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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

WESCO INSURANCE COMPANY,  
  
Plaintiff(s),  
  
v.  
  
SMART INDUSTRIES CORPORATION,  
  
Defendant(s).

Case No. 2:16-CV-1206 JCM (EJY)

ORDER

Presently before the court is plaintiffs Jennifer Wyman, Bear Wyman, and the estate of Charles Wyman’s (collectively “the Wymans”) motion for partial summary judgment as to the issue of comparative fault (ECF No. 212), joined by plaintiffs Sara Rodriguez and Jacob Wyman (“Rodriguez plaintiffs”) (ECF No. 246). Defendants Smart Industries Corporation (“SIC”) filed a response (ECF No. 247), to which the Wymans replied (ECF No. 254), joined by Rodriguez (ECF No. 257).

Also before the court is the Wymans’ motion for partial summary judgment as to the cause of Charles Wyman’s (“decedent”) death (ECF No. 215), joined by the Rodriguez plaintiffs (ECF No. 245). SIC filed a response (ECF No. 248), to which the Wymans replied (ECF No. 255), joined by the Rodriguez plaintiffs (ECF No. 258).

Also before the court is the Wymans’ motion for partial summary judgment as to special damages (ECF No. 216). SIC filed a response (ECF No. 248), to which the Wymans replied (ECF No. 255), joined by the Rodriguez plaintiffs (ECF No. 258).

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1       **I.       Background**

2               *A. Factual Background*

3               The facts of this case have been extensively detailed in prior orders. (*See, e.g.*, ECF No.  
4 263). The court briefly highlights only those facts pertinent to the instant motions. The instant  
5 action involves a wrongful death and survival claim against SIC, which allegedly manufactured a  
6 defective arcade vending machine that caused decedent’s death on October 4, 2015. (ECF No.  
7 18-A at 5).

8               Five days prior to his death, decedent, acting in his role as a route manager employed by  
9 Nickels and Dimes Incorporated, inspected an arcade vending machine at the Boulevard Mall in  
10 Las Vegas, Nevada. (ECF No. 1 at 3). The scope of decedent’s employment frequently required  
11 him to service similar machines and remove coins from them. *Id.* at 2.

12               SIC manufactured, distributed, and/or sold the vending machine named the “Clean Sweep  
13 69 Dual 7th Generation,” a “claw” arcade game wherein the user pays coins and attempts to pick  
14 up a prize. *Id.* at 3. A reversal of the green wire grounding conductor and the hot black ungrounded  
15 wire inside the machine caused it to operate in a dangerously energized state. *Id.*

16               Unaware of the defect, decedent examined the machine, came into contact with its  
17 energized parts, and received an electric shock. *Id.* Decedent was electrocuted for approximately  
18 ten minutes until the Clark County Fire Department arrived to unplug the machine. *Id.* Paramedics  
19 transported the unconscious decedent to Sunrise Hospital, where he remained until his death. *Id.*

20               *B. Procedural Background*

21               SIC removed the underlying case against Wesco Insurance Co. to federal court on May 31,  
22 2016. (ECF No. 1). It was then consolidated with the instant case. (ECF No. 33). The Wymans  
23 assert four claims against defendant, including a strict products liability claim. (ECF No. 18-A).  
24 This case has undergone numerous discovery and evidentiary disputes, as well as the addition of  
25 parties. (*See, e.g.*, ECF No. 199). While discovery in the case closed in 2017, this court ordered a  
26 limited reopening of discovery that is still ongoing by stipulation of the parties. (*See* ECF Nos  
27 199; 265). On June 26, 2020, this court issued an order granting the Wymans’ motion *in limine*  
28 such that SIC is precluded from arguing its machine did not cause decedent’s death.

1           The Wymans now move for partial summary judgment as to the issues of comparative  
2 fault, the cause of decedent’s death, and special damages. (ECF Nos. 212; 215; 216).

3           **II.     Legal Standard**

4           The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
5 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
6 show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
7 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
8 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
9 323–24 (1986).

10           For purposes of summary judgment, disputed factual issues should be construed in favor  
11 of the nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
12 withstand summary judgment, the nonmoving party must “set forth specific facts showing that  
13 there is a genuine issue for trial.” *Id.*

14           In determining summary judgment, a court applies a burden-shifting analysis. “When the  
15 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
16 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at  
17 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine  
18 issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests.,*  
19 *Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

20           By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
21 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
22 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed  
23 to make a showing sufficient to establish an element essential to that party’s case on which that  
24 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
25 party fails to meet its initial burden, summary judgment must be denied and the court need not  
26 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
27 60 (1970).

28

1           If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
2 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
3 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of material  
4 fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
5 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to require a  
6 jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

7           In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
8 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
9 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
10 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
11 for trial. *See Celotex*, 477 U.S. at 324.

12           At summary judgment, a court’s function is not to weigh the evidence and determine the  
13 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*  
14 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all  
15 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the  
16 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
17 granted. *See id.* at 249–50.

18           The Ninth Circuit has held that information contained in an inadmissible form may still be  
19 considered for summary judgment if the information itself would be admissible at trial. *Fraser v.*  
20 *Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3d 410,  
21 418–19 (9th Cir. 2001) (“To survive summary judgment, a party does not necessarily have to  
22 produce evidence in a form that would be admissible at trial, as long as the party satisfies the  
23 requirements of Federal Rules of Civil Procedure 56.”))

### 24 **III. Discussion**

#### 25 *A. Motion as to Product Liability*

26           The Wymans argue that, under Nevada law, comparative and contributory fault are not  
27 defenses to strict products liability. (ECF No. 212 at 4). SIC argues that comparative negligence  
28 is a defense under Arizona law, which it believes is applicable in this case. (ECF No. 247 at 2).

1 The Nevada Supreme Court has adopted the Restatement (Second) of Conflicts of Law “as  
2 the relevant authority for Nevada’s choice-of-law jurisprudence in tort cases and concluded that  
3 the most significant relationship test of section 6 of the Second Restatement governs a choice-of-  
4 law analysis, ‘unless another, more specific section . . . applies.’” *Dictor v. Creative Mgmt. Sevs.,*  
5 *LLC*, 223 P.3d 332, 335 (Nev. 2010) (citing *GMC v. Eight Judicial Dist. Court of Nev.*, 134 P.3d  
6 111, 116 (Nev. 2006)).

7 SIC argues that Second Restatement § 185 controls, and therefore Arizona law is  
8 applicable. (ECF No. 247 at 11). Section 185 states:

9 The local law of the state under whose workmen’s compensation  
10 statute an employee has received an award for an injury determines  
11 what interest the person who paid the award has in any recovery for  
12 tort or wrongful death that the employee may obtain against a third  
13 person on account of the same injury.

14 Restatement (Second) of Conflict of Laws, § 185.

15 The Wymans argue that § 164 is more applicable, as it states: “When determining whether  
16 contributory fault on the part of the plaintiff precludes his recovery in whole or in part, the  
17 applicable law will *usually* be the local law of the state where the injury occurred.” Restatement  
18 (Second) of Conflict of Laws § 164 (emphasis added).

19 Section 185 is not applicable here. Section 185 governs “what interest the *person who paid*  
20 the award has in any *recovery* for tort . . . that the *employee* may obtain against a *third person* on  
21 account of the same injury.” Restatement (Second) of Conflict of Laws, § 185 (emphasis added).  
22 This section governs any action that Wesco might bring to recover against any tortfeasor that has  
23 paid recovery to a prospective employee, chiefly subrogation proceedings. *See, e.g., Talbot v.*  
24 *WMK-Davis, LLC*, 380 P.3d 823, 827 (Mont. 2016); *Harris v. Ballard*, 100 A.D. 3d 196, 198 (N.Y.  
25 App. Div. 2012); *Langston v. Hayden*, 886 S.W. 2d 82, 85–86 (Mo. 1994); *Kolberg v. Sullivan*  
26 *Foods, Inc.*, 644 N.E. 2d 809, 811 (Ill. App. Ct. 1994). In the instant case, the family seeks its  
27 initial recovery from SIC. Section 185 has no bearing on proceedings for an initial recovery.

28 Therefore, § 164 controls this court’s analysis, so “the applicable law will usually be the  
local law of [Nevada] where the injury occurred.” Restatement (Second) Conflict of Laws § 164.  
Nevada law states that contributory negligence is not a defense to strict products liability. *See*

1 *Young's Mach. Co. v. Long*, 692 P.2d 24, 25 (Nev. 1984). The motion for partial summary  
2 judgment deals only with the strict products liability claim.<sup>1</sup> (*See* ECF No. 212). The court grants  
3 the Wymans' first motion for partial summary judgment.

4 *B. Motion as to Causation*

5 The Wymans argue that there is no genuine dispute of material fact that decedent died as a  
6 result of electrocution. (ECF No. 215 at 7).

7 When addressing the motion *in limine* on this point, this court previously found that the  
8 parties "may not dispute that Wyman is dead by way of electrocution by the arcade machine."  
9 (ECF No. 263). Defendants conceded this point in briefing their motion *in limine*, stating "Charles  
10 Wyman was electrocuted when he came into contact with an energized surface, ultimately  
11 resulting in his death." (ECF No. 227 at 5). Since the parties never truly disputed this point, and  
12 are now barred from doing so, the Wymans' second partial motion for summary judgment is  
13 granted.

14 *C. Motion as to Special Damages*

15 The Wymans argue they are entitled to summary judgment such that, if they prevail at trial,  
16 they receive an award of \$1,494,965.48 in special damages. (ECF No. 216). The Wymans assert  
17 these damages in two categories, expenses and lost wages. The parties dispute these damages to  
18 various extents. Regarding expenses, the parties do not dispute \$1,080.31 in medical expenses  
19 from MedicWest Ambulance, and the court grants summary judgment as to that amount.

20 SIC does not necessarily dispute the \$165,788 in medical expenses from Sunrise Hospital  
21 or the \$1,508.17 in funeral expenses from Affordable Cremation & Burial, but it asserts that it has  
22 not conducted sufficient discovery to concede or confirm those amounts. (*See* ECF No. 249 at 7,  
23 9, 11). On February 19, 2020, this court ordered a reopening of discovery allowing SIC to depose  
24 several witnesses, including the Rule 30(b)(6) designee of Sunrise Hospital, the designee of  
25 Affordable Cremation & Burial, and Dr. Samir Bangalore, M.D, all related to the Wymans' special  
26 damages calculation. (*See* ECF No. 199). Since then, this discovery period has been extended

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28 <sup>1</sup> While contributory negligence could be an affirmative defense to negligence, the  
Wymans are no longer pursuing their negligence claim. (*See* ECF No. 254).

1 several times by stipulation of the parties due to the global coronavirus pandemic, and discovery  
2 remains ongoing. (*See, e.g.*, ECF No. 265).

3 Pursuant to Federal Rule of Civil Procedure 56(d), SIC must indicate what specific facts it  
4 hopes to gather from the additional discovery. *See Family Home & Fin. Ctr., Inc. v. Fed. Home*  
5 *Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). Here, SIC does not indicate what it hopes  
6 to learn from deposing these witnesses, only that these depositions “may have a bearing on the  
7 claim.” (ECF No. 249 at 9). SIC presents no facts disputing the Wymans’ calculations, nor do  
8 they assert any specific facts that the additional discovery might uncover. SIC also explicitly notes  
9 that it does not contest the disclosure of the documents that form the basis of these calculations.  
10 *See id.* at 7 n.6. As SIC has provided no facts disputing the calculation of any of the Wymans’  
11 expense damages, the court grants the Wymans’ summary judgment motion as to the \$167,296.17  
12 from Sunrise Hospital and Affordable Cremation & Burial.

13 As to lost wages, SIC disputes the report prepared by the Wymans’ expert witness,  
14 Terrance Clauretje, Ph.D., which states the present-day value of decedent’s lost wages is  
15 \$1,326,589.00. (*See* ECF Nos 216 at 6; 249 at 11–13). Dr. Clauretje prepared a “[p]reliminary  
16 [r]eport on the [l]oss of [f]inancial [s]upport” regarding the Wymans’ possible damages. (ECF  
17 No. 249 at 5). Dr. Clauretje admitted that this report was preliminary, stating that he was “awaiting  
18 income information prior to 2014.” *Id.* The Wymans contend that Dr. Clauretje “did not expect  
19 this information to significantly alter his economic loss estimate.” (ECF No. 256 at 5). Although  
20 the additional income statements might not alter the calculation significantly, they may alter it in  
21 some way. Therefore, SIC presents a genuine dispute of material fact as to the Wymans’ precise  
22 lost wages calculation. The court denies the Wymans’ motion as it pertains to the \$1,326,589 lost  
23 wages calculation.

#### 24 **IV. Conclusion**

25 Accordingly,


26 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Wymans’ motion for  
27 partial summary judgment as to comparative fault (ECF No. 212) be, and the same hereby is,  
28 GRANTED.

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IT IS FURTHER ORDERED that the Wymans' motion for partial summary judgment as to the cause of decedent's death (ECF No. 215) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the Wymans' motion for partial summary judgment as to special damages (ECF No. 216) be, and the same hereby is, GRANTED as to the \$168,376.48 in expenses, and DENIED as to lost wages.

DATED July 22, 2020.

  
UNITED STATES DISTRICT JUDGE