NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT CARVER et al.,

Plaintiffs and Appellants,

v.

UNIROYAL, INC.,

Defendant and Appellant;

TONY SELLERS,

Defendant and Respondent.

D028496

(Super. Ct. No. N64081, N64378)

APPEALS from a judgment and post-judgment orders of the Superior Court of San Diego County, Vincent P. DiFiglia, Judge. Reversed.

Following a jury trial, Uniroyal, Inc. (Uniroyal) appeals a judgment[1] entered on special verdicts in favor of Robert Carver,

1 Uniroyal filed a notice of appeal stating it is appealing the judgment and the court's post-judgment orders awarding costs, denying Uniroyal's motion for judgment notwithstanding the verdict and denying Uniroyal's motion for an order preserving evidence. In an amended notice of appeal, Uniroyal stated it was

Jason Mondragon and John Johnstone (plaintiffs). Carver, Mondragon and Johnstone's son, Jeffrey, were riding in the rear of a truck owned and driven by Tony Sellers when Sellers lost control of the vehicle while driving on Interstate 5. Mondragon was injured, Carver was rendered quadraplegic, and Jeffrey Johnstone was killed in the accident. The jury found the accident was caused by a defect in the right rear tire manufactured by Uniroyal and found Uniroyal 100 percent at fault for the injuries and death.

Uniroyal contends the court erred in (1) barring comparative fault liability for riding without seat belts in the rear of a pick-up truck; (2) denying its motions in limine and requests for a foundational hearing relating to the qualifications of plaintiffs' experts and the admissibility of their opinions on manufacturing defects; (3) treating plaintiffs and Sellers as adverse parties and structuring the trial proceedings on that basis; and (4) denying Uniroyal's motion for new trial on the ground of the jury foreman's mental incompetence.

Plaintiffs appeal from the judgment and from the court's order granting Uniroyal's post-trial motion to tax Carver's cost

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also appealing a stipulation and order for inclusion of costs and prejudgment interest in the previously entered judgment. Uniroyal's briefs do not specify errors in the court's post-trial orders; we deem points not raised abandoned. (*Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 609, fn. 3; *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.)

bill, contending that the court erred by (1) refusing to permit testimony on certain consequential damages; (2) denying Carver recovery of the cost of a discovery referee; (3) refusing arguments and an instruction on loss of enjoyment of life as a compensable item of general damages; (4) refusing instructions on design defect and consumer expectations; (5) admitting evidence of Carver's use of intoxicants; and (6) excluding evidence probative of Uniroyal's liability.

We conclude the court prejudicially erred in instructing the jury on contributory negligence. We further find the court abused its discretion in refusing to hold a hearing to consider the qualifications of plaintiffs' experts and basis for their opinions. Finally, we hold the court erred in treating plaintiffs and Sellers as adverse parties. Our disposition of Uniroyal's appeal renders moot plaintiffs' appeal of the post-judgment order taxing costs. Plaintiffs' conditional appeal of the judgment requests an advisory opinion that we shall not give. Accordingly, we reverse the judgment, vacate the costs award and dismiss plaintiffs' appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 1993, Jeffrey Johnstone and plaintiffs Carver and Mondragon were riding unrestrained in the camper shell-covered bed of Tony Sellers' 1982 Chevrolet pick-up truck on Interstate 5 en route from San Diego to Tustin. The right rear tire sustained

a separation of tread and outer steel belt. The tire did not lose air. Sellers stepped down hard on his brake and the truck skidded, collided with the center median and flipped over. The camper shell broke off on impact with the median. Plaintiffs were thrown from the truck; Carver was rendered a quadriplegic, Johnstone was killed and Mondragon suffered injuries.

Sellers had purchased the truck approximately eight months earlier, on November 27, 1992, for use in his new business, primarily to transport workers. At that time, the truck had 90,565 miles on it and a set of Uniroyal "Laredo LT" model steel-belted tires. The truck's former owner purchased the tires in May 1985 when the truck had 64,612 miles on it. The former owner installed the camper shell to store gear. Plaintiffs' tire failure expert estimated the right rear tire, which was manufactured in 1984, had over 40,000 miles of use on it at the time of the accident. Sellers never personally checked the tire pressure during the time he owned the vehicle. In May 1992 Sellers purchased two new tires from Discount Tire. According to a Discount Tire store manager, company policy would have required all four of Sellers' tires to be checked and the air put at the proper level before the vehicle left the shop.

Plaintiffs sued Uniroyal for personal injuries and wrongful death based on negligence and strict products liability and Sellers for negligence. They contended the tire was defectively

manufactured because of insufficient curing or vulcanization[2] that caused "poor rubber-to-metal bonding."[3] Uniroyal maintained that the tire had no manufacturing defect, but was run in underinflated and overloaded conditions and sustained impact damage that eventually caused the tread separation. Uniroyal also argued Sellers was negligent for exceeding the speed limit and not providing the vehicle with proper seating and plaintiffs were negligent for agreeing to ride in the rear of the truck.[4]

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2 In the vulcanization process, a "raw" tire is placed in a press that applies measured amounts of pressure and heat for a specified length of time to produce a firmly cured tire. Undercure occurs when the raw tire has not received the proper temperature, time or pressure to trigger a particular chemical reaction in the rubber.

3 The court observed that the plaintiffs' theory of the tire's defect changed repeatedly over the course of the case. The parties later stipulated that plaintiffs' sole claim of defect in the tire was undercure. During presentation of Uniroyal's expert Donald Avila, Carver's counsel responded to an objection by stating: "Mr. Carlson has testified, and I think Mr. Grogan will testify that the exposed steel cords are essentially a function of the belt and tread coming off. They are exposed because the rubber was scraped off. They are exposed because there was a poor interface, rubber-to-metal interface. That is our theory of the case. [¶] You've heard Dr. Kashar testify to that at length. You've heard Mr. Carlson testify on the poor rubber-to-metal bonding. The court keeps saying, 'Like it or not, that's your theory. You're stuck with it.' [¶] Let me pursue it." The main theory advanced by plaintiffs was poor rubber-to-metal bonding due to undercure. Seller's expert, Grogan, testified it was a combination of the open inner liner splice allowing in moisture and the poor adhesion that led to the tread separation.

4 Uniroyal's answer contained affirmative defenses asserting plaintiffs' comparative fault and assumption of the risk. The eleventh affirmative defense alleged that "plaintiff did not

However, the court admonished the jury that they were not to consider the absence of seat belts or fixed seats in the truck bed as a factor in plaintiffs' negligence. It instructed the jury that, as a matter of law, contributory negligence could not be based upon the failure to wear a seat belt where none were provided.

The jury returned a special verdict. It found Sellers negligent but determined his negligence was not the legal cause of plaintiffs' injuries. It also found Uniroyal negligent and concluded its negligence was the legal cause of plaintiffs' injuries. The jury found the tire had a manufacturing defect at the time it left Uniroyal's plant and that the defect caused the plaintiffs' injuries. It concluded Uniroyal was 100 percent at fault for the injuries sustained by all three plaintiffs. The court entered judgment against Uniroyal.

I.

The Court Erred in Instructing the Jury on Comparative Negligence

Before trial, Carver moved in limine for an order excluding any evidence that he was not wearing a seatbelt or other safety

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exercise due care, caution or circumspection, or any care, caution or circumspection, for his own safety . . . and voluntarily assumed the risk of injury attendant upon his conduct . . . ." The fifteenth affirmative defense alleged that plaintiffs' own "acts, omissions, faults, negligence or culpable conduct" contributed to their injuries.

restraint at the time of the accident on the grounds, among others, that his failure to use unavailable seatbelts was irrelevant and Uniroyal could not prove with certainty the injuries he would have received had he worn a seatbelt. Later, Carver filed an additional brief arguing he could not be negligent as a matter of law for riding in the covered bed of a truck on the ground that he "had no duty to wear a seat belt because there was none available to him." On the same issue, Uniroyal filed a brief addressing the admissibility of certain Vehicle Code sections including the Motor Vehicle Safety Statute, Vehicle Code section 27315,[5] which imposes an obligation to use seat belts in certain types of vehicles. Uniroyal argued plaintiffs' violation of the section "underscored" their negligence.

The court granted plaintiffs' motion, ruling "as a matter of law, a plaintiff cannot be held comparatively negligent for riding in the back of a pick-up truck that was not equipped with bolted down seats and/or seatbelts." It found Sellers alone faced the potential liability for having plaintiffs ride in the bed of his pickup truck without providing restraints.

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5 Vehicle Code section 27315 mandates the use of seat belts by persons over 16-years-old at all times while a passenger in a private passenger motor vehicle on a highway. (Veh. Code § 27315, subd. (e).) It requires that no driver of a private passenger vehicle operate a vehicle unless all passengers over

During jury selection, three prospective jurors were removed for cause after expressing opinions about riding in vehicles without seatbelts. One juror said his motor home had seats with signs indicating they were not to be occupied while the vehicle was in motion; another felt Carver should be responsible for his actions in riding without seat belts; the third juror felt Carver "assumed some of the responsibility" in getting in the truck. That juror explained that he owned a truck with a camper shell and related that the camper shell came with literature stating it was not designed to carry people.

The court instructed the jury on contributory negligence as follows:

> "Contributory negligence, comparative fault, is negligence on the part of a plaintiff which, combining with the negligence of a defendant, or with a defect in a product, contributes as a cause in bringing about the injury. [¶] As a matter of law, contributory negligence cannot be based upon a failure to wear a seat belt where none are provided. [¶] In addition, you are instructed you cannot find contributory negligence on the part of plaintiff John McGarry. . . . [¶] However, one who is simply a passenger in a motor vehicle and has no right to the control, slash, or management of such vehicle nevertheless has the duty to exercise the same ordinary care for his own safety and protection as a person of ordinary prudence would take under the same circumstances. [¶] You must determine from all the evidence what conduct might reasonably have been expected of a person of ordinary prudence in the same circumstances. [¶] As to the wrongful death cause of action in this

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four years-old are properly restrained by a seatbelt. (Veh. Code, § 27315, subd. (d)(1).)

> case, contributory negligence is negligence on the part of a decedent which, combining with the negligence of a defendant or with a defect with the product, contributes as a cause in bringing about death. . . .
> "[¶] In order to determine the proportionate share of the total fault attributable to the plaintiffs you will of necessity be required to evaluate the combined negligence of the plaintiffs and the negligence or defective product of the defendants whose negligence or defective product contributed as a cause to plaintiff[s'] injury. [¶] In comparing the fault of such persons you should consider all the surrounding circumstances as shown by the evidence. . . .[¶] The instructions relating to contributory negligence apply only to plaintiffs Robert Carver; Jeffrey Johnstone, through his heir, John Johnstone; and Jason Mondragon."

At trial, Uniroyal was permitted to argue that the plaintiffs were negligent in deciding to ride in the truck bed and that the jury should consider the contributory negligence instruction as to them on that basis. Under the court's instruction, however, it was not permitted to argue that plaintiffs could be held contributorily negligent for riding in the back of a truck not equipped with fixed seats and/or seatbelts.[6]

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6 Plaintiffs made a continuing objection and requested a continuing limiting instruction "each time a reference is made to seat belt or no seat belt, insofar as Mr. Carver is concerned, insofar as it deals with a fixed seat or non-fixed seat, insofar as his getting in the vehicle in the back or not getting in the vehicle. . . ." The court complied, stating "the jury will be admonished that the evidence is to be considered for the limited purpose of its applicability to Mr. Sellers." During testimony of Uniroyal's expert about the safety aspects of seat belts, the court obliged plaintiffs' request for a limiting instruction,

Uniroyal contends the court erred in ruling that plaintiffs were not contributorily negligent as a matter of law for riding in the bed of a truck not equipped with seat belts. It asserts plaintiffs' decision to ride unrestrained in the truck bed raised a substantial issue of contributory negligence that the jury should have considered. It also contends the court's order exempting plaintiffs from contributory negligence under these circumstances contradicts the intent of mandatory seat belt usage under Vehicle Code section 27315. Uniroyal maintains it was denied the right to a jury trial on a critical defense and that the error was reversible per se, requiring a new trial on all liability issues.

We conclude that the court's instruction on contributory negligence prejudicially confused and misled the jury. The jury should have been permitted to consider the absence of seat belts in assessing plaintiffs' contributory negligence in choosing to ride in the truck bed. As the court properly instructed, plaintiffs had a duty as passengers to exercise ordinary care for their own safety. The California Supreme Court explained that duty in *Pobor* v. *Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324: ". . . the passenger is bound to exercise ordinary care

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advising the jury that "with respect to the issue of the use of seat belts, that issue, as you will be instructed later, . . . cannot be the basis of any contributory negligence on the part of the occupants of the vehicle.

for his own safety. He may not shut his eyes to an obvious danger . . . He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury." (See also *Rodriquez* v. *Lompoc Truck Co.* (1964) 227 Cal.App.2d 769, 775.)

The court agreed that some danger was presented -- it allowed the jury to consider whether plaintiffs were negligent in choosing to ride in the back of Sellers' truck. But we are unable to distinguish the general danger of riding in a truck bed from the risk of harm or injury posed by the absence of fixed seats or restraints.

In *Twohig* v. *Briner* (1985) 168 Cal.App.3d 1102, this court recognized as a matter of "common knowledge" that safety belts are effective in reducing fatalities and minimizing injuries in motor vehicle collisions. (*Id.* at p. 1107.) We noted that "an available and visible seat belt provides a passenger with an opportunity to mitigate damages by minimizing his or her exposure to potential injury before an accident . . . ." (*Id.* at p. 1109.) We believe it equally clear that a passenger may minimize exposure to potential injuries by declining to ride at highway speed in a truck bed having no seat belts or any other restraints. Indeed, Carver testified that the day of the

accident, he did not want to go to work because he did not like riding in the truck bed. He was aware of an element of danger riding in the back of a pickup truck, even with a camper shell attached, due to the possibility of an accident. He testified at his deposition that he always wore seatbelts when they were provided in vehicles and that he would not ride in the back of a truck without a camper shell.

Under contributory negligence principles, the jury was entitled to consider any circumstances tending to show whether plaintiffs, as passengers, exercised care for their own protection that a reasonable person would have exercised under similar circumstances. Such circumstances would include the fact that Seller's truck bed lacked seat belts or other restraints and safety devices and that plaintiffs chose to ride there despite the obvious danger of riding in a vehicle without restraints of any kind. (See, e.g. *Reyes* v. *Kosha* (1998) 65 Cal.App.4th 451, 462 [". . . the fact that Reyes and Barcenas chose to live in the camp despite the obvious danger of fire . . . goes to the question of comparative fault, a question to be decided by the trier of fact"]; *Von Beltz* v. *Stuntman* (1989) 207 Cal.App.3d 1467, 1483 [". . . plaintiff clearly was aware that the Aston-Martin had no seat belts and had some knowledge that the stunts in which she was about to engage were hazardous . . . [T]he circumstances of the instant case presented a jury question of

whether plaintiff was contributorily negligent"]; *Rodriquez* v. *Lompoc Truck Co.*, *supra*, 227 Cal.App.2d at pp. 775-776 [plaintiffs' decision to ride in a car for 9 miles knowing the right-rear tire to be flat was sufficient evidence to support instructions on contributory negligence].)

We disagree with the holding of *Wineinger* v. *Bear Brand Ranch* (1988) 204 Cal.App.3d 1003, criticized on other grounds in *Ornelas* v. *Randolph* (1993) 4 Cal.4th 1095, 1107, relied upon by plaintiffs, to the extent it suggests a contrary result. The *Wineinger* court's cursory holding in that case was focused upon proximate cause -- that the evidence did not support jury consideration of contributory negligence based on a number of circumstances including that the passenger had no control over the removal of the top, seats or safety belts of a car. (*Id.* at p. 1010-1011.) To the extent *Wineinger*'s holding is interpreted to prevent juries from considering the potential danger assumed by choosing to ride in the altered vehicle, we decline to follow it. *Dutton* v. *City of Pacifica* (1995) 35 Cal.App.4th 1171, another case upon which plaintiffs rely, is inapplicable because it simply addresses a third party's duty of care to another not to increase risk of injury. (*Dutton* v. *City of Pacifica*, *supra*, 35 Cal.App.4th at pp. 1174-1175 [rejecting a duty of care owed by a police officer for injuries occurring in an truck accident

after the officer ordered people to get into the back of a truck and leave the scene].)

It follows that, in considering the totality of the circumstances to determine contributory negligence, the jury should also have been permitted to consider the existence of Vehicle Code section 27315, mandating passengers' use of seat belts in private vehicles. (*Housely* v. *Godinez* (1992) 4 Cal.App.4th 737.) "While subdivision (j) of section 27315 precludes defense arguments that a violation of the statute constitutes 'negligence as a matter of law or negligence per se,' nothing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt . . . [I]t was the Legislature's plain intent to allow section 27315 to play the traditional role of a statute in tort litigation, a factor to be considered by the jury in determining the reasonableness of the conduct in question." (*Id.* at pp. 744, 747.)

Plaintiffs counter that other statutes refute Uniroyal's claim that a jury should consider plaintiffs' fault for riding without restraints in the bed of Sellers' truck. They argue Vehicle Code section 27315 does not require truck bed riders to be restrained when it is read and reconciled with Vehicle Code

sections 21712, subdivision (c), 31400, and 23116.[7] We disagree. When we read those sections in conjunction with Vehicle Code section 27315, we see nothing that contradicts that section's clear mandate that passengers over the age of 16 wear a seat belt. As noted above (footnote 6, supra), Vehicle Code section 23116, subdivision (e) was not in effect at the time of the accident. Vehicle Code section 31400 requires that trucks transporting workmen have seats securely fastened to the vehicle (plainly requiring workers to be seated in those seats) but is silent about seat belts. Vehicle Code section 21712 arguably may

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7 At the time of the accident, Vehicle Code section 23116, subdivision (a) provided: "No person driving a motortruck shall transport any minor under the age of 12 years in the back of the motortruck in a space intended for any load on the vehicle on a highway unless the space is enclosed to a height of 46 inches extending vertically from the floor, the vehicle has installed means of preventing the minor from being discharged, or the minor is secured to the vehicle in a manner which will prevent the minor from being thrown, falling or jumping from the vehicle." Effective January 1, 1994, the statute was amended to permit passengers to ride in the back of a truck on a highway if either secured by a restraint system or transported in an enclosed camper or camper shell. (Veh. Code, § 23116, subds. (b), (d); Stats. 1993 ch. 895 (AB 153), § 1; Gov. Code, § 9600.) Vehicle Code section 31400 in part requires that "trucks used primarily or regularly for the transportation of workmen shall be (a) equipped with seats securely fastened to the vehicle. (Veh. Code, § 31400, subd. (a).) Vehicle Code section 21712 prohibits riding on any vehicle or portion of a vehicle that is not designed or intended for the use of passengers, but exempts employees engaged in the necessary discharge of his duty or "persons riding completely within or upon vehicle bodies in space intended for any load on the vehicle." (Veh. Code, § 21712, subds.(b),(c).)

allow persons to ride in the bed of a truck, but it does not exempt those persons from wearing seat belts or other restraints.

In any event, we reject plaintiffs' suggestion that compliance with the statutes they cite would exempt them from application of contributory negligence. In *Ramirez* v. *Plough, Inc.* (1993) 6 Cal.4th 539, the California Supreme Court noted the prevailing view of using statutory compliance as a defense to tort liability:

> Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, ... the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them. (Rest.2d Torts, § 288C, com. a, p. 40; see also Elsworth v. Beech Aircraft Corp. (1984) 37 Cal.3d 540, 547 [208 Cal.Rptr. 874, 691 P.2d 630] [manufacturer's compliance with federal aircraft safety regulations does not preclude liability for defective design]; Buccery v. General Motors Corp. (1976) 60 Cal.App.3d 533, 540-541 [132 Cal.Rptr. 605] [compliance with federal motor vehicle safety standards does not preclude liability for defective design].)

(*Id.* at p. 548.) Nevertheless, the court said "there is some room in tort law for a defense of statutory compliance. Where the evidence shows no unusual circumstances, but only the ordinary situation contemplated by the statute or administrative rule, then 'the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court

as a matter of law, as sufficient for the occasion. . . .' [Citations.]" (*Ibid*, citing Rest.3d Torts, § 288C, com. a, p. 40 and *Arata* v. *Tonegato* (1957) 152 Cal.App.2d 837, 842-843 [jury entitled to consider compliance with federal labeling requirements for hair dye as factor in determining negligence].) On the present record we cannot conclude as a matter of law that plaintiffs complied with all applicable statutes. We think it is for the jury to consider these statutes and assess whether a reasonable person would have taken additional precautions.

Under the circumstances, we find the court erred when it prohibited the jury from considering the absence of seat belts in the truck bed in assessing contributory negligence. Even though the record shows Uniroyal was permitted to argue plaintiffs' contributory negligence for riding in the bed of the truck, they were precluded from arguing the specific factor that posed the risk of harm: the absence of seat belts. We conclude it is probable the erroneous instruction confused and mislead the jury, prejudicially affecting its verdict. (*Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 580; *Rutherford* v. *Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 [instructional error in civil cases requires reversal only where it seems probable that the error prejudicially affected the verdict].)

Under the *Rutherford* v. *Owens-Illinois, Inc.* standard, we take into account "'(1) the state of the evidence, (2) the effect

of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Rutherford* v. *Owens-Illinois, Inc., supra,* 16 Cal.4th at p. 983; *Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.) The determination of whether prejudice occurred due to instructional error depends heavily on the nature of the error, assessed in the context of the trial record, and it must be probable rather than merely possible that the jury's verdict was based on the incorrect instruction. (*Soule, supra,* at pp. 580-581 and fn. 11.)

The jury ultimately rejected any contributory negligence on the part of plaintiffs, instead concluding plaintiffs' injuries and death were 100 percent caused by Uniroyal. Its general finding that Sellers was negligent but not the cause of plaintiffs' injuries does not, as plaintiffs suggest, preclude a finding that plaintiffs were in some manner negligent. Carver was aware of the dangers of riding in the truck bed. Uniroyal's bio-mechanics expert testified that with proper restraints and a designated seating position plaintiffs would have been protected from their severe or fatal injury patterns.

In closing argument, Carver's counsel emphasized the court's instruction: "And the judge is going to tell you an instruction that you shouldn't and you can't find Mr. Carver guilty of contributory negligence because he's in the back of a truck

without a seat belt." Rereading or emphasizing the language of an incorrect instruction enhances the likelihood of prejudice. (*Shell Oil Co.* v. *Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 772.) We do not believe the remaining instructions remedied or lessened the effect of the incorrect instruction. While there is no direct evidence of the jury's attitude about the contributory negligence instruction, the record indicates they were advised and admonished before and during the trial that they could not base any contributory negligence on the plaintiffs with respect to the use of seat belts. These repeated admonitions underscore the prejudice suffered by Uniroyal. We therefore reverse the judgment for retrial on all liability issues. (*Hasson* v. *Ford Motor Company* (1977) 19 Cal.3d 530, 552-553, overruled on other grounds in *Soule* v. *General Motors Corp.*, *supra*, 8 Cal.4th at p. 580; *Curties* v. *Hill Top Developers* (1993) 14 Cal.App.4th 1651, 1656-1657.)

II.

The Experts

Plaintiffs designated Robert Carlson, Jr. and Lawrence Kashar and Sellers designated Richard Grogan as experts to give opinions about the manufacturing defects and the cause of the tire's failure. Carlson, a litigation consultant with a masters degree in mechanical engineering and ten years of tire-related experience at Michelin America's Research & Development

Corporation, testified in his deposition that the tire had a manufacturing defect consisting of a defective inner liner that allowed air and moisture to enter the structure of the tire, causing it to weaken. He identified evidence of "undercure" as a "contributing factor." Later in his deposition Carlson stated, "The defect is undercure, and it manifests itself in the reduced adherence in the . . . tread belts, and an inner liner crack. That is the mechanism of the failure." According to Carlson, undercure meant that the tire was manufactured with lack of full vulcanization, or chemical reaction, in the rubber. Evidence of undercure, according to Carlson, manifested itself in the yellow appearance to the cable. He also conducted a shore test on a small piece of tread that he said "probably" indicated undercure. He found the inner liner crack by inflating the tire to approximately 5 pounds per square inch (psi) and placing soap on the outside carcass of the tire directly opposite the inner liner splice. Carlson did no other testing on the tire.

Carlson has no degree in chemistry; his training in chemistry is limited to high school and college classes and a rubber technology course he attended while employed with Michelin, of which one aspect was chemistry. He testified he never devised or evaluated tests to determine the correct vulcanization of rubber products or tires, nor had he conducted tests to evaluate a cure problem. Carlson admitted his

professional experience in tire design at Michelin was limited to mechanical aspects of the tire: determining the shape and pressure profiles of the tire to achieve a desired performance. The curing process and related problems was handled by another group at Michelin.

Lawrence Kashar, a physical and mechanical metallurgist whose expertise includes the failure analysis of metals and alloys, testified in deposition that in his opinion, the existence of brass plating on the steel wires of the tire indicated that the "curing process did not proceed in the manner that was intended, and that good adhesion between the rubber and steel wires probably was not obtained." Kashar testified that the sources of his opinion were the deposition transcripts of Carlson and Uniroyal's experts Donald Avila and Gary Fowler; a paragraph from a metals handbook indicating that the steel cords in tires are brass plated; and plaintiff's counsel's comment to him that Grogan testified that during curing the brass is "consumed . . . in order to get a good bond between the steel and the rubber." Kashar admitted he had no background, training, or special experience in tire manufacturing or in physical testing and evaluation of materials specifically for inclusion in tires, nor was he ever involved in the design, specifications or criteria for steel cords in tires.

At the time of his deposition, Kashar had done no testing, review of scientific literature or independent investigation of his own and was unable to identify any physical law, chemical formula, or technical, scientific or industry literature supporting his theory. Following his first deposition, Kashar reviewed the literature and testified in a second deposition that the tire was defective due to poor bonding between the brass plating and the rubber. According to Kashar, the brass/rubber bond should be stronger than the rubber itself; if a proper bond was made, the rubber would tear and adhere to the wires if an attempt were made to separate the belts from the rubber. Kashar conceded the scientific literature contradicted Carlson and Grogan's theory that 100 percent of the brass coating is consumed during the vulcanization process in a properly cured tire, but said the literature did not cause him to change his ultimate opinion.

Sellers designated Grogan to testify about the cause of the tire's failure. Although Grogan was continuously employed by Dunlop Tire Company from 1947 to 1980, his direct experience with radial tires and steel/brass/rubber adhesion was for a six-month period in 1958 as a senior technical assistant and "compounder" in a team at Dunlop charged with getting the radial tire into production. Grogan's work on that project consisted of devising and conducting tests to determine the force required to separate

a rubber block from a steel cord. His education consists of a "national certificate" in applied physics from the Birmingham College of Advanced Technology, which he attended for a "brief period" while working for Dunlop. He is neither a chemist nor an engineer.

Grogan gave three reasons at his deposition why the tire failed. First, he testified it failed because of tread separation caused primarily by a bad inner liner joint which allowed air and moisture to enter the belt and rust the cords. Second, and to a "very much secondary" extent, the tire failed due to weak adhesion between the cords and surrounding rubber. Finally, he said there was porosity in the "skim stock"[8] due to undercure or "other factors." As to the theory of weak adhesion, Grogan stated "[t]he fact that you can see brass means that the adhesion hasn't formed properly;" there was no proper bond as opposed to insufficient vulcanization. He testified, based only upon his "[y]ears of experience in the industry," that brass is one hundred percent consumed in the vulcanization process if the process is correct. Grogan's explanation as to why clean brassy cords was always indicative of poor adhesion was based on the chemical reaction occurring between the rubber and metal:

> "[Grogan]: The purpose of the brass is to combine with the sulfur in the rubber compound to form a

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8 The skim coat of a tire is the rubber layer coating both sides of the sheet of steel wires that form the belts.

> link between the rubber and the brass. And the brass sticks to the steel, and the brass sticks to the rubber. And so the brass has to enter into a chemical reaction with the rubber to get adhesion at all. It can't just sit there for the ride.
> . . .
> "[Defense counsel]: Well, what chemical formula or scientific principle do you rely on in support of that opinion?
> . . .
> "[Grogan]: The copper and the brass is converted to copper sulfide, at least in part, but probably wholly. And this forms the cross-link between the rubber and the metal."

Grogan later attempted to explain that his conclusion about consumption of brass and inadequate vulcanization was not based on the chemical reaction itself, but only on the fact that visible brass appeared on the tire. Grogan found the bad inner liner splice by conducting a single air test on the tire consisting of viewing bubbles after spraying soapy water on a portion of the tire's inner liner. He did not repeat the test nor did he document his findings about the inner liner splice by photograph or videotape.

Uniroyal moved in limine to exclude the opinions of Carlson Kashar and Grogan relating to the cause of tire failure, specifically their opinions that the manufacturing defect in the tire was "undercure" or inadequate vulcanization. Uniroyal argued that Carlson and Grogan's opinions, based upon the theory that a "brassy" appearance to the tire's steel belt wires proved insufficient curing, failed to satisfy the foundational

requirements for scientific evidence mandated by *People* v. *Leahy* (1994) 8 Cal.4th 587 (*Leahy*) and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*). It maintained *Leahy* and *Daubert* envisioned the court as a gatekeeper to assess the reliability of their methodologies. Uniroyal further argued that neither Carlson's expertise or methodology met the requirements for scientific reliability and knowledge sufficient under Evidence Code sections 720 and 801.[9] Uniroyal challenged both Carlson and Grogan's qualifications to provide their opinions under Evidence Code sections 720 and 801, arguing they lacked the requisite knowledge, skill, experience, training or education to offer admissible opinions on the issue of undercure. Uniroyal moved to exclude Kashar's opinion regarding brassiness of the steel cords as proof of defect on the ground it was not based upon any specialized skill, experience or training

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9 Evidence Code section 720, subdivision (a) provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert *on the subject to which his testimony relates*. Against the objection of a party, such special knowledge, skill, experience, training or education must be shown before the witness may testify as an expert." (Emphasis added.)

Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] ... [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which

and was cumulative of Carlson and Grogan's testimony. At a pretrial hearing, it requested the court conduct a hearing under Evidence Code section 402 to exercise that function before the jury heard their testimony.

The court denied Uniroyal's in limine motions. It considered it improper to render an advance ruling on the admissibility of Carlson and Grogan's testimony, concluding that it would take these issues from the jury.[10] The court also denied Uniroyal's motion to exclude Dr. Kashar's testimony, finding it was being asked to "judge the credibility of a witness

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his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

10 The court stated: ". . . these motions are, in effect, advance evidentiary ruling requests which are improper. [¶] Apparently, the big question here is - if I understand the moving papers, is this existence of brassy wires being indicative of an under cure, and still having in mind [*Daubert* and *Leahy*], I don't see how I can determine as a matter of law at this time that that testimony from either of those witnesses is excludable." The court sought input on the manner of making such an evaluation: ". . . in this situation I have got the notion of a 402 hearing,; I've got an opportunity for a motion to strike, and, as already has been indicated, jurors are really quite intelligent people, and to rule and preclude testimony on this subject without hearing it at all, as opposed to the excerpts from depositions here and there that have been submitted, I think would be grossly unfair, grossly unfair."

Finally, in response to Uniroyal's assertion that the court could make its ruling on the papers, the court commented: "It is not the same as hearing the testimony from the witness, and hearing both sides of the story, and enabling counsel to establish the appropriate foundation for the testimony. It simply cannot be done . . . I think that I've got to give you an opportunity to kind of -- to try your lawsuit. So the motion to exclude the testimony of Mr. Carlson and Grogan will be denied."

who has not even testified and determine that it is cumulative based upon other witnesses who have not yet testified . . . ." It took Uniroyal's request for a 402 hearing under consideration.

The case proceeded in separate liability and damages phases. During the liability phase, the court denied Uniroyal's further objection on *Kelly* grounds to Carlson's methodology and rejected Uniroyal's renewed argument that Grogan's air test method was not scientifically viable. It denied Uniroyal's renewed 402 motion as to Kashar, finding sufficient foundation for Kashar's testimony.

Carlson was permitted to testify that the nature of the manufacturing defect causing the tire to fail was a "defective tread belt adhesion system." He concluded that the presence of bare and brassy cords over 40 percent of the tire's circumference "shows that the tire did not have sufficient adhesion . . . it means that the vulcanization process was not complete . . . ." He explained: "In the curing process . . . copper combines with sulfur in the rubber to form a copper sulfide, which is a black compound. And when you take apart tires that are properly cured, you see the silver wire. You don't see the copper-colored wire." The court denied Uniroyal's motion to strike Carlson's testimony at the close of the liability phase of trial.

Grogan testified at trial that a tire investigator who sees "clean, brassy cords" on a failed tire "knows there has been no

bonding between the rubber and the cord -- steel cords, of course." Grogan said a clean, brassy appearance is "highly significant, because that tells me that there has been no adhesion there." According to Grogan, two manufacturing defects existed in the accident tire: improper adherence of the cord and the split in the inner liner. Based on his air test, he believed wet air permeated the tire causing rust and ultimately the tread separation. He explained that wet air entering the inner liner opening worked *in conjunction with* the weak bond to "push[] the tread off." The jury heard Kashar's testimony from his second deposition in which he conceded problems with Carlson and Grogan's testimony.

Uniroyal's tire failure expert Donald Avila testified the tire had been run in overloaded and underinflated conditions and had sustained continuous and severe impact damage causing it to eventually break apart. As to plaintiffs' theory that the tire left the manufacturing plant without adequate adhesion between the rubber and steel, Avila and another Uniroyal expert Jerry Leyden agreed that a tire with insufficient vulcanization would have failed much earlier in its life. Uniroyal's former director of development and testing, Charles Reynolds, also indicated that lack of adhesion between the steel and rubber "promote[s] very early tire failures." Even Sellers' expert Grogan admitted that

tire failure should occur early on, within six months to two years of its life.

Uniroyal contends the court committed reversible error by allowing evidence of plaintiff's "brassy wire theory" as conclusive proof of a defectively manufactured tire without conducting a preliminary *Kelly*[11] admissibility hearing. It argues the theory underlying plaintiffs' experts' opinions -- that 100 percent of the brass coating on the steel cords is consumed during vulcanization -- is a novel scientific "method of proof" (*Kelly, supra,* 17 Cal.3d at p. 30) subject to *Kelly's* three-prong inquiry. Uniroyal urges the defect theory is inadmissible because plaintiffs' did not and cannot demonstrate the reliability and general acceptance in the relevant scientific community of the fact that 100 percent of brass is consumed during the tire curing process, nor can plaintiffs show their experts were qualified to express opinions based upon the theory. Uniroyal further argues that even if the theory was admissible, neither it nor the other defect theories suggested by plaintiffs amount to substantial evidence of a manufacturing defect. According to Uniroyal, prejudice from the court's error results from the dominant role of the theory during trial.

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11 As did the California Supreme Court in *People* v. *Leahy* (1994) 8 Cal.4th 587, 604 and *People* v. *Venegas* (1998) 18 Cal.4th 47, 76, fn. 30), we refer to the formula as the *Kelly* test.

Plaintiffs on the other hand argue that *Kelly* is inapplicable because their experts' opinions do not rely upon a novel scientific technique, process or theory. They say their experts' testimony is based only upon the well-known chemical reaction that occurs between brass and rubber and a physical inspection similar to that used by other tire failure analysts. According to Plaintiffs, neither Carlson, Grogan nor Kashar rested their opinion on the theory that brass is supposed to be completely converted into copper sulfide in order to produce the desired rubber/steel bond. Plaintiffs compare their experts' opinions to medical opinions based upon deductions from physical symptoms; according to plaintiffs the real controversy was over the "inferences, if any, to be drawn from recognized facts."

The *Kelly* rule for admission of scientific evidence is applicable to "expert testimony which is based, in whole or in part, on a technique, process, or theory which is new to science, and even more so, the law." (*People* v. *Stoll* (1989) 49 Cal.3d 1136, 1156; *People* v. *Cegers* (1992) 7 Cal.App.4th 988, 997.) Application of *Kelly* is not limited to use of new machines or processes; it extends to novel scientific theories or principles. (*People* v. *Stoll*, *supra*, 49 Cal.3d at p. 1156; *Metaleuca, Inc.* v. *Clark* (1998) 66 Cal.App.4th 1344, 1357 [*Kelly* test deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles];

People v. *Peneda* (1995) 32 Cal.App.4th 1022, 1030 [expert's approach did not involve a "novel scientific theory or technique"].) "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." (*People* v. *Venegas*, *supra*, 18 Cal.4th at p. 47.)

Kelly requires the proponent of a new scientific technique, process, or theory to establish three factors. First, it must establish that the theory is "reliable" by showing that it has "'gained general acceptance in the particular field to which it belongs.'" (*Kelly*, *supra*, 17 Cal.3d at p. 30; *People* v. *Stoll*, *supra*, 49 Cal.3d at p. 1156; *People* v. *Venegas*, *supra*, 18 Cal.4th at p. 78.) Second, it must show the witness testifying on general acceptance is properly qualified as an expert on the subject. (*Kelly*, *supra*, 17 Cal.3d at p. 30; *People* v. *Venegas*, *supra*, 18 Cal.4th at p. 78.) Third, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. (*Ibid.*) In performing a *Kelly* evaluation, the court's duty is not to decide whether the theory is "'reliable as a matter of "scientific fact," but simply whether it is generally accepted as reliable by the relevant scientific community.'" (*People* v. *Venegas*, *supra*, 18 Cal.4th at p. 85 quoting *People* v. *Shirley* (1982) 31 Cal.3d 18, 55.)

The testimony of the challenged experts is of a scientific nature. Although one can arguably address the issue posed under *Kelly*, particularly under prongs two and three, we are not persuaded that the issue meets the threshold criteria for *Kelly*'s application, namely, that it is "new to science." (*People* v. *Stoll*, *supra*, 49 Cal.3d at p. 1156.) Accordingly, we believe it best to analyze Uniroyal's objections under the traditional tests under Evidence Code sections 720 and 801.

Uniroyal urges us to perform an independent review and reject the general scientific acceptance of plaintiffs' theory. Because the court refused to conduct any hearing on the qualifications of plaintiffs' experts' and the bases of their theories, we are incapable of performing de novo review and believe it more appropriate, as did the California Supreme Court in *People* v. *Leahy*, *supra*, 8 Cal.4th 609-610, to remand the issue to the trial court for an appropriate hearing on retrial. (See also *People* v. *Pizarro* (1992) 10 Cal.App.4th 57, 88-89.)

We do not fault the court for not granting Uniroyal's in limine motions based solely upon the experts' deposition testimony. However, we are concerned by the court's failure to hold an Evidence Code section 402 hearing to determine whether Carlson, Grogan and Kashar were qualified as experts and to assess the basis for their opinions. Uniroyal's motions in limine raised substantial concerns about the qualifications of

these witnesses and the foundation for their testimony sufficient to warrant such hearings.

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] . . . 'The competency of an expert "is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement." [Citation.]' [Citation.]" (*People* v. *Ramos* (1997) 15 Cal.4th 1133, 1175.) "On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion. [Citations.]" (*People* v. *Williams* (1997) 16 Cal.4th 153, 197.)

Under Evidence Code sections 801 and 803,[12] the court had wide discretion to rule on foundational matters forming the basis of the expert's testimony. Upon Uniroyal's motions it was *required* to consider whether Carlson, Grogan and Kashar were sufficiently competent and qualified to render their opinions. (See e.g. *Miller* v. *Los Angeles County Flood Control Dist* (1973) 8 Cal.3d 689, 700-703; *Korsak* v. *Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523; 1 Jefferson, Cal. Evidence Benchbook (3d

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12 Evidence Code section 803 provides in part: "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion."

ed. 1998) § 29.24, p. 588 ["If there is a dispute about whether a witness is qualified as an expert witness to give opinion testimony, the judge must make a determination that the witness is so qualified before permitting him or her to testify"].)

Based on the record before us, we question whether Carlson, Grogan and Kashar were sufficiently qualified in experience, training or education to render opinions on chemical processes during the manufacturing of tires. "'"The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited."'" (*People* v. *Williams* (1989) 48 Cal.3d 1112, 1136 [police officer who had investigated 100 rape cases over 17 years was qualified to state it was not unusual for rapist to have no marks on his body, but was not qualified with psychiatric training and expertise to state that marks on the rapist is dependent on the victim's emotional makeup].)

As to Carlson and Grogan, it does not follow that their experience in the tire industry gives them the ability to give opinions on all aspects of tire manufacture or failure. (E.g. *People* v. *Davis* (1965) 62 Cal.2d 791, 801 [not all psychologists are competent to give an opinion on sanity].) Whether a person has sufficient expertise to testify as an expert in a particular

case "depends on the facts of that case, the questions propounded to the witness and his particular qualifications." (*Ibid.*) In particular, we see little basis for Carlson and Grogan's qualifications to render conclusions about the chemical reaction during vulcanization or advance the proposition that brassy color *necessarily* indicates undercure. Neither witness is a chemist. Neither gave details of any direct experience conducting studies or tests to evaluate insufficient vulcanization. We do not accept the reasoning that visual examination of numerous failed tires provides sufficient knowledge to give opinions about the significance of brass colored cords. Carlson in particular could not state how many light truck tires he had examined that experienced belt separation due to undercure or undervulcanization. As for Kashar, plaintiff's metallurgist, he admitted he had no experience in the tire industry and was not an expert in evaluating rubber or polymers.

Uniroyal raised legitimate issues about the foundation for these experts' opinions. Neither Carlson nor Grogan conducted any actual testing or chemical analysis of the steel cord in the failed tire to determine whether proper adhesion was obtained. As indicated, Kashar, who had the most relevant training and experience to review and interpret the scientific literature, eventually admitted that the premise underlying Carlson and Grogan's conclusions was contradicted by the scientific

literature existing on the very subject at issue: rubber-to-steel adhesion in steel-belted tires.[13] At the time of Uniroyal's original in limine motion, Kashar's opinions, based on deposition testimony of other experts and matters admittedly outside his expertise, were merely cumulative. (Evid. Code, § 352.)

Foundational problems with other aspects of Carlson and Grogan's testimony appeared during trial. Grogan, for example, was permitted to testify that the presence of rust on the accident tire supported his opinion that the tire had a defective inner liner splice. He testified, however, that the rust did not form until after the first 39,000 miles of use. Grogan attempted to explain his theory by speculating about the use of dry air and wet air in inflating the tire: "If this guy inflated his tire with dry air, 39,000 miles, then there would obviously be no rust. But then he might come across a filling station or something where there was wet air, and then the whole process would start. So it's perfectly possible to run this tire for quite a long distance without the rust appearing, and then suddenly you get wet air going through instead of dry air, and

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13 See Van Ooij, "Fundamental Aspects of Rubber Adhesion to Brass-Plated Steel Tire Cords," 52 *Rubber Chemistry and Technology* 605, 623, 625 (1979) [". . . .the adhesive reaction between rubber and steel cord, at least as far as initial adhesion is concerned, involves only a small fraction of the coating (i.e., the brass coating is not completely consumed during bonding). . . . only a fraction of the brass coating is consumed under conditions of normal cure."]

now it starts to rust, and now it starts to fail." Experts are given considerable leeway concerning the matters upon which they may rely, but they may not rely on speculation or conjecture. (*Korsak* v. *Atlas Hotels, Inc.*, *supra*, 2 Cal.App.4th at p. 1526.)

Based on the inconsistencies, contradictions and weaknesses of the expert opinions, we conclude the court's failure to hold a 402 hearing was not harmless. Certainly, the admission of testimony by three separate experts that a manufacturing defect existed when the tire left the plant influenced the jury. The jury heard the experts testify conclusively that the accident tire left the plant with a manufacturing defect, evidenced mainly by the presence of yellow-colored wire on portions of one of the tread pieces.[14] This evidence was contrasted by testimony from Uniroyal's experts that the presence of brass wires was meaningless or proved good adhesion and that a tire with such a defect would not withstand over 40,000 miles of use. As indicated, even Sellers' expert Grogan admitted that if a tire is going to fail, it will do so within six months to two years of its life. The jury nevertheless rejected Uniroyal's expert's testimony.

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14 We disagree with plaintiffs contention that expert Grogan provided independent evidence of a separate defect, namely, an open inner liner splice. As indicated above, Grogan testified that two defects -- poor adhesion and an open inner liner splice -- worked in conjunction with each other to cause the tread to separate from the belt.

Given an opportunity for a hearing on the issue of their qualifications and bases of their opinions, we cannot say plaintiffs or Sellers are incapable of showing adequate qualifications or foundation for their experts' testimony. Accordingly, on remand the court should hold a 402 hearing on the experts' qualifications and bases of their opinions.

III.

Parties' Alignment

Uniroyal contends the court erred by declining to treat Sellers as a party aligned with plaintiffs, and that Uniroyal was prejudiced by the court's allocation of peremptory challenges, orders regarding the presentation of testimony and sequence of closing arguments. Specifically, Uniroyal contends (1) it was given only eight peremptory challenges to the sixteen allocated to plaintiffs' and Sellers combined; (2) plaintiffs were unfairly permitted to call Sellers as an adverse witness under Evidence Code section 776; (3) Sellers was given independent time to cross-examine Uniroyal's witnesses; and (4) plaintiffs and Sellers unfairly obtained three closing arguments in rebuttal to Uniroyal's closing argument. Uniroyal argues that although the prejudice is "difficult to quantify," the errors were prejudicial. We believe the record shows plaintiffs and Sellers were largely if not completely united in interest against Uniroyal and based upon the pretrial contentions of the parties,

the court should have reallocated the peremptory challenges and readjusted the order of proof. However, Uniroyal has not shown, and we cannot find, prejudice as a result of the court's ruling.

The court was required to determine the parties' respective interests in case issues and allot peremptory challenges in "the interests of justice" under Code of Civil Procedure section 231.[15] That determination, involving the court's assessment of the issues in the case, the parties' focus on those issues at trial, and ultimate fairness in the trial proceedings, is one appropriate for review under an abuse of discretion standard. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065 [abuse of discretion standard applies to a broad range of decisions, including those relating to case management, pleadings, admission of evidence and dismissal].)

The court also has broad discretion to determine the order of witnesses and arguments under Code of Civil Procedure sections 607 and 320. "When several defendants, each having separate defenses, appear by separate counsel, the court must determine

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15 Code of Civil Procedure section 231, subdivision (c) provides: "If there are more than two parties, the court shall, for the purpose of alloting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. . . . If there are more than two sides, the court shall grant such additional peremptory challenges to a side as the interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides.

their relative order of presentation. (Code Civ. Proc., § 607, subd. 8; see also Evid. Code, § 320.) The reviewing court will uphold such a determination unless abuse of discretion is clear and a miscarriage of justice has resulted. [Citation.]" (*Diamond Springs Lime Co.* v. *American River Constructors* (1971) 16 Cal.App.3d 581, 602; *People* v. *Alvarez* (1996) 14 Cal.4th 155, 207 [trial court's ruling on order of proof is reviewed for abuse of discretion].)

Despite Seller's counsel's representation that he was "adverse to everybody," plaintiffs' arguments in support of treating the case as having three "sides" should have compelled the court, in the interests of justice, to treat the case as having two basic sides. Carver's counsel stated that, although Sellers was technically a defendant, his liability was "infinitesimal" as compared to Uniroyal's. Those comments, as well as plaintiffs' mild treatment of Sellers on the stand, indicate that the overwhelming thrust of plaintiffs' case was to prove Uniroyal's liability. The court was appropriately reluctant to treat the case as three-sided and itself believed that the "[case] may well try as a two-party case. . . ." It is clear from the record that the sole basis of plaintiffs' and Sellers' case was that the sole cause of the accident was a defectively manufactured Uniroyal tire.

While we believe the court should have structured the case differently, Uniroyal has not shown it was prejudiced at trial by the court's rulings. (*Reid* v. *Balter* (1993) 14 Cal.App.4th 1186, 1195.) "When an appeal is taken from a judgment and the appellant alleges the trial court made an erroneous pretrial ruling, it is not enough to show that the ruling was indeed erroneous. In addition, the appellant must also 'show resulting prejudice, and the probability of a more favorable outcome, *at trial*.'" (*Ibid.*, [emphasis in original], quoting *Waller* v. *TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) For example, Uniroyal complains it was not provided with at least the same number of peremptory challenges as plaintiffs and Sellers, yet the record shows it did not use all eight of its challenges in excusing potential jurors. It cannot argue that had it obtained more peremptory challenges, it would have used them. Likewise, with regard to Uniroyal's inability to rebut Grogan's opinions about the defective inner liner splice, Uniroyal did present evidence of the lack of an opening in the splice through its own experts in its case in chief. On Uniroyal's offer of proof, the court prohibited other testimony from Uniroyal's expert under Code of Civil Procedure 2034 on a ground unrelated to the order of proof, namely, the testimony (about a particular test conducted to determine whether the splice was open) was not covered in the

expert's deposition. Uniroyal has not made a sufficient showing of prejudice with regard to its remaining points.

IV.

Right to a Competent Jury

Because of the conclusions reached above, we see no need to address Uniroyal's argument regarding deprivation of its right to a competent jury.

V.

Plaintiffs' Appeal

Plaintiffs have appealed both the judgment and the court's order granting Uniroyal's motion to tax costs in certain respects. They describe their appeal as addressing two categories of issues: the first involving certain items of damages and costs they should have recovered, the second involving instructional and evidentiary issues. Plaintiffs assert we must address the first category of issues regardless of the disposition of Uniroyal's appeal and may abandon the latter category of issues in the event Uniroyal's appeal is unsuccessful. They are incorrect.

Because reversal of the judgment operates to vacate the award of costs incident to that judgment, plaintiffs' appeal from the order granting Uniroyal's motion to tax costs is moot and the appeal must be dismissed. (See e.g. *Muething v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 275; *Evans v. Southern Pacific*

Transportation Co. (1989) 213 Cal.App.3d 1378, 1388.) We further dismiss the remainder of plaintiffs' appeal as to the underlying judgment. The judgment was in plaintiffs' favor. As a general rule plaintiffs cannot appeal a favorable judgment because they are not aggrieved. (Code Civ. Proc. § 906; *In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1041-1042; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 188, p. 243.) Apart from this ground, we have not found nor have plaintiffs cited authority for their unusual conditional appeal. In any event, plaintiffs' appeal seeks advisory opinions on instructional and evidentiary matters that we cannot say are "necessary" to a final determination of the case upon retrial; we decline to give them. (Code Civ. Proc. § 43; *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 284.)

DISPOSITION

The judgment is reversed. Uniroyal is to recover its costs on appeal. Plaintiffs' appeal is dismissed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P.J.

McDONALD, J.