

Recent Cases

By Kevin F. Calcagnie

The following are summaries of recently published decisions which may be of interest to consumer attorneys. Official cites are used where available at the time of publication. As with any new case, subsequent histories should be consulted for changes such as depublication or review by the California Supreme Court.

Negligence Per Se – Auto Repair Facility

Alcala v. Vazmar Corporation (2nd Dist., Oct. 17, 2008) 167 Cal.App.4th 747, 84 Cal.Rptr.3d 402

The parents of an 18-year-old man who was killed when he lost control of his vehicle in the rain and collided with another vehicle, filed suit against a tire center which had serviced the vehicle two weeks before the accident. The plaintiffs alleged that the defendant facility, which had rotated and aligned the tires, was negligent in failing to advise the plaintiffs that the tires were extremely worn and below the legally required tread depth, and contended that the condition of the tires had caused the decedent to lose control. At trial the plaintiffs requested that the court instruct the jury on negligence per se, based upon alleged violations of Vehicle Code Sections 27465 and 27501, which prohibit dealers or retail sellers from installing on vehicles tires which do not have a minimum tread depth of one-thirty-second of an inch.

On appeal from a jury verdict in favor of the defendant, the plaintiff contended that the trial court erred in refusing the negligence per se instruction. However, the court of appeal disagreed, holding that the court had not erred in declining the instruction:

It is clear from the language of the statutes that sections 27465 and 27501 were enacted in an attempt to remove unsafe tires from vehicles using the roadways and highways of the state. Subdivision (a) of both statutes precludes dealers and retail sellers of tires from installing such tires and subdivision (b) of both statutes prevents any person from using such tires....

Under the plain language of both statutes, a dealer or retailer of tires cannot “sell, offer for sale, expose for sale, or install on a vehicle” a tire that does not meet applicable tread depth requirements. There is nothing in the plain language of either statute to suggest that the word “install” is limited only to those tire installations that are incident to a sale....

[W]e agree with Earthbound that the statutes were not intended to apply when a tire mounted on the vehicle is removed and remounted thereon by the dealer or retail seller. This construction is consistent with the intent of the 1971 amendment to protect emergency roadside service operators who remove a failed tire and replace it with a spare tire which does not meet the minimum requirements of the sections. And such a construction reflects common sense. Any other interpretation would prevent repair shops (that happen to sell tires) from performing routine service jobs that require the removal and reinstallation of tires (e.g., replacing worn brakes) on any vehicles with tires less than the required tread depth. Such a result certainly does not comport with the Legislature’s stated purpose of increasing road safety.



Kevin F. Calcagnie is a partner with Robinson, Calcagnie & Robinson in Newport Beach, specializing in products liability litigation.

www.orangecountylaw.com

Products Liability – Federal Preemption

Williamson v. Mazda Motor of America, Inc. (4th Dis., Oct. 22, 2008) 167 Cal.App.4th 905, 84 Cal.Rptr.3d 545

The heirs of a woman who was killed in a head-on collision filed a products liability action against the manufacturer of the minivan in which she was a passenger. The plaintiffs alleged that the occupant’s restraint system of the vehicle was defective in that the middle seat of the middle row where the decedent was riding had only a two-point lap belt instead of a three-point lap belt and shoulder harness, which caused her body to jack-knife over the lap belt, resulting in severe abdominal injuries and internal bleeding.

The defendant demurred to the complaint, arguing that federal preemption barred the plaintiffs’ allegations, because Federal Motor Vehicle Safety Standard 208 promulgated under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 et seq.) authorizes automobile manufacturers to install a lap-only seatbelt at the inboard seating positions of a vehicle. The trial court sustained the demurrer without leave to amend and the court of appeal affirmed, holding that the plaintiffs’ claims were preempted by the regulation:

Plaintiffs allege defendants defectively

designed the minivan, in part, by equipping “[t]he center seating position of the middle bench seat ... with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson....” In effect, they seek to hold defendants liable for choosing the lap-only seatbelt option for a rear inboard seat position. If successful, plaintiffs’ claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208 because it would effectively require them to install only lap/shoulder seatbelts at inboard seating positions to avoid liability under California law. Such a result would “stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208” (*Heinricher v. Volvo Car Corp.*, *supra*, 809 N.E.2d at p. 1098) and is therefore preempted....

The post-*Geier* cases considering FMVSS 208’s preemptive effect on an automobile manufacturer’s choice of passenger restraint systems are not controlling precedent in California....

However, these cases have almost uniformly found FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option and we find their analysis to be persuasive. Therefore, we conclude that to the extent plaintiffs contend defendants are liable for failing to install a lap/shoulder seatbelt in the minivan’s middle row inboard seat, their claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan.

Assumption of the Risk – “Active Sports”

Kindrich v. Long Beach Yacht Club (4th Dist., Oct. 28, 2008) 167 Cal.App.4th 1252, 84 Cal.Rptr.3d 824

A man who was injured while disembarking from a boat following a burial at sea service filed an action against the yacht club which owned the boat and the dock, as well as the boat’s skipper. The plaintiff alleged that he had broken his leg while jumping from the boat to the dock, and that the defendants were negligent in

failing to have someone on the dock to assist in tying off the boat, and in failing to ensure that portable steps were provided for passengers disembarking.

The defendants moved for summary judgment, arguing that the plaintiff’s claim was barred by the doctrine of primary assumption of the risk. The trial court granted the motion but the court of appeal reversed, holding that the plaintiff was not engaged in a type of sporting event where the doctrine of primary assumption of the risk could be applied:

[F]or purposes of this case, we need only consider whether Carl’s injuries occurred while he was engaged in an “active sport,” which relieved defendants of a duty of care.

There are more than 100 published cases defining what is and what is not an “active sport” qualifying for application of the doctrine of primary assumption of risk. “Since the decision in *Knight*, which involved a recreational game of touch football, our state Supreme Court and appellate courts have examined the applicability of the primary assumption of the risk defense in a wide variety of cases involving sports and recreational activities....”

This case is more analogous to *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 112 Cal.Rptr.2d 217....

Shannon distinguished *Ford v. Gouin*, *supra*, the waterskiing case, by noting that in *Ford*, our Supreme Court “explicitly used the language ‘non-competitive but active sports activity’ in applying the doctrine to waterskiing. [Citation.] A review of the reasoning set forth in *Ford* makes clear that the court focused on the physical skill and risk involved in the waterskiing itself to conclude that the activity of waterskiing was a sport, and the boat driver a coparticipant in that sport. [Citation.] The same certainly cannot be said of a mere passenger in a boat....” (Id. at p. 798, 112 Cal.Rptr.2d 217.)

Here, the trial court characterized the activity in which plaintiff engaged as “jumping” rather than boating. We disagree that we must surgically separate an activity’s constituent parts apart from the general activity in which the plaintiff was engaged. Carl was engaged in boating, not in jumping. If he

had been a jumper, in the sense of one who competes in athletic events, our conclusion would be different. But he was disembarking from the boat; his method of doing so, be it leaping, jumping, stepping off, or walking the gangplank, did not turn his activity into an “active sport.”

Products Liability – Finance Lessors

Arriaga v. CitiCapital Commercial Corporation (5th Dist., Nov. 3, 2008) 167 Cal.App.4th 1527, 85 Cal.Rptr.3d 143

A man who was injured when his finger became entangled in a glue spreading machine filed an action against several defendants, including the manufacturer, retailer and lessee of the machine, as well as a finance lessor which had purchased the machine for, and then rented it to, a prior owner. The finance lessor moved for summary judgment, arguing that as a lessor and one-time seller of the glue spreader, it was not part of the chain of commerce, and thus not subject to strict liability, and that as the seller of a used good, it had no duty to inspect or test the product for defects.

The trial court granted summary judgment and the court of appeal affirmed, holding that the finance lessor could not be held liable under either strict products liability or negligence theories:

A finance lease as defined in Commercial Code section 10103, subdivision (a)(7), is the product of a three-party transaction. The lessor does not select, manufacture, or supply the goods. Rather, the supplier manufactures or supplies the goods pursuant to the lessee’s specifications....

A finance lessor, such as CitiCapital, does not select the specific machine or manufacturer of the machine. Accordingly, unlike a retailer or a commercial lessor, the finance lessor does not maintain an ongoing relationship with a particular manufacturer. Thus, the finance lessor is not in any position to either directly or indirectly exert pressure on the manufacturer to enhance the safety of the product. Therefore, even if the finance lessor’s tangential function of providing money to make the purchase possible is characterized as a link in the vertical chain of distri-

bution, imposing strict liability on that finance lessor will not further a critical policy consideration. In other words, strict liability is not justified by the underlying policy....

To date, no California court has considered whether the strict products liability doctrine is applicable to finance lessors. However, when faced with this issue, other jurisdictions have ruled that finance lessors are not strictly liable in tort....

In sum, imposing strict product liability on the lessor under a finance lease, as defined under both the California Commercial Code and the Uniform Commercial Code, does not further the policy considerations underlying the strict products liability doctrine. A finance lessor's role in the chain of events does not provide a basis for imposition of strict liability....

It is undisputed that CitiCapital never had possession of the machine. Further, there is no evidence that CitiCapital had any notice of the defect. Since the machine was in the sole possession and control of first AVP and then Orepak for nearly five years, and CitiCapital had no notice of the defect, CitiCapital owed no duty to Arriaga to inspect the machine.

School District Liability – Special Needs Students

Jennifer C. v. Los Angeles Unified School District (2nd Dist., Dec. 8, 2008) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2008 WL 5122998

A 14-year-old special needs student who was sexually assaulted on school grounds during a lunch break filed an action against the school district, alleging negligent supervision and maintenance of a dangerous condition of public property. The plaintiff contended that while “mainstreamed” and allowed to interact with the general education student body, she was assaulted by another special needs student who took her to a hidden alcove underneath a stairway.

The school district moved for summary judgment, arguing that as a matter of law the plaintiff would have to demonstrate that the same type of conduct or victimization had previously occurred on the cam-

pus before there could be a finding of foreseeability. The trial court granted summary judgment, but the court of appeal reversed, holding that the absence of prior similar incidents was not a bar to a finding of liability:

“When an injury occurs despite a defendant’s efforts to provide security or supervision, it is relatively easy to claim that, ipso facto, the security or supervision provided was ineffective. Without more, such claims fail.” (*Thompson v. Sacramento Unified School Dist.* (2003) 107 Cal.App.4th 1332, 1370.) Here, there is “more.” Given the unique vulnerability of “special needs” students, it is foreseeable that they may be victimized by other students. Where school officials allow a hidden area to be maintained on campus, it is foreseeable that other students may use the hiding place to take advantage of a “special needs” student. School officials were on constructive notice that this hidden alcove was a potential place for victimization, i.e. a “problem area.” ...

The types of victimization of a “special needs” child are only limited by the imagination of the “victimizer.” This could include teasing, harassment, assault, battery, sexual assault, taking lunch money, or robbery. In this context, it is the “special needs” student’s vulnerability to all of the above that gives rise to the duty to adequately supervise and to eliminate hidden areas where victimization can occur....

A “special needs” child at public schools needs help and protection. We believe school officials, in theory, would agree with this unremarkable statement. But, in our view, they may need an incentive to drive compliance with the duty to provide adequate supervision. Our ruling today provides that incentive. We hold that maintenance of a hiding place where a “special needs” child can be victimized satisfies the foreseeability factor of the duty analysis even in the absence of prior similar occurrences.

Premises Liability – Independent Contractors

Tverberg v. Fillner Construction, Inc. (1st Dist., Dec. 5, 2008) ___ Cal.App.4th ___,

___ Cal.Rptr.3d ___, 2008 WL 5102860

A man who was injured when he fell into a hole while installing a canopy at a construction site filed an action against the general contractor alleging causes of action and premises liability. The defendant moved for summary judgment based upon *Privette v. Superior Court* (1993) 5 Cal.4th 689, contending that it owed no duty of care to the plaintiff. In opposition to the motion, the plaintiff argued that he was not an employee of the subcontractor which had hired him, but rather, an independent contractor, and therefore *Privette* did not apply.

Even though both sides agreed that the plaintiff had been hired as an independent contractor, the trial court granted summary judgment. However, the court of appeal reversed, disagreeing with a contrary decision in *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1093-1096:

After careful consideration, we find the Tverbergs’ reasoning to be persuasive, for several reasons. First, as we have noted, all of the *Privette* cases decided by the California Supreme Court involved plaintiffs who were identified as employees or who were said to have been covered by workers’ compensation. None of the plaintiffs in these cases were independent contractors. (See *Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at p. 664; *McKown v. Wal-Mart Stores, Inc.*, *supra*, 27 Cal.4th at p. 223; *Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at pp. 202-203; *Camargo v. Tjaarda Dairy*, *supra*, 25 Cal.4th at p. 1238; *Toland v. Sunland Housing Group, Inc.*, *supra*, 18 Cal.4th at p. 257; *Privette*, *supra*, 5 Cal.4th at p. 692.) This fact distinguishes the Tverbergs’ action from one in which the injured plaintiff was an employee of a hirer’s contractor.

Second, the California Supreme Court decisions all acknowledge that the *Privette* rule is grounded in the interplay of the workers’ compensation system and the peculiar risk doctrine. A plaintiff entitled to workers’ compensation benefits is limited to that remedy and may not also seek recovery from the hirer of his or her employer, for reasons of public policy....

When we make our own examination of the public policy reasons cited by *Privette* and its progeny in support of those decisions, we find that those reasons are inextricably connected to the interplay of the peculiar risk doctrine and the workers' compensation system....

These public policy reasons – applicable when the plaintiff is an injured employee – have no force when the injuries are suffered by an independent contractor....

Our reading of *Lopez* is one that is consistent with the result for which the Tverbergs argue in their appeal – that only a plaintiff who is entitled to apply for workers' compensation benefits is barred from bringing a successful action for damages against the hirer of the contractor who in turn hired the plaintiff.

For all these reasons, we conclude that the reasoning of *Michael* is inconsistent with controlling California Supreme Court authority, and that, as an independent contractor, Jeffrey Tverberg does not fall within the employee class of plaintiffs included within the scope of the *Privette* line of cases.

Because Jeffrey Tverberg was not an employee of Perry, *Privette* and its progeny do not apply to bar him from being able to seek recovery from Fillner.

Right to Repair Act – Product Manufacturers

Greystone Homes, Inc. v. Midtec, Inc. (4th Dist., Dec. 2, 2008) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2008 WL 5063294, 08 Cal. Daily Op. Serv. 14,712

A homebuilder filed an action against a manufacturer of plumbing fittings, seeking replacement costs which it had incurred as a result of claims by homeowners arising from damage caused by defective fittings. The manufacturer moved for summary judgment, arguing that under the economic loss rule the builder could not recover for purely economic losses that it had incurred, and that the Right to Repair Act (Civil Code § 895 et seq.), which had abolished the economic loss rule, did not apply to actions by builders or actions

against product manufacturers.

The trial court granted summary judgment, concluding that because the builder was not a homeowner the economic loss rule barred recovery. The court of appeal reversed, holding that a builder may bring an equitable indemnity action against a product manufacturer under the Act, seeking reimbursement for a homeowner's economic losses caused by the manufacturer's negligence or breach of contract:

In addition to rejecting Midtec's textual arguments, we also reject Midtec's claim that various public policy rationales require that we interpret the Act to preclude homeowners from recovering economic losses in tort actions against product manufacturers. Midtec argues that that if this court were to hold that a product manufacturer may be liable for economic losses caused by a defective product, this would "eviscerate the long-standing line of demarcation between tort and contract law," and would cause there to be "no end to litigation," as various component manufacturers would be drawn into construction defect litigation.

The Legislature's choices in this area are entitled to heightened deference, as the *Aas* court itself recognized:...

We conclude that the Right to Repair Act abrogates the economic loss rule in actions brought by homeowners against individual product manufacturers for a violation of the Act's standards based upon the manufacturer's negligence or breach of contract....

Greystone's derivative equitable indemnity claim is premised on the homeowners' losses. Thus, the fact that Greystone could not prevail on a direct cause of action against Midtec (see part III.D., *post*) does not defeat Greystone's equitable indemnity claim.

There is nothing in the Act that suggests that the Legislature intended to preclude indemnity claims under the Act. In fact, the Act expressly contemplates indemnity actions, and also the possibility that an indemnitee will bring, "a separate complaint for equitable indemnification"

Spoliation of Evidence – Terminating Sanction

Williams v. Russ (_____ Dist., Oct. 27, 2008) 167 Cal.App.4th 1215, 84 Cal.Rptr.3d 813

A trustee who was removed from his position as head of an employee benefits and retirement plan filed a legal malpractice action against his former lawyer, contending that poor advice had led to his removal. During discovery the defendant turned over the entire client file consisting of 36 file boxes, which the plaintiff put into a storage space he had rented for that purpose. During discovery it was revealed that most of the file which the plaintiff has stored had been destroyed by the storage facility when the plaintiff had fallen behind on his rental payments.

The defendant then moved to dismiss the action as a discovery sanction, arguing that the plaintiff's conduct in allowing the destruction precluded the defendant from reconstructing the file and obtaining documents relevant to his defense. The trial court concluded dismissal was the appropriate sanction, finding that the spoliation was highly prejudicial to the defense of the case. The court of appeal affirmed, holding that dismissal of the action was not an abuse of discretion:

[W]e hold that a party moving for discovery sanctions based on the spoliation of evidence must make an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense. (See *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, *supra*, 107 Cal.App.4th at pp. 1346-1347, 133 Cal.Rptr.2d 207, and cases cited therein.) We conclude that Russ met this initial burden. As discussed above, there was ample evidence to support a finding that Williams intentionally destroyed the file.

Although Williams claims there was no showing of prejudice sufficient to warrant a terminating sanction, this contention is merely a rehash of his earlier evidentiary contentions. As with those, the evidence is in conflict, requiring us to accept as true the statements by Russ and Slyngstad that the file contained his notes, pleadings, research, and other materials, and that

Slyngstad copied only the correspondence. Because Williams bore the burden of disproving prejudice, he was required to show that any other documents from the file that he claimed existed would in fact have allowed Russ to adequately reconstruct the client file. He did not....

As the *Cedars-Sinai* court noted, “[w]ithout knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate....” (*Cedars-Sinai*, *supra*, 18 Cal.4th at p. 14, 74 Cal.Rptr.2d 248, 954 P.2d 511.) That is precisely what happened here when Williams permitted the destruction of his client file. That Russ at one time had that file and passed on the chance to copy its entire contents in no way mitigates Williams’s intentional wrongdoing and the prejudice it caused.

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