (emphasis added). Dr. Fowler also notes that Defendant provides a "flagpole bracket low on the C-pillar which, had it been used, would not generate the same loading patterns to the ROPS in the advent of a tip over as occurred in the subject incident." (Doc. 107-3 at 21). Defendant expressly warns users that accessories can add extra weight to the ROPS, which reduces the overall weight that the ROPS is capable of bearing. (Doc. 107-5 at 12 ("Modifying your vehicle or using non-Honda accessories can make it unsafe . . . You should also be aware that accessories add weight, reducing the amount of cargo and total weight you can carry, and can raise the vehicle's center of gravity, increasing the risk of a rollover.")).

When juxtaposed to Plaintiff's evidence, Defendant's evidence demonstrates that there are genuine fact issue for trial. *Anderson, 477 U.S. at 250*; *Fed. R. Civ. P. 56(e)*. As previously discussed, Dr. **[*28]** Mason states that the modifications Decedent installed were foreseeable and that they did not cause the cross bar to fail during the roll over. (Doc. 123 at 16). Instead, Dr. Mason opines that the cross bar failed because the hole that was drilled in the middle of it made it weaker. (*Id.*)

As demonstrated, the parties' expert testimony in this case is in direct conflict, so, the applicability of Defendant's misuse defense will require the fact-finder to make credibility determinations as to these experts. This responsibility falls to a jury —not the Court. *See Kavanaugh, 641 P.2d at 263*. Thus, the Court declines to enter judgment in Plaintiff's favor on the issue of misuse.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. 83) and Defendant's Motion for Summary Judgment (Doc. 84) are **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's punitive damages claim contained in Count IV of his Complaint (Doc. 1-2 at ¶¶ 49-52) is **DISMISSED**, as the parties have stipulated to this dismissal.

IT IS FINALLY ORDERED that considering Plaintiff's remaining claims, the parties are directed to comply with Paragraph 10 of the *Rule 16* Scheduling Order (Doc. 10 at 6-7) regarding notice of readiness for pretrial **[*29]** conference. Upon a joint request, the parties may also seek a referral from the Court for a settlement conference before a Magistrate Judge.

Dated this 23rd day of September, 2024.

/s/ Diane J. Humetewa

Honorable Diane J. Humetewa

United States District Judge

End of Document

Updike v. Am. Honda Motor Co.

United States District Court for the District of Arizona

September 13, 2024, Decided; September 13, 2024, Filed

No. CV-21-01379-PHX-DJH

Reporter
2024 U.S. Dist. LEXIS 165035 *; 2024 WL 4182232

Steven Updike, Plaintiff, v. American Honda Motor Company Incorporated, et al., Defendants.

Subsequent History: Partial summary judgment denied by, Summary judgment denied by, Dismissed by, in part *Updike v. Am. Honda Motor Co., 2024 U.S. Dist. LEXIS 170962, 2024 WL 4266593 (D. Ariz., Sept. 23, 2024)*

Motion granted by, in part, Motion denied by, in part, Motion denied by, Judgment entered by *Updike v. Am. Honda Motor Co., 2024 U.S. Dist. LEXIS 185220, 2024 WL 4465684 (D. Ariz., Oct. 9, 2024)*

Motion granted by, in part, Motion denied by, in part, Motion denied by *Updike v. Am. Honda Motor Co. Inc., 2025 U.S. Dist. LEXIS 20434 (D. Ariz., Feb. 5, 2025)*

Core Terms

argues, roll, Deposition, calculate, abrasion, belt, cage, testing, rebuttal, damages, marks, dune, hole, roof, scientific, harness, lap, rollover, expert testimony, sand dune, credibility, methodology, surviving, cervical, collapse, fracture, tubing, warnings, witnesses, factors

Counsel: For Steven Updike, surviving son, for himself and on behalf of all statutory beneficiaries under *A.R.S. § 12-612(A)* **[*1]** , deceased, James Updike, Plaintiff: Jorge Franco, Joseph Andrew Brophy, LEAD ATTORNEYS, Jennings Haug Keleher McLeod Waterfall LLP - Phoenix, Phoenix, AZ.

For American Honda Motor Company Incorporated, a California corporation, Defendant: Paul G Cereghini, William Francis Auther, LEAD ATTORNEYS, Sarah Brunswick, Bowman & Brooke LLP - Phoenix, AZ, Phoenix, AZ.

Judges: Honorable Diane J. Humetewa, United States District Judge.

Opinion by: Diane J. Humetewa

Opinion

ORDER

Defendant American Honda Motor Company Incorporated ("Defendant") has filed six Motions to Exclude Portions of Opinion Testimony by Plaintiff Steven Updike's ("Plaintiff") experts as outside the Scope of *Federal Rule of Evidence 702*[1] and *Daubert*. (Docs. 86, 88, 89, 91, 92 and 93). The matter is fully briefed. (Docs. 101-106, 114-119). For the following reasons, the Court declines to exclude Plaintiff's expert witnesses prior to trial.[2]

I. Background

Plaintiff has brought this wrongful death action on his own behalf and on behalf of all statutory beneficiaries of Decedent James Updike, Sr. ("Decedent")—Plaintiff's father. (Doc. 1-2 at 13). Plaintiff alleges that Decedent was driving a **[*2]** 2019 Honda Talon manufactured by Defendant and that it rolled over in the Imperial Sand Dunes in Glamis, California on February 7, 2020. (*Id.* at ¶¶ 10-15). Plaintiff alleges that the Talon's rollover protection system ("ROPS") failed when the rear bar at the top of the roll cage directly behind and above the driver's head snapped, causing the roll cage to buckle and injure Decedent. (*Id.* at ¶¶ 16-17). The Talon's original safety harnesses were replaced with

[1] Any references to "rules" herein are in reference to the Federal Rules of Evidence, unless otherwise stated.

[2] The parties have requested oral argument in this matter, but the Court denies this request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See Fed. R. Civ. P. 78(b)* (court may decide motions without oral hearings); *LRCiv 7.2(f)* (same).

aftermarket Pro Armor harnesses by Plaintiff before the roll over. (Doc. 89-7 at 4). Plaintiff brings claims for negligence, strict product liability, breach of express/implied warranty and punitive damages against Defendant. (Doc. 1-2 at ¶¶ 20-52). To support these claims, Plaintiff has retained several expert witnesses which Defendant now seeks to exclude.

II. Legal Standard

Rule 702 of the Federal Rules of Evidence tasks the trial court with a special "gatekeeping" obligation to ensure that any expert testimony provided is relevant and reliable. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1999). A qualified expert may testify based on their "scientific, technical, or other specialized knowledge" if it "will assist the trier of fact to understand the evidence." Fed. R. Evid. 702(a). An expert may be qualified to testify based on his or **[*3]** her "knowledge, skill, experience, training, or education." *Id.* The expert's testimony must also be based on "sufficient facts or data," be the "product of reliable principles and methods," and the expert must have "reliably applied the principles and methods to the facts of the case." *Id.* at 702(b)-(d). "Rule 702 should be applied with a 'liberal thrust' favoring admission." Messick v. Novartis Pharmaceuticals Corp., 747 F.3d 1193, 1197 (9th Cir. 2014) (quoting Daubert, 509 U.S. at 588).

Daubert's general holding applies to an expert's testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Daubert suggests a number of factors for courts to consider in discharging its gatekeeping obligation; however, these factors do not apply to testimony that depends on knowledge and experience of the expert, rather than a particular methodology. United States v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000) (citation omitted) (finding that Daubert factors do not apply to a police officer's testimony based on twenty-one years of experience working undercover with gangs). Furthermore, "[t]he inquiry envisioned by Rule 702" is "a flexible one." Daubert, 509 U.S. at 594. "The focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* The proponent of expert testimony has the ultimate burden of showing **[*4]** that the expert is qualified and that the proposed testimony is admissible under Rule 702. *See* Lust by & Through Lust v. Merrell Dow Pharms., 89 F.3d 594, 598 (9th Cir. 1996). The trial court is vested with broad discretion deciding whether an expert is qualified to testify. *See, e.g.,* General Elec. Co. v. Joiner, 522 U.S. 136, 142, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); United States v. Espinosa, 827 F.2d 604, 611 (9th Cir.1987) ("The decision to admit expert testimony is committed to the discretion of the district court and will not be disturbed unless manifestly erroneous").

That the opinion testimony aids, rather than confuses, the trier of fact goes primarily to relevance. *See* Temple v. Hartford Ins. Co. of Midwest, 40 F. Supp. 3d 1156, 1161 (D. Ariz. 2014) (citing *Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)*). Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Fed. R. Evid. 401. However, an expert witness, "cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." United States v. Diaz, 876 F.3d 1194, 1197 (9th Cir. 2017) (internal citations omitted); *see also* Fed. R. Evid. 704.

III. Discussion

Defendant seeks to exclude six of Plaintiff's purported experts: Dr. Andrew Rentschler, Dr. James Mason, Dr. Michael Markushewski, Mr. Mark Cannon, Dr. Daniel M. Wolfe, and Mr. Jamie Winkler. (Docs. 86, 88, 89, 91, 92 93). Plaintiff has responded to each of Defendant's Motions arguing that their experts should not be excluded as "this is not a case where the severe **[*5]** and sparingly imposed remedy of pre-trial exclusion of any of Plaintiff's experts is justified under Daubert." (*E.g.*, Doc. 101 at 2). The Court will address the Parties' arguments for and against the exclusion of each expert in turn, beginning with Dr. Markushewski as some of the other experts' opinions rely on his expert opinion.

A. Dr. Markushewski

Defendant seeks to exclude Dr. Markushewski's opinion that the Decedent was "properly wearing the available seat belt restraints at the time of the Subject Accident" under Rules 403, 702 and Daubert. (Doc. 89 at 3). Defendant essentially argues that Dr. Markushewski's opinion is not based on reliable principles and methods as required by Rule 702(c) because: (1) he did not perform any testing to validate his opinion, and (2) he did not exclude other potential causes based on the evidence before him. (*Id.* at 9-10). Defendant also

argues that Dr. Markushewski's opinions are "built on inadmissible hearsay" and should be excluded. (Doc. 119 at 2). Plaintiff argues in response that Dr. Markushewski's opinions are supported by eyewitness testimony and that testing conducted by Dr. Markushewski show's that a Talon occupant of Decedent's height and weight, wearing an identical helmet **[*6]** with identical harness settings, would not have struck his head on the roof of a Talon that did not sustain a ROPS failure and collapsed roof. (Doc. 103 at 5, 12). Plaintiff also argues that Dr. Markushewski did not need to conduct testing to identify "load marks" on the Talon's harness. (*Id.* at 12). After discussing the relevant portions of Dr. Markushewski's opinions, the Court will address each of Defendant's arguments for exclusion in turn.

In Dr. Markushewski's expert report authored on May 23, 2022, he concludes that (1) the roll cage failed and the roof panel and roll cage tubing collapsed downward toward the driver occupant space, (2) Decedent's helmet was impacted by the collapsing roof and roll cage structure creating a mechanism for his ultimately fatal injuries, and (3) the roll cage structure is defectively designed and unreasonably dangerous and not suited for its intended purpose. (Doc. 89-8 at 10). In his supplemental rebuttal report authored on April 12, 2023, Dr. Markushewski further concludes that (1) Decedent "was wearing an appropriate helmet and was properly wearing the available seat belt/harness restraint" and (2) the seat belt "provided the restraint necessary **[*7]** to prevent his neck injury in this protectable rollover incident if the roll cage does not collapse. The roll cage collapse into the occupant space compromised [Decedent's] ride-down space and was proximate to, and the mechanism for, his ultimately fatal neck injuries." (Doc. 89-9 at 16). Dr. Markushewski bases these opinions, in part, on an inspection of the Talon conducted in Phoenix, AZ on February 9, 2023. (*Id.* at 4).

Important here, Dr. Markushewski states that he inspected the Talon's restraint system. (*Id.* at 8). The Talon's restraint system is a "4-point, 3 inch wide manually adjusted harness manufactured by ProArmor." (*Id.*) The restraint system consists of:

> a manually adjustable lap belt with a center lift-lever locking mechanism with a secondary Velcro attachment tab. The shoulder harnesses are sewn onto the lap belts such that the lift lever will simultaneously latch the lap belts and shoulder harnesses with one center latch. A central cross strap connects the shoulder harnesses together. The upper section of shoulder harness is wrapped around a cross bar behind the seat and held in place with a 3-bar slide adjuster. The inboard and outboard lap belt anchors are mounted to **[*8]** brackets on the inboard and outboard sections of the vehicle frame.

(*Id.*) Dr. Markushewski states that the "as-found" adjustment positions of the lap belts and shoulder harnesses on the Talon were documented and that the lap belt and shoulder harness adjustments had been moved from Decedent's adjusted position to accommodate Gregory Updike, Decedent's son, who drove the vehicle back to the camp after the incident. (*Id.* at 9). Gregory Updike testified to this and stated that he knew the restraints were tight because of the way Decedent was sitting restrained against them after the rollover and because he had to loosen the restraints a great deal to get them on and then retighten it. (Doc. 103-1 at 38, 25-26). Dr. Markushewski examined the restraint system and found that the lap belt "displayed a full width linear abrasion evident approximately 12 inches from the outboard lap belt anchor." (Doc. 89-9 at 9). He also found that the lap belt displayed a full width linear abrasion evident at approximately 12 inches from the inboard lap belt anchor. (*Id.* at 10).

Dr. Markushewski also conducted a "surrogate fit check" test where he had a surrogate who was 5' 10-1/2" tall and weighed 227 pounds **[*9]** go through various clearance and restraint system measurements. (*Id.* at 12). Dr. Markushewski and his surrogate conducted an "inversion test" with a new Pro Armor 3 inch wide, 4-point restraint system in a machine which allows for testing of full-size vehicles in a rotational manner under a 1G environment. (*Id.* at 13). Based on this test, Dr. Markushewski states that the test Defendant's experts Michael Carhart and Eddie Cooper performed was flawed as they did not adjust the lap belt to where the "visually obvious dynamic loading marks left by [Decedent] during the incident" were. (*Id.* at 15). He also concluded that "the seat belt provided the restraint necessary to prevent [Decedent's] neck injury in this protectable rollover incident if the roll cage d[id] not collapse." (*Id.* at 16).

Dr. Markushewski has also been deposed in this matter. He discussed his conclusion that the lap belt displayed linear abrasion marks evident approximately 12 inches from the outboard and inboard lap belt anchors. (*See* Doc. 89-7). When asked about the characterization of the abrasion marks, Dr. Markushewski stated that they

were "light abrasions as you would expect in a crash like this." (*Id.* at 7). When **[*10]** asked how much force was calculated to have applied to the webbing in pounds, Dr. Markushewski stated that he did not calculate the pounds of force Decedent would have experienced during the rollover—but estimates it at four or five Gs. (*Id.*) Dr. Markushewski also stated that friction creates broken fibers when the belt is loaded, but that these marks can occur from the webbing of the belt being in a position for a long period of time. (*Id.*) Dr. Markushewski did not attempt to re-create these marks through a "drop test," but he did do an inversion test with a surrogate. (*Id.* at 7-8). Dr. Markushewski admitted that the outboard abrasion mark could be a "set mark," a mark which does not have broken fibers, but confirmed that the inboard side abrasion mark looked like an impact mark and stated that the outboard side was likely both a set mark and abrasion mark based on his experience. (*Id.* at 10). He further stated that this mark "looks like a dynamic loading mark. It's more than a set mark, which is just kind of a light fold. This is much more than that." (*Id.*)

1. Dr. Markushewski's Opinion is Admissible

Defendant argues that Dr. Markushewski's opinion on the abrasion marks "is nothing **[*11]** more than [his] own 'say so,' and should be excluded." (Doc. 89 at 8). Defendant essentially argues that Dr. Markushewski should have, but did not, conduct a dynamic drop test to determine whether the "dynamic abrasion marks" arose under similar circumstances to the accident at issue. (*Id.*) Because he did not conduct this test, Defendant argues that Dr. Markushewski's opinion is not the product of reliable principles and methods and should therefore be excluded under *Rule 702* and *Daubert*. (*See id.*) Plaintiff argues in response that these marks are visible to the naked eye and obvious from the discoloration at that part of the harness. (Doc. 103 at 9). He also argues that the inversion testing Dr. Markushewski conducted was sufficient. (*Id.* at 11-12).

Dr. Markushewski has a Bachelor of Science in Mechanical Engineering Technology. (Doc. 103-2 at 23). His *curriculum vitae* states that he has worked on crashworthiness issues, specifically, restraint systems since 1994. (*Id.* at 24). Indeed, Dr. Markushewski conducted an "inversion test" and found that Decedent was wearing the restraint system properly during the incident and that the roll cages collapse was the mechanism for his fatal neck injuries. (Doc. **[*12]** 89-9 at 16). When asked about the abrasion marks he found at the twelve-inch mark, Dr. Markushewski admitted that the outboard abrasion mark could be a set mark, but confirmed that the inboard side abrasion mark looked like an impact mark because there's torn fibers inside these marks and stated that the outboard side was likely both a set mark and abrasion mark—based on his experience. (Doc. 89-7 at 10). When asked whether he conducted any testing to demonstrate the difference between a set mark and an abrasion mark with broken fibers, Dr. Markushewski stated it wasn't necessary as he "relied upon prior publications, my own work and my experience to come up with that conclusion." (*Id.* at 8).

The Court finds that Dr. Markushewski has extensive experience, as he states in his CV, conducting research, design, testing and evaluating restraint systems. Based on that experience, he is knowledgeable concerning the differences between set marks and abrasion marks. This particular opinion depends on Dr. Markushewski's knowledge and experience, rather than a particular methodology; so, the *Daubert* factors do not apply to this opinion. *Hankey, 203 F.3d at 1169* (stating that the *Daubert* factors do not apply to testimony that depends **[*13]** on knowledge and experience of the expert, rather than a particular methodology). It is also permissible, as Plaintiff notes, that a qualified expert may rely on their visual inspection of evidence to render an opinion. *See Icon-IP Pty Ltd. v. Specialized Bicycle Components, Inc., 87 F. Supp. 3d 928, 940 (N.D. Cal. 2015)* (finding that it is "a matter of common sense that a visual and manual inspection would be one acceptable way for a mechanical engineer to assess the structural characteristics of a bicycle seat."); *Fontem Ventures, B.V. v. NJOY, Inc.*, 2015 WL 12743861, at *7 (C.D. Cal. Oct. 22, 2015) (noting that an "expert's opinions as to certain uncomplicated elements can be based on a visual inspection.").

Moreover, Defendant's argument goes to the weight of the evidence, not its admissibility. *See Johnson v. City of San Jose, 2023 U.S. Dist. LEXIS 227978, 2023 WL 8852489, at *4 (N.D. Cal. Dec. 21, 2023)* ("Defendants' arguments as to the evidentiary support for [the expert]'s opinions go to the weight of his testimony, rather than its admissibility.") (citation omitted); *see also Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1237 (9th Cir. 2017)* ("Where, as here, the experts' opinions are not the 'junk science' *Rule 702* was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof[.]"). This evidence

"should be attacked by cross examination, **[*14]** contrary evidence, and attention to the burden of proof [rather than] exclusion." *Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)*.

Finally, the Court finds that Dr. Markushewski's purported testimony is more probative than prejudicial, so, the Court will not exclude his testimony under *Rule 403*. *Rule 403* states that the trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Fed. R. Evid. 403*. Here, Dr. Markushewski's testimony is highly probative as it establishes how Decedent was injured as well as that the design of the roll cage was defective. (Doc. 89-8 at 10). This probative value of Dr. Markushewski's testimony is also bolstered by the fact that Dr. Rentschler stated that he is relying on Dr. Markushewski's opinion to come to his own conclusion on the mechanism of Decedent's injury. (Doc. 86-8 at 4). Finally, although this evidence may be somewhat prejudicial to Defendant's case, "[v]irtually all evidence is prejudicial or it isn't material." *Old Chief v. United States, 519 U.S. 172, 193, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)* (O'Connor, J., dissenting) (citations omitted). Any prejudice this evidence and testimony may hold **[*15]** is outweighed by its probative value. *See Fed. R. Evid. 403*.

Thus, the Court will not exclude Dr. Markushewski for not performing testing to validate his opinion.

2. Other Potential Causes

Defendant also argues that Dr. Markushewski should be excluded because he failed to rule out other potential causes for the abrasion marks based on the evidence before him. (Doc. 89 at 12 (citing *Walsh v. LG Chem Am., 2021 U.S. Dist. LEXIS 201344, 2021 WL 4859990, at *5-6 (D. Ariz. Oct. 19, 2021)*). It also argues that an expert "must provide reasons for rejecting alternative hypothesis using scientific methods and procedures and elimination of those hypotheses must be founded on more than subjective beliefs or unsupported speculation." (*Id.* (citing *Messick v. Novartis Pharms. Corp., 747 F.3d 1193, 1198 (9th Cir. 2014)*). Not so.

This argument essentially relies on the differential diagnosis sub-body of *Daubert* law which has been endorsed by the Ninth Circuit. Differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." *Clausen v. M/V NEW CARISSA, 339 F.3d 1049, 1057 (9th Cir. 2003)*. "The first step in the diagnostic process is to compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration. The issue at this point in the process is which of the **[*16]** competing causes are generally capable of causing the patient's symptoms or mortality.." *Clausen, 339 F.3d at 1057-58*. The second step is for the expert to "engage in a process of eliminating or ruling out the identified potential causes." *Stanley v. Novartis Pharms. Corp., 11 F. Supp. 3d 987, 1001 (C.D. Cal. 2014)* "When an expert rules out a potential cause in the course of a differential diagnosis, the 'expert must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and the elimination of those hypotheses must be founded on more than subjective beliefs or unsupported speculation.'" *Messick, 747 F.3d at 1198* (citing *Clausen, 339 F.3d at 1058*).

As stated above, Dr. Markushewski's opinion regarding abrasion marks depends on his knowledge and experience, rather than the use of scientific methods and procedures; therefore, he does not need to provide reasons for rejecting alternative hypothesis using scientific methods and procedures. *Clausen, 339 F.3d at 1057-58*. This argument also goes to the weight of the evidence and not its admissibility—so, this evidence "should be attacked by cross examination, contrary evidence, and attention to the burden of proof [rather than] exclusion." *Primiano, 598 F.3d at 564*. The Court declines to exclude Dr. Markushewski's because he did not chase alternate explanations for the abrasion marks.

3. Hearsay

Defendant also **[*17]** argues that Dr. Markushewski's opinions are "built on inadmissible hearsay." (Doc. 119 at 2). The Federal Rules of Evidence clearly denote that expert witnesses may rely on inadmissible evidence to form their opinion (including hearsay) if experts in that particular field would rely on "those kinds of facts or data." *Fed. R. Evid. 703*; *Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 873 (9th Cir. 2001)* ("experts are entitled to rely on hearsay in forming their opinions."). Not only would other experts in this field rely on eyewitness testimony, but some of Defendant's experts have relied on Greg Updike's testimony. (Doc. 89-4 at 6 (expert report of Dr. Graeme Fowler)).

Specifically, Dr. Graeme Fowler relied on Greg Updike's testimony to reconstruct decedents accident. (*Id.* at 7-12). In fact, one of Plaintiff's experts, Dr. Wolfe, criticized Dr. Fowler for relying "entirely on witnesses who did not see the incident, with the exception of Greg Updike, who caught a split second of the incident in his rear-view mirror." (Doc. 92-2 at 11). So, because other experts have relied on this "hearsay," Dr. Markushewski is allowed to rely on the conversation between Dr. Jim Mason and Gregory Updike—especially since Gregory Updike confirmed what Dr. Mason told Dr. Markushewski **[*18]** when he was deposed, which is what Dr. Markushewski actually relied on in his expert report. (Doc. 89-9 at 9).

In sum, the Court declines to exclude Dr. Markushewski from testifying.

B. Dr. Rentschler

Defendant next argues that Dr. Rentschler's opinions should be excluded because (1) he relies on Dr. Markushewski's opinion and is acting as a "conduit" for his opinions and (2) Dr. Markushewski's opinions are faulty.[3] (Doc. 86 at 8, 11). Defendant seeks to exclude Dr. Rentschler under *Rules 403* and *702* as well as Daubert for his "unblinking" reliance on Markushewski's opinions. (*Id.* at 8). Plaintiff argues that, even though Dr. Rentschler relies on Dr. Markushewski's opinion, his opinion is still admissible as this reliance does not provide a basis for exclusion. (Doc. 101 at 6, 8). Plaintiff also argues that he can prove his claims without this evidence—which is an argument raised in the parties' summary judgement motions.[4] (*Id.* at 8).

The opinions of multiple experts may be necessary in a complex case to establish a party's theory of liability or to fully defend against liability. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig., 978 F. Supp. 2d 1053, 1066 (C.D. Cal. 2013)*. An expert's opinion may find its basis in part "on what a different expert believes on the basis of expert knowledge **[*19]** not possessed by the first expert." *Id.* (citing *Dura Auto. Sys. of Ind., Inc. v. CTS Corp., 285 F.3d 609, 613 (7th Cir. 2002)*). "For example, a physician may rely for a diagnosis on an x-ray taken by a radiologist, even though the physician is not an expert in radiology." *Id.* "There are limits to this general rule, however. Where the 'soundness of the underlying expert judgment is in issue,' the testifying expert cannot merely act as a conduit for the underlying expert's opinion." *Id.* (citing *Dura Auto. Sys., 285 F.3d at 613*). An expert's "sole or primary reliance on the opinions of other experts raises serious reliability questions." *In re ConAgra Foods, Inc., 302 F.R.D. 537, 556 (C.D. Cal. 2014)*. More scrutiny is given to an expert's "reliance on the information or analysis of another expert where the other expert opinions were developed for the purpose of litigation." *In re Toyota Motor Corp., 978 F. Supp. 2d at 1066* (citation omitted).

Here, Dr. Markushewski's opinions were created for the purposes of litigation, so, given increased scrutiny, the question is whether Dr. Rentschler is "merely acting as a conduit" for Dr. Markushewski's opinions.

Plaintiff retained Dr. Rentschler to opine on the "mechanism" of Decedent's injury. (Doc. 101 at 4). In his preliminary report, Dr. Rentschler concludes that:

> 1. On February 7, 2020, Mr. James Updike Sr. was driving a 2019 Honda Talon on sand dunes in Glamis, **[*20]** California when the Talon pitched forward over the top of a dune and rolled end-over-end before coming to rest on all four wheels.
> 2. The roll cage failed and the roof panel and roll cage collapsed downward toward the driver occupant space during impact with the sand dune.
> 3. Contact occurred between the top of Mr. Updike's helmeted head and the intruding roof structure/roll cage during the rollover event.
>
> 4. The injury mechanism responsible for Mr. Updike's C2 nondisplaced type II/III fracture of the dens involves localized hyperextension with associated compression. ***This injury mechanism resulted from the contact between Mr. Updike's helmeted head and the intruding roof structure/roll cage during the subject incident***.

(Doc. 86-9 at 10) (emphasis added). The Court notes that Rentschler's conclusions 1-3 are substantially similar to the conclusions that Dr. Markushewski came to, but his fourth conclusion is unique. (*See id.*) To come to this conclusion, Dr. Rentschler reviewed medical records, the inspection done by Dr. James Mason, Dr. Mason and Dr. Markushewski's written reports, "other available documents." (*Id.* at 4-5). From his review, he states the following opinion:

---

[3] This argument is a repeat of Defendant's argument that Dr. Markushewski's are not admissible, which the Court rejected above.

[4] The Court will address this argument in a separate order addressing the parties' summary judgment motions.

> The loading paradigms **[*21]** experienced by Mr. Updike's cervical spine during the various phases of the subject incident were investigated in the context of the mechanisms responsible for damage to the various tissues and the constellation of injuries he presented with. As previously described, the initial contact between the front of the nosed-down Honda and the sand dune would have resulted in forward and upward motion of Mr. Updike's body relative to the occupant space in the Honda. As the four-point restraint system retained Mr. Updike's torso, his cervical spine loading paradigm would primarily consist of cervical flexion and tension, inconsistent with the mechanisms for his cervical spine injuries. Similarly, the inertial loading of Mr. Updike's cervical spine as the vehicle came to rest would not be sufficient to cause injury. During the contact between the ROPS and the sand (i.e. while inverted), Mr. Updike's body would have accelerated upward and toward his seatback. Mr. Updike's cervical spine would have experienced extension and tension until being contacted by the intruding roof structure and possibly the head restraint in the Honda. In the absence of contact between Mr. Updike's head and the intruding **[*22]** roof structure/roll cage, no significant injury mechanisms would be expected during this phase. The intruding roof structure/roll cage contacted Mr. Updike's helmet, facilitating a combination of compression and local hyperextension of the upper cervical spine, with possible shear force of C1 on C2. The resulting cervical motions and forces were sufficient to cause type III fracture of the dens in combination with failure of the anterior longitudinal ligament and widening of the C1-2 articulations as noted in the available diagnostic studies.

(*Id.* at 9-10).

At his deposition, Dr. Rentschler testified that he became involved in this matter because of Dr. Markushewski. (Doc. 86-8 at 3). Dr. Rentschler states that he was tasked with addressing the biomechanical aspects of the case, which include: "look[ing] at the injury that [Decedent] sustained, considering the injury mechanism, how that injury occurred as a result of the incident and then, ultimately, what [were] any factors involved in the actual injury and, ultimately, could it have been prevented based on our findings if there was an issue with the vehicle." (*Id.*) When asked what other experts he has relied on, Dr. Rentschler stated **[*23]** that he is relying on Dr. Markushewski because "[h]e was the one who inspected and analyzed the restraint system in this case and determined -- that basically did the testing -- the inversion testing with respect to that to determine what the clearance would have been for [Decedent] based on his interpretation of the settings for the restraint system." (*Id.* at 4). When asked what the opinions are that he has generated himself, Dr. Rentschler testified that his opinions are that:

> [Decedent's] cervical injuries, certainly, the C2 odontoid fracture and cervical spine injury at that level was the result of contact between the top of his helmet and the roof of the subject Honda Talon during the rollover event, that based on, again, the restraint system and Mr. Markushewski's findings, that absent the deformation to the ROPS system sustained during the incident rollover, that Mr. Updike would have had sufficient clearance within the vehicle during the event to prevent any contact between his head or helmet and the roof of the vehicle and that, therefore, absent deformation or crush damage to the ROPS, that Mr. Updike would not have sustained the cervical injuries that he did as a result of **[*24]** the incident.

(*Id.* at 7).

The Court finds that Dr. Rentschler is not acting as a conduit for Dr. Markushewski. Dr. Rentschler can rely on Dr. Markushewski's opinion as Rentschler's opinion builds upon Markushewski's analysis and Markushewski's testimony is admissible. *See* *In re Toyota Motor Corp., 978 F. Supp. 2d at 1066*. While Dr. Rentschler certainly references Dr. Markushewski's expert opinion, he utilizes this opinion to come to his own conclusion: that "[t]he injury mechanism responsible for [Decedent's] C2 nondisplaced type II/III fracture of the dens involves localized hyperextension with associated compression. This injury mechanism resulted from the contact between [Decedent's] helmeted head and the intruding roof structure/roll cage during the subject incident." (Doc. 86-9 at 10). The Court finds that the relationship between Dr. Rentschler and Dr. Markushewski's is akin to a physician relying on a radiologist for a diagnosis on an x-ray—they have been retained to give opinions on different areas of expertise. *See* *In re Toyota Motor Corp., 978 F. Supp. 2d at 1066*. Dr. Rentschler is not simply regurgitating Dr. Markushewski's opinion but is utilizing his opinion to come to his own opinion on the injury mechanism—an area which Dr. Markushewski has not opined. (Doc. 86-8 at **[*25]** 3). Since Dr. Rentschler is using Markushewski's opinion as a reference point, the Court will not exclude his opinion. *Townsend v. Monster*

Beverage Corp., 303 F. Supp. 3d 1010, 1035 (C.D. Cal. 2018) ("an expert may validly use another expert's report as a reference point for his own assessments.") (citation omitted).

The Court also finds that the probative value of Dr. Rentschler's testimony is not outweighed by the danger of prejudice his reliance on Dr. Markushewski presents. As stated above, an expert may rely on another expert's opinion to establish their own opinion. *See In re Toyota Motor Corp., 978 F. Supp. 2d at 1066*. There is no danger of unfair prejudice or misleading the jury because Dr. Rentschler's reliance on Dr. Markushewski's opinion as a reference point for his own opinion is lawful. *Townsend, 303 F. Supp. 3d at 1035*. Furthermore, the probative value of Dr. Rentschler's anticipated testimony is high as he will establish the mechanism of Plaintiff's neck injury. *Fed. R. Evid. 403*.

In sum, the Court declines to exclude Dr. Rentschler at this juncture.

C. Dr. Mason

Defendant next argues that Dr. Mason should be excluded as his opinions are untested, inherently unreliable, and, therefore, inadmissible. (Doc. 88 at 11). It also states that Mason has done no case specific testing at all. (*Id.* at 16). Plaintiff argues that Dr. Mason's opinion does not **[*26]** have to be supported by testing. (Doc. 102 at 8).

Plaintiff retained Dr. Mason to "assess the pre-drilled design of the ROPS bar and tubing that failed during [Decedent's] rollover." (Doc. 102 at 6). Dr. Mason is a doctor in "applied (fracture) mechanics." (*Id.*) Dr. Mason concluded in his expert report that:

> The ROPS was defective in design due to the introduction of a hole in the underside of the rear cross bar and due to the use of thin-walled tubes in its construction, i.e. tubes with too large of a diameter and too small of a wall thickness. The aftermarket components attached to the rear crossmember were foreseeable and likely increased the stress around the hole in the crossmember by approximately 3-4%, much less than the hole itself.

(Doc. 88-6 at 5-6). Dr. Mason's opinions are stated as follows:

> To a reasonable degree of engineering certainty, I have formed the following opinions.
>
> 1. The roll over protection system (ROPS or roll cage) in the Honda deformed and fractured due to downward forces applied to the top.
>
> 2. Reportedly, the vehicle was going approximately 20-25 miles per hour (mph) over soft sand dunes when it encountered a sloped drop-off of approximately 15-25 feet and pitched **[*27]** forward, conditions that were foreseeable and that the ROPS should have been designed to easily survive.
>
> 3. A fracture resulting in intrusion of the ROPS into the passenger compartment from above occurred at a hole that was introduced into the underside of the rear cross bar during manufacture. The location and size of the hole resulted in the stress around the hole being approximately three times higher than if the hole had not been introduced. Consequently, the hole made the cross bar three times weaker.
>
> 4. The use of tubing that was approximately 2 inches in diameter with a wall thickness of approximately 1116 inch introduced localized inelastic tube buckling as a failure mode, and consequently weakened the ROPS overhead structure, allowing the B-pillar support and the C-pillar support to buckle, resulting in intrusion of the ROPS into the passenger compartment from above during this incident.
>
> 5. The use of tubing that was approximately 2 inches in diameter with a wall thickness of approximately 1116 inch resulted in a ROPS system that could easily collapse when subjected to bending as a result of buckling andlor impact, as it partially did in the left B and C pillars, resulting in **[*28]** intrusion of the ROPS into the passenger compartment from above during this incident.
>
> 6. The thin wall of the tubing allowed the left longitudinal bar to deform and bend near its connection to the left B pillar, resulting in intrusion of the ROPS into the passenger compartment from above during this incident.

(*Id.* at 3-4). Dr. Mason also states that:

> The introduction of a hole in the bottom of the crossbar was a bad idea from the start. Engineers are taught that holes create stress concentration and then they are taught how to minimize the increased risk of failure that such holes create. The introduction of the hole made the cross bar three times weaker than it was without the hole. The logical alternative designs include eliminating the hole or moving the hole to the top or side of the

> tube. This is basic engineering.
> . . .
> Further destructive investigation is needed to determine whether the collapse of the ROPS was due to manufacturing defect.

(Doc. 88-5 at 8). In sum, his opinion is that: "[t]he ROPS was defective in design due to the introduction of a hole in the underside of the rear cross bar and due to the use of thin walled tubes in its construction, i.e. tubes with too large of **[*29]** a diameter and too small of a wall thickness." (*Id.*)

During his deposition, Dr. Mason stated that he has "d[one] an estimate of the force that occurred based on some of the numbers given by others in this case, particularly, I want to say, Mr. Fowler." (Doc. 88-7 at 3). He did not, however, conduct testing to confirm what amount of force is required to produce the deformation on the Talon's roof or fracture the cross bar. (*Id.*) In fact, Dr. Mason has not done any testing of his own in this matter; but he did calculate that the approximate force the Talon endured during the roll-over was approximately 7,200-9,000 pounds of force given the weight of the Talon and speed approximated by Mr. Fowler. (*Id.* at 3-4).

Here, Dr. Mason is certainly qualified as an expert. *Fed. R. Evid. 702(a)*. He is a doctor in "applied (fracture) mechanics." (Doc. 102 at 6). He has also taught courses related to "materials science and failure of materials." (Doc. 88-5 at 2). He has also conducted studies to evaluate the fracture of metals, plastics, and composites. (*Id.*) Based on his education, training and experience the Court finds that Dr. Mason is a qualified expert. *Fed. R. Evid. 702*. Dr. Mason was forthcoming in his deposition about his expertise **[*30]** in this matter, admitting many areas, such as what conditions the ROPS should be able to survive, injury causation, and "quasistatic tests" (tests where force is applied at various points and measured), were outside of his expertise. (*See* Doc. 88-7). Dr. Mason did calculate, in theory, that the Talon endured 7,200-9,000 pounds of force given the weight of the Talon and speed Decedent was going which was approximated by Mr. Fowler. (*Id.* at 3). While Dr. Mason did not perform any of his own testing, the admissibility of expert testimony "does not depend on the expert personally performing testing," however. *Speaks v. Mazda Motor Corp., 118 F. Supp. 3d 1212, 1219 (D. Mont. 2015)* (citing *Fed. R. Evid. 702*).

Like Dr. Markushewski, much of Dr. Mason's opinions and conclusion are based on his knowledge and experience; meaning that the *Daubert* factors do not apply to his testimony. *See Hankey, 203 F.3d at 1169* (finding that *Daubert* factors do not apply to a police officer's testimony based on twenty-one years of experience working undercover with gangs). Dr. Mason himself states that his opinions are based on his education, background, knowledge, and experience in the fields of materials science, fracture mechanics, and mechanical engineering. (Doc. 88-5 at 2). Based on the above, the Court finds that Dr. Mason is **[*31]** qualified to testify on the failure of the Talon's crossbar generally and will not exclude his from testifying at this juncture.

Dr. Mason's opinion is ripe for rigorous cross-examination, not exclusion. *See Primiano, 598 F.3d at 564*.

D. Mr. Cannon

Defendant next argues that Mr. Cannon should be excluded as his disclosure is untimely and because he is not qualified to testify regarding the adequacy of warnings. (Doc. 91 at 3). Defendant also argues that his testimony will not aid the jury. (*Id.* at 8). Defendant states that it anticipates Mr. Cannon will testify that "(1) [Defendant] should have mentioned and/or more fulsomely highlighted any safety risk associated with the installation and placement of the certain aftermarket accessories (i.e., the lighted whip and antenna) in the Talon's Owner's Manual" and that "(2) the flagpole bracket information in the Owner's Manual is 'deficient,' 'not reasonable,' not 'appropriate,' and does not 'follow [Dorris'] recommended format regarding warnings relative to safety.'" (*Id.* at 3). Defendant argues that Mr. Cannon is really a case-in-chief expert as Plaintiff's Complaint includes "failure to warn" allegations in both the negligence and strict liability counts. (Doc. **[*32]** 91 at 3 n.4).

Plaintiff argues that Mr. Cannon is qualified by both experience and training as a "human factors expert" because he has a masters degree in advanced safety and engineering management and has over 25 years of experience in forensic engineering and investigates a wide variety of mechanical and safety issues. (Doc. 104 at 5-6). Plaintiff does not address Defendant's timeliness argument. (*See* Doc. 104). The Court will review these arguments in turn.

Federal Rule of Civil Procedure 26(a)(2)(B) requires the parties to disclose the identity of each expert witness

"accompanied by a written report prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). Expert disclosures must be made according to the deadlines set by the Court. *Id.* at 26(a)(2)(D). A rebuttal expert may only testify after the opposing party's initial expert witness testifies. Lindner v. Meadow Gold Dairies, Inc., 249 F.R .D. 625, 636 (D. Hawaii 2008). Specifically, rebuttal expert testimony must address the "same subject matter" identified by the initial expert. Fed. R. Civ. P. 26(a)(2)(C)(ii); Lindner, 249 F.R.D. at 636.

Under Rule 16(f), a court may issue "any just orders" where "a party or party's attorney fails to obey a scheduling or pretrial order." Fed. R. Civ. P. 16(f). The Ninth Circuit has held that the purpose of Rule 16 is "to encourage forceful judicial management." Sherman v. United States, 801 F.2d 1133, 1135 (9th Cir. 1986). Whether to issue sanctions under Rule 16(f) is left to the sound discretion of **[*33]** the district court. *See* Ayers v. City of Richmond, 895 F.2d 1267, 1269 (9th Cir. 1990) (citing Ford v. Alfaro, 785 F.2d 835, 840 (9th Cir.1986)).

Plaintiff states that he retained Mr. Cannon to "rebut Dr. Fowler's inference that [Defendant's] warnings were sufficient to inform Talon owners that the use of an aftermarket mounting bracket or radio antenna might cause the Talon's ROPS to break and its roof to collapse during a slow speed rollover in soft sand." (Doc. 104 at 2). The Court's Rule 16 Scheduling Order set the following deadlines: Plaintiff's expert disclosure deadline - May 22, 2022; Defendant's expert disclosure deadline - September 27, 2022; Plaintiff's rebuttal expert deadline - October 12, 2022. (Doc. 10 at 3). Importantly, this order states that "[r]ebuttal experts shall be limited to responding to opinions stated by initial experts." (*Id.* at 3). The Court also extended the deadline for the "disclosure of experts and completion of expert discovery" to July 28, 2023. (Doc. 71).

Mr. Cannon's expert report, authored on December 6, 2022, states that the "assignment and scope" of his engagement is to "evaluate and comment on the reports submitted by Dr. Fowler and Dr. Dorris on behalf of American Honda. Specifically, I was asked to address the issue of information and warnings provided on **[*34]** the Honda Talon and the contrast between the findings in Drs. Fowler's and Dorris' reports." (Doc. 104-1 at 2). Mr. Cannon reviewed these reports (*Id.* at 3-6) and addressed his concerns with them. (*Id.* at 7-8). Mr. Cannon notes that he does not disagree with Dr. Dorris "regarding the warnings and labels provided by [Defendant] on the Talon with respect to the specific subject matters that the warnings address" but that "[a]ntenna and flag pole bracket mounting are not addressed in these warnings and the information about the bracket, as cited by Dr. Fowler, does not comport with the warnings format extolled by Dr. Dorris." (*Id.*) Mr. Cannon concludes that:

> Dr. Fowler criticizes [Decedent] for placing the Quick Light whip and the Rugged Radio aerial antenna where they were found mounted to the Talon because they compromised the strength of the cross-member and "undoubtedly" applied a concentrated load, increasing the bending stresses. Dr. Fowler is describing actions that are critical to safety. However, the information in the manual upon which Dr. Fowler bas[e]s his opinion on the mounting decision does not follow the methodology in putting forth safety information in an explicit format **[*35]** that Dr. Dorris opines is adequate. ***If the flag pole mounting information is as critical as Dr. Fowler describes, then it needs to follow Dr. Dorris' recommended format regarding warnings relative to safety***. And by Dr. Dorris' reckoning, the flagpole bracket information in the manual is deficient and not reasonable nor appropriate.

(*Id.* at 8) (emphasis added).

Reviewing these opinions, the Court finds that Mr. Cannon is responding to opinions stated by Defendant's experts: Dr. Dorris and Dr. Fowler. Thus, the Court, in its discretion, declines to exclude Mr. Cannon because that he is not a "case-in-chief expert in rebuttal expert clothing." (Doc. 91 at 1); Ayers, 895 F.2d at 1269.

Lastly, the Court finds that Mr. Cannon's testimony is admissible because he is a qualified expert, and his report contradicts or rebuts Dr. Fowler's report; as the Court found above. *See* Lindner, 249 F.R.D. at 636. Furthermore, his testimony is relevant as his testimony will necessarily attack the credibility of Defendant's experts and "it is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience." *United States v. Sine, 493 F.3d 1021, 1034-35 (9th Cir. 2007)* (internal citation omitted). So, the Court declines to exclude Mr. Canon. Messick v, 747 F.3d at 1197. However, **[*36]** since Mr. Cannon is designated as a rebuttal expert, he cannot testify in Plaintiff's case-in-chief or at all unless and until Defendant's experts testify as to the opinions for which he has been designated as a rebuttal expert. *See* Lindner, 249 F.R.D. at 636.

E. Dr. Wolfe

Next, Defendant seeks to exclude Mr. Wolfe on the basis that he (1) lacks the knowledge, training, and experience required to render the opinions in his report, (2) he merely restates Dr. Fowler's opinions, and (3) he misstates the law by invading the province of the jury and the Court. (Doc. 92 at 1). Defendant states that Plaintiff retained Mr. Wolfe to "assume the role of Monday morning quarterback" and critique Dr. Fowler's accident reconstruction. (Doc. 92 at 4). Plaintiff argues that he retained Dr. Wolfe to

> rebut Dr. Fowler's opinions by evaluating Dr. Fowler's methodology of (1) simply fabricating data (like the Talon's speed) without any reliable scientific basis; (2) relying solely on witnesses who admit to not seeing the rollover or knowing anything about Jim's path of travel and (3) using measurements from what Dr. Fowler concedes is fundamentally a different sand dune at the same general location two years after the fact and which **[*37]** all agree has none of the same measurements or characteristics of the subject dune.

(Doc. 105 at 2). Plaintiff also argues that he is entitled to offer rebuttal testimony under *Daubert*. (*Id.* at 12).

Again, rebuttal expert testimony must address the "same subject matter" identified by the initial expert. *Fed. R. Civ. P. 26(a)(2)(C)(ii)*; *Lindner, 249 F.R.D. at 636*. In other words, "[t]he function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party." *Armer v. CSAA Gen. Ins. Co., 2020 U.S. Dist. LEXIS 101851, 2020 WL 3078353, at *5 (D. Ariz. June 10, 2020)* (citing *Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 759 (8th Cir. 2006)*). Deciding whether an opinion is a proper rebuttal opinion in nature is largely a factual determination that is entrusted to the sound discretion of the district court. *See Estate of Goldberg v. Goss-Jewett Co., Inc., 2019 U.S. Dist. LEXIS 229238, 2019 WL 8227387, *2 (C.D. Cal. 2019)*. However, "[e]xpert testimony should be excluded if it concerns a subject improper for expert testimony" such as "one that invades the province of the jury." *Taylor v. Cnty. of Pima, 2023 U.S. Dist. LEXIS 51815, 2023 WL 2652602, at *3 (D. Ariz. Mar. 27, 2023)* (quoting *United States v. Lukashov, 694 F.3d 1107, 1116 (9th Cir. 2012)*. The "province of the jury" includes "[d]etermining the credibility of witnesses, resolving evidentiary conflicts, and drawing reasonable inferences from proven facts." *Id.* (citing *Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004)* (per curiam)). Expert testimony is also inadmissible if it "simply 'presents a narrative of the case which a lay juror is equally capable of constructing.'" *Id.* (quoting *Taylor v. Evans, 1997 U.S. Dist. LEXIS 3907, 1997 WL 154010, at *2 (S.D.N.Y. Apr. 1, 1997)*).

Dr. Wolfe is a Ph.D in Electrical and Computer Engineering and **[*38]** is accredited as a traffic accident reconstructionist by the Accreditation Commission for Traffic Accident Reconstruction. (Doc. 109-1 at 166-167). Indeed, as Plaintiff notes, other court's within this district have found this accreditation to qualify an expert to testify regarding accident reconstruction. *Empire Fire & Marine Ins. Co. v. Patton, 2019 U.S. Dist. LEXIS 237574, 2019 WL 11544461, at *3 (D. Ariz. Aug. 26, 2019)* ("[the expert], as a certified accident reconstruction expert, is qualified to testify about that conclusion.").

Dr. Wolfe states that he was asked to "review and evaluate" the report authored by Dr. Fowler. (Doc. 92-2 at 2). To furnish an opinion of Fowler's report, Wolfe reviewed the following materials:

> (1) Photograph of James Updike in the Honda Talon; (2) Photographs and videos from Chris Taylor; (3) Photograph and videos from Mike Deschamps; (4) Photographs and videos from Scott Wedge; (5) Videos from Jason Treyvillyan; (6) Panoramic still of incident location; (7) Legal documents; (8) Medical documents pertaining to James Updike; (9) American Honda Motor Company, Inc., (AHM) produced discovery documents; (10) Deposition transcript of Chris Taylor [June 17, 2022]; (11) Deposition transcript of Dennis Engler [June 16, 2022]; (12) Deposition transcript of Gary Knight [May 24, **[*39]** 2022]; (13) Deposition transcript of Greg Updike [May 26, 2022]; (14) Deposition transcript of James Updike, Jr. [June 6, 2022]; (15) Deposition transcript of Jason Treyvillyan [June 16, 2022]; (16) Deposition transcript of Jeff Updike [June 7, 2022]; (17) Deposition transcript of John Gallagher [June 15, 2022]; (18) Deposition transcript of Layne Arnold [June 15, 2022]; (19) Deposition transcript of Mark Jensen [May 24, 2022]; (20) Deposition transcript of Michael Deschamps, Jr. [June 14, 2022]; (21) Deposition transcript of Omar Chavez [June 15, 2022]; (22) Deposition transcript of Scott Wedge [June 14, 2022]; (23) Deposition transcript of Sergeant Brandon Jacobs [June 17, 2022]; (24)

> Deposition transcript of Steven Updike [June 6, 2022]; (25) Deposition transcript of Troy Pieper [June 16, 2022]; (26) Deposition transcript of Vincent Gallagher [June 17, 2022]; (27) Report by Graeme Fowler, Ph.D., P.E. [November 18, 2022]; (28) Report by Eddie R. Cooper [November 18, 2022]; (29) Report by Michael Carhart, Ph.D. [November 18, 2022]; (30) Report by Nathan T. Dorris, Ph.D. [November 18, 2022]; [and] (31) Publicly available literature, including, but not limited to, the documents cited **[*40]** within the report, learned treatises, text books, and scientific standards.

(*Id.* at 2-3). From his review, Dr. Wolfe criticizes Dr. Fowler's opinion, stating that:

> Dr. Fowler's opinion regarding the dune profile is not founded or based upon a reasonable degree of scientific certainty. Dr. Fowler's basis for his opinion regarding the sand dune is based upon scan data of a different location and two cones placed by the Officers over 2 years after the subject incident. By his own admission, Dr. Fowler opines that the subject sand dune had migrated eastward and that none of the available file material provided a clear depiction to assist with establishing its size and geometry. Dr. Fowler also noted that multiple vehicles driving over the dune post-crash created additional difficulties in determining the path of the Honda and the impact location on the dune.
>
> . . .
>
> Based on a review of Dr. Fowler's report, he performed a trajectory or airborne analysis of the Honda as it traversed a dune (albeit not the subject dune topography). Dr. Fowler relied entirely on witnesses who did not see the incident, with the exception of Greg Updike, who caught a split second of the incident in his rear-view **[*41]** mirror. Dr. Fowler states that using the commercially available software program Working Model 2D, the speed at which the Talon left the dune crest was estimated and motion during the end-over incident was modeled. The Working Model 2D project appears to be based upon the aforementioned scan data of a nearby dune profile selected over 2 years after the subject incident. Based upon the fundamental laws of physics, the topography on which the Honda was traversing would have a direct effect on the kinematics and trajectory of the vehicle.

(*Id.* at 8-9). Dr. Wolfe offers the following specific conclusions/ opinions based on his review:

> 1) The description of the slope, rise, and run of the subject dune varied significantly based upon a review of the available deposition testimony.
>
> 2) There are no known measurements that were taken of the subject dune, such as, rise, run, or slope.
>
> 3) The deposition testimony clearly establishes that the terrain and topography of the subject dune has changed from February 7, 2020. This is also supported by literature regarding the environmental effects on sand dunes and by common sense.
>
> 4) Dr. Fowler's basis for his opinion regarding the characteristics or topography **[*42]** of the sand dune is based upon scan data of a location on a different dune face delineated by two cones placed 2 years after the subject incident by other recreational riders who happened to be off-duty officers.
>
> 5) Dr. Fowler's basis and foundation for his inputs into the Working Model 2D as it relates to the dune topography is not based upon any direct measurement of the subject dune.
>
> 6) Dr. Fowler's inputs for his analysis are not (and cannot be) based upon a reasonable degree of scientific certainty.

(*Id.* at 11-12).

The Court finds that Dr. Wolfe's testimony is proper rebuttal expert testimony. First, being a Ph.D in Electrical and Computer Engineering and being accredited as a traffic accident reconstructionist, Dr. Wolfe is qualified to testify as an expert on accident reconstruction due to his education, training and experience. *Fed. R. Evid. 702*. Furthermore, he does not simply restate Dr. Fowler's opinions—he contradicts them based on his review of the record—which is permissible. *See Carter v. Johnson & Johnson, 2022 U.S. Dist. LEXIS 178589, 2022 WL 4700575, at *3 (D. Nev. Sept. 29, 2022)* ("an expert can criticize another expert's methodology without affirmatively disproving the matter himself.") (citation omitted). In fact, "[t]his type of testimony [is] much more informative than merely presenting **[*43]** those issues to [the opposing party's expert] on cross-examination" as it is "helpful to the trier of fact to hear these criticisms from an expert." *Id.* (quoting *Aero-Motive Co. v. Becker, 2001 U.S. Dist. LEXIS 22137, 2001 WL 1698998, *4-6 (W.D. Mich. Dec. 6, 2001)*). Dr. Fowler was asked to "reconstruct the accident based upon the materials provided, the inspections and analyses described below and, my

knowledge and experience in the field of off-road vehicle design, performance, and operation." (Doc. 92-4 at 2). Dr. Wolfe, through his own report, has attempted to "repel, counteract or disprove" Dr. Fowler's opinions—which is the "function of rebuttal testimony." *Armer, 2020 U.S. Dist. LEXIS 101851, 2020 WL 3078353, at *5*. For example, Dr, Wolfe critiques Dr. Fowler for relying "entirely on witnesses who did not see the incident, with the exception of Greg Updike, who caught a split second of the incident in his rear-view mirror." (Doc. 92-2 at 11). He also states that Dr. Fowler's opinions "regarding the dune profile [are] not founded or based upon a reasonable degree of scientific certainty" because his basis for his opinion regarding the sand dune is "based upon scan data of a different location and two cones placed by the Officers over 2 years after the subject incident." (*Id.* at 8). Thus, Dr. Wolfe's attempts to rebut the credibility of **[*44]** Dr. Fowler's opinions through these opinions and conclusions will be helpful to the trier of fact since he is also an expert. *See Carter, 2022 U.S. Dist. LEXIS 178589, 2022 WL 4700575, at *3*.

Furthermore, Dr. Wolfe is not "misstating the law" as he does not opine on any "ultimate issue." *Fed. R. Evid. 704*. Instead, his testimony attempts to rebut the credibility of Dr. Fowler's expert opinion. Defendant is correct that "[d]etermining the credibility of witnesses [falls] within the exclusive province of the jury," *Taylor, 2023 U.S. Dist. LEXIS 51815, 2023 WL 2652602, *3*, but to determine credibility, the opposing party may advance evidence that a witness is not credible. The Federal Rules of Evidence specifically allow this type of testimony: "Any party, including the party that called the witness, may attack the witness's credibility." *Fed. R. Evid. 607*. So, Dr. Wolfe has not misstated the law.

Dr. Wolfe's testimony is also relevant, so, it will aid, rather than confuse, the jury. *See Temple, 40 F. Supp. 3d at 1161*; *Fed. R. Evid. 702(a)*. Dr. Wolfe's testimony will necessarily attack the credibility of Dr. Fowler's and, again, "it is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience." *Sine, 493 F.3d 1021, 1034-35 (9th Cir. 2007)* (internal citation omitted). Of course, as a rebuttal expert, he cannot testify in Plaintiff's case-in-chief and cannot **[*45]** testify at all unless and until Dr. Fowler testifies as to the opinions for which has been designated as a rebuttal expert. *See Lindner, 249 F.R.D. at 636*.

In sum, the Court finds that Dr. Wolfe's opinions are proper rebuttal opinions in nature, which is a determination entrusted to the sound discretion of this Court, *Estate of Goldberg, 2019 U.S. Dist. LEXIS 229238, 2019 WL 8227387, *2*, and the Court will not exclude him from testifying as such.

F. Mr. Winkler

Finally, Defendant seeks to exclude Plaintiff's damages expert, Jamie Winkler, as his opinions are "wholly inconsistent with Arizona law with respect to the damages recoverable by individual beneficiaries in a wrongful death action."[5] (Doc. 93 at 1). Defendant argues that Mr. Winkler's opinions will not assist the jury because (1) he has used the wrong legal standard in calculating the losses [Decedent's] Estate incurred as a result of his death and (2) his methodology is unreliable. (*Id.* at 7, 8). It also argues that Mr. Winkler is not qualified to testify as an expert because: (1) he is not a certified public accountant; (2) he has never obtained any certifications in the field of finance; and (3) does not have any graduate level education. (*Id.* at 4-5). Plaintiff argues that Mr. Winkler is a qualified expert and that his **[*46]** testimony is admissible as Decedent's statutory beneficiaries are entitled to lost future income. (Doc. 106 at 3, 12).

1. Mr. Winkler's Opinions

Mr. Winkler was engaged to "opine on damages stemming from the alleged wrongful death of [Decedent]." (Doc. 93-6 at 4). Winkler states in his initial expert report that he has "extensive experience in the determination of economic damages, including matters involving lost earnings." (*Id.*) Mr. Winkler holds a bachelor's degree in economics as well as finance and "has experience in cases involving personal injury, breach of contract, patent and trademark infringement, and franchise matters, among other causes of action." (*Id.* at 9). He has also "issued expert reports and offered testimony on such matters." (*Id.*)

In this report, Mr. Winkler approximates Decedent's lost earnings for his work life expectancy (74 years old) and his life expectancy (84 years old). (Doc. 93-6 at 8). Decedent was 70 years old at the time of his death. (*Id.* at 4). Decedent was the president of Updike Distribution

[5] Defendant states that Decedent's statutory beneficiaries "have derived and will continue to derive substantial economic benefits as a result of [Decedent's] estate planning that they would not have enjoyed but for his death." (Doc. 93 at 4).

Logistics ("UDL") a company he founded and owned 25% of. (*Id.* at 4, 16). Mr. Winkler estimates Decedent's total damages at $4,550,211 for his work life expectancy **[*47]** and $5,377,091. (*Id.* at 8). This is based on Decedent's lost salary of approximately $106,000 per year as well as quarterly profit distributions from UDL. (*Id.* at 5-6). To estimate the value of these quarterly profit distributions, Mr. Winkler projected UDL's net income through Decedent's life expectancy and assumed a "conservative" two-percent annual growth rate. (*Id.* at 6-7). Based on this analysis, Mr. Winkler states that "the total value of [Decedent's] Future Lost Distributions is $14,285,342" but that he then "discounted this revenue stream back to the date of this report" at a rate of 18.8%. (*Id.* at 7). Applying this discount rate, Mr. Winkler calculates "the present value of [Decedent's] Future Lost Distributions [as] $5,454,939." (*Id.*) Mr. Winkler also takes into account that Decedent's 25% stake in UDL was bought out for $3,356,000 and off sets this price by the present value of the buyout price ($1,936,923) to calculate an offset of $1,419,077. (*Id.* at 8). Finally, Mr. Winkler calculated a "consumption offset" for the expenditures Decedent would have incurred if he were alive. (*Id.*) Mr. Winkler calculated that a rate of 13.5% based on the "Patton-Nelson Personal Consumption **[*48]** Tables," a "reputable study that considers gender, income, and household size." (*Id.*) Mr. Winkler also provides tables and schedules which show, in detail, howe he came to these calculations. (*Id.*)

Mr. Winkler also provided a rebuttal expert report in response to Defendant's expert: Craig Reinmuth. (Doc. 106-1 at 20). Reinmuth's report "argues that Valerie [Updike (Decedent's spouse)] sustained zero damages, despite being deprived of an income stream that would have generated millions over the coming years." (*Id.* at 21). Mr. Winkler states that Mr. Reinmuth's report reduces Winkler's damages calculation by 97% but that this is driven by "unsupported or otherwise flawed adjustments." (*Id.*) Winkler admits that Reinmuth's report identified an error within his calculated life expectancy which added an extra year to Decedent's life expectancy. (*Id.*) Mr. Winkler also admits that Reinmuth's report identified an error in the buyout offset calculation where the "but-for buyout" was not discounted to the date of the actual buyout, but the date of his report which results is a 10% reduction. (*Id.* at 22). There also seems to be some dispute between Mr. Winkler and Mr. Reinmuth in whether to deduct **[*49]** income taxes from the damages calculation since this is a "legal determination" which "hinges on whether the awarded damages will be taxable." (*Id.* at 27). In sum, Mr. Winkler states that he has incorporated the following changes to his report:

- Adjusts life expectancy to February 13, 2034
- Adjusts measurement date of buyout offset to May 14, 2020
- Updates discount rates based on current U.S. Treasury yields
- Updates UDL Projection based on actual performance through Q3 2022
- Presents an alternative which accounts for income taxes

(*Id.* at 28). Mr. Winkler provides the following summary of his calculations:

Go to table1

(*Id.*) Mr. Winkler has also provided exhibits showing how he came to these conclusions based on his calucaltions. (*See id.* at 32-39).

2. Mr. [*50] Winkler is Qualified to Testify as an Expert

First, the Court finds that Mr. Winkler is a qualified expert witness. An expert may be qualified by "knowledge, skill, experience, training, or education." *Fed. R. Evid. 702*. Mr. Winkler holds a bachelor's degree in economics as well as finance—which are directly relevant to his opinions. (Doc. 93-6 at 9). Mr. Winkler also has relevant experience evaluating and calculating economic losses, specifically as it pertains to economic losses in various personal injury cases. (Doc. 106-1 at 29-30). While Mr. Winkler's experience in testifying is sparce, "[p]rior experience need not consist of prior expert witness testimony on the same issue." *In re ConAgra Foods, Inc., 302 F.R.D. 537, 551 (C.D. Cal. 2014)* (citation omitted); *see also id.* ("If witnesses could not testify for the first time as experts, we would have no experts"). In fact, the "threshold for qualification is low for purposes of admissibility; minimal foundation of knowledge, skill, and experience suffices." *Id.* (citation omitted). The Court finds that Mr. Winkler meets this "low" threshold through his knowledge, experience and education as he has relevant education and experience. *See id*; *see also Diviero v. Uniroyal Goodrich Tire Co., 919 F. Supp. 1353, 1357 (D. Ariz. 1996)*, *aff'd*, *114 F.3d 851 (9th Cir. 1997)* ("An expert's experience is given significant weight **[*51]** in determining the witness' qualifications as an expert if only technical knowledge is required. If, however, scientific knowledge is necessary the expertise must be coextensive with the particular

scientific discipline.").

3. Mr. Winkler's Methodology is Sufficiently Supported

Next, Defendant's argument that Mr. Winkler's methodology is unreliable does nor persuade the Court to exclude him. Most of Defendant's arguments, such as Mr. Winkler's assumption that Decedent would have worked through his natural life, are disagreements with the basis for Mr. Winkler's opinions. These arguments go to the weight of this evidence, not its admissibility, as these assumptions are based on the facts. *Johnson, 2023 U.S. Dist. LEXIS 227978, 2023 WL 8852489, at *4* ("Defendants' arguments as to the evidentiary support for [the expert]'s opinions go to the weight of his testimony, rather than its admissibility."); *see also United States v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993)* ("any weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility").

Furthermore, Defendant's argument that Mr. Winkler failed to use a "company risk factor" is not a basis for exclusion because "[n]ormally, failure to include variables will affect the analysis' probativeness, **[*52]** not its admissibility." *Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002)* (quoting *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*). Instead, a "vigorous cross-examination" allows the jury to "appropriately weigh the alleged defects and reduces the possibility of prejudice." *Id.* (citation omitted). Stated differently, Mr. Winkler's report is not "so incomplete as to be inadmissible as irrelevant." *Id*; *see also Primiano, 598 F.3d at 564* ("Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion."). In sum, the Court, in its discretion, finds that Mr. Winkler has supported his methodology such that exclusion at this stage would be improper. *See Joiner, 522 U.S. at 142*.

4. Mr. Winkler's Opinions are Consistent with Arizona law

Finally, Defendant's argument that Mr. Winkler's damages calculation is inconsistent with Arizona law is unpersuasive. Defendant specifically argues that Winkler has "made no attempt to calculate the 'reasonable value of the economic support and maintenance' which [Decedent] may have provided to the statutory beneficiaries during his lifetime." (Doc. 93 at 7). Plaintiff argues that "[i]t is settled Arizona law that a surviving spouse is entitled to recover '[t]he income and services that have already been lost as a result **[*53]** of the death, and that are reasonably probable to be lost in the future.'" (Doc. 106 at 4 (citing Revised Arizona Jury Instructions ("RAJI") (Civil) (7th Ed.)).

In Arizona, "[a]s a general rule, a plaintiff in a tort action is entitled to recover such sums as will reasonably compensate him for all damages sustained by him as the direct, natural and proximate result of such negligence, provided they are established with reasonable certainty." *Nunsuch ex rel. Nunsuch v. United States, 221 F. Supp. 2d 1027, 1034 (D. Ariz. 2001* (quoting *Continental Life & Accident Co. v. Songer, 124 Ariz. 294, 304, 603 P.2d 921 (1979)*). "Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, ***lost earnings***, and diminished earning capacity." *Id.* (quoting *Wendelken v. Superior Court in and for Pima County, 137 Ariz. 455, 671 P.2d 896 (1983)* (emphasis added). However, "[l]oss of earnings is an item of special damage and must be specially pleaded and proved." *Id.* (quoting *Mandelbaum v. Knutson, 11 Ariz. App. 148, 149, 462 P.2d 841, 842 (1969)*). In a wrongful death action, "wrongful death damages are statutorily limited to injuries 'resulting from the death,' which may include the decedent's prospective earning capacity." *Walsh v. Advanced Cardiac Specialists Chartered, 229 Ariz. 193, 196, 273 P.3d 645, 648 (2012)* (internal citations and quotations omitted). Statutory beneficiaries in a wrongful death action "can recover their economic loss resulting from death." *Popal v. Beck, 2022 Ariz. App. Unpub. LEXIS 143, 2022 WL 457363, at *3 (Ariz. Ct. App. Feb. 15, 2022)*.

Here, as Defendant itself notes, *A.R.S. § 12-613* permits a damage award to "the surviving parties who may be entitled to recover" which include **[*54]** a "surviving husband or wife, child, parent or guardian, or personal representative" on their behalf. *A.R.S. § 12-612(A)*. Indeed, an "estate is not entitled to economic damages under the wrongful death statute because it can seek such damages only if none of the statutory beneficiaries survive." *Popal, 2022 Ariz. App. Unpub. LEXIS 143, 2022 WL 457363, at *3*. Here, however, Decedent is survived by his statutory beneficiaries and they have brought this action under *A.R.S. § 12-612* as "beneficiaries" and specifically seek "surviving statutory wrongful death" damages. (Doc. 1-2 at 13, 21 ("[Plaintiff]

is the surviving biological son of [Decedent] and brings this action for himself and for all eligible statutory wrongful death beneficiaries under *A.R.S. § 12-612(A)*, including Valerie Updike, the decedent's surviving wife, and the decedent's surviving sons, James Updike, Jr., Greg Updike and Jeffrey Updike.")). So, Mr. Winkler's calculations are not "inconsistent with Arizona law" as *A.R.S. § 12-612* specifically allows for the recovery of loss of future earnings in a wrongful death action. *See Walsh, 273 P.3d at 648*; *Popal, 2022 Ariz. App. Unpub. LEXIS 143, 2022 WL 457363, at *3*.

In sum, the Court will not exclude Mr. Winkler here.

IV. Conclusion

For the reasons stated above, the Court declines to exclude Plaintiff's expert witnesses: Dr. Michael Markushewski, Dr. Andrew Rentschler, Dr. James Mason, **[*55]** Mr. Mark Cannon, Dr. Daniel Wolfe, and Mr. Jamie Winkler in its discretion. *See Joiner, 522 U.S. at 142*. Of course, Defendant may re-raise any relevant *702*/*Daubert* objections to a witnesses' testimony or qualifications at trial.[6]

Accordingly,

IT IS ORDERED that Defendant's Motions to Exclude Portions of Opinion Testimony (Docs. 86, 88, 89, 91, 92 and 93) are **DENIED without prejudice**.

Dated this 13th day of September, 2024.

/s/ Diane J. Humetewa

Honorable Diane J. Humetewa

United States District Judge

[6] The Court will exercise its discretion to limit expert testimony it finds may be cumulative during the course of trial.

Table1 (*Return to related document text*)

	Original (Pre-Tax)	Updated Pre-Tax	Updated After-Tax	Reinmuth After Tax
Lost Salary	$1,322,817.00	$1,178,029.00	$792,319.00	$660,380.00
Lost Distributions	$6,313,464.00	$5,882,322.00	$4,659,712.00	$1,614,541.00
Buyout Offset	$(14,191,991.00)	$(1,902,118.00)	$(1,426,588.00)	$(2,105,177.00)
Lost Earnings	**$6,216,291.00**	**$5,158,234.00**	**$4,025,444.00**	**$169,744.00**
Consumption offset	$839,199.00	$696,362.00	$543,435.00	$22,915.00
Total Damages	**$5,377,091.00**	**$4,461,872.00**	**$3,482,009.00**	**$146,829.00**

Table1 (*Return to related document text*)

End of Document

Garcia v. Mine Safety Appliances Co.

United States District Court for the District of Arizona

April 6, 2023, Decided; April 6, 2023, Filed

No. CV-19-05789-PHX-SMB

Reporter
2023 U.S. Dist. LEXIS 60978 *; 2023 WL 2813565

Adalberto Murillo Garcia, et al., Plaintiffs, v. Mine Safety Appliances Company, et al., Defendants.

Core Terms

lock, summary judgment, skip, manhole, design defect, instructions, clearance, ladders, issue of material fact, non-movant, obstructed, genuine, argues, height, feet, strict product liability, deposition testimony, material fact, distance, testing, bottom, opined, user, warn, contends, injuries, rebuttal, reliable, asserts

Counsel: **[*1]** For Adalberto Murillo Garcia, husband, individually and on behalf of C.A.M. on behalf of J.A.M. on behalf of B.M., Aracely Vasquez Rivera, wife, individually and on behalf of B.M. on behalf of C.A.M. on behalf of J.A.M., Plaintiffs: Jami White, LEAD ATTORNEY, Cruz & Associates PC, Phoenix, AZ; Jason A Harris, LEAD ATTORNEY, Harris Injury Law PLLC, Phoenix, AZ; John Michael Popilock, LEAD ATTORNEY, PRO HAC VICE, Law Offices of Robert A Stutman PC, Ft Washington, PA; Jordan S Friter, LEAD ATTORNEY, PRO HAC VICE, Law Offices of Robert A Stutman PC, Fort Washington, PA.

For Mine Safety Appliances Company, a business corporation, Defendant: William Francis Auther, LEAD ATTORNEY, Bowman & Brooke LLP - Phoenix, AZ, Phoenix, AZ.

For Mine Safety Appliances Company LLC, a foreign limited liability company, Defendant: Dontan K Hart, William Francis Auther, LEAD ATTORNEYS, Bowman & Brooke LLP - Phoenix, AZ, Phoenix, AZ.

Judges: Honorable Susan M. Brnovich, United States District Judge.

Opinion by: Susan M. Brnovich

Opinion

WO

ORDER

Pending before the Court is Defendant Mine Safety Appliances Company, LLC's ("MSA") Motion for Summary Judgment. (Doc. 74.) Plaintiff Adalberto Murillo Garcia filed a Response (Doc. 83), and MSA filed **[*2]** a Reply (Doc. 89). Also before the Court is MSA's Motion to Exclude the Testimony of Plaintiff's expert witness, Mark Cannon. (Doc. 76.) Plaintiff filed a Response (Doc. 85), and MSA filed a Reply (Doc. 88). The Court heard oral argument on April 6, 2023. After reviewing the parties' arguments and the relevant law, the Court will grant MSA's Motion in part for the following reasons.

I. BACKGROUND

This case originated from Plaintiff's work-related fall down a manhole. In June 2018, Plaintiff worked as a laborer when he sustained his injuries. (Docs. 75 at 1; 83 at 2.) While working in an "enclosed underground vault," Plaintiff attempted to create a scaffold by placing a wooden board between two sections of a ladder he was standing on. (Doc. 75 at 1.) Plaintiff was wearing a safety harness designed and manufactured by MSA—the Workman Rescuer SRL-R ("Rescuer"). (*Id.* at 2.) The Rescuer uses a cable-based internal locking mechanism to stop a worker's fall. (*Id.*; Doc. 83 at 3.) Plaintiff's co-worker handed Plaintiff the wooden board as he began to lose his footing on the ladder. (Doc. 84 at 8.) Plaintiff fell down the manhole, but the Rescuer did not lock up to arrest his fall. (*Id.*)

Plaintiff **[*3]** raises the following claims in his First Amended Complaint: (1) strict product liability; (2) negligence; (3) *res ipsa loquitur*; (4) breach of express

warranties; and (5) loss of consortium. (Doc. 1-3 at 15, 20-29.) MSA now moves for summary judgment on all claims and to preclude Plaintiff from recovering punitive damages. (*See* Doc. 74 at 9.) In his Response, Plaintiff concedes his claims for relief under negligence (failure to warn), *res ipsa loquitor*, and breach of express warranties. (Doc. 83 at 17.) Plaintiff also no longer seeks punitive damages. (*Id.* at 18.) The Court will therefore address only Plaintiff's claims for strict product liability and negligence, recognizing that Plaintiff's loss of consortium claim is tied to the viability of his other claims.

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A material fact is any factual issue that might affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* "A party **[*4]** asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record" or by "showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fed. R. Civ. P. 56(c)(1)(A)-(B)*. The court need only consider the cited materials, but it may also consider any other materials in the record. *Id.* at *56(c)(3)*. Summary judgment may also be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Initially, the movant bears the burden of demonstrating to the Court the basis for the motion and "identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id. at 323*. If the movant fails to carry its initial burden, the non-movant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos. Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000)*. If the movant meets its initial responsibility, the burden then shifts to the non-movant to establish the existence of a genuine issue of material fact. *Id. at 1103*. The non-movant need not establish a material issue **[*5]** of fact conclusively in its favor, but it "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Liberty Lobby, 477 U.S. at 247-48*. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id. at 249-50* (citations omitted). However, in the summary judgment context, the Court believes the non-movant's evidence, *id. at 255*, and construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson, 357 F.3d 1072, 1075 (9th Cir. 2004)*. If "the evidence yields conflicting inferences [regarding material facts], summary judgment is improper, and the action must proceed to trial." *O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1150 (9th Cir. 2002)*.

III. DISCUSSION

When sitting in diversity jurisdiction, federal courts apply federal procedural law and state substantive law. *Gasperini v. Center for Humanities, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)*. Arizona law therefore applies to Plaintiff's claims. *See id.*

A. Motion to Exclude

The Court will first address whether to exclude Mark Cannon's opinions because they may inform the Court's summary judgment analysis. MSA argues Cannon's engineering expert opinions are unreliable and should be excluded because they were based on a misidentification **[*6]** of the Rescuer's locking system. (Doc. 76 at 9-10.) MSA specifically points out that Cannon's theory of "skipping" as a design defect is inconsistent with how the Rescuer actually operates. (*Id.* at 11.) MSA also argues Cannon's opinions are inadmissible under *Federal Rule of Evidence 702* because "he conducted no testing of his own" and relied on "the incorrect design to form the basis of his causation opinion." (*Id.* at 13.) MSA describes Cannon's opinion as speculative and inadmissible because he admitted that Plaintiff's fall height could not be determined "within any degree of certainty, and fall height is essential to his calculation of fall speed." (*Id.* at 15-16.)

Plaintiff acknowledges that Cannon's initial report described a locking device that differed from the Rescuer in how the pawls rotate to engage the locking mechanism. (*See* Doc. 85 at 6.) But Plaintiff contends that Cannon's description of the Rescuer was based on MSA's principal engineer's description. (*Id.* at 6-7.) Cannon also compiled a rebuttal report, in which he opined that his previous reliance on MSA's engineer's description and the actual design of the Rescuer's internal components "is similar" and thus did not change any of his opinions. **[*7]** (Doc. 84-1 at 60-61.) Plaintiff also points to Cannon's deposition testimony, in which he testified that while the original mechanism he identified in his original report differed from mechanism in the Rescuer, his opinions and analysis remained the same. (*Id.* at 70-71.)

Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

"The Court acts as a gatekeeper to ensure the proffered testimony is both relevant and reliable." *Clayton v. Heil Co. Inc., No. CV-19-04724-PHX-GMS, 2022 U.S. Dist. LEXIS 217694, 2022 WL 17404792, at *2 (D. Ariz. Dec. 2, 2022)* (citing *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*). The Court "should not exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013)*; *see also Fed. R. Evid. 702*, cmt. 2000 amendment ("[P]roponents . . . only have to demonstrate by a preponderance of evidence that their opinions are reliable.").

The core of MSA's first argument is that Cannon lacks specialized knowledge, **[*8]** and his opinion should be excluded, because his report described a different machine and locking mechanism than the Rescuer. The Court finds that Cannon's rebuttal report and deposition testimony are sufficient to cure his mistaken reference to a slightly different locking design. Cannon ultimately opined that the differences between the type of design in his initial and rebuttal reports (which addressed the Rescuer) did not change ultimate opinion. MSA did not dispute Cannon's opinions within the context of that rebuttal report. The Court thus finds that Cannon has sufficient specialized knowledge to avoid exclusion of his opinion.

MSA's second argument focuses on whether Cannon's opinion as to causation should be admissible based on Cannon not performing his own independent testing of the Rescuer. (Doc. 76 at 12-13.) MSA primarily argues that "[t]here is no evidence of a skip occurring at all during this incident." (*Id.* at 13.) Cannon relies on the joint testing (*see* Doc. 75 at 4 ¶ 15) to explain that a skip can occur at a pull speed that should cause the device to catch, the probability of a skip increases as the amount of extended cable increases, and a skip can result in a free **[*9]** fall. (*See* Doc. 85-1 at 34-57.) Cannon's reports contain detailed explanations of Plaintiff's potential fall height, the Rescuer's ability to lock relative to pull speed, and how skipping could have occurred. (*See, e.g.*, Docs. 84-1 at 51-54, 60-67.) MSA presents arguments to contradict Cannon's conclusions, but not the principles of physics Cannon presents to support those conclusions. Even in the absence of Cannon's "own testing" the Court finds Cannon's opinion sufficiently reliable, and therefore should not be excluded. *See Fed. R. Evid. 702*, cmt. 2000 amendment.

MSA's third argument addresses a substantive dispute of fact to be addressed later in this Order. *See infra* Sec. III(B)(2). Cannon's rebuttal report laid out the basis for his fall height calculation. (*See* 75-1 at 146.) Cannon discussed Plaintiff's deposition testimony, where he claimed he was twelve feet from the bottom of the manhole. (*Id.*) Unsure of whether Plaintiff's description was from his feet to the ground or from his eye-height to the ground, Cannon calculated the speed of Plaintiff's free fall based on the lower of the two options (estimated distance from Plaintiff's feet to the ground). (*Id.*) When considering the opinion from **[*10]** MSA's expert about the distance in which the Rescuer would lock, and the fall height associated with Plaintiff's testimony, Cannon opined that "it is highly unlikely that [Plaintiff] did not fall fast enough to trigger the locking pawls as intended." (*Id.*) Recognizing that the parties offer different fall clearance distances, *see infra* Sec. III(B)(2), the Court finds that Cannon's opinion is "based on sufficient facts or data." *Fed. R. Evid. 702*.

Therefore, the Court will deny MSA's Motion to Exclude

(Doc. 76) and analyze MSA's Motion for Summary Judgment with the benefit of Cannon's opinions. *See Ellison, 357 F.3d at 1075*.

B. Design Defect Claims

Plaintiff brings design defect claims under strict liability and negligence theories. To establish a prima facie case for strict products liability under Arizona law, plaintiffs must show "the product is defective and unreasonably dangerous; the defective condition existed at the time it left defendant's control; and the defective condition is the proximate cause of the plaintiff's injuries." *St. Clair v. Nellcor Puritan Bennett LLC, No. CV-10-1275-PHX-LOA, 2011 U.S. Dist. LEXIS 128842, 2011 WL 5331674, at *4 (D. Ariz. Nov. 7, 2011)* (citing *Dietz v. Waller, 141 Ariz. 107, 685 P.2d 744, 747 (Ariz. 1984)*). Strict products liability claims do "not rest on traditional concepts of fault," meaning plaintiffs need not "prove the defendant was negligent." *Id.* In contrast, to establish negligent **[*11]** design, "the plaintiff 'must prove that the designer or manufacturer acted unreasonably at the time of . . . design of the product.'" *Canning v. Medtronic Inc., No. CV-19-04565-PHX-SPL, 2022 U.S. Dist. LEXIS 69251, 2022 WL 1123061, at *4 (D. Ariz. Apr. 14, 2022)* (quoting *Gomulka v. Yavapai Mach. & Auto Parts, Inc., 155 Ariz. 239, 745 P.2d 986, 988-89 (Ariz. Ct. App. 1987)*). A design defect "arises when the manufacturer has failed to use reasonable care to design its products so as to make it safe for intended uses." *Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717, 719 (Ariz. Ct. App. 1975)*.

MSA argues summary judgment is appropriate because Plaintiff cannot establish that the Rescuer was defectively designed, or that any defect caused Plaintiff's injuries. (Doc. 74 at 9-10, 14.) MSA relies on the same purported lack of evidence to support its arguments for both strict liability and negligence theories. (*See id.* at 10, 18.) Plaintiff argues the evidence at least establishes issues of material fact to be determined by a jury. (Doc. 83 at 9.)

1. The Rescuer's Design

MSA argues summary judgment is appropriate because Plaintiff cannot establish a design defect. Plaintiff contends the Rescuer's design is defective because it permits "skipping"—a term the parties use to describe a phenomenon where the Rescuer's internal components "bounce" rather than engage, which causes the Rescuer not to lock. (*Id.* at 6; Doc. 83 at 5.) Plaintiff cites his deposition testimony where he testified to being **[*12]** "100 percent sure" the Rescuer never locked, and he never felt it try to lock. (Doc. 84-1 at 16.) Plaintiff also cites Cannon's expert opinion that the Rescuer's design allows skipping, which may lead to a potential failure to arrest the user's fall "when a certain amount of cable is extended during use." (*Id.* at 57.) Cannon further opined that Plaintiff's fall resulted from the Rescuer's "skipping and failing to lock as intended." (*Id.*) In its Motion, MSA contends it is "undisputed that the Rescuer locked-up during post-incident testing." (Doc. 74 at 11.) Yet, MSA recognizes that the Rescuer did skip once during that testing. (*Id.*) MSA asserts Plaintiff's evidence is insufficiently speculative and points to contradictory evidence that the Rescuer will lock and arrest within thirty-three inches, independent of whether a skip occurred.[1] (Doc. 89 at 3.)

The Court concludes that Plaintiff has provided sufficient evidence of a design defect to avoid summary judgment. During his deposition, Plaintiff testified that the Rescuer was set correctly, and being used correctly, when he fell. Plaintiff also testified that he never felt the Rescuer lock while he was falling. Cannon opined that **[*13]** the Rescuer's design permits skipping and arrest failure, which could cause a user to free fall. MSA offered an abundance of conflicting evidence to challenge Plaintiff's testimony and Cannon's opinions. That conflicting evidence highlights the issues of material fact that remain in dispute—whether Plaintiff's evidence is sufficient to establish that the Rescuer has a design defect is for the jury to decide.

2. Causation

MSA also argues summary judgment is appropriate because Plaintiff cannot establish that the Rescuer was the proximate cause of Plaintiff's injuries. (Doc. 74 at 14.) MSA asserts Plaintiff misused the Rescuer by failing to follow warnings and instructions and that misuse solely caused his injuries. (*Id.*) Arizona law

---

[1] MSA also argues the Rescuer has no design defects because regardless of potential skipping, the Rescuer will still lock up within a certain fall distance. (*See* Doc. 74 at 12.) Additionally, MSA asserts Plaintiff had an insufficient amount of unobstructed clearance for the Rescuer to function as designed. (*Id.* at 13-14.) The Court will address below whether genuine issues of material fact remain as to whether Plaintiff's fall path was obstructed, and whether Plaintiff had sufficient fall clearance.

provides the following affirmative defense to products liability actions:

> The proximate cause of the incident giving rise to the action was a use or consumption of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable or was contrary to any express and adequate instructions or warnings appearing on or attached to the product or on its original container or wrapping, if the intended consumer knew or **[*14]** with the exercise of reasonable and diligent care should have known of such instructions or warnings.

A.R.S. § 12-683(3). The Rescuer's user instructions state, "[a]lways remove obstructions below the work area to ensure a clear fall path. The minimum recommended fall clearance is . . . 8 ft (2.4m) plus free fall. The maximum allowable free fall is 2 ft." (Doc. 75-1 at 113.) MSA asserts Plaintiff failed to follow the Rescuer's instructions by having an obstructed fall path and inadequate fall clearance. (Doc. 74 at 15-16.)

The parties present conflicting evidence as to whether the manhole was obstructed and how much fall clearance Plaintiff had. MSA contends all evidence shows that Plaintiff's fall path was obstructed, and that inside the manhole were "cross brace holding pipes, two ladders with ladder rungs and rails, and pipes on both sides of the fall path." (*Id.* at 15.) Citing its statement of facts, MSA states Plaintiff's "fall was obstructed, and he stated that during his fall, his leg hit a 'big thing sticking up.'" (*Id.* at 14; Doc. 75 at 3 ¶ 11.) Plaintiff responds that the ladders were being used consistent with the Rescuer's user instructions, and that the pipes were adjacent to, but not under, **[*15]** Plaintiff when he fell. (Doc. 83 at 13.) Plaintiff states he did hit something, but then fell directly to the bottom of the manhole. (*Id.*)

The Court notes that MSA did not cite Plaintiff's entire statement to support its contention that "[Plaintiff's] fall was undisputedly obstructed." (Doc. 74 at 15.) Plaintiff's June 27, 2018 statement at the hospital states: "*When I hit the bottom my left foot hit the big thing sticking up* and bent my foot back and slammed my knee into the pipe." (Doc. 75-1 at 140) (emphasis added). Plaintiff's statement does not support MSA's contention. The Court also notes that in the photograph MSA provides, the ladders are being used in a similar fashion as the illustrative figures from the Rescuer's user instructions. (*See* Docs. 75 at 3; Doc. 75-1 at 114.) That photograph supports Plaintiff's description that the objects in the manhole were next to Plaintiff as he fell, but not below him.

MSA also contends Plaintiff did not have enough fall clearance when he fell. (Doc. 74 at 16.) Neither party provided a certain, irrefutable distance between where Plaintiff tried to install the scaffolding and the bottom of the manhole. MSA's expert opined that based on Plaintiff's **[*16]** height and the length of the ladders, Plaintiff must have been between four to five feet from the bottom of the manhole. (*Id.*) MSA cites Plaintiff's deposition testimony, where Plaintiff testified that the middle of the manhole was about seven or eight feet from the floor to assert that Plaintiff's self-serving statements represent the only evidence to rebut "the undisputed evidence." (Docs. 74 at 16-17; 75 at 2; 75-1 at 91.) Plaintiff counters that the Rescuer's user instructions contain only a recommendation, not a requirement, for minimum fall distance (*see* Doc. 75-1 at 113), and that he testified to being twelve or thirteen feet from the bottom when he began to fall. (Doc. 84-1 at 16.)

The evidence cited by the parties demonstrates that there is a dispute of material fact regarding how much fall clearance Plaintiff had. Both MSA and Plaintiff cite circumstantial evidence based on the length of the ladders, descriptions of the manhole, and Plaintiff's height to suggest the distance between Plaintiff's feet and the ground. Each party's experts reached different conclusions based in part by the same deposition testimony provided by Plaintiff. The Court thus concludes that material **[*17]** facts remain in dispute as to the adequacy of Plaintiff's fall clearance.

The Court finds that genuine issues of material fact exist as to whether: (1) the Rescuer was defectively designed; (2) Plaintiff's fall was obstructed/unobstructed; and (3) Plaintiff had sufficient fall clearance. As such, the Court will deny MSA's Motion for Summary Judgment as to the strict products liability, negligence[2], and loss of consortium claims.[3] The Court will grant judgment in MSA's favor as to Plaintiff's claims for

---

[2] MSA argued that Plaintiff could not establish a breach of duty because there was no design defect, and Plaintiff could not establish causation given that the fall was obstructed. (Doc. 74 at 18.)

[3] Plaintiff's loss of consortium claim is derivative of Plaintiff's other claims and will similarly survive summary judgment. *See* Martin v. Staheli, 248 Ariz. 87, 457 P.3d 53, 58 (Ariz. Ct. App. 2019).

negligence (failure to warn), *res ipsa loquitor*, and breach of express warranties. (*See* Doc. 83 at 17.)

IV. CONCLUSION

Accordingly,

IT IS ORDERED denying MSA's Motion to Exclude the Testimony of Mark Cannon. (Doc. 76.)

IT IS ORDERED granting in part Defendant's Motion for Summary Judgment (Doc. 74) as to the claims of negligence (failure to warn), *res ipsa loquitor*, breach of express warranties, and punitive damages. The Motion is denied as to the strict products liability, negligent design, and loss of consortium claims.

Dated this 6th day of April, 2023.

/s/ Susan M. Brnovich

Honorable Susan M. Brnovich

United States District Judge

Stafford v. Magruder

Court of Appeals of Nevada

July 15, 2016, Filed

No. 66415

Reporter
2016 Nev. App. Unpub. LEXIS 210 *; 132 Nev. 1032; 2016 WL 3964630

SIDNEY STAFFORD; AND PULTE BUILDING SYSTEMS, LLC, Appellants, vs. REBECCA MAGRUDER, Respondent.

Notice: NOT DESIGNATED FOR PUBLICATION. PLEASE CONSULT THE NEVADA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE NEVADA REPORTER.

Subsequent History: Petition granted by, in part, Stay denied by, As moot Stafford v. Eighth Judicial Dist. Court, 2019 Nev. App. Unpub. LEXIS 468 (Nev. Ct. App., May 15, 2019)

Core Terms

district court, new trial, preemptively, pre-trial, waived, motion in limine, inadmissible

Judges: **[*1]** Gibbons, C.J., Tao, J., Silver, J.

Opinion

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion for new trial in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Following an auto collision, Rebecca Magruder filed a complaint for negligence against Sidney Stafford and his employer, Pulte Building Systems, LLC (collectively, "Pulte").[1] Prior to trial, Magruder filed a motion in limine seeking, in relevant part, to prohibit Pulte's accident reconstruction and biomechanical experts, Terry Knapp and Mark Cannon, from testifying at trial. Magruder argued that the experts' opinions were inadmissible under Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008). After conducting a hearing the district court denied the motion.

The jury trial was bifurcated, beginning with a liability phase to be followed by a causation/damages phase. During the liability phase of the trial, Magruder orally requested that Pulte's expert Cannon be prohibited from remaining in the courtroom while other witnesses testified. The district court denied the motion. Magruder then decided to preemptively call Cannon to testify during her case-in-chief.

At **[*2]** the conclusion of the liability phase, the jury returned a verdict finding both Magruder and Pulte negligent and assigning 55% fault to Magruder. Magruder then filed a motion for new trial pursuant to NRCP 59(a)(1) in which she argued that she was prejudiced by Cannon's inadmissible testimony and by the inclusion of jury instruction no. 22. Without addressing the alternate ground asserted, the district court concluded that Cannon should have been precluded from testifying and granted Magruder's motion. This appeal followed.

The principal question raised by this appeal is whether, by preemptively calling Cannon to testify, Magruder waived her previous pre-trial objection to Cannon's testimony. For the reasons set forth herein, we conclude that she did not and affirm the district court's order.

Magruder did not waive her objection to Cannon's testimony

Here, Magruder filed a pre-trial motion in limine challenging Cannon's testimony as inadmissible on the ground that Cannon lacked the requisite evidentiary

[1] We do not recount the facts except as necessary to our disposition.

foundation for his opinions and did not meet the assistance requirement set forth in *Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008)*. After the court denied that motion, Magruder herself then called Cannon to testify in what Magruder characterizes **[*3]** as a "preemptive strike" to point out the shortcomings of Cannon's testimony to the jury and neutralize its effectiveness before Pulte could present its defense, and before Cannon could observe Magruder's testimony. Pulte argues that once Magruder called Cannon to testify, she waived her earlier objection to the substance of his testimony as well as to his expert qualifications. We disagree.

Answering the question before us implicates two conflicting principles. On the one hand, a fully litigated pre-trial motion in limine is generally sufficient to preserve an issue for appellate review even without a subsequent renewal of that objection at trial. *BMW v. Roth, 127 Nev. 122, 136-37, 252 P.3d 649, 659 (2011)* ("where the admission or exclusion of evidence at trial is in harmony with the order in limine, the alleged error at trial is the same as the error alleged in the ruling on the motion. Therefore, because there is no new error, the motion in limine properly preserves the error claim."). *See also Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002)* (in criminal cases, "[W]here an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient **[*4]** to preserve an issue for appeal.").

On the other hand, it is also true that, in general, "[a] party cannot complain of evidence which the party itself has introduced or brought in." *75 Am. Jur. 2d Trial § 349*. But the parties do not cite, and our own research does not reveal, any Nevada authority resolving the question of whether a civil litigant who unsuccessfully sought to exclude evidence through a pre-trial motion in limine may nonetheless preemptively introduce the contested evidence at trial without waiving the earlier objection. The closest Nevada authority is a criminal case, *Pineda v. State, 120 Nev. 204, 88 P.3d 827 (2004)*, which we find instructive.

In *Pineda*, the district court ruled before trial that the defendant's prior felony convictions could be used for impeachment under *NRS 50.095(1)* if the defendant chose to testify. *120 Nev. at 208, 88 P.3d at 830*. The defendant testified at trial and chose to preemptively introduce the prior convictions himself during his direct examination. *Id.*

On appeal, the defendant challenged the district court's pre-trial order in limine and argued that his prior convictions should never have been admitted into evidence and that he was entitled to a new trial during which no evidence of his prior criminal convictions would be presented by either party. *Id.* **[*5]** In response, the State argued that the defendant waived his right to contest the ruling in limine because the defendant himself elicited the evidence, relying upon *Ohler v. U.S., 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000)*, in which the United States Supreme Court held that a defendant who preemptively introduces evidence of a prior conviction on direct examination following an adverse in limine ruling may not claim on appeal that the admission of such evidence was erroneous. *See id.; Ohler, 529 U.S. at 760*.

In resolving the appeal, the Nevada Supreme Court declined to follow *Ohler*, and instead held that the admissibility of such evidence is still subject to review on appeal "where the defendant, as a tactical matter, elects to introduce such evidence after having objected to basic admissibility via a fully litigated motion in limine." *Pineda, 120 Nev. at 209, 88 P.3d at 831*. The court reasoned that this conclusion represented a logical extension of its decision in *Richmond, 118 Nev. 924, 59 P.3d 1249 (2002)*, under which the defendant's objection would have been preserved had he instead waited for the State to introduce the evidence first. *Id.*

We conclude that the court's reasoning in *Pineda* applies equally in the context of a civil action, and therefore that Magruder did not waive her previous pre-trial objection by preemptively calling Cannon during her own case-in-chief. This is especially so when one of the motivating factors that prompted Magruder to call Cannon when she did was to prevent Cannon from first hearing the testimony of other witnesses and possibly adjusting his testimony accordingly. **[*6]**

Here, Magruder initially objected to the sum and substance of Cannon's testimony via pre-trial motion. Then, at trial, Magruder requested that Cannon not be allowed to hear the testimony of other witnesses before being asked to testify himself. Only after both requests were denied did Magruder decide to present Cannon's testimony in her own case-in-chief, in what appears to have been an effort not only to preemptively mitigate the harm of Cannon's testimony but also to lock it in place before Cannon could observe Magruder testify.

Under these circumstances, we conclude that Magruder did not waive her pre-trial objection when, after her

objection was overruled, she preemptively chose to call Cannon to testify in her own case-in-chief in order to limit any damage that might have resulted from Cannon's testimony and to mitigate any prejudice that might have resulted from the district court's potentially erroneous denial of Magruder's initial objection. *See* Pineda, 120 Nev. at 209, 88 P.3d at 831; *see also* Lawrence v. MountainStar Healthcare, 2014 UT App 40, 320 P.3d 1037, 1057 (Utah Ct. App. 2014), *cert. denied sub nom. Lawrence v. MountainStar, 329 P.3d 36 (Utah 2014)* ("[Appellant's] attempt to mitigate any harm from the trial court's adverse ruling by introducing the evidence, asking her witnesses about it, and stipulating to the precise language the jury would **[*7]** hear did not amount to a waiver or an invited error."); Dickerson v. Chadwell, Inc., 62 Wn. App. 426, 814 P.2d 687, 690-91 (Wash. Ct. App. 1991) ("Washington courts have repeatedly held that a party prejudiced by an evidentiary ruling who then introduces the adverse evidence in an effort to mitigate its prejudicial effect is not precluded from obtaining review of the ruling."). *But see* Simmons v. Garces, 198 Ill. 2d 541, 763 N.E.2d 720, 738, 261 Ill. Dec. 471 (Ill. 2002) (holding objection waived where party failed to object at trial and introduced evidence originally sought to be excluded on direct examination).

The district court did not abuse its discretion by concluding that Cannon's testimony was inadmissible

Pulte also asserts that, even if Magruder's objection was not waived, the district court should not have granted a new trial because Cannon's testimony was admissible and therefore the district court's initial decision to permit Cannon to testify was not erroneous.

We review a district court's decision to permit or exclude expert testimony for abuse of discretion. *See* Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); Brown v. Capanna, 105 Nev. 665, 671-72, 782 P.2d 1299, 1303-04 (1989). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." Hallmark, 124 Nev. at 498, 189 P.3d at 650.

As the Nevada Supreme Court explained in *Hallmark*,

> [t]o testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or **[*8]** she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

124 Nev. at 498, 189 P.3d at 650 (alterations in original). Here, the parties focus their arguments on the assistance requirement.

To meet the assistance requirement, the expert's testimony must be "relevant and the product of reliable methodology." Hallmark, 124 Nev. at 500, 189 P.3d at 651 (internal citations omitted). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. In determining whether an expert's opinion is based upon reliable methodology, the court considers, among other things, whether the opinion is "based more on particularized facts rather than assumption, conjecture, or generalization." Hallmark, 124 Nev. at 500-01, 189 P.3d at 651-52 (internal citations omitted).

Having reviewed the record on appeal, we cannot say that **[*9]** no reasonable judge could have concluded that Cannon did not meet the assistance requirement. Therefore, we conclude that the district court did not abuse its discretion by concluding that Cannon's testimony was inadmissible. *See* Hallmark, 124 Nev. at 498, 189 P.3d at 650.

The district court did not abuse its discretion by granting Magruder's motion for a new trial

Under NRCP 59(a)(1), the court may grant a new trial where an aggrieved party's substantial rights have been materially affected by an "[i]rregularity in the proceedings of the court, . . . or any order of the court . . . , or abuse of discretion by which either party was prevented from having a fair trial . . . ." "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." Edwards Indus., Inc. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

Here, the district court reasoned that given the closeness of the jury's determination, that Magruder was 55% negligent as compared to Pulte's 45% negligence,

Cannon's testimony likely played an important role in the jury's verdict. The district court also noted Stafford's testimony that he did not see Magruder until after the collision occurred, and concluded that Cannon's testimony was the only testimony **[*10]** contradicting Magruder's description of the collision. Thus, the district court concluded that a new trial was warranted because Cannon's testimony materially affected Magruder's substantial rights and prevented her from having a fair trial. Under these facts, we cannot say that the district court committed a palpable abuse of discretion in granting a new trial.[2]

We therefore,

ORDER the judgment of the district court AFFIRMED.

/s/ Gibbons, C.J.

Gibbons

/s/ Tao, J.

Tao

/s/ Silver, J.

Silver

End of Document

---

[2] Because we conclude that the district court did not err by granting the motion for new trial based on the prejudicial effect of Cannon's testimony, we need not address the parties' arguments concerning jury instruction no. 22, the so-called "range of vision" instruction.

Bombardier Serv. Corp. v. Tronair, Inc.

United States District Court for the Northern District of West Virginia

January 21, 2005, Decided; January 21, 2005, Filed

CIVIL ACTION NO. 1:04CV35

Reporter
2005 U.S. Dist. LEXIS 47874 *; 2005 WL 6743463

BOMBARDIER SERVICE CORP., Plaintiff, v. TRONAIR, INC, Defendant.

Core Terms

engine, expert testimony, inclusions, reliable, sulfide, hoist

Counsel: **[*1]** For Bombardier Service Corp., Plaintiff: J. Greg Goodykoontz, LEAD ATTORNEY, Steptoe & Johnson, PLLC - Clarksburg, Clarksburg, WV; Jamison H. Cooper, LEAD ATTORNEY, Cooper Law Offices, Bridgeport, WV; Robert E Gifford, LEAD ATTORNEY, Steptoe & Johnson PLLC - Bridgeport, Bridgeport, WV.

For Tronair, Inc., Defendant: James S. Arnold, LEAD ATTORNEY, Guthrie & Thomas, PLLC, Charleston, WV; Nicholas P. Mooney, II, LEAD ATTORNEY, Spilman Thomas & Battle PLLC, Charleston, WV.

Judges: IRENE M. KEELEY, UNITED STATES DISTRICT JUDGE.

Opinion by: IRENE M. KEELEY

Opinion

ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT

At a hearing on January 14, 2005, the Court heard arguments on the defendant, Tronair, Inc.'s ("Tronair"), motion to exclude or, in the alternative, to limit the testimony of the plaintiff, Bombardier Service Corp.'s ("Bombardier"), expert, Ram Kossowsky, Ph.D. ("Dr. Kossowsky").[1] Because the testimony is reliable and relevant, the Court **DENIES** Tronair's motion (dckt. no. 63).

I. FACTUAL BACKGROUND

On November 6, 2002, employees of Bombardier were removing an engine from a de Havilland Q400 ("Dash 8") aircraft at Bombardier's facility in Bridgeport, West Virginia. The Nacelle Mounted Engine hoist ("hoist") made by Tronair, which Bombardier was using to remove the engine from the aircraft wing, collapsed. As a result, the engine was dropped and damaged. Bombardier has sued Tronair for that damage, claiming that the hoist was defective.

In preparing for trial, Bombardier and Tronair have focused on the front attachment pin of the hoist as the cause of the collapse. Tronair argues that cause of the hoist's collapse was a torsional pre-crack resulting from overtorquing a nut on the mounting pin, which finally failed under the bending load of the aircraft engine.

While Bombardier acknowledges that pre-cracks did contribute to the pin's failure, its expert, Dr. Kossowsky, contends that the pre-cracks originated from a defect in both the design and material of the mounting pin. Dr. Kossowsky is a mechanical engineer and consultant with ARRCA, Inc. ("ARCCA"), a firm **[*3]** retained by Bombardier to provide advice in this case.

Tronair disputes the manner in which Dr. Kossowsky arrived at his conclusions. Specifically, it argues that his opinion is based on incomplete factual data, that he changed his opinion, that he is focusing on the wrong factors in this case and that he misapplied the methodology he utilized.

---

[1] The defendant's originally moved to exclude the testimony of two of the plaintiff's experts, Dr. Kossowsky and Eli Levy, P. Eng. However, prior to this hearing, the plaintiff's withdrew Dr. Levy as an expert witness **[*2]** in this case. Therefore, the portion of Tronair's motion that pertains to Dr. Levy is **DENIED AS MOOT.**

II. LEGAL ANALYSIS

Under *Federal Rule of Evidence 702*, a court should admit expert testimony that is reliable and helps the jury understand the evidence. To determine reliability, a court should evaluate the expert's methodology, not his conclusion. *TFWS v. Schaefer, 325 F.3d 234, 240 (4th Cir. 2003)*.

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, courts assess the reliability of expert testimony using the following nonexclusive factors:

(1) whether the expert's theory can be or has been tested;

(2) whether the theory has withstood peer review and publication;

(3) whether there is a known or potential rate of error;

(4) whether standards exist for the application of the theory; and

(5) whether the theory has been generally accepted by the relevant scientific community.

In *Westberry v. Gummi, 178 F.3d 257, 260-61 (4th Cir. 1999)*, **[*4]** the Fourth Circuit recognized that:

> *Rule 702* was intended to liberalize the introduction of relevant expert evidence. And, the court need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct. As with all other admissible evidence, expert testimony is subject to being tested by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."

As a general rule, the party offering the expert testimony has the burden of establishing its admissibility by a preponderance of the evidence. See *Higginbotham v. KCS Int'l, Inc., 85 Fed. Appx. 911 (4th Cir. 2004)*.

III. DISCUSSION

In this case, Tronair attacks Dr. Kossowsky's testimony as scientifically unreliable. It does not argue that Dr. Kossowsky's methods have not been peer-reviewed or tested, have excessive rates of error, have no standards governing their application, or have not been accepted in the field. Bombardier argues that, if Dr. Kossowsky did in fact change his opinion or misapply his own methodology, these are matters that go to the weight of his testimony and can be properly addressed on cross-examination.

Specifically, Tronair **[*5]** contends that Dr. Kossowsky utilized the wrong methodology for analyzing resulfurized steel. This, however, is a hotly disputed issue in this case. According to the affidavit of Mark Russell Cannon, an engineer employed by ARCCA, "if one reads ASTM E45, it explains that there are various methods of rating inclusions.[2] One method, and one method only, is based on SAE J422 which excludes resulfurized steels. Dr. Kossowsky did not use that method." He goes on to state that:

> ASTM E45 is a learned treatise that lists five "recognized methods for determining the nonmetallic inclusion content of steel." Dr. Kossowsky used Method A, which explains how to rate sulfide inclusions. There is another method listed in ASTM E45 that Dr. Kossowsky did not use, but is "used only to rate oxides, never sulfides." This is known within the document as Method C, and references Society of Automotive Engineers (SAE) Recommended Practice J422. SAE J422 only refers to Method C, not the entire standard.

Because Mr. Cannon and Dr. Kossowsky both have been employed by ARCCA in this litigation, Cannon's opinion obviously must be carefully scrutinized. In ASTM E45, Method A is compared to "the Jernkontoret Method," and states that, "if desired, the predominant chemical type of inclusions may be determined and recorded, as sulfide, alumina, silicate, or globular oxide." ASTM Standard E45 (Standard Practice for Determining the Inclusion Content of Steel), Section 11, pp. 222-23. In comparison, the footnote to Method C states that "this method is similar to SAE Recommended Practice J422." Id. at Section 12, p. 223. Method C itself makes no mention of sulfide, and one has to look at SAE J422 to discover that this method is not appropriate for sulfides.

In addition to Methods A and C, there are three other methods outlined in ASTM E45. Only Method C references SAE J422. In point of fact, SAE J422 itself states that resulfurized grades are generally classified

---

[2] On November 19, 2004, the defendant filed a motion to exclude Mr. Cannon's affidavit. The Court **DENIES** this motion (dckt. no. 70) because the affidavit is relevant to the issue of the reliability of Dr. Kossowsky's **[*6]** testimony and good cause has not been shown to strike it from the Court's consideration.

using ASTM E45-60T, Method A, Jernkontoret Charts.

Tronair does not dispute that the ASTM is a reliable source in the field of mechanical engineering. **[*7]** Its expert, Dr. Eagar, contends that Dr. Kossowsky misapplied the standard. That argument, however, goes to the weight to be given to the opinion, a matter that, as Bombardier argues, Tronair's attorneys can explore during their cross-examination of Dr. Kossowsky.

IV. CONCLUSION

Because none of Tronair's arguments succeeds in establishing that the methods employed by Dr. Kossowsky are scientifically unreliable, the Court **DENIES** Tronair's motion (dckt. no. 63).

It is so **ORDERED.**

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: January 21, 2005.

/s/ Irene M. Keeley

IRENE M. KEELEY

UNITED STATES DISTRICT JUDGE
