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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

VAN DYK LINES, INC., Plaintiff and Appellant, v. PETERBILT MOTORS COMPANY, Defendant and Respondent.	B268676 (Los Angeles County Super. Ct. No. BC501771)

APPEAL from an order of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Reversed.

Wood, Smith, Henning & Berman, Michael J. Partos and Nicholas M. Gedo for Plaintiff and Appellant.

Murchison & Cumming and Edward G. Farrell for Defendant and Respondent.

Van Dyk Lines, Inc. (appellant) appeals from an order granting a Motion for Judgment Notwithstanding the Verdict (JNOV motion) following a jury trial in this product liability action. The jury assigned 60 percent fault to respondent Peterbilt Motors Company (respondent) and 40 percent fault to appellant, and the trial court entered a net judgment in favor of appellant in the amount of $3,545,833.90. Respondent subsequently filed its JNOV motion, which the trial court granted. The court then entered final judgment in favor of respondent.

After viewing the evidence in the light most favorable to the jury's verdict, we find that substantial evidence supported the verdict. We therefore reverse the trial court's order granting the JNOV motion.

FACTUAL BACKGROUND

The fire

On December 14, 2011, an oil tanker truck owned by appellant caught fire and came to a stop under an overpass bridge on the 60 Freeway. Bilal Bhutta (Bhutta) was operating the vehicle at the time of the fire. The parties stipulated that the fire resulted from a failure of one of the truck's universal joints (u-joints). The failure of the u-joint caused the tanker truck's driveshaft to dislodge from the vehicle. When the shaft came apart, it was "flailing about under the truck." A bearing cap from the u-joint attached to the driveshaft punctured the belly of the gasoline tanker, and sparks ignited a fire in the tanker. Bhutta stopped the vehicle underneath the bridge, and the fire caused extensive damage to the bridge.

The California Highway Patrol (CHP) investigated the fire and Officer Reuben Hernandez testified that when he arrived at the scene, he was directed by firefighters to a piece of debris lying on the road. It turned out to be the truck's interaxle drive shaft

and u-joints. This part was displayed to the jury at trial. The CHP ultimately determined that the driveshaft seized and broke free from the second rear axle. At the time of the incident, the truck had over 650,000 miles on the odometer.

The truck[1]

The tractor portion of the truck involved in the incident was manufactured by respondent in September 2005. The tractor is considered a model year 2006. Appellant's owner, Ronald Knuckles, purchased the tractor in January 2006. Dana Holding Corporation (Dana) designed and manufactured the tractor's SPL170XL interaxle driveshaft. The u-joint was a component of the SPL170XL interaxle driveshaft. The SPL170XL driveshaft and u-joint were installed in the tractor by respondent.

When a vehicle such as this leaves respondent's factory, the u-joint contains grease for lubrication. The joint is designed with zerc grease fittings which allow technicians to inject grease (lubrication) into the channels of the u-joint to keep it lubricated. According to Dana's specifications, the u-joint's first lubrication is due at 350,000 miles and then once again every 100,000 miles thereafter. In addition, the u-joint must be inspected per manufacturer guidelines every time the vehicle is serviced.

The recall

By at least 2010, respondent had become aware of excessive warranty claims relating to failures of the SPL170XL interaxle driveshafts in trucks manufactured after 2005. Respondents knew that the failures could result in significant property damage or personal injury. Respondent transmitted a document to the National Highway Traffic Safety Administration (NHTSA) entitled "Warranty Trend Analysis for Peterbilt." The document

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1 The truck is occasionally referred to in the record as "truck 706."

contained a graph reflecting a trend of rising failure rates for trucks manufactured in the third quarter of 2005, approaching one percent. The subject truck's manufacture date fell within the peak of that graph.

In April 2011, respondent mailed consumers a safety recall notice, covering its trucks manufactured between 2006 and 2007 containing Dana SPL170XL interaxle driveshafts as component parts. The recall provided:

> "Peterbilt Motors has decided that a defect which relates to motor vehicle safety, exists in certain model year 2007 and 2008 vehicles built between January 4, 2006 and April 30, 2007 and equipped with certain extended lube interaxle drivelines. Our records indicate that your vehicle . . . was manufactured within this time period and may contain a defect.
>
> "The bearing surfaces of the SPL170XL extended lube universal joints that attach the interaxle driveline to the drive axles may become prematurely worn due to breakdown of lubrication and/or excessive heat. Prematurely worn bearing surfaces may result in a loose and/or bound universal joint. If undetected, the condition may result in universal joint failure, allowing the interaxle driveline to detach from the axle. A detached driveline may pose a personal injury or property damage hazard."

The recall did not include the subject truck, which was manufactured in 2005 and designated by respondent as a model year 2006 vehicle. However, respondent's Products Safety and Compliance Manager, Rodney Curbo, admitted that the subject 2006 truck was identical in design and manufacture to the 2007-2008 model year trucks covered in the recall. The subject truck had a Dana SPL170XL interaxle driveshaft and FlexAir

suspension. Those parts were installed in the same design configuration in the subject truck as in trucks covered by the recall. If the subject truck were manufactured 120 days later, it would have been covered in the recall as there was nothing about its design or component parts that made it any different from the trucks manufactured 120 days later.

In December 2010, in response to the NHTSA's request that it expand the scope of the recall to include model year 2006 trucks, respondent's attorney sent a letter to the agency claiming that the earlier vehicles did not need to be included in the recall because trucks built prior to 2006 would have more than 350,000 miles on them. Thus, respondent stated, such vehicles were likely no longer in service or the u-joints would have already failed.

The recall notice itself does not reference a mileage limit. Curbo admitted that respondent actually performed the recall repair on vehicles with more than 350,000 miles. In addition, appellant's expert, Michael Shirley (Shirley), testified that respondent should have expanded the vehicle population of its recall to include model year 2006 trucks, which were identical in all material ways to the recalled trucks.

Shirley explained that the recall involved a defect which caused the u-joints to overheat. This caused the lubrication used on that component to deteriorate prematurely, resulting in rapid wear and eventually causing the joint to seize and break from the truck. The engineers who devised the recall determined that a change in the phase angle of the configuration of the interaxle driveshaft would alter the distribution of forces during the operation of the truck, resulting in a reduction of stress and heat on the u-joints and preventing their failure during use.

The vehicle's maintenance

Appellant's work orders reflecting maintenance of the subject truck were introduced in evidence. They showed that appellant's mechanics lubricated and inspected the truck and its u-joints approximately every 90 days after it was acquired, and also whenever it was brought in for service in between those 90 day periods.

Mechanic Matthew Bolton lubricated the u-joint of the subject truck as part of a service on November 17, 2011, less than one month before the date of the fire. On December 8, 2011, an unknown driver filled out a vehicle inspection report noting that "driveline need be checked" for the truck. On December 9, 2011, Bolton checked the driveline, determined it was sufficiently tight, and greased the driveline at that time.

In addition, the drivers were to inspect the tractors prior to beginning their trip for the day. Vehicle inspection reports were filled out by the driver after completing a pre-trip inspection. The vehicle inspection report for the day does not note any defect or problem with the driveline.

Nevertheless, the driveline may not have been properly inspected the day of the incident. Bhutta testified that to check the driveline, a person must look under the hood of the vehicle. This is not where a driveline is located. Leonardo Smith, who was Bhutta's trainer in the week leading up to the incident, testified that he never inspected the driveline for the subject vehicle and he was never trained or told that he was supposed to check any drivelines.

Appellant's evidence of product defect

Knuckles, appellant's principal, testified that any recalled vehicle would be taken out of service and brought to a facility for repair. All trucks covered by respondent's April 25, 2011 recall notice were taken in for repair. However, because the subject

truck was manufactured in 2005 and not covered by the recall, it was not taken in for the recall repair.

Knuckles testified that he generally expects a truck of this sort to operate for over a million miles. Appellant's expert, Shirley, also testified that a truck such as this should last for a million miles or more of service, and when properly maintained, u-joints should typically last for the life of the truck.[2]

Shirley testified that the subject truck had the same defect as the trucks covered in the recall. Specifically, he testified that the subject truck's interaxle driveshaft's u-joint's working angles were higher than the maximum operating angle set forth by Dana:

> "Truck 706 had the interaxle driveshaft u-joint working angles that were higher than the maximum driveshaft operation angles set forth by Dana. And these high working angles produced higher temperatures and higher inertial acceleration forces, which resulted in the subject failure and cargo tank puncture and the truck fire on December 14, 2011."

The manufacturer's maximum operating angles were designed so that if the driveshaft was operated with u-joints "at or below these angles, you can expect a reasonably good life from the component."

Shirley was aware that Dana's specifications for the working angles were lower than the angles on truck 706 for several reasons. He reviewed quality control documents provided

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[2] In contrast, respondent's expert testified that the u-joint is a component that requires maintenance and replacement, just like brakes or tires. However, respondent's expert admitted that the Dana manual did not specifically recommend replacement of u-joints, but instead stated "we recommend that all driveshafts be inspected for wear."

by respondent and documents created during testing by respondent and Dana in determining whether or not to declare the safety recall. In addition, he reviewed a Dana document which showed "dynamometer testing." Shirley explained this process to the jury as follows: "they would take exemplar interaxle driveshafts and put them in a laboratory and operate them on a dynamometer which produced power at different operating angles for the u-joints. And they ran endurance testing on them."

Shirley reviewed the different operating angles represented on the document. He was asked, "which was the accident vehicle?" Shirley was able to point out to the jury which configuration was on the subject truck. As the Dana document referenced, that configuration was not a preferred way to configure the u-joint, as was "borne out in some of the test results that they performed."

Shirley showed the jury another chart produced by Dana which showed "miles to failure versus percentage of parts that were failed." The document showed three variations of the interaxle driveshaft configuration. When asked, "which one are we?" Shirley pointed out to the jury the configuration present on the subject truck, explaining "more percentage of those u-joints are going to fail at a lower mileage than the other two designs, which require more miles to fail."

Shirley opined that the recall should have been expanded to include model year 2006 trucks. He also opined that "the interaxle driveshaft u-joint on truck 706 would not have catastrophically failed on December 14, 2011, if the service work set forth by [respondent] in safety recall 1210F had been performed." When asked whether the subject vehicle was defective as designed and manufactured by respondent, Shirley answered affirmatively.

In addition to the testimony based on various documents produced in discovery, Shirley also inspected the part that failed. Based on his observations of what was left of the u-joint, Shirley opined that it failed due to overheating and seizure of the bearings. Shirley testified, based in part on his observations of grease residue on the part itself, that the u-joint had been properly maintained, inspected and lubricated throughout its life. In addition, he had reviewed appellant's maintenance records. Shirley opined that the regular lubricating must have been done or else there would have been "problems with this truck long before 657,000 miles."

Appellant also produced a mechanical engineer and metallurgist, Dr. Arun Kumar. Like Shirley, Kumar examined the failed u-joint cross and interaxle driveline that were shown to the jury. Kumar also reviewed the documents produced by Dana and respondent as well as the maintenance records for the subject truck. Kumar performed an infrared analysis as well as borescope examination on the failed part and testified that he could see the lubrication when he did the borescope inspection. He described it as a "burned-up black, gooey mess." The grease was there, it was just overheated and burnt. The infrared analysis also showed that the grease residue found on the u-joint had lubricating properties. After going over his observations of the u-joint in detail before the jury, Kumar provided his opinion that the seizure of the joint in this case was due to "mechanical seizure," not due to inadequate lubrication. Kumar opined that such failures could take place at any mileage, from 100,000 miles to 960,000 miles, depending on the angle of the u-joint, with more failures occurring where the angle was higher.

PROCEDURAL HISTORY

The State of California (Caltrans) initially filed this action against appellant for recovery of repair costs of the bridge on

Highway 60 that was damaged after the truck fire under the bridge. On September 25, 2013, appellant filed its operative first amended cross-complaint against respondent. The cross-complaint asserted causes of action against respondent for equitable indemnity, apportionment of fault/contribution, and declaratory relief.

On November 3, 2014, Caltrans and appellant negotiated a settlement of Caltrans's claim, pursuant to which appellant paid Caltrans $6,000,000 and appellant reserved its right to pursue its indemnity claim against respondent.

To avoid confusing the jury, the trial court ordered the caption to be changed to show appellant as the plaintiff and respondent as the defendant.

A seven-day jury trial began on July 13, 2015. At the conclusion of the presentation of evidence, respondent moved for a directed verdict, claiming that appellant did not produce any evidence other than the recall to establish the defect, and that there was no evidence that the problem identified in the recall contributed to the accident. The court summarily denied the motion, stating: "I will let the jury decide this matter."

On July 21, 2015, the jury returned the special verdict form, finding as follows: (1) respondent manufactured truck 706; (2) truck 706 failed to perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably forseeable way; (3) the design or manufacture of truck 706 was a substantial factor in causing harm to appellant; (4) appellant was negligent with respect to the maintenance of truck 706; and (5) appellant's negligence was a substantial factor in causing its harm. The jury allocated 60 percent of the responsibility for appellant's harm to respondent, and allocated 40 percent of appellant's harm to appellant.

On July 30, 2015, the trial court entered a net judgment in favor of appellant in the amount of $3,545,833.90.

On August 27, 2015, respondent filed its motion for judgment notwithstanding the verdict. Respondent argued that a lack of substantial evidence supporting the verdict mandated judgment in respondent's favor. Respondent characterized the evidence as "at most, inferential evidence drawn from a vehicle recall that did not involve the subject truck." Respondent argued that there was no independent evidence of a defect and there was no evidence that the subject truck failed to meet the minimum safety expectations of an ordinary consumer. Respondent concluded that the jury's inference of a product defect was not reasonable or logical.

On September 15, 2015, appellant filed an opposition to respondent's JNOV motion. Appellant pointed out that it was procedurally improper for respondent to seek reconsideration of the trial court's evidentiary ruling allowing the recall notice in evidence by way of a JNOV motion. Appellant argued, "a JNOV may only be considered or granted where it is manifestly apparent that the verdict is not supported by the evidence as admitted at trial." Appellant further argued that substantial evidence, independent of the recall notice, was admitted at trial showing that the subject truck was defective in its design and/or manufacture.

On September 28, 2015, the trial court issued a tentative ruling granting respondent's motion. The court noted that a recall notice, in and of itself, does not establish the elements of a product liability claim. The court stated, "The admission of the recall evidence, without first requiring plaintiff to prove Truck 706 had the defect described in the recall notice, may have been error, but, if so, erroneous evidentiary rulings should be

addressed in a motion for new trial." The court further noted that respondent did not file a motion for new trial.

The court wrote:

> "Plaintiff for a products liability claim was required to prove the existence of a defect, that is, that Truck 706 had a defect when it left [respondent]; and also that the defect was a cause of the truck fire that occurred six years later. [Appellant's] evidence was insufficient to prove that Truck 706 had a defect that caused the failure of the universal joint and the vehicle fire on December 14, 2011."

The court emphasized that appellant's expert did not know the working angles on Truck 706. Thus, the court concluded, "Shirley could not tie his theory to the existence of an actual defect in Truck 706 that was the cause of the truck's destruction." The court characterized the parties as "agree[ing]" that "the universal joint failed because its lubrication was inadequate." The court noted, "when a jury finds the plaintiff's failure to maintain a product is 40 % of the cause for the product's failure the plaintiff has not negated causes, other than a manufacturing defect, for the product's failure."

Finally the court noted that it had not received appellant's opposition. Upon learning that appellant had opposed the motion, the court granted appellant's request to continue the hearing for one day so that the court could review the opposition papers.

On September 29, 2015, the trial court issued a new tentative ruling which was substantially similar to the previous one. The court ruled that appellant's evidence was "insufficient to prove that truck 706 had a defect that caused the failure of the universal joint and the vehicle fire on December 14, 2011."

The court stated, "[t]he evidence is that the universal joint failed because its lubrication was inadequate." However, the

court also noted that there was testimony that appellant properly maintained and lubricated the u-joints on truck 706. The court "disagree[d]" with appellant's position that truck 706 had the same defect as the trucks subjected to the recall. The court stated that since appellant argued that there was no breakdown of lubrication, appellant was "left without an explanation or evidence as to what component in the truck, as sold in 2005, was defective and caused its destruction in 2011."

At the outset of the hearing on September 29, 2015, appellant's counsel noted that it was 9:24 a.m. and asked the court to continue the hearing since the court had another trial scheduled to start at 9:30 a.m. The court stated: "I don't think I have another time. I think that I lose jurisdiction tomorrow in this matter. The motion was filed so late." Following brief argument, the court granted the JNOV. The court entered judgment in respondent's favor on November 6, 2015.

On December 2, 2015, appellant filed its notice of appeal.

DISCUSSION

I. Applicable law and standard of review

A JNOV motion challenges the sufficiency of the opposing party's evidence and therefore functions as a demurrer to the evidence. "'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 (*Hauter*).)

In reviewing the evidence before the jury, the trial judge "cannot weigh the evidence . . . or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several

reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.]" (*Hauter, supra*, 14 Cal.3d at p. 110.)

On appeal from a JNOV, we use the same standard the trial court used in granting the JNOV. (*Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829.) "We independently determine whether the record, viewed in the light most favorable to the verdict, contains any substantial evidence to support the verdict." (*Ibid.*) Thus, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards any contrary showing. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60 (*Campbell*).)

Our task is to determine whether the jury's verdict was supported by substantial evidence, contradicted or uncontradicted. Where such evidence exists, it is error for the trial court to grant a motion for judgment notwithstanding the verdict. (*Gordon v. Strawther Enterprises, Inc.* (1969) 273 Cal.App.2d 504, 511.)

II. Substantial evidence supported the jury verdict

Appellant's theory at trial was design defect strict liability. Design defect strict liability can be established under either of two alternative tests: the consumer expectation test or the risk-benefit test. Because appellant proceeded under the consumer expectation test, it was required to show causation, and that the product failed to satisfy ordinary consumer expectations as to safety. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430.) The consumer expectation test is not limited to products or accidents of common experience. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 565.) "[A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance." (*Id.* at pp. 566-567).

A. Failure to satisfy ordinary consumer expectations

In line with appellant's theory of liability, the jury was asked: "Did Truck 706 fail to perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably forseeable way?" The jury responded affirmatively.

Substantial evidence supported this conclusion. The parties stipulated that the fire resulted from a failure of one of the truck's u-joints. The jury heard both expert and lay testimony that the subject u-joint should have lasted the life of the truck, and that such a truck should have an expected lifetime of approximately 1,000,000 miles. With 656,950 miles on the odometer, the subject truck was several hundred thousand miles away from its lifetime expectancy. These facts established ordinary consumer expectations for the part in question.[3]

There was ample evidence that the failure of the u-joint was a result of a defective design. Specifically, appellant's expert opined that the u-joints were installed at angles that were substantially higher than the angles that Dana had prescribed. Appellant's expert further opined that this improper angle caused

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[3] Respondent argues that the jury could not rationally disbelieve the express 350,000-mile warranty, which specifically promised that no maintenance would be needed during the warranty period. Respondent insists that this warranty period gave definition to the term "premature wear" as set forth in the recall notice, and that insofar as the jury assumed premature wear occurred after 350,000 miles of use, such assumption defies common sense. We reject this argument. The jury was entitled to believe the testimony that these trucks, and the u-joints, are expected to last 1,000,000 miles. The jury was not required to limit a consumer's expectations to the warranty period, and respondent cites no authority for such a proposition.

excessive stress on the u-joints and ultimately caused the failure of the u-joint.

The jury also viewed documents and evidence establishing a spike in u-joint failures covering trucks manufactured during the time period when truck 706 was manufactured. Appellant's expert opined that truck 706 and other trucks that were model year 2006 should have been included in respondent's safety recall covering a later time period. He opined that if the truck had been recalled and repaired as specified in the recall, the accident would not have happened. Appellant's expert told the jury it was his opinion that the subject truck was defective as designed and manufactured by respondent.

Appellant's expert's testimony was substantial evidence on which the jury was entitled to rely. From the evidence described above, the jury was entitled to conclude that the u-joint failed to perform as safely as an ordinary consumer would expect under the circumstances.

B. Causation

After determining that truck 706 failed to perform as safely as an ordinary consumer would expect, the jury was required to find causation. Specifically, the jury was asked: "Was the design or manufacture of Truck 706 a substantial factor in causing harm to [appellant]?" The jury responded affirmatively to this question as well.

Substantial evidence supported the jury's conclusion that the u-joint failure was caused, in part, by the design defect. There was evidence, both lay and expert, that the truck was properly maintained and lubricated. There was expert testimony that truck 706 had interaxle driveshaft u-joint working angles that were higher than the maximum driveshaft operation angles set forth by Dana. The high working angles produced higher temperatures than the joint could withstand, resulting in the

subject failure and cargo tank puncture and the truck fire on December 14, 2011. Appellant's expert exhibited test results to the jury supporting his conclusion. A second expert also opined that the failure of the joint was due to mechanical seizure of the joint due to improper angles, rather than negligent maintenance of the joint.

The evidence described above was substantial evidence on which the jury was entitled to rely. *Doupnik v. General Motors Corp.* (1990) 225 Cal.App.3d 849 (*Doupnik*), provides a helpful analogy. In *Doupnik,* the jury apportioned a percentage of fault to an intoxicated driver and a percentage of fault to the vehicle manufacturer based on a defective roof post. In discussing the vehicle manufacturer's claim that substantial evidence did not support the jury's verdict against it, the *Doupnik* court explained that "the question is whether an inference can be drawn from the evidence that the defective welds were a substantial factor in bringing about the injury to Doupnik." (*Id.* at p. 868.) In answer to this question, the court stated, "'It is enough that [the plaintiff] introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not.'" (*Ibid.*) The *Doupnik* court explained that it is within the competence of an expert to predicate an opinion about the cause of an injury upon the descriptive characteristics of the accident. The court rejected the vehicle manufacturer's argument that the subject of roof collapse was only amenable to proof by an analysis of the physical forces acting upon the roof, stating: "We see no reason why the mode of proof must be so constrained." (*Id.* at p. 869.) There was no evidence compelling the sole inference that the welds were not the cause of the injury. Since the evidence submitted by the plaintiffs was legally credible and the inferences drawn

therefrom supported the jury's conclusion, the verdict was supported by substantial evidence. (*Id.* at pp. 869-870.)

Similarly, here, the jury acted reasonably in determining that the product defect described by appellant's experts was a cause of the events of December 14, 2011.[4]

In sum, there was ample evidence from which the jury was entitled to infer that truck 706 had a design defect at the time it was sold to appellant, and that such defect was a causal factor in the fire. Thus, whether or not respondent's product was defective was a question of fact. As such, it was submitted to the jury, and the jury came to a reasonable conclusion. It was inappropriate for the trial court to reweigh the evidence and reach a contrary factual conclusion. (*Campbell, supra,* 22 Cal.3d at p. 60.)

C. The question of whether there was sufficient foundation for appellant's expert testimony is not before us

Respondent argues that appellant's expert, Shirley, did not know the working angle of the driveline on the subject truck.

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[4] Respondent cites nine out-of-state authorities for the proposition that evidence of a recall, in and of itself, does not prove a defect in a product. (*Calhoun v. Honda Motor Co.* (6th Cir. 1984) 738 F.2d 126, 133-134 (*Calhoun*); *Bagel v. American Honda Motor Co.* (1985) 132 Ill.App.3d 82, 88; *Bailey v. Monaco Coach Corp.* (N.D. Ga. 2004); 350 F. Supp.2d 1036, 1045; *Vockie v. General Motors Corp.* (E.D. Pa. 1975) 66 F.R.D. 57, 61; *Landry v. Adam* (1973) 282 So.2d 590, 596-597; *Fields v. Volkswagen of Am., Inc.* (Okla. 1976) 1976 OK 106 at *P35; *Harley-Davidson Co. v. Daniel* (Ga. 1979) 244 Ga. 284, 286-287; *Long v. TRW Vehicle Safety Sys.* (D. Ariz. Oct. 14, 2011) 2011 U.S. Dist. LEXIS 119111; *Hughes v. Stryker Corp.* (11th Cir. Ala. 2011) 423 Fed. Appx. 878.) First, we note that respondent has failed to provide any controlling authority on this point. Further, as set forth above, appellant set forth sufficient evidence of a defect separate and apart from the recall notice itself. Therefore we decline to address these cases.

Respondent admits that Shirley reviewed numerous documents, including the accident report, photos, service history records, respondent's information on the internet, inspection forms, preventative maintenance records, lubrication specifications, Dana manuals, and the recall information. However, respondent argues, Shirley never ascertained the true factory-installed angle of the subject u-joint. Therefore, respondent argues, Shirley's testimony was of little value to the jury.

Respondent points to no place in the record where respondent made an objection to Shirley's testimony regarding the angles on the u-joint based on lack of foundation. Even if such an objection had been made, respondent has not appealed any evidentiary objections. Objections to evidence are not properly considered on an appeal from a grant of a JNOV motion. Therefore, we may not assess whether the admission of such evidence was proper. (See *Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575 ["In assessing whether judgment notwithstanding the verdict was properly granted, we consider the trial that was actually conducted, not the one that might have been conducted"].)

Respondent makes a similar criticism of the testimony of Kumar. Respondent argues that, when discussing the working angles, Kumar based his understanding upon a Dana document, rather than any design drawings or measurements provided by respondent. Again, respondent fails to cite a place in the record where an objection to Kumar's testimony was made on foundational grounds. Further, had such an objection been made, it has not been appealed and is not before us. The jury heard Kumar's testimony, thus the jury was entitled to rely on it. The expert testimony must be considered in determining whether the JNOV was properly granted.

Respondent is correct that an expert's opinion may not be speculative, based on unconventional matters, or grounded in unsupported reasoning. (*Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 576.) An expert's opinion may not be based on assumptions of fact without evidentiary support. (*Ibid.*) However, while we need not discuss the propriety of the admission of the expert testimony, we note that there was ample evidentiary support for the experts' opinions that the angle of the u-joint was improper on truck 706. Shirley relied on Dana's calculations and Dana's study of the u-joint failure phenomenon. Respondent's experts relied upon the same study, which was admitted into evidence. The jury also heard testimony that the subject 2006 truck was identical in design and manufacture to the 2007-2008 model year trucks covered in the recall. This evidence was sufficient to form the foundation for Shirley's opinion that the working angle in the subject truck was far in excess of Dana's specifications. (See *Doupnik, supra*, 225 Cal.App.3d at p. 868 [rejecting vehicle manufacturer's claim that roof collapse amenable to proof only by analysis of the physical forces acting on the roof].)[5]

III. The jury's verdict was not inconsistent

In its order granting the JNOV motion, the trial court stated that "[t]he fact that the jury found plaintiff to be 40 % liable for the fire in Truck 706 is inconsistent with Truck 706 having a defect when it left [respondent] that caused a fire during its operation five years (and 656,000 miles) later."

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[5] In addition, as appellant points out, respondent fails to direct us to contrary evidence in the record suggesting that the u-joint angles on the subject truck in fact complied with Dana's specifications. Thus, the jury did not even have any conflicting evidence before it on the question of whether the u-joint angle on truck 706 was improper.

Preliminarily, we note that the special verdict form specifically permitted the jury to find both parties responsible and to allocate liability accordingly. That is exactly what the jury did. Neither party has pointed out any objection to the jury special verdict form that was made in the trial court, nor is there any argument before us that the special verdict form was improper. Had an appropriate objection to the special verdict form been made, and overruled, such ruling could have been appealed. (*Leeper v. Nelson* (1956) 139 Cal.App.2d 65, 69 [where no motion for new trial, or objection to the form of judgment was registered in any manner in the trial court, point cannot be raised on appeal].) It was improper for the trial court to find such allocation inappropriate on a JNOV motion. (See *Miller v. Brown* (1955) 136 Cal.App.2d 763, 773 [objection that jury findings are in conflict must be raised in a motion for new trial]; *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1321 [purpose of motion for judgment notwithstanding the verdict is to challenge the sufficiency of the evidence supporting the jury's verdict].)

Further, under California law, it is not inconsistent for a jury to determine that a design defect is one of two factors contributing to an accident. (*Campbell, supra,* 22 Cal.3d at pp. 56-57.) In *Campbell,* the plaintiff sued a tractor manufacturer alleging a design defect in the tractor's power steering unit. On appeal from a jury verdict in the plaintiff's favor, the tractor manufacturer argued that the jury's responses to certain interrogatories, which suggested that the plaintiff's employer had used and maintained the tractor in an unreasonable way, were fatally inconsistent with the verdict. The appellate court found that "there was evidence from which the jury could well have concluded that, assuming arguendo that there was product misuse, a manufacturing or design defect in the tractor *also*

contributed to the accident." (*Ibid.*) Thus, there was "no fatal inconsistency between the special findings and the general verdict. [Citation.]" (*Id.* at p. 57; see also *Doupnik, supra,* 225 Cal.App.3d at pp. 853-854 [apportioning 80 percent of fault to drunk driver and 20 percent of fault to vehicle manufacturer].)

In support of its determination that the verdict was inconsistent, the trial court cited a Sixth Circuit case applying Kentucky law, *Calhoun, supra*, 738 F.2d 126. The case is not controlling in this court. While respondent relies upon *Calhoun* in its brief, respondent has failed to make any reasoned argument as to why we should consider the case as persuasive authority. Under the circumstances, we give no weight to the case.

Even if *Calhoun* were relevant, it is distinguishable. In *Calhoun*, the plaintiff brought an action against Honda after an accident in which the plaintiff rear-ended a stopped truck while driving his Honda motorcycle. Due to his injuries, the plaintiff could not recall what happened, and there were no witnesses to the accident. (*Calhoun, supra*, 738 F.2d at p. 127.) At trial, the plaintiff relied upon a recall letter issued by Honda five months before the accident, stating that the performance of the rear brake pad was reduced by heavy rain conditions. It was not raining at the time of the accident, but plaintiff had taken the motorcycle to a car wash 30 minutes before the accident. (*Id.* at p. 128.)

The jury found liability on the part of Honda and awarded the injured plaintiff $1,250,000. (*Calhoun, supra*, 738 F.2d at p. 129.) The trial court granted a JNOV motion, and the Sixth Circuit affirmed. The court explained:

> "Calhoun's evidence never went further than to show that the claimed defect was a possible, not probable cause of the collision. This is insufficient to establish liability. The recall letter stated that the

> motorcycle's braking performance was reduced by heavy rain. However, it was not raining the day of the accident nor did plaintiff successfully prove that washing the motorcycle at a car wash was tantamount to a condition of heavy rain."

(*Calhoun, supra*, 738 F.2d at p. 131.)

The court pointed out that plaintiff's expert assumed that the brakes were wet when applied by the plaintiff because the motorcycle had been washed some time beforehand. The assumption, however, was not supported by any evidence. The expert did not know how much time had passed since the wash; how many stops the plaintiff made before the accident; or the material out of which the brake pad was made in order to determine its drying time. (*Calhoun, supra*, 738 F.2d at pp. 131-132.) The court concluded that the evidence in the case never rose to the level of probable cause. Instead, it was merely a possible cause. Plaintiff's inattentiveness could not be excluded from a list of possible causes. (*Id.* at p. 133.)

The facts and evidence in this case are vastly different. The parties agreed that a u-joint failure caused the destructive fire. On the issue of why the u-joint failed, there were very limited possibilities for the jury to consider: either the product was defective, or appellant failed to properly maintain the vehicle. Appellant's expert, Shirley, testified that it was due to a defect in the manufacture of the truck. He also provided evidence negating the possibility that improper maintenance was the cause of the joint failure. Kumar provided similar evidence. Both experts relied upon their inspection of the part itself, their review of test results, product manuals, and other competent evidence. The evidence of probable cause was sufficient.

Respondent cites *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396 (*Jones*) for the proposition that mere

possibility alone is insufficient to establish a prima facie case. In *Jones*, one expert testified that there was "less than a 50-50 chance" that the plaintiff's illness was caused by the drug she ingested. (*Id.* at p. 401.) A second expert was unwilling to state that the drug was even a possible cause of the illness. (*Ibid.*) Because there was no expert medical testimony on which the jury could reasonably find causation, the trial court granted a directed verdict. (*Id.* at p. 402.) The Court of Appeal affirmed, finding that the highly conjectural and ambiguous testimony of the medical experts did not meet the test of proximate cause. (*Ibid.*) Again, the evidence here is far different. The jury heard expert testimony, grounded in studies and investigation, that a design defect was the cause of the disaster. There was ample evidence of proximate cause.

IV. The relevance of the recall is not an issue before this court

Respondents argue that the recall notice was irrelevant. Respondents point out that in *Calhoun*, the trial court ruled that in the event that the motion for judgment notwithstanding the verdict was reversed, a new trial should be granted. The conditional grant of a new trial was based on the trial court's belief that it was prejudicial error to allow the recall letter into evidence under the circumstances of that case. It was not necessary for the circuit court to address this issue, because it affirmed the motion for judgment notwithstanding the verdict. However, in dicta, the court briefly addressed the issue and concluded that the recall letter should have been excluded from evidence. The letter was placed into evidence before independent evidence as to defect and causation were established, and the plaintiff failed to show that the conditions described in the letter were present when the plaintiff had the accident. (*Calhoun, supra,* 738 F.2d at p. 133.)

As the trial court properly noted, erroneous evidentiary rulings should be addressed in a motion for new trial. Here, respondent did not file a motion for a new trial. Thus, the issue of the propriety of the trial court's decision to admit the recall notice into evidence was not addressed in the trial court's ruling and is not before us. We decline to address it further.

DISPOSITION

The order granting the JNOV motion is reversed. Appellant is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT