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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YAMAHA RHINO LITIGATION	G052182 (JCCP No. 4561) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Reversed in part and affirmed in part.

Coleman & Balogh and Benjamin L. Coleman for Plaintiff and Appellant Elizabeth Ault-Smietana.

Bowman and Brooke, Paul G. Cereghini and Lawrence R. Ramsey for Defendants and Respondents Yamaha Motor Corporation, U.S.A., Yamaha Motor Manufacturing Corporation of America, and Yamaha Motor Company, Ltd..

* * *

In this strict products liability action, plaintiff and appellant Elizabeth Ault-Smietana sued for injuries she suffered in an accident involving an off-road vehicle designed by defendants and respondents Yamaha Motor Corporation, U.S.A., Yamaha Motor Manufacturing Corporation of America, and Yamaha Motor Company, Ltd. (collectively, Yamaha). Ault-Smietana broke her leg when she extended it outside of the vehicle to brace herself as it tipped over during a turn. The jury returned a verdict in Yamaha's favor and Ault-Smietana appeals.

Ault-Smietana first contends the trial court erred in refusing to instruct the jury on the consumer expectations test for design defect claims because the vehicle's ordinary users did not expect it to tip over during reasonable turns on level ground. We agree the instruction was required because substantial evidence supports Ault-Smietana's version of how the accident occurred and how the vehicle's ordinary users expected it to perform. We disagree, however, that the instruction was required on Ault-Smietana's alternative theory that the vehicle's design was defective because it lacked doors or other safeguards to prevent a passenger from extending his or her leg outside the vehicle during an accident. Ault-Smietana cited no evidence to show and failed to explain why a consumer expectations test instruction was required on this second theory.

Ault-Smietana also contends the trial court erred in granting nonsuit on her claim Yamaha failed to adequately warn about the vehicle's propensity to tip over during reasonable turns on flat ground. The trial court granted nonsuit on this claim because it found the evidence established that neither Ault-Smietana nor her husband reviewed the safety instructions and warnings included in the owner's manual and the labels affixed to the vehicle, and therefore any alleged inadequacy in those warnings did not constitute a substantial factor in causing the accident as a matter of law. Our independent review of the record confirms the absence of any evidence to support the required causation element on Ault-Smietana's failure to warn claim.

Ault-Smietana next contends the trial court erred by sustaining several objections to her trial attorney's closing argument. We conclude the court did not abuse its discretion in sustaining the majority of the objections to counsel's argument because he cited facts that were not in evidence and invited the jury to draw unsupported inferences. Moreover, the court's error in sustaining another objection was not prejudicial.

Finally, Ault-Smietana contends the trial court erred in granting Yamaha's motion to exclude her expert's testimony about two of the vehicle's features that may have contributed to the accident. We find no abuse of discretion because the court allowed the expert to testify about one of the allegedly defective features, and properly excluded the expert's opinion about another possible defect because the deposition testimony by Ault-Smietana's expert established no factual basis to support the expert's opinion.

We reverse the judgment and remand for a new trial on Ault-Smietana's design defect claim, but affirm the judgment on all other claims.

I

FACTS AND PROCEDURAL HISTORY

Ault-Smietana and her husband were off-road enthusiasts who owned several off-road vehicles. Ault-Smietana's husband had years of experience riding and driving a wide variety of off-road vehicles. The vehicle at issue is a 2007 Yamaha Rhino 660 SE, which is an off-road utility task vehicle, or UTV. The Rhino is different than an all-terrain vehicle, or ATV, which essentially is a four-wheel motorcycle that the operator rides by straddling the machine and controlling it with a hand throttle and brakes. The Rhino is similar to a golf cart. The operator rides inside the Rhino, sits in a seat, and controls it with a steering wheel and foot pedals for the gas and brakes. A stock Rhino has a passenger seat, a roll cage covering the driver and passenger seats, and a small bed

in the back. Yamaha designed the Rhino without doors to provide an open-air experience and with more clearance and a narrower wheelbase than its competitors to make the vehicle "more terrainable," meaning it could operate on a variety of terrains and provide more access to the woods and hills.

Ault-Smietana's husband purchased the Rhino at issue from a friend a couple months before the accident. The parties presented conflicting evidence regarding the degree to which the vehicle had been modified from its stock condition. Ault-Smietana's witnesses testified the Rhino essentially was in stock condition when the accident occurred. Yamaha's witnesses testified the Rhino had undergone extensive modifications, including the addition of a second row of seats in the back, and a larger roll cage that covered all four seats and lacked the factory warning labels and handhold for the passenger seat. Yamaha's witnesses also claimed the Rhino had new front seats that eliminated the factory hip restraints and employed a different type of seat belt, aftermarket tires, and an aftermarket stereo system that included a large speaker on the passenger side floorboard that altered the passenger's foot placement. Yamaha's evidence also showed the warning and safety labels on the dashboard area might have been removed before the accident.

In March 2010, Ault-Smietana, her husband, their children, and some friends took a weeklong camping trip to the Imperial Sand Dunes Recreation Area near Glamis, California. They frequently used their off-road vehicles in the desert sand dunes, and they brought the Rhino with them on this trip. The Glamis campground is a maintained, flat gravel area where visitors park their motorhomes, campers, and off-road vehicles. A natural desert landscape surrounds the campsite and provides an expansive area for campers to ride or drive their off-road vehicles. The landscape includes undulating terrain with dips and mounds, various types and sizes of bushes and desert plants, and large sand dunes in some locations.

Near the end of their trip, Ault-Smietana and her husband went for a ride in the Rhino with Ault-Smietana's husband driving. They employed the "buddy system," which required any ride to include two vehicles in case anything happened. On this ride, the couple's friend, Andy Trent, accompanied them in a separate vehicle. Ault-Smietana and her husband both testified Trent was alone in his vehicle, but Trent's 17-year-old son testified he was with his father and witnessed the accident. The record also contains conflicting evidence on where and how the accident happened.

Ault-Smietana's husband testified they were traveling in the campground on flat terrain with gravel and a little sand as they headed toward some nearby sand dunes. They were in front of Trent when Ault-Smietana's husband looked back and noticed Trent had turned around and was heading in a different direction. According to Ault-Smietana's husband, he was driving about 15 miles per hour when he took his foot off the gas pedal and began a gentle left hand turn to circle back and check on Trent. As Ault-Smietana's husband began his turn, he claims the two wheels on the driver's side lifted off the ground and the vehicle began tipping toward Ault-Smietana's side. Feeling the Rhino start to tip, Ault-Smietana stuck her right leg out of the vehicle to brace herself and broke her leg below the knee as it either hit the ground or was crushed by the vehicle. Ault-Smietana's husband testified that he immediately started to counter steer and put his foot back on the gas to prevent the Rhino from tipping over on to Ault-Smietana's side. He claims this maneuver prevented the Rhino from tipping all the way over onto Ault-Smietana's side, and instead shifted the vehicle's weight to his side and caused it to tip over 90 degrees before coming to rest on the driver's side with the vehicle's wheels off the ground.

No other witness testified the accident occurred in the campground despite the larger number of campers present. Although Ault-Smietana generally testified the accident occurred as her husband described, she claimed they "were quite a ways away" from the campground when the accident occurred. According to Ault-Smietana, they

were in "normal desert style terrain" that was "nice and flat" with lots of dirt and smaller rocks.

Trent's son testified the accident occurred well outside the campground in the small dunes where there were undulations from the mounds of sand and bushes. Trent's son observed Ault-Smietana's husband drive between two small dunes at approximately 15 to 25 miles per hour when he made a "very tight" left turn and caused the Rhino's driver-side wheels to go up onto the side of a small dune. The combination of the tight turn and the dune's slope caused the Rhino to tip over toward the passenger side and come to rest on another dune at an approximately 45 degree angle; the dune's slope prevented the Rhino from tipping over a complete 90 degrees.

Yamaha's accident reconstructionist testified the accident likely occurred as Trent's son described because the reconstructionist was unable to reproduce the accident in the manner described by Ault-Smietana's husband. Yamaha's expert testified it was not possible for the Rhino to tip over far enough to Ault-Smietana's side for her to injure her leg on flat ground, and then have her husband counter steer and roll the Rhino over to his side of the vehicle. Once the vehicle tipped far enough for Ault-Smietana to injure her leg, the laws of physics required the Rhino to continue tipping to that side and no amount of counter steer or acceleration could cause it to tip over to the driver's side.

Ault-Smietana's broken leg never healed properly. Eventually, an infection and other complications required doctors to amputate her leg approximately six inches below her knee. Ault-Smietana's operative third amended complaint alleged a strict products liability claim based on theories of design defect and failure to warn, and included a claim for exemplary damages.[1]

[1] Ault-Smietana's complaint also alleged a claim for general negligence, but she dismissed that claim during trial and it is not at issue on appeal.

At trial, Ault-Smietana argued the Rhino's design was defective because (1) its high ground clearance and narrow track width created a high center of gravity that made the vehicle dangerously unstable even in low speed turns on flat terrain, and (2) it lacked adequate safeguards to protect users in the event it tipped over, such as doors to keep the user's feet and legs inside the vehicle. Ault-Smietana also presented evidence to show Yamaha had notice of the Rhino's propensity to tip over during low speed turns on flat terrain because Yamaha began receiving complaints from dealers and users almost immediately upon the vehicle's release. Yamaha presented expert engineering testimony that it safely designed the Rhino, and that stability was one of several interrelated factors that must be balanced in designing an off-road vehicle like the Rhino. Other factors included maneuverability and controllability. Yamaha's expert testified he conducted numerous experiments with the Rhino and he could not duplicate the tip over Ault-Smietana's husband described.

At the start of trial, the court granted Yamaha's motions in limine to exclude testimony by Ault-Smietana's expert that the Rhino was defective because it lacked a rear differential and had a "jackrabbit" throttle that caused the vehicle to accelerate at a rate disproportionate to the pressure applied to the gas pedal. The court concluded the expert lacked a factual basis to support his opinion these factors contributed to the accident. After the close of evidence, the trial court also granted Yamaha's nonsuit motion on Ault-Smietana's failure to warn claim. The court found the evidence insufficient because Ault-Smietana and her husband testified they did not review the warnings that Yamaha provided, and therefore any inadequacy in the warnings did not cause the accident.[2]

[2] The trial court also granted Yamaha's nonsuit motion on Ault-Smietana's punitive damages claim, and she does not challenge that ruling on appeal.

The trial court instructed the jury on Ault-Smietana's design defect claim based solely on the risk-benefit test. The court refused Ault-Smietana's request to instruct the jury on the consumer expectations test because the court concluded the facts and circumstances surrounding the accident and Ault-Smietana's claim did not support the instruction. The jury returned a general verdict in Yamaha's favor without any findings to explain how it resolved the numerous conflicts in the evidence. The court entered judgment on the verdict and this appeal followed after Ault-Smietana unsuccessfully moved for a new trial.

II

DISCUSSION

A. *The Trial Court Erred in Refusing to Instruct the Jury on the Consumer Expectations Test*

1. Governing Legal Principles on Design Defect Claims

"A manufacturer may be held strictly liable for placing a defective product on the market if the plaintiff's injury results from a reasonably foreseeable use of the product. [Citations.] Products liability may be premised upon a theory of design defect, manufacturing defect, or failure to warn." (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1231 (*Saller*).)

"Strict liability[, however,] is not absolute liability. [Citation.] A manufacturer is not an insurer for all injuries that may result from the use of its product; it is liable for injuries caused by a product *defect*. . . . Strict product liability seeks to hold manufacturers (and others in the stream of commerce) accountable when there is 'something wrong' with the product." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 (*Johnson*); see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 568, fn. 5 (*Soule*).)

"A design defect . . . exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 (*McCabe*).) "Defective design may be established under two theories: (1) the consumer expectations test, which asks whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner; or (2) the risk/benefit test, which asks whether the benefits of the challenged design outweigh the risk of danger inherent in the design." (*Saller*, *supra*, 187 Cal.App.4th at pp. 1231-1232; see *Soule*, *supra*, 8 Cal.4th at pp. 566-567.) "A claim of design defect may be proved under the consumer expectation theory (if applicable) or the risk benefit theory. The tests are not mutually exclusive, and a plaintiff may proceed under either *or both*." (*McCabe*, at p. 1126, italics added.)

"The consumer expectations test, which is 'rooted in theories of warranty, recognizes that implicit in a product's presence on the market is a representation that it is fit to do safely the job for which it was intended.'" (*Johnson*, *supra*, 240 Cal.App.4th at p. 32.) "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.'" (*Saller*, *supra*, 187 Cal.App.4th at p. 1232; see *Soule*, *supra*, 8 Cal.4th at p. 566.)

"If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' [citation], leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence."'" (*McCabe*, *supra*, 100 Cal.App.4th at p. 1120; see *Johnson*, *supra*, 240 Cal.App.4th at p. 32.) "Where a product is in such 'specialized use' that the general public is not familiar with its safety characteristics, a

manufacturer may still be liable if 'the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who do use it.'" (*Johnson*, at p. 32.)

"[T]he inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.'" (*Saller*, *supra*, 187 Cal.App.4th at p. 1232; see *Soule*, *supra*, 8 Cal.4th at p. 569.) "The critical question is whether the '*circumstances of the product's failure* permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.'" (*McCabe*, *supra*, 100 Cal.App.4th at p. 1122; see *Soule*, *supra*, 8 Cal.4th at pp. 568-569.)

"On the other hand, 'the jury may not be left free to find a violation of the ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the [risk/benefit test].' [Citation.] The consumer expectations test is inappropriate 'when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit,' since 'in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not.'" (*Saller*, *supra*, 187 Cal.App.4th at p. 1233; see *Soule*, *supra*, 8 Cal.4th at pp. 562-563, 568.)

"Under [the risk/benefit] test, products that meet ordinary consumer expectations nevertheless may be defective if the design embodies an '"excessive preventable danger."' [Citations.] To prove a defect under this test, a plaintiff need only demonstrate that the design proximately caused the injuries. Once proximate cause is demonstrated, the burden shifts to the defendant to establish that the benefits of the

challenged design, when balanced against such factors as the feasibility and cost of alternative designs, outweigh its inherent risk of harm." (*McCabe*, *supra*, 100 Cal.App.4th at pp. 1120-1121.) "In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design." (*Saller*, *supra*, 187 Cal.App.4th at p. 1233.)

"Whether a plaintiff may proceed under the consumer expectation test or whether design defect must be assessed solely under the risk-benefit test is dependent upon the particular facts in each case. [Citation.] Because '"'[i]n many situations . . . the consumer . . . would have *no idea* how safe the product could be made,'"' the consumer expectation test is 'reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions and is thus defective *regardless of expert opinion about the merits of the design*.' [Citation.] For example, 'the ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions.'" (*McCabe*, *supra*, 100 Cal.App.4th at p. 1121; see *Soule*, *supra*, 8 Cal.4th at pp. 566-567 & fn. 3.)

2. Substantial Evidence Supported an Instruction on the Consumer Expectations Test

Ault-Smietana contends the trial court erred in refusing her request to instruct the jury under the consumer expectations test because the everyday experience of the Rhino's ordinary users would allow them to form an expectation about whether the Rhino would tip over during a gentle turn at 15 miles per hour on level terrain.[3] We

[3] Ault-Smietana asked the trial court to instruct the jury with CACI No. 1203, which states as follows: "[*Name of plaintiff*] claims the [*product*]'s design was

agree a consumer expectations test instruction was required on this instability theory, but disagree an instruction was required on Ault-Smietana's alternative theory concerning the lack of doors or other sufficient safeguards.

"Upon request, a party in a civil case is entitled to correct, non-argumentative jury instructions on every theory of the case that is supported by substantial evidence. [Citations.] The trial court has no duty to instruct on its own motion, nor is it obligated to modify proposed instructions to make them complete or correct." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519; 526 (*Maureen K.*); see *Soule*, *supra*, 8 Cal.4th at p. 572.) """""A reviewing court must review the evidence [in the light] most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented."""""" (*DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 240 (*DeWitt*).)

Whether the evidence so viewed required the trial court to give a particular instruction is a question of law that we review de novo. (*Maureen K.*, *supra*, 215 Cal.App.4th at p. 526; *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845.) Under the de novo standard, we review the trial court's ruling, not its rationale. (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 889, fn. 5; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.)

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defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*]; [¶] 2. That the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way; [¶] 3. That [*name of plaintiff*] was harmed; and [¶] 4. That the [*product*]'s failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm."

In *Soule*, the Supreme Court concluded the trial court erred by instructing the jury on the consumer expectations test because the product's ordinary users did not have any reasonable expectation about its minimum safety under the "esoteric circumstances" of the product's alleged failure. (*Soule, supra*, 8 Cal.4th at p. 570.) There, the plaintiff suffered injuries in an offset, head-on collision that caused the left front wheel assembly of her car to tear loose and collapse the driver-side floorboard into the passenger compartment. The plaintiff sued her car's manufacturer for strict products liability, claiming the manufacturer defectively designed the car because the location and configuration of the front wheel assembly in relation to other components allowed the assembly to collapse the floorboard and resulted in more serious injuries than the plaintiff otherwise would have suffered. (*Id*. at pp. 556-557.)

The *Soule* court explained the evidence did not support a consumer expectations test instruction because "[a]n ordinary consumer of automobiles cannot reasonably expect that a car's frame, suspension, or interior will be designed to remain intact in any and all accidents. Nor would ordinary experience and understanding inform such a consumer how safely an automobile's design should perform under the esoteric circumstances of the collision at issue here." (*Soule, supra,* 8 Cal.4th at pp. 568, 570.) The court further elaborated, "Plaintiff's theory of design defect was one of technical and mechanical detail. It sought to examine the precise behavior of several obscure components of her car under the complex circumstances of a particular accident. . . . [¶] . . . Indeed, both parties assumed that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters. Therefore, injection of ordinary consumer expectations into the design defect equation was improper." (*Id*. at p. 570.)

In contrast, the Court of Appeal in *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990 (*Romine*), concluded the trial court properly instructed the jury on the consumer expectations test because the product's ordinary users reasonably had

expectations about its minimum safety under the circumstances at issue. (*Id*. at p. 1004.) There, the plaintiff was seriously injured when the driver's seat in her vehicle collapsed rearward during a rear-end collision, forcing the plaintiff to slide up the seat and strike her head and neck on her vehicle's back seat. The plaintiff sued both the designer and manufacturer of her vehicle's seat for strict products liability. (*Id*. at pp. 994-996.) The *Romine* court concluded the evidence supported a consumer expectations test instruction because "[r]ear-end collisions are common and within the average consumer's ordinary experience. Consumers have expectations about whether a vehicle's driver's seat will collapse rearward in a rear-end collision, regardless of the speed of the collision." (*Id*. at p. 1004.)

Here, Ault-Smietana argued two separate design defects caused her injuries. Her principal theory was that the Rhino's design rendered it dangerously unstable because its high ground clearance and narrow track width created a high center of gravity that made the Rhino prone to tipping over even during ordinary turns on level ground. Secondarily, Ault-Smietana argued the Rhino's design lacked sufficient safeguards to protect passengers if it tipped over, such as doors to prevent passengers from sticking their legs out of the vehicle.

The ordinary users of Rhinos and other off-road vehicles have the experience and knowledge to form basic assumptions about the safe operation and use of the vehicles. They understand the vehicles may tip or roll over if the driver makes a sharp turn at an inappropriately high speed, or a quick turn on uneven or unstable ground. The Rhino's users know the vehicle is designed with a roll bar or cage because the vehicle potentially could tip or roll over when used in a reasonably foreseeable manner. The users, however, reasonably expect the vehicles will *not* tip over during a gentle turn at 15 miles per hour on level, firm terrain. That is one of the most fundamental operations users can perform with these vehicles, and they expect to be able to do so safely without tipping over.

A tip over under those conditions is more analogous to the collapsing seat in *Romine* than to the front wheel assembly tearing loose and collapsing the floorboard in *Soule*. Ault-Smietana's instability defect theory does not require technical or mechanical detail (see *Soule*, *supra*, 8 Cal.4th at p. 570), a complicated analysis of how the Rhino's various components interacted under the esoteric circumstances of a complicated accident (see *ibid*.; *Romine, supra*, 224 Cal.App.4th at p. 1002), or a careful assessment of the feasibility, practicality, risks, and benefits of other designs (see *Saller*, *supra*, 187 Cal.App.4th at p. 1233). Instead, the theory simply requires an examination of the specific facts surrounding the accident at issue, and a determination whether the Rhino's ordinary users would expect it to tip over in that specific situation. The theory therefore presented a claim based on the consumer expectations test. (*Soule*, at pp. 568-569; *McCabe, supra*, 100 Cal.App.4th at p. 1122 [same].)

Moreover, substantial evidence supported giving a consumer expectations test instruction on this theory. Ault-Smietana and her husband testified the accident occurred when he took his foot off the gas pedal, made a gentle left turn on level ground at approximately 15 miles per hour, the Rhino tipped over toward Ault-Smietana's side of the vehicle, and she put her leg out to brace herself. Yamaha's product liability manager testified the Rhino's ordinary users would not expect the vehicle to tip over while making a "gentle turn" on "flat terrain" at "12 to 15 miles an hour." This evidence is sufficient to support an instruction on the consumer expectations test. (See *McCabe, supra*, 100 Cal.App.4th at p. 1120.)

Yamaha disputed Ault-Smietana's version of the accident and presented testimony to support a much different version of how and where the accident occurred. The governing legal standard, however, required the trial court, and requires us, to view the evidence in the light most favorable to Ault-Smietana. (*DeWitt, supra*, 204 Cal.App.4th at p. 240.) Ault-Smietana's evidence supports an instruction on the

consumer expectations test even if Yamaha's evidence describes a version of the accident that does not support the instruction.

Yamaha contends the trial court properly refused to instruct the jury on the consumer expectations test because the Rhino is a complex product, and therefore the "test is presumptively unsuitable to evaluate its design." Yamaha misapplies the governing legal standard. Courts determine whether the consumer expectations test applies by examining the product in the factual context of the specific failure or accident at issue, not in isolation. (*Soule*, *supra*, 8 Cal.4th at pp. 568-569; *McCabe*, *supra*, 100 Cal.App.4th at p. 1122.) Thus, the circumstances under which the product failed determine whether the consumer expectations test applies, not the product's complexity.

The *Romine* court explained the consumer expectations test often is not applicable to cases concerning design defects in automobiles because complex technical matters usually are involved, but the court nonetheless determined the test applied because the design defect theory that an automobile's seat should not collapse rearward in a rear-end collision did not require evidence on technical matters. Ordinary consumers have reasonable expectations about whether a vehicle's seat should collapse rearward in that situation without considering the overall complexity of an automobile. (*Romine*, *supra*, 224 Cal.App.4th at pp. 1002-1004.) Likewise, evidence on technical matters is not required to establish that the Rhino's ordinary users reasonably expect the vehicle will not tip over during a gentle turn on level ground.

Yamaha also contends the consumer expectations test did not apply because "both sides recognized that expert testimony was necessary to illuminate complicated and unfamiliar design considerations underlying [Ault-Smietana's] stability defect theory." We disagree. Although both sides presented expert testimony about a variety of design and engineering considerations for the Rhino, including the center of gravity, ground clearance, track width, and various trade-offs affecting the design of an off-road vehicle, that evidence did not make the consumer expectations test inapplicable.

The consumer expectations test only requires evidence concerning the plaintiff's use of the product, the circumstances surrounding the injury, and the product's objective features that have a bearing on an evaluation of its safety. (See *Saller*, *supra*, 187 Cal.App.4th at p. 1232; *McCabe*, *supra*, 100 Cal.App.4th at p. 1120.) Ault-Smietana presented sufficient evidence on these matters to require a jury instruction on the consumer expectations test. The expert testimony on which Yamaha focuses relates to the alternative risk/benefit test, which allows a jury to find a product's design defective when the design "embodies an '"excessive preventable danger,"'" even if the product meets ordinary consumer expectations. (*McCabe*, at pp. 1120-1121; see *Saller*, at p. 1233.)

Ault-Smietana may prove her design defect claim under the consumer expectations test, the risk/benefit test, or both. The tests are not mutually exclusive and which test or tests apply depends on the facts of the particular product failure at issue. (*McCabe*, *supra*, 100 Cal.App.4th at pp. 1121, 1126.) Here, the evidence supported a jury instruction on both tests, and the existence of evidence to support an instruction on one does not render an instruction on the other inappropriate or unnecessary.

The *McCabe* court explained how a trial court should proceed when the evidence supports both tests: "In a jury case, the trial court must initially determine, as a question of foundation and in the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. [Citations.] If the court concludes it is not, no consumer expectation instruction should be given. [Citation.] If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case and to disregard the evidence about consumer expectations unless the jury finds that the test is

applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner." (*McCabe, supra,* 100 Cal.App.4th at p. 1125, fn. 7; see *Saller, supra,* 187 Cal.App.4th at pp. 1233-1234.) If the jury finds the consumer expectations test is not applicable or is not satisfied, then the jury must consider the product under the risk/benefit test. (See *McCabe,* at pp. 1126.)

Here, the evidence supported both instructions. If the jury accepted Ault-Smietana's version of the accident, then it could proceed to decide whether the Rhino was defective under the consumer expectations test. On the other hand, if the jury accepted Yamaha's version of the accident or otherwise determined the Rhino was not defective under the consumer expectations test, then the jury could determine whether the Rhino was defective under the risk/benefit test. The trial court erred by denying the jury the opportunity to decide which test applied based on how it resolved the evidentiary conflict.[4]

Next, Yamaha contends any error the trial court committed in refusing to instruct on the consumer expectations test was harmless because the court did not prevent Ault-Smietana from presenting any evidence on that theory, the court properly instructed

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[4] Both Yamaha and the trial court suggest the consumer expectations test did not apply because Ault-Smietana's Rhino had been substantially modified before the accident. This suggestion does not make the consumer expectations test inapplicable for two reasons. First, there was conflicting evidence about whether and to what extent the Rhino was modified, and therefore we must view that evidence in the light most favorable to Ault-Smietana when deciding whether a consumer expectations test instruction was required. (*DeWitt, supra,* 204 Cal.App.4th at p. 240.) Second, the modification or alteration of a product is an affirmative defense; it does not make the consumer expectations test inapplicable. Modification is a complete defense when the modification is the sole cause of the injuries. (See, e.g., *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56; CACI No. 1245.) When the modification only contributes to the injuries it is evaluated under comparative fault principles. (See, e.g., *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 (*Daly*); *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17-19; CACI No. 1207A.)

the jury on the alternative risk/benefit test, and the risk/benefit test allegedly places a lesser burden of proof on the injured plaintiff than the consumer expectations test. We disagree and find the error was prejudicial.

"A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.] . . . [¶] Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury." (*Soule, supra*, 8 Cal.4th at p. 580.)

Here, it is probable the court's refusal to instruct on the consumer expectations test prejudicially affected the verdict. The consumer expectations test and the risk/benefit test are alternative ways of establishing a design defect; they are not mutually exclusive nor are they defenses to one another. (*McCabe*, *supra*, 100 Cal.App.4th at p. 1121.) The jury therefore could have found the Rhino was defective under the consumer expectations test even if the jury concluded the Rhino was not defective under the risk/benefit test. (*Ibid.*) If the jury resolved the conflict in the evidence about where and how the accident occurred in Ault-Smietana's favor, it is probable the jury would have found the Rhino was defective under the consumer expectations test because the Rhino's ordinary user would not expect it to tip over making the turn Ault-Smietana and her husband described. The sharp conflict in the evidence on how the accident occurred prevents us from predicting what the jury's verdict would have been if it was properly instructed, and therefore we conclude the error was prejudicial. (See *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 773 [degree of conflict in evidence important factor in determining whether instructional error prejudicial]; *Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d

1101, 1107-1108 [instructional error prejudicial when sharply conflicting evidence rendered it impossible to determine how jury would resolve issues under proper instructions].)

Having determined the trial court erred in refusing a consumer expectations test instruction on Ault-Smietana's instability design defect theory, we next consider whether the court erred in refusing that instruction on Ault-Smietana's second design defect theory—the Rhino lacked doors or other sufficient safeguards to protect passengers in the event it tipped over. We conclude Ault-Smietana forfeited any claim the consumer expectations test applied to this theory. Her briefs acknowledge this separate design defect theory, but they fail to explain why the consumer expectations test applies. (*C.M. v. M.C.* (2017) 7 Cal.App.5th 1188, 1200, fn. 5 [appellant forfeited claim of error because "she has not provided any argument or citations to authority or to the record in support"].)

Moreover, our review of the record supports the trial court's determination the risk/benefit test applies to this theory. Not only did Ault-Smietana fail to present any evidence on what the Rhino's consumers expected concerning safeguards in the event it tipped over, but also Yamaha presented testimony showing the decision whether to include doors on the Rhino required the balancing of several competing factors that must be considered under the risk/benefit test. For example, although a door would keep a passenger from extending a leg out during a tip over, it also would encourage passengers not to wear a seatbelt or helmet and to rest their hands and arms on the door, which can lead to other injuries. On this record, the risk/benefit test was the only proper instruction on Ault-Smietana's second defect theory.

Finally, because the consumer expectations test did not apply to Ault-Smietana's lack of adequate safeguards theory, Yamaha contends Ault-Smietana waived the right to a consumer expectations test instruction on her instability theory by failing to request a separate consumer expectations test instruction limited to that theory.

Not so. Ault-Smietana urged the trial court to apply the consumer expectations test to all of her theories, but the trial court concluded the test did not apply to any of her theories. Ault-Smietana was not required to make a second request for the instruction limited to her instability theory when the court had ruled the test did not apply at all. She made her request and thereby preserved the issue for appeal.[5]

B. *The Trial Court Did Not Err by Granting Nonsuit on Ault-Smietana's Failure to Warn Claim*

Ault-Smietana contends the trial court erred in granting nonsuit on her claim that Yamaha failed to adequately warn consumers about the Rhino's propensity to tip over during gentle turns at moderate speed on flat ground. The court granted nonsuit because it concluded Ault-Smietana failed to present evidence showing either she or her husband reviewed the warnings Yamaha provided, and therefore Ault-Smietana failed to establish any alleged inadequacy in those warnings was a substantial factor in causing her injuries. According to Ault-Smietana, the court erred because she presented sufficient evidence to submit the causation issue to the jury. We disagree.

A motion for nonsuit "has the effect of a demurrer to the evidence: It concedes the truth of the facts proved and contends that those facts are not sufficient as a matter of law to sustain the plaintiff's case." (*Alpert v. Villa Romano Homeowners Assn.*

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[5] Citing *Saller*, Ault-Smietana contends the trial court's failure to give a consumer expectations test instruction "require[s]" an unqualified reversal of the judgment and a retrial on all claims. Not so. We have the authority to order a retrial on a limited issue if that issue can be separately tried without any confusion or uncertainty. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776.) The court's failure to instruct on the consumer expectations test requires a retrial on Ault-Smietana's design defect claim, but she fails to explain how that error requires a retrial on her failure to warn claim. As explained below, the trial court properly granted Yamaha nonsuit on that claim because the evidence showed Ault-Smietana and her husband did not review the Rhino's safety warnings, and therefore any defect in those warnings did not cause her injuries. The lack of an instruction on the consumer expectations test had no bearing on that claim.

(2000) 81 Cal.App.4th 1320, 1328.) "'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . ."'" (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214.) Nonsuit is appropriate when the "'plaintiff's proof raises nothing more than speculation, suspicion, or conjecture.'" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124.) "We independently review the ruling on a motion for nonsuit, guided by the same rules that govern the trial court." (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1296; see *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060 ["We review an order granting a nonsuit de novo"].)

"To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. [Citation.] The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 (*Huitt*); see *Motus v. Pfizer Inc.* (C.D. Cal. 2001) 196 F.Supp.2d 984, 991 (*Motus*) [applying California law].)

Huitt involved two plumbers who sued the gas company for injuries they suffered when natural gas accumulated in a water heater closet and ignited as they tried to light the water heater's pilot light. Immediately before the accident, the plumbers had bled the accumulated air out of the newly installed steel gas lines. The plumbers alleged the gas company was strictly liable for failing to warn that new steel gas pipes absorbed the odorant added to natural gas and thereby prevented users from detecting the accumulation of gas. According to the plumbers, they would not have bled the lines into

the confined closet if the gas company had warned them about the possibility of odor fade. The jury returned a verdict in the plumbers' favor and the gas company appealed. (*Huitt, supra*, 188 Cal.App.4th at p. 1588.)

The Court of Appeal reversed, concluding the plumbers failed to present evidence showing the gas company's failure to warn about odor fade caused the accident. (*Huitt, supra*, 188 Cal.App.4th at pp. 1600, 1602, 1603.) The undisputed evidence established the plumbers failed to read any of the labels on the water heater, the installation manual, the lighting instructions, or any other materials about the water heater or natural gas. (*Id*. at pp. 1599-1600.) Consequently, neither the absence of a warning about order fade nor any other inadequacy in the warnings caused the accident as a matter of law because the evidence showed the plumbers would not have discovered any warning the gas company provided about odor fade. (*Id*. at pp. 1602-1603.)

Similarly, in *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, the Supreme Court affirmed the trial court's summary judgment on a failure to warn claim because the evidence showed the plaintiff could not establish causation. (*Id*. at p. 556.) The plaintiff was a minor who developed Reye's syndrome after taking the defendant's nonprescription aspirin. The plaintiff alleged the defendant failed to warn that a child could develop Reye's syndrome from taking defendant's aspirin while recovering from certain viral illnesses. The *Ramirez* court explained the plaintiff could not establish causation as a matter of law because the evidence showed the "[p]laintiff's mother, who administered the [aspirin] to [the] plaintiff, neither read nor obtained translation of the product labeling. Thus, there is no conceivable causal connection between the representations or omissions that accompanied the product and [the] plaintiff's injury." (*Id*. at pp. 555-556.)

Here, the evidence likewise reveals that Ault-Smietana's failure to warn claim fails as a matter of law because the evidence shows neither she nor her husband read any of the safety instructions or warnings included in the Rhino's owner's manual or

the safety labels affixed to the vehicle. Consequently, Yamaha's failure to include a warning in these materials about the possibility the vehicle could tip over could not have caused the accident.

Ault-Smietana contends her testimony was sufficient to require the trial court to submit the claim to the jury because she testified she "may have" read the safety labels on other off-road vehicles. That is not sufficient. Ault-Smietana does not cite any evidence to show she read either the owner's manual or the safety labels for her or any other Rhino. Whether she read the manual or labels for other vehicles is irrelevant. The determining factor here is Ault-Smietana's testimony that it did not matter what Yamaha put in its owner's manual or the labels affixed to the Rhino because she did not read them. Ault-Smietana also ignores her testimony that she believed users should not have to read and comply with available safety instructions and warnings.

Ault-Smietana next contends the evidence supported submitting this claim to the jury because she testified she relied on her husband to provide safety instructions on their off-road vehicles, and he testified he may not have read the warning labels on the Rhino, but he had seen lots of warning labels during his many years of off-roading, and "you look at one, you've seen them all." That too is not sufficient. To show a deficiency in the Rhino's warnings caused the accident, Ault-Smietana had to show either she or her husband reviewed the Rhino's warnings, not the warnings from another vehicle. Moreover, Ault-Smietana's husband testified he did not read the safety instructions or warnings in the Rhino's owner's manual or the labels affixed to the vehicle.[6]

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[6] The clear evidence establishing Ault-Smietana and her husband did not read the owner's manual and safety labels for the Rhino distinguish this case from *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, on which Ault-Smietana relies. *Conte* reversed a summary judgment in favor of a drug manufacturer on a failure to warn claim. The trial court concluded the plaintiff could not establish causation as a matter of law because the doctor who prescribed the plaintiff's drug submitted a declaration stating he did not review or rely on any warnings or other information from the manufacturer when prescribing the drug for the plaintiff. The Court of Appeal reversed because the doctor's

Ault-Smietana also argues the trial court should have submitted this claim to the jury even without testimony that she or her husband reviewed the warnings Yamaha provided because her safety expert testified Ault-Smietana's husband would have learned about any tip over warning Yamaha placed on the vehicle based on his experience with off-road vehicles and his interaction with other users. Not so. To establish other Rhino owners would have informed Ault-Smietana's husband about any warning Yamaha provided, Ault-Smietana had to present evidence showing her husband talked with other users about Yamaha's warnings. His generic experience with off-road vehicles is not sufficient. (*Huitt, supra,* 188 Cal.App.4th at pp. 1598-1599 [plaintiff must show specific warning would have reached him or her].)

Next, Ault-Smietana contends the evidence establishes causation because her husband testified he would not have purchased or driven the Rhino if he had known it could tip over during slow turns on level terrain. The *Huitt* court, however, rejected this same argument because it "confuse[s] *knowledge* with *causation*." (*Huitt, supra,* 188 Cal.App.4th at p. 1597.) As the *Huitt* court explained, "causation . . . requires the plaintiffs to prove that if the [defendant] had issued a warning, they would have acquired the knowledge they lacked. A warning that never reached [the] plaintiffs would not have changed the events that occurred on the day of the accident." (*Ibid.*)

Finally, Ault-Smietana contends we should apply "a relaxed standard for causation" because public policy supports compensating injured consumers in cases involving nonessential products like "pleasure vehicles." In support, Ault-Smietana cites *Dimond v. Caterpillar Tractor Co.* (1976) 65 Cal.App.3d 173 (*Dimond*), where the Court

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declaration conflicted with his deposition testimony stating he probably reviewed the manufacturer's warning and information during his residency training and it was his practice to review and rely on drug manufacturer information when prescribing drugs. The *Conte* court found this conflict created a triable issue of fact. (*Id.* at pp. 98-100.) There is no such conflict in the testimony of Ault-Smietana and her husband when focusing on the Rhino's warnings as opposed to the warnings for other vehicles.

of Appeal concluded the public policy underlying strict products liability supported applying an inference of causation when a plaintiff is unable to provide direct evidence on the issue through no fault of his own.[7]

In *Dimond*, the plaintiff worked in a warehouse where he used a forklift-like machine to move large rolls of paper. After hearing a loud noise, a coworker investigated and found the plaintiff face down on the floor a few feet behind his forklift-like machine. One large roll of paper was on top of the plaintiff across his shoulders and another one was on the ground nearby. The coworker also found a large dent in the machine's overhead cage that was not present when the plaintiff's shift started. No one other than the plaintiff witnessed the accident. The plaintiff sued the forklift-like machine's manufacturer, claiming defects in the machine caused his injuries. (*Dimond, supra,* 65 Cal.App.3d at pp. 177-178.)

The plaintiff testified he could not remember how the accident happened and expert testimony confirmed he suffered from retrograde amnesia. The plaintiff also testified he was concerned he would be injured if a roll of paper fell while he was using the machine because (1) the machine had a warning label that stated the machine's overhead cage offered no protection against heavy or capacity loads, and (2) the machine had an unprotected propane tank that might explode if struck by a falling roll of paper. The trial court granted the manufacturer nonsuit because the plaintiff failed to present direct evidence on how the accident happened, and therefore failed to show any defect in the machine caused his injuries. (*Dimond, supra,* 65 Cal.App.3d at pp. 178-180.)

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[7] Ault-Smietana also relies on a federal district court case from Iowa in which the court applied a presumption that the plaintiff consumer would have heeded all adequate warnings the manufacturer provided. (*Rowson v. Kawasaki Heavy Industries, Ltd.* (N.D. Iowa 1994) 866 F.Supp. 1221, 1239-1240.) That presumption, however, "is not recognized in California." (*Huitt, supra,* 188 Cal.App.4th at p. 1603; see *Motus, supra,* 196 F.Supp.2d at pp. 994-995.)

The Court of Appeal reversed because the evidence supported an inference the plaintiff was in the forklift-like machine when the paper rolls started to fall, and the further inference that "the inadequate and misleading warning [about the overhead cage] or the exposed position of the propane tank, or both, caused him to leave what was in fact a protected place." (*Dimond, supra*, 65 Cal.App.3d at p. 182.) The *Dimond* court explained the plaintiff had gone as far as he could in proving a causal connection between the defects and his injuries, and refusing to draw an inference of causation would allow the manufacturer to escape liability merely because of the fortuitous circumstances that no one else witnessed the accident and the plaintiff's injuries prevented him from remembering the accident. (*Id*. at p. 183.)

Dimond does not apply here, and Ault-Smietana fails to establish any basis for applying "a relaxed standard for causation." Both Ault-Smietana and her husband testified at trial. They explained their version of the facts surrounding the accident and the warnings they read and failed to read. There are no fortuitous or other circumstances that prevented them from reviewing the warnings Yamaha provided and establishing the alleged inadequacy of those warnings caused her injuries. Rather, Ault-Smietana failed to establish causation because she and her husband candidly acknowledged they did not read the warnings Yamaha provided. We find no policy reason for excusing Ault-Smietana from that failure and affirm the trial court's decision granting nonsuit.

C. *The Trial Court Did Not Prejudicially Err by Sustaining Objections to Ault-Smietana's Closing Argument*

Ault-Smietana contends the trial court erred during closing argument by sustaining objections to her trial attorney's argument. The objections related to argument by Ault-Smietana's counsel addressing two topics: (1) complaints of other Rhino tip overs Yamaha received from its dealers and customers, and (2) the credibility of Yamaha's expert witnesses. We discern no abuse of discretion in many of the trial court rulings, and find no prejudice assuming the court erroneously sustained the objections.

"In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. '"'"The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.'"'" [Citations.] "Counsel may vigorously argue his case and is not limited to 'Chesterfieldian politeness.'" [Citations.] "An attorney is permitted to argue all reasonable inferences from the evidence. . . ."'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 (*Cassim*).)

"An attorney who exceeds this wide latitude commits misconduct. For example, '[w]hile a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences.' [Citation.] Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character." (*Cassim*, *supra*, 33 Cal.4th at p. 796; see *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143.)

Just as counsel has wide latitude in making closing argument, "[a] trial court 'is given great latitude in controlling the duration and limiting the scope of closing' argument. [Citation.] It 'may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 743; see *Herring v. New York* (1975) 422 U.S. 853, 862.) We review a trial court's exercise of this broad discretion under the deferential abuse of discretion standard. (*Edwards*, at p. 743.)

The admissibility and proper use of complaints Yamaha received about other Rhino tip overs was a disputed issue at trial. Yamaha moved in limine to exclude all evidence *and argument* concerning other Rhino vehicles that tipped over. In response, Ault-Smietana's counsel explained he did not intend to offer evidence of other incidents

or the number of complaints Yamaha received about Rhinos tipping over. Rather, he simply intended to offer evidence that Yamaha had received complaints of other tip overs to show Yamaha had notice of a potential defect. The trial court therefore granted Yamaha's in limine motion because evidence of specific incidents was not necessary to establish notice. At trial, Ault-Smietana's counsel elicited testimony from Yamaha's product liability manager and consultant that Yamaha had received complaints about Rhinos tipping over during slow turns on flat ground at 12 to 15 miles per hour, but Yamaha was unable to reproduce those events.

During his closing argument, Ault-Smietana's counsel repeatedly referred to complaints about other Rhinos rolling over. For example, he argued, "[Yamaha] started hearing from dealers, consumers and the Yamaha consultant, all say the one problem that was with [the Rhino], is that it would tip over on flat terrain." Similarly, he argued, "there's one little problem" with the Rhino, "according to [Yamaha's consultant,] . . . our clients, and the people complaining[, the Rhino would tip over during turns on level ground at 12 to 15 miles per hour]." Yamaha's counsel objected to these statements as improper argument. The trial court initially overruled the objections, but admonished the jury that counsel's argument was not evidence and it was the jury's role to decide what the evidence showed. As Ault-Smietana's counsel persisted in his references to other tip overs, the court sustained objections and eventually conducted an in camera conference to discuss the issue. The court explained it sustained the objections because Ault-Smietana's counsel treated the questions he had asked witnesses as evidence, while ignoring the witnesses' responses.

We find no abuse of discretion because the trial court reasonably concluded Ault-Smietana's counsel treated evidence of complaints as established facts, rather than simply notice that Yamaha was aware of complaints about the Rhino.[8] (*Granville v.*

[8] Ault-Smietana suggests Yamaha waived any objection to her counsel's argument about other tip overs because Yamaha repeatedly declined the trial court's

Parsons (1968) 259 Cal.App.2d 298, 304 [where evidence admitted for limited purpose, it is improper to refer to it for another purpose during closing argument].) As stated above, counsel "'may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences.'" (*Cassim*, *supra*, 33 Cal.4th at p. 796.)

The trial court's in limine ruling admitted evidence Yamaha had received complaints other Rhinos had tipped over solely to show Yamaha had notice of a potential defect. At closing argument, Ault-Smietana's only remaining claim was for strict products liability based on a design defect theory under the risk/benefit test. Ault-Smietana cited no authority showing how evidence of other complaints offered to show notice is relevant to a design defect claim under the risk/benefit test.

Ault-Smietana contends notice is an issue under the risk/benefit test because it is relevant to two of the factors the jury must balance when applying that test. Specifically, she contends notice is relevant to show the "gravity of the potential harm resulting from the use of the [Rhino]," and the "likelihood that this harm would occur." (See CACI No. 1204.) We disagree. As explained above, the trial court's in limine ruling excluded all evidence and argument regarding other specific incidents, including the number of complaints Yamaha received about tip overs. Ault-Smietana provides no explanation how generic evidence that Yamaha received complaints about tip overs establishes either of these factors.

During closing argument, the trial court also sustained objections to two separate statements Ault-Smietana's counsel made in attacking the credibility of Yamaha's expert witnesses. First, concerning one of Yamaha's engineering experts,

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invitations for a limiting instruction. We disagree. The court's in limine order barred evidence and argument about complaints of other tip overs except to establish notice of a potential defect. Yamaha's decision to decline a limiting instruction waived its right to an instruction explaining to the jury how it could use evidence of prior complaints, but it did not waive the limits imposed by the in limine order.

Ault-Smietana's counsel argued, "I know now why he is, apparently, unlicensed anywhere that he lives. I guess if they get to know him --." Ault-Smietana offers no explanation how the trial court erred in sustaining an objection to this statement, and we find no abuse of discretion. The expert testified the engineering work he performed did not require a license and Ault-Smietana offered no evidence to rebut that testimony. More importantly, counsel's statement implies he had knowledge of some fact that either prevented the expert from being licensed or lead to the revocation or suspension of the expert's license, but no evidence supports that inference. Counsel may not infer he possesses facts not presented to the jury and counsel may not invite the jury to speculate or draw unsupported inferences. (*Cassim*, *supra*, 33 Cal.4th at p. 796.)

Second, Ault-Smietana's counsel made the following statement about all of Yamaha's expert witnesses: "I submit to you that Yamaha, to put [on its expert witnesses], knowing they're under oath, saying the things that they've said – and you think about it, it is against your common sense, every single one of their experts is trying to convince you against your common sense that they're – just because they have Ph.D.'s and they have all the education, that you're going to listen to them. [¶] The thing about it, is to put them on knowing this, Yamaha did, it's a last resort, and the problem to do this – for them to do this is they're assuming – you've got to believe they're assuming that you are gullible enough to believe it. That's – no other reason."

The trial court sustained Yamaha's objection, and in a chambers conference explained this argument improperly suggested the opinions of Yamaha's experts related to matters within the jury's common knowledge, but California law only authorized expert opinion when the subject matter is beyond the jury's common knowledge. The court further explained Ault-Smietana's counsel could attack the basis for an expert's opinion or point out inconsistencies, but having failed to move to exclude the testimony, counsel could not suggest the subject matter of the expert's testimony was within the common knowledge of the jury. Finally, the court also explained the argument was

improper because it suggested Yamaha's counsel was suborning perjury by knowingly having the experts testify falsely.

When trial resumed, the court instructed the jury: "Ladies and Gentlemen. Experts are called to testify in trials because they have something that is beyond the jurors' common experience and common sense. The court has already instructed . . . you do not have to accept an expert's opinion. As with any other witnesses, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part or none of an expert's testimony."

Ault-Smietana contends the trial court erred because her counsel had the right to argue the expert's testimony conflicted with the jury's common sense. We agree. "The permissible scope of closing argument is broad, and the prosecutor's recommendation that the jury should use its common sense when . . . evaluating conflicting expert evidence . . . fell well within the boundaries of permissible argument." (*People v. Richardson* (2008) 43 Cal.4th 959, 1017-1018.)

The error here was trivial and therefore harmless. (See *Cassim*, *supra*, 33 Cal.4th at p. 800.) The trial court's instruction did not prohibit the jury from using its common sense to evaluate the expert's instructions. To the contrary, the instruction affirmed the jury's ability to reject all or any part of an expert's opinion if the jury did not find it useful or believable.

D. *The Trial Court Did Not Err by Granting Yamaha's Motions in Limine to Exclude Certain Opinions by Ault-Smietana's Expert*

Ault-Smietana contends the trial court erred by granting Yamaha's motions in limine to bar her expert from testifying that the Rhino's "jackrabbit" throttle and lack of a rear differential contributed to the accident. The record supports the trial court's ruling and we therefore find no abuse of discretion.

"A motion in limine is made to exclude evidence before it is offered at trial on the ground that the evidence is either irrelevant or subject to discretionary exclusion as

unduly prejudicial." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1480-1481.) We generally review a trial court's ruling on the admissibility of evidence for abuse of discretion and reverse only where the court exceeded the bounds of reason. "In other words, the appellate court will not disturb the trial court's decision unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination." (*Id.* at p. 1481; see *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392 (*Condon-Johnson*).)

Citing *Condon-Johnson*, Ault-Smietana contends we should independently review the trial court's ruling to exclude the opinions of her expert. *Condon-Johnson*, however, recognized that the generally applicable standard of review is abuse of discretion, and the de novo standard of review applies only when the issue presented is a question of law, such as when the admissibility of the evidence turns on the interpretation of a statute. (*Condon-Johnson*, *supra*, 149 Cal.App.4th at p. 1392; see *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.) Here, the trial court's ruling does not turn on the interpretation of a statute or any other question of law, and we therefore apply the abuse of discretion standard.

Yamaha first moved to exclude any testimony by Ault-Smietana's expert that the Rhino had a "jackrabbit" throttle that may have contributed to the accident. A vehicle has a "jackrabbit" throttle when it accelerates disproportionately to the amount of pressure applied to the gas pedal. Yamaha moved to exclude the expert's opinion about a "jackrabbit" throttle as irrelevant because Ault-Smietana's husband testified he took his foot off the gas pedal and was decelerating when the Rhino tipped over. The trial court agreed and granted the motion.

Ault-Smietana does not challenge this rationale for granting the motion. Instead, she now argues her expert also sought to testify more broadly about a "transient throttle" and engine braking that occurs when the driver takes his or her foot off the gas

pedal. According to Ault-Smietana, the deceleration resulting from engine braking may contribute to the Rhino tipping over. The argument lacks merit. Yamaha's motion and the trial court's ruling did not address or in any way prohibit testimony about a transient throttle or engine braking. In fact, Ault-Smietana's expert testified about engine braking as a possible contributing factor to the accident.

Yamaha's second motion sought to exclude testimony by Ault-Smietana's expert that the lack of a rear differential contributed to the accident. A rear differential enhances vehicle stability because it allows the outside wheel to turn faster than the inside wheel during a turn. Yamaha argued the court should exclude the testimony because Ault-Smietana's expert conceded at his deposition that he lacked sufficient information to determine whether the lack of a rear differential contributed to the accident. Specifically, when asked whether it was his "opinion that the fact that the Rhino does not have a rear differential is somehow causative of this accident," Ault-Smietana's expert responded as follows: "With respect that I know what the lack of a rear differential can produce – and that is the potential understeer to neutral or oversteer scenario – and can contribute, but I can't tell you based on these facts that that actually did occur in this event." The trial court agreed with Yamaha and granted the motion.

We discern no abuse of discretion. Although the expert testified the lack of a rear differential could cause steering difficulties and contribute to a tip over, he acknowledged he lacked the facts necessary to reach that conclusion here. Accordingly, any testimony the absence of a rear differential contributed to this particular accident would be based on speculation or conjecture and therefore inadmissible. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.)

Ault-Smietana nonetheless contends the trial court erred because the governing legal standards required the court to consider the Rhino and all its components as an integrated whole, and therefore evidence relating to problems with specific components is admissible even if the particular component alone did not cause the

accident at issue. (See *Daly, supra,* 20 Cal.3d at pp. 746-747.) Ault-Smietana further contends the trial court failed to recognize that the governing substantial factor causation standard is "'a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.'" (See *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79; see also *Soule, supra,* 8 Cal.4th at p. 572 [substantial factor is governing causation standard on product defect claims].) Ault-Smietana misconstrues the basis for the trial court's ruling.

The trial court did not exclude the opinion testimony regarding the lack of a rear differential because it was only a contributing factor rather than the cause of the accident. The court excluded the opinion because the expert conceded he lacked a factual basis to conclude the absence of a rear differential contributed to this accident in any way. That was not an abuse of discretion.

III

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial on Ault-Smietana's design defect claim. The judgment is affirmed on all other claims. Ault-Smietana shall recover her costs on appeal.

ARONSON, J.

I CONCUR:

THOMPSON, J.

O'LEARY, P.J., Concurring and Dissenting.

I respectfully dissent to the part of the majority opinion finding the trial court erred by failing to give the consumer expectations test instruction for the design defect claim concerning the instability theory. In all other respects, I concur in the majority opinion.

The majority concludes the facts of this case are more closely aligned with the facts in *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990 (*Romine*), than the facts in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*). (Maj. opn. *ante*, at p. 15.) The majority opines this case simply requires an examination of the specific facts surrounding the accident and ordinary users of Rhinos and other off-road vehicles have the experience and knowledge necessary to form basic assumptions about the safe operation and use of the vehicles. (Maj. opn. *ante,* at p. 15.) I disagree.

Elizabeth Ault-Smietana proceeded on a theory the Rhino lacked lateral stability. She argued the Rhino's ground clearance and narrow track width created a high center of gravity that made the vehicle dangerously unstable even at low speed turns on flat terrain. (Maj. opn. *ante*, at p. 7.) Ault-Smietana's expert testified the Rhino design was defective. He opined the vehicle was laterally unstable at low speeds, even on flat, benign terrain with reasonable turn inputs. In analyzing the stability of a four-wheel, off-road vehicle, the expert testified the considerations are center of gravity, height, track width, as well as other factors. In addition to this "static-type assessment," he testified dynamic testing can be done to determine stability limits. He summed up the considerations by testifying the stability of an off-road vehicle during a turn depends on a number of characteristics, including the "tightness of the turn, the turn radius, the speed, obviously, the coefficient of friction of the ground surface, the loading characteristics of the machine, [and] deceleration or acceleration."

Yamaha's expert testified how designing an off-road vehicle involves a careful balancing of trade-offs. The higher the vehicle's ground clearance, the more obstacles it can drive over, but it becomes less stable. Similarly, the narrower the vehicle's track width, the greater the vehicle's maneuverability, but it becomes less stable.

This expert testimony demonstrates the determination of whether a design defect was the cause of the accident versus other factors is not as "simple" a task as the majority suggests. (Maj. opn. *ante*, at p. 15.) Center of gravity, height, track width, and dynamic testing, etc., and the circumstances of the alleged failure were not within the common knowledge and experience of Rhino's ordinary users. A trial court should not instruct a jury on the consumer expectations test "'when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit,' since 'in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not.' [Citation.]" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233.) In these situations, like here, the appropriate test is the risk/benefit test. (*Romine, supra,* 224 Cal.App.4th at p. 1002.)

An additional factor that supports the conclusion the trial court did not err in refusing to give the consumer expectations test instruction is the considerable conflict in the testimony as to the Rhino's condition at the time of the accident. (Maj. opn. *ante*, at p. 4.) Ault-Smietana's witnesses testified the Rhino was in stock condition when the accident occurred. Yamaha's witnesses testified the Rhino had undergone extensive modification, including the addition of a second row of seats in the back, a larger roll cage that covered all four seats and lacked factory warning labels and a handhold for the passenger seat, new front seats that eliminated the factory hip restraints and employed a different type of seat belt, aftermarket tires, and an aftermarket stereo system that

included a large speaker on the passenger side floorboard that altered where the passenger could place his or her feet. (Maj. opn. *ante*, at p. 4.)

As noted by the majority, the accident occurred in March 2010. (Maj. opn. *ante*, at p. 4.) The evidence established the first inspection of the Rhino was done in November 2012, about 30 months after the accident. Ault-Smietana disputed the Rhino was in the same modified state on the day of the accident as it was when it was inspected in November 2012. Ault-Smietana testified the vehicle was returned to the previous owner immediately after the accident, and she could not testify as to when the modifications were made.

In addition to the vehicle's condition, the record contains conflicting evidence on where and how the accident happened. (Maj. opn. *ante*, at p. 5.) Ault-Smietana and her husband both testified the accident occurred on flat terrain. Both described the accident as having occurred when Ault-Smietana's husband made a slow turn on flat terrain. The only significant difference in their testimony concerned how far they were from the campground when the accident occurred. Ault-Smietana testified the accident occurred far from the campground, and her husband testified it occurred in the campground. (Maj. opn. *ante*, at p. 6.)

Ault-Smietana's and her husband's testimony the accident occurred during a slow turn on a flat surface is in stark contrast to Trent's son's testimony. Trent's son testified the accident occurred in an area where there were undulations from mounds of sand and bushes as opposed to the flat terrain described by Ault-Smietana and her husband. Trent's son also testified the accident occurred as Ault-Smietana's husband was making a tight turn between two small dunes at approximately 15 to 25 miles per hour. He observed the driver-side wheels on the Rhino to go up onto the side of a small dune. He explained the Rhino tipped over because of the combination of the tight turn and the dune's slope. Trent's son version of the accident is consistent with Yamaha's expert's testimony. It is not insignificant Trent's son was a disinterested observer.

"[T]he consumer expectations test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567.) This is not such a case. I find the court did not err in refusing to give the consumer expectations test instruction.

Lastly, if I were to agree there was error, which I do not, any error would be harmless. In *Soule,* our Supreme Court considered and rejected the theory instructional error in civil cases is inherently prejudicial. The court held, "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Soule, supra,* 8 Cal.4th at p. 580.)

Our state Constitution provides that "No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party." (*Soule, supra,* 8 Cal.4th at p. 580.) Prejudice is shown when "there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." (*Id.* at p. 574.)

The record does not support a finding of prejudice. As previously described, there was conflict in the testimony of the competing experts, conflict as to the vehicle's modifications, and conflict as to the accident's circumstances. Given this degree of conflict in the evidence on critical issues, I cannot conclude that if the consumer expectations test instruction had been given, it was reasonably probable Ault-

Smietana would have received a more favorable result. Nor can I conclude there was a miscarriage of justice. I would affirm.

O'LEARY, P. J.