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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| CHRISTOPHER WALKOWIAK et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>MP ASSOCIATES et al.,<br><br>Defendants and Respondents. | B220494<br><br>(Los Angeles County<br>Super. Ct. No. VC051140) |

APPEALS from judgments of the Superior Court of Los Angeles County, Raul A. Sahagun and Brian F. Gasdia, Judges. Affirmed in part and reversed in part with directions.

Girardi | Keese, Amanda McClintock; Niddrie, Fish & Buchanan, Martin N. Buchanan; Law Offices of Martin N. Buchanan and Martin N. Buchanan for Plaintiffs and Appellants.

Waters, McCluskey & Boehle and Gregg W. Brugger for Defendant and Respondent MP Associates.

Bragg & Kuluva and Sherry L. Grguric for Defendant and Respondent Roger George Rentals.

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## INTRODUCTION

Plaintiffs Christopher and Katherine Walkowiak appeal from summary judgments entered in favor of defendants MP Associates and Roger George Rentals. Plaintiffs contend the trial court erred in granting summary judgment based on the sophisticated user defense. They also claim evidentiary error. While we agree with the trial court that the sophisticated user defense applies here to bar liability based on the failure to warn, we nonetheless conclude the trial court erred in granting summary judgment as to all causes of action. For that reason, we reverse the summary judgment in favor of MP Associates. As to Roger George Rentals, we affirm.

## FACTS

### A. *Defendants' Manufacture and Sale of Pyrotechnic Devices*

Defendant MP Associates (MP) manufactures pyrotechnic devices. Defendant Roger George Rentals (RGR) rents and sells special effects supplies, including pyrotechnic devices manufactured by MP. Its primary clientele is the entertainment industry.

Thaine Morris (Morris) is a 50 percent owner of MP and the owner of Skeeter Special Effects, Inc., which does business as RGR. Morris holds a Class 1 Pyrotechnic Operator license from the State of California and a federal license enabling him to handle any type of pyrotechnic or explosive material used in the entertainment industry.

In the early 1990's, Morris developed a 44mm simulated stinger missile (SSM) for use in military training. The SSM consists of a cardboard tube with a red plastic cap on one end and a white plastic cap on the other end. The tube contains pyrotechnic materials near the end with the red plastic cap. Prior to ignition, the white plastic cap is to be removed. Upon ignition, a pellet of pyrotechnic material is propelled out of the end of the tube by gunpowder. It produces bright white light and smoke, and it travels about 200 feet. It simulates the appearance of a missile.

MP manufactured the SSM and initially sold it to the military. Morris demonstrated how to use the SSM. Later, MP began marketing the SSM to the entertainment industry for special effects use. MP did not change or add to the labeling or packaging of the SSM for sale to the entertainment industry.

The SSM can be used with a launcher or by any means which would fix the direction in which it is launched. Morris had demonstrated the SSM to the military without using a launcher. However, he was aware that launchers were made for use with the SSM. MP did not manufacture such launchers.

The SSM had a sticker on the side of the cardboard tube which read, "Dangerous. Handle With Care. Keep Fire Away." This was a standard warning that MP placed on all of the pyrotechnic devices it sold. The SSM also had a piece of tape over the white plastic cap which read, "Remove Before Ignition. This Side Up." Once the tape was removed, there was nothing on the SSM to indicate which end was to face up. Additionally, the tape could become bunched up on the side of the cap, so that the lettering on the tape was not visible.

Packaging materials which came with the SSM included a list of "Dos and Don'ts" which applied to pyrotechnic devices in general. The list included the warning not to "use any explosive material unless completely familiar with safe procedures for their use, or under the direction of competent, experienced persons." However, the packaging materials did not include any specific instructions for use of the SSM. In fact, Morris had never prepared written instructions for use of the SSM.

RGR purchased SSMs in sealed containers with the packaging materials described above from MP. It sold SSMs only to purchasers with a Class 1 or Class 2 Pyrotechnic Operator license. Morris or an RGR employee would discuss use of the SSM with the purchaser.

Since 1998, MP has sold over 20,000 SSMs. Until the accident in this case, there had been no misfires or injuries resulting from the use of an SSM.

**B. *Walkowiak's Experience as a Pyrotechnic Operator***

Plaintiff Christopher Walkowiak (Walkowiak) began working for John Hartigan (Hartigan), owner of Ultimate Effects, in 1993 or 1994. Hartigan had a Class 1 Pyrotechnic Operator license. Walkowiak received on-the-job training in special effects. He obtained a Class 3 Pyrotechnic Operator license in 1995 and a Class 2 license in 1998 or 1999. In order to obtain these licenses, Walkowiak had to obtain references from pyrotechnicians and pass a written examination. The written examination was general in nature and did not cover SSMs or other specific types of explosive devices.

Walkowiak had an excellent reputation for safety. He obeyed safety warnings and instructions and had never had an accident at work.

**C. *Walkowiak's Accident***

In July 2005, RGR sold 22 SSMs to Neil Smith (Smith), who held a Class 1 Pyrotechnic Operator license and was working with Ultimate Effects, for use in the movie "Over There." The SSMs were to be used with a shoulder launcher, and Morris was aware of this when the SSMs were sold. Only about 12 of the SSMs were used; Ultimate Effects saved the remainder for future use.

On January 18, 2007, Walkowiak was working with Hartigan on the movie set for "Charlie Wilson's War." Hartigan instructed Walkowiak to test fire one of the leftover SSMs, using the same shoulder launcher that had been used in "Over There." The shoulder launcher consisted of a steel tube bolted to a rifle stock. The steel tube was closed at the end bolted to the rifle stock. The SSM was loaded into the open end of the steel tube. It was fired by means of a battery-operated power switch which was connected to the SSM by wires. Walkowiak's Class 2 license allowed him to use the SSM fired from a shoulder launcher under the supervision of a Class 1 license holder.

Walkowiak had not worked on "Over There." He had never fired an SSM before or seen an SSM loaded into a shoulder launcher. He had not seen any instructions for using the SSM. Hartigan, also, did not know how to use the SSM.

Walkowiak was aware that the SSM was a controlled pyrotechnic device that was potentially dangerous. He knew that he should get questions regarding its use answered before using it.

Walkowiak called Smith and asked him how to operate the shoulder launcher. Smith told him how to wire and prepare the launcher. He did not tell Walkowiak how to load the SSM into the launcher, however.

Before loading the SSM into the shoulder launcher, Walkowiak saw tape with printing on one end of the SSM. He did not recall seeing the words "Remove Before Ignition" or "This Side Up" on the tape. However, he understood these words to mean that the cap and tape should be removed before discharging the SSM, and "This Side Up" referred to the discharge end of the SSM.

Walkowiak removed the cap and the tape from the SSM. Walkowiak made the decision as to how to load the SSM into the shoulder launcher.

Walkowiak loaded the SSM into the shoulder launcher and connected the wires. He believed he was loading the device safely and correctly. He knelt down and pointed the shoulder launcher toward a wall. After a countdown, Walkowiak fired the device. There was an explosion and a bright flash of light. The SSM exploded in the steel tube. The steel tube broke off the rifle stock and hit Walkowiak in the face, causing severe injury.

**D. *After the Accident***

After the accident, the white cap with the tape on it from the SSM was found on a table. The tape was bunched up on the raised edge of the cap, rendering the words "Side Up" illegible.

On January 30, 2007, the California State Fire Marshal tested the SSM. The marshal was able to replicate the accident by inserting the SSM backwards into the steel tube of the shoulder launcher. The marshal concluded that (1) Walkowiak had no experience loading or firing the SSM; (2) Hartigan was unfamiliar with proper operation

of the SSM and failed to instruct Walkowiak as to its safe use; and (3) the SSM was loaded backwards into the shoulder launcher.

According to Morris, Hartigan called him shortly before the accident, wanting to buy the same type of SSMs Smith had bought in 2005. Morris told him he had none in stock but could get them in a week or two. He added that Hartigan would need to come in and talk about use of the SSMs before they could be sold.[1]

After the accident, Hartigan called Morris and told him that Walkowiak had loaded a SSM backwards and been injured. Morris did not know how Hartigan had acquired the SSM and checked his records. They showed that Smith had purchased the SSMs two years earlier.

Morris viewed photographs taken by the California State Fire Marshal. He agreed that the only way the accident could have occurred was if the SSM had been loaded backwards.

In Morris's opinion, Walkowiak and Hartigan failed to follow the warning that the user not use the device unless familiar with safe procedures for its use. Morris also opined that any experienced pyrotechnics user would have known from the label on the SSM which end should be pointed up. He further opined that any licensed pyrotechnic operator would know how to use the SSM.

## PROCEDURAL BACKGROUND

Walkowiak and his wife filed this personal injury action against MP, RGR, Morris, Hartigan, Ultimate Effects and others. Causes of action included strict products liability, based on design and manufacturing defects and failure to warn, and negligence.

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[1] Hartigan did not recall this conversation.

RGR and MP separately moved for summary judgment or, in the alternative, summary adjudication. The trial court granted their motions and entered judgments in their favor.

The trial court found that, according to the California State Fire Marshal, "the only way to recreate the accident was to load the [SSM] in the tube upside down. . . . No other person gave any evidence that the accident occurred any other way. . . . The individual [SSMs] are labeled '44 mm Stinger Simulator Dangerous Handle with Care Keep Fire Away' and tape covering the cap at the end of the tube says 'Remove before ignition This end up.'"

The trial court found that Walkowiak did "not know if he put the [SSM] in the launcher backwards (i.e. upside down). . . . [Walkowiak] understood that 'this side up' referred to the discharge end of the [SSM] but does not remember seeing those words on the cap before firing the [SSM]. . . . However, it is undisputed that the [SSM] was labeled 'This Side Up.'"

The trial court noted Morris's opinion that Walkowiak did not follow the warnings that came with the SSM, "specifically the one that requires the user not to use any explosive material unless completely familiar with safe procedures for their use."

The trial court then explained that "[m]erely because an accident has occurred, there is no presumption of a defect or negligence," citing *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 676. In this case, Walkowiak "has not shown that the device had any physical, manufacturing or design defect. No party has shown a single incident where the device was used properly."

Therefore, the trial court noted, the only potential basis for imposing liability on defendants was the breach of a duty to warn of a danger, citing *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995. The court added, "[h]owever, product liability cannot be based on failure to warn of a danger that is known or obvious to a user. [*Holmes v. J. C. Penney Co.* (1982) 133 Cal.App.3d 216, 220.] Failure to warn of a danger that is generally known and recognized does not, by itself, render a product dangerous. [*Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930.]"

The trial court proceeded to explain the basis of its grant of summary judgment to defendants: "A sophisticated user is charged with knowledge of a product's inherent dangers, where the inference is supported that the person allegedly injured by its product could reasonably [have been] expected to have known of a hazard connected with its use," citing *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64. In the case before the court, Walkowiak, "a holder of a class two Pyrotechnician's license, and employee of a Class one License holder, should have known which end of the [SSM] to load into the launcher, should have known of the dangers of misuse, in particular mis-loading the device and therefore, [defendants] had no duty to warn of this unforeseeable misuse." Absent a duty to warn, there was no liability and defendants therefore were entitled to summary judgment.

As to MP, the trial court additionally found that Walkowiak's "negligence per se argument regarding a missing label 'Do not hold in hand,' in violation of state law, is unavailing because [Walkowiak] cannot show causation. It is undisputed that [Walkowiak] was not holding the device in his hand when he was injured."

The trial court also rejected Walkowiak's argument that the SSM could have been modified to prevent it from being loaded backwards into the launcher. It explained that "[t]here is no duty to make products accident proof, incapable of causing injury under any circumstance, or to design the safest product possible," citing as an example, *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 568, footnote 5. The court noted that such a design would make the SSM unsuitable for other uses, and added, "Given the training and expertise that the professional users are presumed to have, the adverse consequences to the product and to the consumer that would result from the modification would likely be unacceptable."

## DISCUSSION

### A. *Standard of Review*

Summary judgment properly is granted if there is no question of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Summary adjudication properly is granted if "there is no triable issue as to any material fact" with respect to a cause of action, affirmative defense, claim for damages or issue of duty. (Code Civ. Proc., § 437c, subds. (b), (c), (f)(1); *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1134-1136.)

To secure summary judgment or adjudication, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The defendant must "demonstrate that under no hypothesis is there a material factual issue requiring a trial." (*Rosenblum v. Safeco Ins. Co*. (2005) 126 Cal.App.4th 847, 856; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The plaintiff may not rely on his or her pleadings to meet this burden (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849), except to the extent they are uncontested by the opposing party (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 626). All doubts as to the propriety of granting the motion are resolved in favor of the opposing party. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment or an adjudication as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004)

32 Cal.4th 1138, 1142.) Inasmuch as the grant or denial of a motion for summary judgment or summary adjudication strictly involves questions of law, we must reevaluate the legal significance and effect of the parties' moving and opposing papers. (*Chevron U.S.A., Inc. v. Superior Court, supra*, 4 Cal.App.4th at p. 548.) We must uphold the judgment if it is correct on any ground, regardless of the reasons the trial court gave. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.)

**B. *Whether the Trial Court Erred in Granting Summary Judgment Based on the Sophisticated User Defense***

Plaintiffs contend the trial court erred in granting summary judgment based on the sophisticated user defense, in that defendants failed to establish that Walkowiak was a sophisticated user of the SSM and, even if they did meet their burden of establishing that defense, plaintiffs established a triable issue of material fact as to the application of the sophisticated user defense.

The sophisticated user defense was explained in *Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th 56. In *Johnson*, the plaintiff was a trained and certified heating, ventilation and air conditioning (HVAC) technician. His work on HVAC systems resulted in exposure to phosgene gas, which caused him to develop pulmonary fibrosis. He sued various manufacturers of air conditioning equipment and supplies based on negligence, strict liability design defect and failure to warn. The defendant moved for summary judgment on the ground it had no duty to warn of the risks of exposure, in that it could assume plaintiff, as a trained professional, was aware of the risks. The trial court granted the motion. (*Id*. at pp. 61-63.)

In explaining the development of the sophisticated user defense, the Supreme Court began with the general principle that "manufacturers have a duty to warn consumers about the hazards inherent in their products." (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 64.) This enables consumers to avoid the hazards through careful use of the products or refraining from using the products altogether. (*Ibid*.)

However, "[t]he sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards." (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 65.) It provides that "sophisticated users need not be warned about dangers of which they are already aware or should be aware. [Citation.] Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. [Citation.] The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' [Citation.] This is because the user's knowledge of the dangers is the equivalent of prior notice. [Citation.]" (*Ibid*.)

After reviewing the operation of the defense in other jurisdictions, the Supreme Court set forth how it would operate in California: "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 71.) This objective test applies, because "[i]t would be nearly impossible for a manufacturer to predict or determine whether a given user or member of the sophisticated group actually has knowledge of the dangers because of the infinite number of user idiosyncrasies." (*Ibid*.) Hence, "even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious." (*Ibid*.)

The defense applies to both negligence and strict liability causes of action. (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 71.) In the strict liability context, "because the intended users are deemed to know of the risks, manufacturers have no obligation to warn, and providing no warning is appropriate. The focus of the defense, therefore, is whether the danger in question was so generally known within the trade or profession that a manufacturer should not have been expected to provide a warning specific to the group to which plaintiff belonged." (*Id*. at p. 72.)

In the case before it, the defendant presented undisputed evidence that HVAC technicians knew or should have known of the risk of exposure to phosgene gas. (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 74.) That the plaintiff was unaware of the risk did not preclude application of the sophisticated user defense. Consequently, there was no triable issue of fact and the defendant was entitled to a summary judgment. (*Id*. at p. 75.)

Here, in challenging the trial court's grant of summary judgment based on the sophisticated user defense, plaintiffs first argue that defendants failed to meet their burden of establishing that Walkowiak was a sophisticated user. They claim that the only evidence supporting the finding that Walkowiak was a sophisticated user "was the self-serving and purely conclusory opinion testimony given by defendant Thaine Morris in his deposition" and a second expert declaration submitted by MP "to shore up Morris's self-serving testimony, but this declaration was purely conclusory as well."

In support of this claim, plaintiffs cite statements by Morris and the second expert, John A. Conkling, Ph.D., regarding what the holder of a Class 2 Pyrotechnic Operator license should know. Inasmuch as Morris and Dr. Conkling were both experts in the field of pyrotechnics, and Morris was a licensed pyrotechnician in California for many years, there was a factual basis for their opinions. That some of their statements might have been conclusory does not render the evidence provided by them insufficient to meet defendants' burden of proof.

Moreover, as defendants point out, Walkowiak's own deposition testimony supported the finding that he was a sophisticated user of pyrotechnics. He had a Class 2 Pyrotechnic Operator license and years of experience in special effects. He knew that the SSM was a controlled pyrotechnic device and potentially dangerous. He understood the nature of the warnings provided on and with the SSM. He knew to ask for instructions on how to operate the device.

In other words, Walkowiak knew or should have known of the risk involved in use of the SSM. Defendants thus met their burden of showing application of the

sophisticated user defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 71.)

Plaintiffs assert that, even if the foregoing evidence was sufficient to meet defendants' burden, plaintiffs then met their burden of establishing a triable issue of fact as to whether Walkowiak was a sophisticated user. They presented evidence that Walkowiak's license only allowed him to use the SSM under the supervision of a Class 1 license holder, and his Class 2 license did not require any knowledge of use of the SSM. In addition, neither he nor Hartigan had experience with or knew how to use the SSM.

That Walkowiak did not have experience using the SSM and could only use it under supervision does not establish that he was unaware of the risks associated with its use. His testimony establishes that he was aware of the risks: he knew the SSM was dangerous, and he understood the nature of the warnings on the device, "Remove Before Ignition" and "This Side Up." He simply did not know how to use the SSM with the shoulder launcher. We know of no authority, however, that would require a manufacturer not only to apprise a user of the risks associated with use of its product but also to provide instruction on how to use the product in a device it did not manufacture.

Plaintiffs also cite as evidence establishing a triable issue of fact as to whether Walkowiak was a sophisticated user Morris's testimony that Walkowiak and Hartigan violated the general warning which came with the SSM not to "use any explosive material unless completely familiar with safe procedures for their use, or under the direction of competent, experienced persons." That Walkowiak and Hartigan failed to follow basic warnings for the safe use of the SSM does not create a triable issue of fact as to the sophisticated user defense. An objective test is used to determine whether the defense applies; the test is not based upon an individual user's knowledge or adherence to warnings given. (*Johnson v. American Standard, Inc.*, *supra*, 43 Cal.4th at p. 71.)

Plaintiffs next argue that, even if the sophisticated user defense applies, it does not apply to their strict liability cause of action based on failure to provide instructions for the safe use of the SSM. They claim the defense applies only to the failure to provide warnings.

In support of their argument, plaintiffs rely on *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691. *Finn* involved a claim of strict liability based on the failure to warn of potential drug side effects. The court observed that "'Failure-to-warn' cases involving claims that the manufacturer knew or should have known of the asserted danger and accordingly should have supplied a warning have been subject in California to a distinct form of analysis in the strict liability arena. The unique nature of the 'defect' within this context was recently well described as follows: '[T]he jury cannot compare the product with other units off the same assembly line, nor can they at least weigh the reasonableness of the design against alternative designs presented by the plaintiff [citation]. Instead, they must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of a warning.' [Citation.]

"The requisite warning may be of two kinds, each of which may have different implications. [Citation.] First, the manufacturer may be required adequately to instruct the consumer as to how the product should be used. For example, in *Midgley v. S.S. Kresge Co*. (1976) 55 Cal.App.3d 67 . . . , strict liability was imposed when the manufacturer failed to advise users on the proper use and assembly of a telescope, thereby causing serious eye injury to the plaintiff. A second distinctive form of warning is that which informs a consumer (or, in the case of prescription drugs, the physician) of potential risks or side effects which may follow the foreseeable use of the product. [Citations.] Within the prescription drug context, the giving of this second form of warning may cause a physician-user to refuse to prescribe the drug. The particular risk described in the warning may well persuade the physician and patient in determining the treatment of choice. The distinct functions performed by the two kinds of warnings were described succinctly by one commentator: 'In some circumstances a warning or directions would have reduced the risk. In other circumstances the warning would simply have afforded the consumer an opportunity to make an informed choice.' [Citation.]" (*Finn v. G. D. Searle & Co., supra*, 35 Cal.3d at pp. 699-700.)

We see nothing in *Finn* which precludes application of the sophisticated user defense only to those failure to warn cases involving a failure to warn of potential dangers, as opposed to failure to warn as to proper use. A case cited by plaintiffs provides support for this conclusion.

*Antcliff v. State Employees Credit Union* (1982) 414 Mich. 624 [327 N.W.2d 814] involved a claim that a scaffolding manufacturer breached its duty to provide instructions for the safe rigging of a powered scaffold. The court held "that on the facts of *this* case *this* defendant was under no duty to instruct on or give directions for the safe rigging of its product." (*Id*., 327 N.W.2d at p. 815.) There was evidence "that scaffolding rigging techniques were customarily learned on the job, knowledge passing from the more experienced worker to the less experienced worker, that scaffold workers did their own rigging, and that choice of suspension technique was largely a matter of personal preference." (*Id*. at p. 818.) The plaintiff, as a journeyman painter, had received both formal and on-the-job training, including training on how to rig scaffolding safely. (*Id*. at p. 818 & fn. 7.)

The evidence also established that the manufacturer produced products for professional riggers, and its "catalogue contained primarily technical information about the product line, the significance of which only an experienced rigger would appreciate." (*Antcliff v. State Employees Credit Union*, *supra*, 327 N.W.2d at p. 818.) The manufacturer sold the scaffolding to the plaintiff's employer, "an experienced subcontractor whose work involved extensive use of scaffolding." (*Ibid*.) The court concluded that "the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require [the manufacturer] to provide instructions for the safe rigging of its product." (*Id*. at p. 821.) Although not identified by name, the sophisticated user defense clearly was applied to a failure to provide instruction case.

**C.** ***Whether the Trial Court Erred in Excluding a Portion of Dr. Hoffmann's Declaration and Rejecting the Risk-Benefit Theory of Design Defect as a Matter of Law***

In opposition to MP's summary judgment motion, plaintiffs submitted the declaration of John M. Hoffmann, Ph.D., P.E., a professional safety engineer. Dr. Hoffman reviewed Walkowiak's and Morris's depositions, the California State Fire Marshal's and Downey Fire Department's reports, inert exemplars of the SSM and a photograph of a new SSM produced by Morris.

Dr. Hoffmann first discussed general principles of safety. He then opined that the SSM was defectively designed, explaining: "In the present matter of the [SSM] there is no indication a systems safety analysis was done. Limiting the analysis to the issue of firing/igniting the [SSM] in a launch tube, it is clear that the [SSM] can be placed in a tube for launch in two ways in spite of any labeling present on the [SSM]. Having identified the hazard of potentially loading the [SSM] in a tube backwards, is there an engineering or design change[] which would eliminate this hazard? Clearly a simple design change or making it impossible to load the [SSM] backwards is feasible and practical. One method would be to add a cardboard or plastic ring on the exit end of the [SSM] such that it cannot be loaded into a launch tube backwards. If the process of conducting a hazard analysis by anyone [*sic*] of the several available methods and implementing the obvious design change, had been done in the matter, this accident would not have occurred."

MP objected to Dr. Hoffmann's declaration on several grounds, including a lack of foundation for his opinion and his qualification as an expert. MP also objected that his opinion was speculative in that it did not address the other uses of the device which did not involve a launching tube. MP further objected that Dr. Hoffman's opinion was irrelevant, in that Walkowiak was a sophisticated and licensed user of the device, not a consumer.

The trial court sustained MP's objection as to Dr. Hoffman's explanation as to why the SSM was defectively designed.

The trial court also rejected plaintiffs' argument that the SSM could have been modified to prevent it from being loaded backwards into the launcher as "misguided." It explained that "[t]here is no duty to make products accident proof, incapable of causing injury under any circumstance, or to design the safest product possible." The court noted that such a design would make the SSM unsuitable for other uses, and added, "Given the training and expertise that the professional users are presumed to have, the adverse consequences to the product and to the consumer that would result from the modification would likely be unacceptable."

A manufacturer may be held strictly liable in tort for personal injuries caused by products it has placed on the market when the injuries result from a reasonably foreseeable use of the products. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 560; *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 472.) Strict liability "extends to products which have design defects, manufacturing defects, or 'warning defects.'" (*Sparks*, *supra*, at p. 472, citing *Anderson v. Owens-Corning Fiberglas Corp.*, *supra*, 53 Cal.3d at p. 995.)

Where defective design is alleged, the risk-benefit test is one of two tests for determining whether the product is defective in design, subjecting its manufacturer to strict liability for resulting injuries. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432.) Under this test, the product may "be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." (*Ibid*.)

In order to prove a defect under the risk-benefit 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 v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1121; accord, *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1310-1311.) Among the factors to be

considered in undertaking a risk-benefit analysis are "'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 479; accord, *Pannu*, *supra*, at p. 1313.)

Absent "very unusual circumstances," a risk-benefit analysis entails "a factual issue which can only be resolved by [a] trier of fact," and not by the court as a matter of law on summary judgment. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 120; *McCabe v. American Honda Motor Co.*, *supra*, 100 Cal.App.4th at p. 1127.)

Here, plaintiffs presented evidence that Walkowiak was injured when he loaded the SSM into the shoulder launcher backwards. When he ignited it, it exploded in the steel tube, causing the tube to break off the rifle stock and hit him in the face. This evidence was sufficient to establish causation. (See, e.g., *McCabe v. American Honda Motor Co.*, *supra*, 100 Cal.App.4th at p. 1127.)

MP failed to present any evidence, let alone meet its burden of proving, that the benefits of the design of the SSM, when balanced against such factors as the feasibility and cost of alternative designs, outweighed its inherent risk of harm. (*McCabe v. American Honda Motor Co.*, *supra*, 100 Cal.App.4th at p. 1121.) The trial court had no evidentiary basis for its conclusions that an alternate design would make the SSM unsuitable for other uses, and that "the adverse consequences to the product and to the consumer that would result from the modification *would likely be* unacceptable." (Italics added.) For this reason, the trial court erred in summarily adjudicating plaintiffs' strict liability cause of action based on design defect.[2]

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[2] In light of this conclusion, we need not resolve the question whether the trial court erred in excluding any portion of Dr. Hoffmann's declaration.

## DISPOSITION

The judgment as to RGR is affirmed. RGR is to recover its costs on appeal.

The judgment as to MP is reversed. The trial court is directed to vacate its order granting MP's motion for summary judgment and to enter a new and different order denying summary adjudication as to plaintiffs' cause of action against MP for strict liability based on design defect. The parties are to bear their own costs on appeal.

JACKSON, J.

I concur:

ZELON, J.

PERLUSS, P. J., Concurring and Dissenting.

I agree the trial court erred in granting summary judgment with respect to Christopher Walkowiak's cause of action for defective product design under the risk-benefit test. However, I respectfully disagree with my colleagues' analysis of the applicability of the sophisticated user defense.

1. *The Risk-benefit Test*

Walkowiak presented evidence, including relevant portions of the opinion testimony of Dr. John M. Hoffmann, a professional safety engineer, that the design of the simulated stinger missile proximately caused the accident and his injuries. Dr. Hoffmann testified, in part, the simulated stinger missile could be inserted in the launch tube in two ways; adding a cardboard or plastic ring on the exit end of the simulator to prevent it from being loaded into the launch tube backwards was feasible; and Walkowiak's accident would not have occurred had this design change been implemented. That testimony, if admissible, shifted to MP Associates the burden to establish 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. (See *Barker v. Lull Engineering Co. Inc.* (1978) 20 Cal.3d 413, 431 [plaintiff's burden is only to make a prima facie showing that the product's design proximately caused the injuries, not that the design itself was defective]; see also *McCabe v. American Honda Motor Co., Inc.* (2002) 100 Cal.App.4th 1111, 1120-1121; *Pannu v. Land Rover North America, Inc*. (2011) 191 Cal.App.4th 1298, 1310-1311.)

Was this testimony admissible? The trial court sustained MP Associates' objection to the full paragraph of Dr. Hoffmann's declaration (quoted on page 16 of the majority opinion) that included these specific statements. The objection states, "Lack of specificity. Conclusory opinion. Lack of foundation for purported qualification of expert to testify concerning standard for design of regulated pyrotechnic devices. Lack of foundation for opinion. Lack of foundation for factual recitation. Testimony as to the state of a legal requirement is inadmissible. [Citation.] Immaterial and irrelevant as

plaintiff is not a consumer, but is a sophisticated user and a licensed pyrotechnician. Further, opinion is speculative in that it fails to deal with the issue that the device in question has many different and unforeseeable applications, and is not used solely in conjunction with a launching tube."

The trial court did not specify which ground(s) for objection it found to be valid, but none is a proper basis for excluding the limited portions of Dr. Hoffmann's declaration necessary to shift to MP Associates the burden of establishing the benefits of the simulator's design outweighed the risk of inserting it backwards into a launcher tube. Most of these objections, which were repeated verbatim as objections (overruled) to two other portions of Dr. Hoffmann's declaration, do not even relate to the testimony now at issue. For example, this limited portion of Dr. Hoffmann's declaration does not identify any legal requirements or industry standards for the design of a regulated pyrotechnic device nor is Dr. Hoffmann's opinion too speculative or conjectural to have evidentiary value. As my colleagues note, Dr. Hoffmann's declaration explained he had reviewed the deposition testimony of Walkowiak and defendant Thaine Morris, as well as the exhibits to those depositions, investigation reports from the Downey Fire Department and the California State Fire Marshall and an exemplar of the simulated stinger missile. Nothing more is required for this expert to conclude the accident was caused by inserting the missile backward into the launcher—a fact that is essentially undisputed—and that a modification of the simulator is possible that would have prevented that mistake.[1]

As the trial court explained, MP Associates was not required to design its product to be accident-proof under all circumstances. But given Dr. Hoffmann's testimony that a

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[1] Dr. Hoffmann's lack of familiarity with other uses of the simulated stinger missile, while arguably material to any testimony proffered that purported to weigh the benefits of various alternative designs, is simply irrelevant to the question whether this design was the proximate cause of this accident. Similarly, the fact that no other comparable launcher-tube accidents have been reported may ultimately prove the current design is not defective, but it does not rebut the evidence that the design was the proximate cause of Walkowiak's injuries.

change in design could have prevented this accident, it was required to present evidence that the benefits of the actual design of its simulated stinger missile outweighed whatever risk that may have existed. (*Barker v. Lull Engineering Co.*, *supra*, 20 Cal.3d at pp. 431-432; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 562.) It failed to do so, requiring reversal of the order granting summary judgment. (See *McCabe v. American Honda Motor Co., Inc., supra,* 100 Cal.App.4th at p. 1127 [because plaintiff proved causation, Honda's failure to provide any evidence negating design defect under risk-benefit theory mandates reversal of order granting summary judgment].)

2. *The Sophisticated User Doctrine*

It may well be that the holder of a California second-class pyrotechnic operator's license is properly considered a sophisticated user under *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 with respect to the simulated stinger missile at issue in this case. It may even be that Walkowiak's status as a sophisticated user of the simulated stinger missile can be established as a matter of law. But the opinion evidence presented on this point in support of the motions for summary judgment (by defendant Morris himself, who holds a first-class pyrotechnic operator's license, and Dr. John A. Conkling, the executive director of the American Pyrotechnic Association) essentially asserted only that the holder of a second-class license "should know how to use this type of material" without providing details regarding either the training or testing requirements for the license that Walkowiak held or the professional experience or educational materials that someone with such a license would normally encounter during his or her career. I believe that is insufficient to establish the sophisticated user defense as a matter of law. (See *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 [an opinion unsupported by reasons or explanations is insufficient to carry moving party's burden on summary judgment]; see also *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co*. (2001) 85 Cal.App.4th 1300, 1315, disapproved on other grounds in *State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1036 [expert declaration stating toxic spill was "sudden and

accidental" was inadmissible to prove that fact because it was devoid of any basis, explanation or reasoning].)[2]

In *Johnson*, in contrast, the evidence underlying the "sophisticated user" determination on summary judgment was quite detailed. Plaintiff, an HVAC technician, alleged that the defendant, a manufacturer of air conditioning equipment, had failed to provide adequate warnings of the potential hazards of exposure to R-22, a hydrochlorofluorocarbon refrigerant, and that he had soldered refrigerant lines on an evaporator manufactured by defendant containing R-22 refrigerant, creating and exposing him to phosgene gas, which ultimately caused him to develop pulmonary fibrosis. (*Johnson v. American Standard, Inc., supra*, 43 Cal.4th at p. 62.) The defendant presented evidence it was widely known among HVAC technicians at the relevant times that R-22 refrigerant can decompose into phosgene gas when exposed to flame or high heat and that exposure to phosgene gas may cause health problems; material safety data sheets describing these dangers and risks were used to educate and train HVAC technicians; and HVAC technicians like plaintiff who work on commercial equipment must be certified by the Environmental Protection Agency, which requires those professionals to understand the decomposition properties of refrigerants at high temperatures. (*Id.* at pp. 61-63.) Thus, in addition to the ultimate conclusion that "HVAC technicians knew or should have known of the risk of phosgene at the time defendant manufactured the product in 1965" (*id.* at p. 74), there was ample supporting

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[2] Evidence Walkowiak may have actually known of the dangers associated with the use of the simulated stinger missile, while certainly relevant to causation, has no direct bearing on the existence of a legal duty to warn or the applicability of the sophisticated user defense. The issue is the knowledge base of the expected user population, not the plaintiff's own subjective knowledge: "The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson v. American Standard, Inc., supra*, 43 Cal.4th at pp. 65-66; see also *id.* at p. 74 ["'[l]egal duties must be based on objective general predications of the anticipated user population's knowledge, not case-by-case hindsight examination of the particular plaintiff's subjective state of mind'"].)

evidence that the specific danger created by exposing refrigerant to high heat and flame was understood by the anticipated user population. (*Ibid.*) Nothing comparable supports the opinions proffered by Morris and Dr. Conkling.

Accordingly, I would reverse the judgment in favor of both MP Associates and Roger George Rentals and return the entire case to the trial court for further proceedings.

PERLUSS, P. J.