UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV14-3747 PSG (MRWx)	Date	April 4, 2016
Title	Kristine M. Rodas v. Porsche Cars North America, Inc., *et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Defendant's Motion for Summary Judgment

Before the Court is Defendant Porsche Cars North America's ("Defendant") motion for summary judgment. Dkt. # 86. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the arguments in the moving, opposing and reply papers, the Court GRANTS the motion.

I. Background

This is a wrongful death and survival action arising from a car crash that occurred in Santa Clarita, California on November 30, 2013. Dkt. # 90, *Plaintiff's Statement of Genuine Disputes of Material Fact and Additional Material Facts* ("Undisputed Fact" or "UF") # 7. Plaintiff's husband, Roger Rodas ("Rodas") and the car's other passenger, Paul Walker IV ("Walker") were both killed. *Id.* # 8. Rodas was driving a 2005 Porsche Carrera GT ("Porsche GT"), manufactured in 2004 by Dr. Ing. h.c. F. Porsche Aktiengesellschaft in Leipzig, Germany. *Id.* # 1, 2. The Carrera GT was sold to Defendant in 2007. *Id.* # 3.

A. The Accident

The crash occurred not long after Rodas and Walker left an event for an organization with which Rodas was involved. *Id.* # 9. The parties agree that Rodas was driving northbound on Kelly Johnson Parkway, which follows a curve to the right and then becomes Hercules Street. *Id.* # 10. Witnesses testified to seeing the driver going "fast" and "sucking asphalt" on Kelly Johnson. *Id.* # 13-20. Damaged trees, a destroyed light pole and skid marks leading upstream of the Carrera GT's point of rest established that the Carrera GT crashed after it was driven through the sweeping right curve on Hercules Street, at which point the Carrera GT entered a clockwise "yaw," or spin. *Id.* # 11, 12. The Carrera GT slid off the road to the right, where the front tires and wheels struck the curb. *Id.* # 21, 22. The front of the Carrera GT struck a tree ("Tree 1"),

which was gouged and damaged. *Id.* # 23. The left side of the Carrera GT then struck a light pole in the vicinity of the driver door's outside handle, knocking the pole down. *Id.* # 24. The rear tires then struck another curb. *Id.* # 25. The Carrera GT then struck another tree ("Tree 2"), again at the driver side door. *Id.* # 26. The impact with Tree 2 broke Tree 2 off above the ground. *Id.* # 26. The Carrera GT continued to rotate clockwise until it struck another tree ("Tree 3") with the passenger side door, finally coming to rest in two pieces next to Tree 3. *Id.* # 27, 28. A fire ensued. *Id.* # 29.

B. The Rodas Autopsy

After the fire was put out and the bodies were removed, autopsies were performed on Walker and Rodas. *Id.* # 30. Rodas had three sets of injuries, each of which was independently fatal. *Id.* # 100.

The first set of fatal injuries was an atlanto-occipital dislocation, hinge fracture of the skull, and associated brainstem laceration. *Id.* # 101. The probable cause of the atlanto-occipital dislocation (head dislocated from spinal column), hinge fracture, and associated brainstem laceration was a direct impact to Rodas' head or chin with either the light pole or Tree 2 when they were presented to the window opening in the driver door, or with Walker. *Id.* #102. Neither the pole nor Tree 2 penetrated the occupant compartment. *Id.*

The second set of injuries was multiple open and comminuted calvarium (skull fractures), with more extensive fracturing on the right side, toward Walker. *Id.* # 103. There were associated right-side brain injuries, including lacerations, which were fatal in the aggregate. *Id.* # 103. The probable cause of the right-sided skull fractures and brain lacerations was contact between Rodas and Walker, or something else to Rodas' right, but not anything outside the vehicle. *Id.* # 104.

The third of the three independently fatal sets of injuries was multiple rib fractures, flail chest, lung lacerations and contusions with associated hemothorax and mediastinal shift. *Id.* # 105. The probable cause of these injuries was contact with the interior panel of Rodas' door when the vehicle impacted the pole or Tree 2 or both. *Id.* # 106. There were three opportunities for Walker and Rodas to collide with one another. *Id.* # 107. Each of the impacts had sufficient energy to potentially cause Rodas' fatal injuries. *Id.* # 113.

C. The Accident Scene

At dusk on the night of November 30, representatives of the Los Angeles Sheriff's Department ("LASD") documented the presence of four tire marks that led from the travel lanes

of Kelly Johnson Parkway to the areas of impact on the curbs. *Id.* # 31, 32. After dark, the LASD placed reflectors adjacent to each of the four marks and then measured the marks. *Id.* # 33, 34. LASD measured the left (driver's side) rear tire mark at 101.26 feet and the right (passenger's side) rear mark at 114.1 feet. *Id.* # 35. Defendant's expert Geoff Germane, Ph.D. ("Germane") later performed a photogrammetric analysis of the tire marks depicted in photographs taken at the scene before it got dark.[1] *Id.* # 36. Germane determined that the left (driver's side) rear tire mark was 100 feet long, while the right (passenger's side) rear mark was 118 feet long. *Id.* # 38. Both LASD and Germane determined that the right rear tire mark was longer than the left. Using the known distance between stationary objects and the frame rate from a nearby surveillance video, which captured the Carrera GT as it was being driven through the sweeping turn, Germane also calculated the Carrera GT's speed. *Id.* # 39-43. The vehicle accelerated from 72 mph at the beginning of the footage to 90 mph by the time it went out of view at the end of the curve. *Id.* # 44-45. It was going approximately 89 mph when the tire marks began, and approximately 74 mph when it hit Tree 1. *Id.* # 54.

D. The Operative Complaint

Plaintiff filed her original complaint on May 12, 2014, and Defendant removed to this Court in May, 2014. Dkt. # 1. The parties litigated a motion to dismiss. Dkt. # 20. After the Court's ruling, Plaintiff filed a First Amended Complaint ("FAC"). *See* Dkt. # 26. The parties litigated a second motion to dismiss, which the Court granted in part and denied in part in February, 2015 ("February, 2015 order"). Dkt. # 37. Plaintiff did not amend her FAC. After the Court's February, 2015 order, Plaintiff's surviving claims are product liability claims based on four alleged defects of the Carrera GT: (1) failure of the suspension component (the right rear toe adjustor rod); (2) absence of a crash cage; (3) substandard side impact protection; and (4) lack of a fuel cell. UF # 55; Dkt. # 37. Plaintiff also has surviving claims for Survival and Wrongful Death under Cal. Code. Civ. Proc. §§ 377.30 and 377.60. *See FAC* ¶¶ 88-93; Dkt. # 37 at 15.

E. Plaintiff's Expert Disclosures

On June 16, 2015, the Court set December 22, 2015 as the deadline for the parties' expert witness disclosures and January 19, 2016 as the deadline for rebuttal expert witness disclosure. *See* Dkt. # 48. Shortly afterwards, the Court granted the parties' request to move rebuttal expert disclosure to February 1, 2016. *See* Dkt. # 52. In her second supplemental initial disclosures on December 22, 2015, Plaintiff identified no evidence on matters relating to liability other than

[1] Photogrammetry is the process by which one plots the locations of known, fixed landmarks in a photograph and uses geometry to plot the locations of items in the same photograph that have since been moved or faded, such as the tire marks left by the Carrera GT. UF # 36.

LASD's accident report and its attachments, which included Plaintiff's experts' preliminary reports. UF # 60. Plaintiff's only expert witnesses were David Renfroe ("Renfroe") and Stanley Andrews ("Andrews"). *Id.* The only evidence Plaintiff presented during discovery concerning how the crash occurred was Renfroe's preliminary investigative report ("Renfroe report"), which Renfroe completed in February, 2014 and which addressed "what caused [the] racecar to suddenly begin a clockwise yaw." *Id.* # 61, 69. Observing the remaining tire marks at the scene of the accident on January 14, 2014, Renfroe noted that the right rear tire mark was much shorter than the left and concluded that the right rear toe adjustor rod must have been broken, causing the crash. *Id.* # 71-74. Renfroe's report is the only evidence of the Carerra GT's defect provided in Plaintiff's disclosures. *Id.* # 62.

Defendant now moves for summary judgment on all of Plaintiff's claims. Dkt. # 86 ("Mot.").

II. Legal Standard

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the nonmoving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

III. Discussion

Following the Court's February 13, 2015 order, Plaintiff's surviving product liability claims are based on four alleged defects with the Carrera GT: absence of a crash cage; substandard side impact protection; lack of a fuel cell; and failure of the suspension component (or "toe rod"). *FAC; see* Dkt. # 37. Defendant argues that it is entitled to summary judgment because Plaintiff has presented absolutely no evidence that the absence of a crash cage, substandard side impact protection, or the lack of a racing fuel cell played a role in Rodas' death. Plaintiff now appears to concede those claims, instead focusing on the theory that failure of the suspension component caused the accident. Defendant argues it is entitled to summary judgment with respect to the failed suspension component theory, as well, because Plaintiff's evidence of causation is speculative and unreliable.

A. Absence of a Crash Cage Theory

Plaintiff has surviving strict liability and negligence claims premised on the Carrera GT's absence of a crash cage. FAC; *see* Dkt. # 37. First, Plaintiff has a claim that Defendant is strictly liable for this alleged design defect under the risks/benefits theory of strict liability, because a properly functioning crash cage would have prevented Rodas' death by preventing intrusion into the passenger compartment, damage to the fuel tank and the Carrera GT's splitting in half in the final impact. *Id.*; *FAC* ¶ 22. Second, Plaintiff has a surviving claim that Defendant is liable for the same alleged design defect under a negligence theory. *FAC* ¶ 22.

Products liability only attaches when an alleged defect in a product causes injury. *Soule v. General Motors Corp.*, 8 Cal.4th 548, 568, n. 5 (1994) (citing *Daly v. General Motors Corp.*, 20 Cal.3d 725, 733 (1978) ("[A] manufacturer does not thereby become the insurer of the safety of the product's user…on the contrary, the plaintiff's injury must have been caused by a 'defect' in the product."). This is true for both negligence and strict liability claims. *Gonzalez v. Autoliv ASP, Inc.*, 154 Cal.App.4th 780, 793 (2007) (citing *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 477 (2001)); *Soule*, 8 Cal.4th at 568 n.5; *see Lambert v. General Motors*, 67 Cal.App.4th 1179, 1185 (1998) ("no practical difference exists between negligence and strict liability" for design defect claims). For Plaintiff to succeed on either claim based on the absence of a crash cage, she must therefore prove that Defendant's alleged failure to equip the Carrera GT with a properly functioning crash cage was a cause of Rodas' injury or death. *See Soule*, 8 Cal.4th at 568 n.5; *see also Sanderson v. International Flavors and Fragrances, Inc.*, 950 F.Supp. 981 (C.D. Cal. 1996) (granting summary judgment for Defendant in a products liability action where Plaintiff had insufficient evidence that Defendant's product caused her injuries).

After the Court's February 2015 order, Plaintiff's only remaining claim regarding the crash cage is that a properly functioning crash cage would have prevented Rodas' death by

preventing intrusion into the passenger compartment, damage to the fuel tank and the Carrera GT's splitting in half. *FAC* ¶ 22; Dkt. # 37 at 4. Defendant argues it is entitled to summary judgment because Plaintiff offers no evidence of causation. *Mot.* 13-14. Specifically, Defendant notes "there is no evidence that Rodas' death was caused by intrusion into the occupant compartment, damage to the fuel tank or the Carrera GT splitting in half." UF # 99. Plaintiff does not dispute those points. *Id.* Nor does Plaintiff dispute that Rodas had three sets of independently fatal injuries, and that the cause of all three of those injuries was impact with either Walker, the interior panel of the car, or objects presented to the window opening of the driver door. *Id.* # 100, 102, 104, 106. Plaintiff also admits that "no crash cage could prevent Rodas from moving to his left or right within the occupant compartment, and no crash cage could have prevented Rodas and Walker from colliding with each other. *Id.* # 114.

Essentially, Plaintiff concedes that the crash cage would not have prevented Rodas' injury or death. Plaintiff does not point to any specific facts to show that there is a genuine issue as to whether the absence of a crash cage caused Rodas injury or death. Defendant's motion for summary judgment is therefore granted with respect to Plaintiff's "absence of a crash cage" theory.

B. Substandard Side Impact Protection Theory

Plaintiff also has surviving claims for strict liability design defect, negligent testing, and negligent failure to warn based on the Carrera GT's allegedly substandard side impact protection. *See* Dkt. # 37.

First, Plaintiff claims that Defendant is strictly liable under the consumer expectations test because the average consumer would not have expected the Carrera GT to break in half upon final impact. *FAC* ¶¶ 12-13, 23, 39, 84; *see* Dkt. # 37. However, Plaintiff concedes that there is no evidence the car broke in half upon impact with Tree 3 or "caused or contributed to Rodas' injuries or death." UF # 143. Plaintiff's own expert opines that Rodas "was killed at the impact with the light pole and the unexpectedly poor side impact performance…did not play a role." Dkt. # 91 at ¶ 53. For that reason, Plaintiff's substandard side impact protection theory suffers from the same causation problems as her crash cage theory. *See Soule*, 8 Cal.4th at 568, n. 5 (products liability only attaches when the injury was caused by the alleged defect). Moreover, Plaintiff concedes that "there is no genuine dispute of material fact sufficient to permit [Plaintiff's] substandard side impact protection claim to go to the jury" under the strict liability design defect theory. UF # 142. Accordingly, the Court grants Defendant's motion for summary judgment as to Plaintiff's strict liability theory for substandard side impact protection.

Second, Plaintiff claims that Defendant was negligent in allegedly failing to test the Carrera GT's side impact safety for compliance with industry standards. *FAC* ¶ 24; *see* Dkt. # 37. Defendant offers evidence that the Carrera GT was thoroughly tested, that it performed well, and that as the Carrera GT's distributor, Defendant was not involved in the Carrera GT's testing. *See Mot.* 21-22. Defendant argues it is entitled to summary judgment because while a distributor can be strictly liable for the design of others, it can only be liable under a negligence theory if the plaintiff demonstrates that the defendant itself was negligent. *Id.* (citing *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (2001)). In response, Plaintiff concedes that Defendant was not involved in testing for the Carrera GT. UF # 2. Plaintiff also concedes that "[t]he Carrera GT was tested according to all of the side impact regulations in the world that applied to cars such as the Carrera GT," that it "not only passed, but…performed better than required," and that during testing "neither the side impact beam nor the door inner panel were deformed into the occupant compartment, which is outstanding performance." *Id.* # 116, 121. Finally, Plaintiff concedes that there is no triable issue of fact "sufficient to permit [Plaintiff's] substandard side impact protection claim to go to the jury" on the negligent testing theory. *Id.*; *see FAC* ¶ 24. The Court therefore grants Defendant's motion for summary judgment as to Plaintiff's negligence claim for substandard side impact protection.

Lastly, Plaintiff claims that Defendant negligently failed to warn Rodas that the Carrera GT had not been sufficiently tested for compliance with industry standards. *FAC* ¶ 24; *see* Dkt. # 37. However, Plaintiff admits that the Carrera GT was tested according to industry standards, and that it performed better than required on those tests. UF # 116, 121. Defendant cannot be liable for failing to warn Rodas of a problem which Plaintiff concedes did not exist. Accordingly, Plaintiff's claim for negligent failure to warn regarding substandard side impact testing fails, and Defendant's motion for summary judgment on this claim is granted.

C. Lack of a Fuel Cell Theory

Plaintiff also has design defect claims based on the Carrera GT's lack of a racing fuel cell. Dkt. # 37. First, Plaintiff seeks to hold Defendant strictly liable under the risks/benefits test. *Id.*; *see FAC* ¶ 25, 51. Second, Plaintiff theorizes that Defendant was negligent in failing to include a racing fuel cell. *Id.* The FAC alleges that the fuel tank ruptured and spilled fuel on the engine compartment, resulting in a fire. FAC ¶ 25.

Defendant offers evidence that the Carrera GT's fuel tank was not compromised during the crash, but remained intact until late in the fire – after Rodas' death. *Mot.* 22-23; UF # 149-161. Defendant further argues that the undisputed evidence shows Rodas did not die from fire or sustain any injuries from fire prior to his death. *Id.* # 151-154. Defendant argues that because there is no evidence that fire caused Defendant's injuries or death, or even that the fuel tank was

compromised, it is entitled to summary judgment because Plaintiff cannot demonstrate causation. *Mot.* 22-23. Plaintiff does not dispute that it has "no evidence that Rodas was alive when his body was affected by the fire;" that "the uncontroverted evidence is that Rodas did not die as a result of the fire…[or] suffer a personal injury as a result of the fire before he died;" or that "there is no evidence that the fuel tank was punctured or otherwise compromised and released fuel during the crash sequence." UF # 149-155. Nor does Plaintiff dispute that "there is no genuine dispute of material fact sufficient to permit the plaintiff's lack-of-fuel-cell claims to go to the jury because of a lack of causation." *Id.* # 48. Plaintiff concedes that Defendants "is entitled to summary judgment on Plaintiff's claims that the Carrera GT was defective for lack of a fuel cell." *Id.* # 161. Defendant's motion for summary judgment on both the negligence and strict liability claims is therefore granted, insofar as those claims are premised on the Carrera GT's lack of racing fuel cell.

D. Failure of the Suspension Component Theory (Right Rear Toe Adjustor Rod)

Plaintiff has four claims based on the alleged failure of the suspension component, or right rear toe adjustor rod. First, Plaintiff asserts that Defendant is strictly liable under the consumer expectations test because the suspension component is designed to "fail in fatigue" when the Carrera GT is used in its intended way. *FAC* ¶ 45; Dkt. # 37. Second, Plaintiff pursues the same claim under a negligence theory. *Id.*; *FAC* ¶ 35. Third, Plaintiff claims that Defendant is strictly liable for a manufacturing defect in the toe adjustor rod, which allegedly broke due to fatigue failure "at a load much lower than that of the ultimate strength of the material used to produce the toe adjustor rod and at a load much lower than that which [the Carrera GT] was designed to withstand." *Id.* ¶ 20; Dkt. # 37. Fourth, Plaintiff has a claim that Defendant is liable for the same manufacturing defect on a negligence theory. *Id.*; *FAC* ¶ 20.

As an initial matter, Defendant is entitled to summary judgment as to the two negligence claims because Plaintiff concedes that Defendant was the distributor of the Carrera GT and was not involved in its design or manufacture. UF # 2; *see Merrill*, 28 P.3d at 125 (holding that a Plaintiff pursuing a products liability negligence claim must establish that defendant was itself negligent).

As for Plaintiff's strict liability claims, Defendant argues that it is entitled to summary judgment because, as with her crash cage, fuel tank and side protection theories, Plaintiff has offered no competent evidence to establish causation. As with those theories, Plaintiff cannot succeed in holding Defendant liable for "failure of the suspension component" without showing that the suspension component actually failed and caused the accident, thereby causing Rodas' injuries and death. *See Soule*, 8 Cal.4th at 568 n.5; *Sanderson*, 950 F.Supp. at 981 (products liability claim must include showing of causation). Where a case involves scientific issues that

are "beyond the experience of laymen," expert testimony is required to establish causation. *Id.* at 985 (plaintiff could not withstand summary judgment by relying on her own testimony regarding her exposure to defendant's products and her alleged injuries or by arguing for an inference of causation) (citing *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal.App.3d 396, 461 (1985)); *see Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 503-04 (9th Cir. 1994) (granting summary judgment where plaintiff provided no expert testimony to establish causal connection between exposure to various chemicals and injuries sustained because drawing a conclusion of causation required specialized knowledge). Here, determining whether a defectively designed or manufactured suspension component was the cause of the accident (as opposed to, for example, driver error) is outside the purview of a layperson. Plaintiff was therefore required to submit competent expert evidence to establish causation by the Court's deadline. *Id.*; *see* Fed. R. Civ. P. 26.

i. Renfroe Preliminary Investigative Report

The deadline to disclose opening expert witness reports was December 22, 2015. *See* Dkt. # 48. The only expert evidence on causation which Plaintiff presented by that deadline was Renfroe's preliminary investigative report dated February 11, 2014. *See* Dkt. # 68, Ex. R ["Renfroe Report"]. In the report, Renfroe opines that one of two things must have caused the accident: either "overt action on the driver's part," or else some portion of the Carrera GT failing, causing a sudden yaw. *Id.* at 19.

Renfroe assesses that the Carrera GT yawed as a result of the right rear toe rod failing. *Id.* at 23. He bases his opinion on three facts. First, Renfroe attributes the accident to failure of the Carrera GT, rather than to Rodas, because the lack of skid marks from an emergency break indicate that Rodas was not attempting a trick maneuver such as a bootleg turn. *Id.* at 21. Second, Renfroe notes that the rear toe rod was broken when he looked at it in the wrecker yard in January, 2014. *Id.* at 23. Third, when Renfroe visited the accident site on January 14, 2014, he saw that the right rear tire mark was much shorter than the left rear tire mark. *Id.* at 20-21. Renfroe explains that for a Carrera GT to not leave a right rear tire mark for a significant portion of its spin means either that there was no weight on the right tire, or else that the tire was angled differently than the left tire. *Id.* at 20. Renfroe deduces that because it would be impossible for the right wheel to bear no weight in a Carrera GT so close to the ground, it must have been turned to the left relative to the center line of the car. *Id.* at 20-21. He explains that when that happens, the "position of the right rear wheel will push the rear of the Carrera GT to the left which then points the car to the right putting it into the clockwise spin…the sudden change of steering angle of the right rear tire is the beginning of the accident sequence." *Id.* at 21. Using somewhat circular reasoning, Renfroe then concludes that the right rear wheel was twisted to the left because:

> The toe adjustor rod failed from a tensile load, allowing the right rear wheel to twist to a left steer attitude that caused the rear to swing to the left causing the Carrera GT to yaw to the right. Therefore, the sudden change in steering angle of the right rear wheel was caused by the toe adjuster rod suddenly failing.

Id. at 23.

Essentially, Renfroe's analysis rests entirely on his observations regarding the tire patterns on January 14, 2014 and his observation that the right rear toe adjustor rod broke at some point. However, Plaintiff does not dispute that the tire marks Renfroe observed on January 14 were not in the same condition as they were immediately after the crash, and that they had faded over the month and a half between the accident and Renfroe's observations. UF # 76. Plaintiff also concedes that despite Renfroe's explanation for the accident – which is based on the right rear tire mark being longer than the left – both police inspection on the night of the crash and later photogrammetric analysis revealed the right rear tire mark to be longer than the left rear tire marks, not shorter. UF # 75, 38.

Federal Rule of Evidence 702 provides that a qualified expert witness may testify only if the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and if the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702(b)-(d). The subject of an expert's testimony must be scientific or technical knowledge. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). "[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* In his preliminary report, Renfroe speculates that the yaw marks occurred as a result of the right rear wheel being angled. *Renfroe Report*, 21. That Renfroe's theory is mere speculation is evidenced by the note after his explanation: "*Is there evidence on the Carrera GT that would corroborate these findings?" Id.* (emphasis in original). Renfroe also speculates that because the right rear toe rod was broken when he observed it, it must have broken before the accident, thereby causing the accident. *Id.* at 23. The only *fact* which supports Renfroe's theories is that the right tire mark was significantly shorter than the left tire mark in January, 2014, but Plaintiff admits that fact is not an accurate representation of the tire marks on the night of the accident. Renfroe's preliminary report is not admissible because it fails to apply reliable principles to the actual facts of this case. *See id.*; Fed. R. Evid. 702(d). Plaintiff has therefore failed to raise a triable issue of material fact as to causation. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387; *Nelson v. Pima Comm. College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citation omitted) ("[M]ere…speculation do[es] not create a factual dispute for purposes of summary judgment."). Defendant has met its burden of demonstrating that there is an absence of evidence as to an essential element of Plaintiff's case. *See Celotex Corp.*, 477 U.S. at 323.

ii. Renfroe Declaration

Perhaps recognizing the insufficiency of the opinions expressed in Renfroe's preliminary report, Plaintiff now seeks to supplement Renfroe's testimony with an additional declaration from Renfroe. *See* Dkt. # 91, *Declaration of David Renfroe ISO Opposition* ["Renfroe Decl."]. The declaration directly contradicts Renfroe's previous report. Although Renfroe still concludes that the accident was caused by failure of the suspension component, he now premises that finding on the fact that the right rear tire left a longer mark, not a shorter one. *Id.* ¶¶ 22, 24. Renfroe bases his new opinion on LASD photos from the night of the crash. He also offers a new, lengthy analysis regarding his initial opinion that the right rear tie rod broke before the accident based on a metallurgical analysis of the thermal damage to the tie rod's surface. *Id.* ¶¶ 32, *et seq.*

Under Federal Rule of Civil Procedure 26, Plaintiff was required to provide Defendant with a written witness report containing "a complete statement of all opinions the witness will express and the basis and reasons for them," and "the facts or data considered by the witness in forming [those opinions]." Fed. R. Civ. P. 26(a)(2). The Court set December 22, 2015 as the deadline for these disclosures. Dkt. # 48. Despite having received the LASD report and photographs as early as August 25, 2015, Plaintiff did not ask Renfroe to supplement his initial report; the only report submitted in time was Renfroe's January, 2014 report. Moreover, the Court set February 1, 2016 as the deadline for rebutting Defendant's experts. Dkt. # 48. Although Plaintiff was in possession of Defendant's expert reports as of December 22, 2015, she did not submit a rebuttal report on or by February 1. Instead, Plaintiff first disclosed the Renfroe declaration along with her opposition to summary judgment on February 8, 2016. In doing so, Plaintiff violated the mandates of FRCP 26. *See Plumley v. Mockett*, 836 F.Supp.2d 1053, 1061 (C.D. Cal. 2010) ("Rule 26 requires parties to disclose all expert evidentiary materials that may be relied upon at trial…at the times directed by the court.").

Defendant asks the Court to exclude the new opinions contained in Renfroe's declarations under Federal Rule of Civil Procedure 37. "Rule 37(c)(1) gives teeth to [Rule 26(a)(2)'s] requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). Failure to timely disclose information as required by a scheduling order can subject a party to sanctions under Rule 37. Fed. R. Civ. P. 16(f). "Excluding expert evidence as a sanction for failure to disclose expert witnesses in a timely fashion is automatic and mandatory unless the party can show the violation is either

justified or harmless." *Jarrow Formulas, Inc. v. Now Health Group, Inc.*, No. CV 10-8301 PSG (JCx), 2012 WL 3186576, at *15 (C.D. Cal. Aug. 2, 2012) (excluding expert declarations filed past the court's deadline because the new declarations contained new opinions and theories that contradicted the witness' expert disclosure, provided a "much deeper analysis," and relied on documents the expert admitted he had not reviewed in time for his initial disclosure). "The party facing the sanction carries the burden of demonstrating that the failure to comply with rules concerning expert testimony is substantially justified or harmless." *Id.* (quoting *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008)).

Rather than using her opposition to offer a coherent legal argument as to why the Court should admit the untimely opinions expressed in Renfroe's declaration, Plaintiff offers a rambling regurgitation of Renfroe's new opinions. The only conceivable argument Plaintiff offers in support of admitting Renfroe's new opinions appears where Plaintiff states that she is entitled to rely on Defendant's experts in proving the cause of Rodas' death. *See Opp.* 6 (citing *Netairus Technologies, LLC v. Apple, Inc.*, No. LA CV10-03257 JAK (Ex), 2013 WL 9570686 (C.D. Cal. Nov. 11, 2013)). To the extent that Plaintiff means to argue that the Court should consider the Renfroe declaration because Renfroe's new opinions rely on evidence submitted by Defendant's experts, that argument is disingenuous. Renfroe's new opinions rely on evidence which was disclosed to Plaintiff at least four months before the deadline for Plaintiff's expert disclosure, if not sooner. For example, Renfroe's metallurgical analysis concerning the visual thermal damage to the tie rod's surface is based on photographs which were shown to Renfroe in January, 2014 and disclosed to Plaintiff's counsel in August, 2015. Dkt. # 94-2 at ¶¶ 3, 7. Renfroe's "metallurgical analysis" using those photographs should have been provided with Plaintiff's initial expert disclosures, or at least by the deadline for submitting a rebuttal report.

Even if the Renfroe declaration had been submitted in time for the rebuttal deadline, it is not a proper one. A rebuttal report should directly respond to or address "new unforeseen facts" brought out in the other side's report on the same subject matter, and is not the "proper place for presenting new arguments." *See R&O Constr. Co. v. Rox Pro Intern. Group, Ltd.*, No. 2:09-cv-01749-LRH-LRL, 2011 WL 2923703, at *2 (D. Nev. July 18, 2011). Here, Renfroe's declaration is not a rebuttal report because it conflicts with his initial report and contains entirely new theories based on evidence which was disclosed to Plaintiffs well before the deadline for expert disclosure. *See id.* Nor is Renfroe's declaration a proper supplemental report, for the same reason that it did not involve any new information. *See Jarrow*, 2012 WL 3186576 at *15 ("Supplemental reports which provide new opinions designed to strengthen the proffering party's legal arguments are improper under Rule 26(e)"); *Plumley*, 2010 WL 8160423, at *4 (Rule 26(e) requires a party to supplement its disclosures upon information later required, but this "does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness's report"). Because Plaintiff has not demonstrated why her

failure to comply with Rule 26 is justified, the Court cannot allow her to use the new opinions contained in Renfroe's declaration.

In sum, Defendant has carried its summary judgment burden by demonstrating that Plaintiff failed to offer any admissible evidence from which a jury could reasonably find that this accident was caused by a broken toe adjustor rod. In opposing Defendant's motion, Plaintiff points only to new expert opinion which the Court finds inadmissible. Plaintiff has failed to raise a triable issue of fact on the issue of causation, an essential element of its claim. Defendant is therefore entitled to summary judgment on Plaintiff's strict liability design defect claims premised on failure of the suspension component. *See Nelson v. Matrixx Initiatives, Inc.*, 592 Fed.Appx. 591, 592 (9th Cir. 2015) (district court properly granted summary judgment where plaintiff could not prove an essential element of its case because its only causation experts were not sufficiently reliable).

E. Wrongful Death and Survival Claims

In its February 13, 2015 order, the Court also denied Defendant's motion to dismiss Plaintiff's claims for Wrongful Death and Survival. *See* Dkt. # 37.

However, Defendant is now entitled to summary judgment on Plaintiff's survival and wrongful death claims for the same reasons it is entitled to summary judgment on Plaintiff's product liability claims: Plaintiff has provided no competent evidence that Rodas' death occurred as a result of any wrongdoing on the part of Defendant. *See Russel v. Lorilland, Inc.* 144 Appx. 583, 584-85 (9th Cir. 2005) (district court properly granted summary judgment on plaintiff's wrongful death claims because she failed to provide the expert testimony required to prove the causation element of her claims); *Kennedy v. Southern California Edison Co.*, 268 F.3d 763, 767-68 (9th Cir. 2001) (in personal injury actions brought under California law, causation must be proven based upon competent expert testimony).

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED in its entirety.

IT IS SO ORDERED.