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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLE ALFANO and MICHAEL
ALFANO,

Plaintiffs,

v.

BRP Inc. and BRP US Inc., and
DOES 1 through 50 inclusive,

Defendants.

Case No. 2:08-cv-1704-JAM-DAD

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY ADJUDICATION

This matter comes before the Court on Defendants BRP Inc. and BRP US Inc.'s ("BRP" or "Defendants") motion for summary adjudication pursuant to Federal Rule of Civil Procedure 56. (Doc. # 75). Plaintiffs Nicole and Michael Alfano ("Plaintiffs") oppose the motion. (Doc. # 101). A hearing on this motion was held on June 2, 2010.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a products liability action arising from a personal watercraft incident that occurred on September 15, 2007 on New

1 Bullards Bar Reservoir in Yuba County, California. Plaintiff,
2 Nicole Alfano, was riding as a passenger on-board a 2005 BRP
3 Sea-Doo GXT personal watercraft (the "PWC") operated by the PWC
4 owner, Jill Smith. After Jill Smith accelerated the PWC,
5 Plaintiff lost her grip on the seat strap, fell off the rear of
6 the PWC and into the water at or near the location of the PWC's
7 propulsion jet nozzle ("jet nozzle") and sustained severe
8 internal injuries. Plaintiffs' claims against BRP are for strict
9 and negligent product liability based on the design of the
10 subject PWC and failure to warn.
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13 In the instant motion, Defendants BRP Inc. and BRP US Inc.
14 seek summary adjudication on Plaintiffs' claims of strict and
15 negligent product liability based on failure to warn. (Doc. #
16 75). Plaintiffs oppose the motion. (Doc. # 101).
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18 II. OPINION

19 A. Legal Standard

20 Summary judgment or summary adjudication is proper "if the
21 pleadings, the discovery and disclosure materials on file, and
22 any affidavits show that there is no genuine issue as to any
23 material fact and that the movant is entitled to judgment as a
24 matter of law." Fed. R. Civ. P. 56(c)(2). Because the purpose of
25 summary judgment "is to isolate and dispose of factually
26 unsupported claims or defenses," Celotex Corp. v. Catrett, 477
27 U.S. 317, 323-324 (1986), "[i]f summary judgment is not rendered
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1 on the whole action, the court should, to the extent
2 practicable, determine what material facts are not genuinely at
3 issue." Fed. R. Civ. P. 56(d).

4
5 The moving party bears the initial burden of demonstrating
6 the absence of a genuine issue of material fact for trial.

7 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

8 If the moving party meets its burden, the burden of production
9 then shifts so that "the non-moving party must set forth, by
10 affidavit or as otherwise provided in Rule 56, 'specific facts
11 showing that there is a genuine issue for trial.'" T.W. Elec.

12 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,
13 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e)). The Court
14 must view the facts and draw inferences in the manner most
15 favorable to the non-moving party. United States v. Diebold,
16 Inc., 369 U.S. 654, 655 (1962).

17
18 A "scintilla of evidence" is insufficient to support the
19 non-moving party's position; "there must be evidence on which
20 the jury could reasonably find for the [non-moving party]."
21 Anderson, 477 U.S. at 252. Accordingly, this Court applies to
22 either a defendant's or plaintiff's motion for summary judgment
23 essentially the same standard as for a motion for directed
24 verdict, which is "whether the evidence presents a sufficient
25 disagreement to require submission to a jury or whether it is so
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1 one-sided that one party must prevail as a matter of law." Id.
2 at 251-52.

3 B. Failure to Warn

4 To find a manufacturer liable for failing to warn, a
5 plaintiff must prove the manufacturer's failure to warn was the
6 proximate cause of the plaintiff's injuries. Conte v. Wyeth
7 Inc., 168 Cal.App.4th 89, 112 (Cal. 1st DCA 2009). A
8 manufacturer of a product can only be liable for those injuries
9 proximately caused by breach of its duty to communicate adequate
10 product warnings. Carlin v. Superior Court, 13 Cal. 4th 1104,
11 1110 (Cal. 4th 1996).

12 Defendants argue that Plaintiffs have not and cannot put
13 forth admissible evidence to satisfy their burden of proof on
14 the essential element of causation to their strict and negligent
15 product liability failure to warn claims. The PWC involved in
16 this case contains warnings, both on-board the subject PWC and
17 within the Operator's Guide, that all users must wear protective
18 clothing, namely a wet suit or equivalent clothing, to prevent
19 severe internal injuries resulting from falling in to the water
20 at or near the location of the jet nozzle. Plaintiff testified
21 in her deposition that she noticed, but did not read, BRP's on-
22 product warning label.

23 Defendants contend that Nicole Alfano's ("Nicole")
24 testimony that she would have acted a certain way or heeded to
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1 the warning had the warning label been adequate is inadmissible
2 as it is too speculative and self-serving pursuant to Federal
3 Rules of Evidence Sections 602 and 701. See Nevada Power Co. v.
4 Monsanto Company, 891 F.Supp. 1406 (9th Cir. 1995). Also, BRP
5 argues that the fact that Nicole Alfano saw the warning label
6 and did not read it, even though she admitted that "nothing
7 prevented her from reading it," precludes a finding of proximate
8 cause as Nicole did not intend to read or rely on the warning.
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11 Plaintiffs contend that the very nature of the label's
12 inadequacy is what caused Nicole to ignore the warning. Had the
13 warning label been adequate, Nicole would have looked at it.
14 Plaintiffs assert that BRP knows that users do not heed its
15 warning to wear protective clothing and therefore BRP had a duty
16 to provide a short and plain warning to consumers. Plaintiffs
17 assert it is unreasonable to expect consumers to read and
18 process such a lengthy message as was containing on the subject
19 PWC. Thus, Plaintiffs argue a genuine issue of fact exists as to
20 whether the label's inadequacy is what caused Nicole to ignore
21 it. Herrera v. Louisville Ladder Group, LLC, 2009 WL 3849705 at
22 *3-4. The Herrera case however, does not address whether the
23 Plaintiff can testify as to whether a different warning would
24 have altered her conduct. Rather, the only issue before the
25 Court in Herrera was the adequacy of the warning.
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1 Here, it is undisputed that Nicole Alfano did not read the
2 PWC warning. Although Plaintiffs argue that the label's
3 inadequacy is what caused Nicole Alfano to ignore the warning,
4 Plaintiffs have offered no admissible evidence which creates the
5 existence of a material factual dispute concerning causation.
6 Normally, undisputed evidence that a plaintiff failed to read
7 instructions or warnings which were provided with the product is
8 sufficient to entitle the defendant to judgment as a matter of
9 law. See Motus v. Pfizer, Inc., 358 F.3d 659, 661 (9th
10 Cir.2004). California law requires proof that "the inadequacy or
11 absence of the warning was a substantial cause of the
12 plaintiff's injury." Plummer v. Lederle Laboratories, Div. of
13 American Cyanamid Co., 819 F.2d 349, 358 (2d Cir. N.Y. 1987);
14 see Ramirez v. Plough, Inc., 6 Cal. 4th 539 (Cal.1993) (requiring
15 "causal connection between the representations or omissions that
16 accompanied the product and plaintiff's injury"). California,
17 unlike some other states, has not adopted a rebuttable
18 presumption that a person would have heeded an adequate warning.
19 See Motus, 196 F.Supp.2d at 991-95. As such, the Plaintiff bears
20 the burden of proving through affirmative evidence that the
21 inadequate warning was the proximate cause of her injuries.
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23 Here, even assuming Plaintiffs' argument that a jury could
24 find inadequacy of the warning, Plaintiffs are unable to
25 establish that an adequate warning would have altered Nicole
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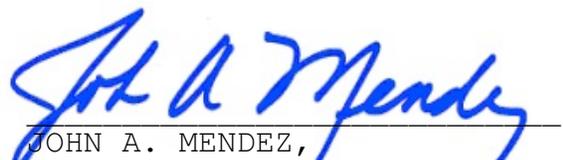
1 Alfano's conduct. The Court finds that Nicole's testimony that
2 she would have acted a certain way or heeded to the warning had
3 it been adequate is inadmissible as it is too speculative and
4 self-serving pursuant to Federal Rules of Evidence Sections 602
5 and 701. See Nevada Power Co. v. Monsanto Company, 891 F. Supp.
6 1406 (9th Cir. 1995) (the court held that plaintiff's testimony
7 that he would have not have used the equipment at all had he
8 known more fully of the dangers was too speculative and self-
9 serving). In the absence of any other supporting evidence or
10 facts on the issue of causation, the Court concludes that
11 Plaintiffs have failed to demonstrate there exists a genuine
12 issue of material fact on the causation issue, which is an
13 essential element to their claims for both strict and negligent
14 product liability for failure to warn. Accordingly, Plaintiffs'
15 strict and negligent failure to warn claims fail as a matter of
16 law.
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20 III. ORDER

21 For the above reasons, Defendants BRP Inc. and BRP US
22 Inc.'s motion for summary adjudication on Plaintiffs' strict and
23 negligent product liability failure to warn claims is hereby
24 GRANTED.
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26 IT IS SO ORDERED.

27 Dated: June 3, 2010

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE