



Appellate Reports

A review of recent decisions of interest to the plaintiff's bar

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Torts/Products liability

Conte v. Wyeth, Inc.

(2008) 168 Cal.App.4th 89

[85 Cal.Rptr.3d 371]

Plaintiff used a generic version of the drug metoclopramide to treat her gastroesophageal reflux disease. She claimed that she developed tardive dyskinesia, a debilitating and incurable neurological disorder, as a result of taking the drug for almost four years. The drug is only approved for use for 12 weeks. She sued the manufacturer of the name-brand version of the drug, marketed as Reglan, Wyeth, Inc., as well as three manufacturers of the generic version of the drug. The trial court granted summary judgment, and the appellate court reversed in part and affirmed in part.

Although plaintiff never actually took Reglan, she sued Wyeth for fraud, concealment, and negligent misrepresentation based on statements made by Wyeth in its packaging for Reglan, which was also published in the PDR. Wyeth argued that since she never actually took Reglan, it did not owe her any duty. The appellate court held, in an issue of first impression in California, that the manufacturer of a name-brand drug did, in fact, owe a duty of due care when providing product warnings for its drug to users of the generic version of the drug. Since the record contained triable issues of fact about whether her physician had been exposed to the allegedly false statements by Wyeth in his training or in consulting the PDR when prescribing Reglan or its generic counterparts, the court reversed the summary judgment for Wyeth.

The court affirmed the summary judgment for the generic-drug manufacturers, finding that plaintiff had failed to present any proof that her physician had seen or relied on any misstatements by them concerning the generic versions of Reglan, and therefore she could not establish causation.

Civil rights

Giraldo v. California Dep't of Corrections

(2008) 168 Cal.App.4th 231

[85 Cal.Rptr.3d 371]

A male-to-female transgender inmate brought action against California Department of Corrections and Rehabilitation (CDCR) and CDCR personnel for negligence, intentional infliction of emotional distress, and violation of cruel or unusual punishment clause of California Constitution, and requested declaratory and injunctive relief. The trial court sustained a demurrer to the negligence cause of action, dismissed the constitutional claim, and based on a jury verdict entered judgment for the defendants on the emotional-distress claim. The inmate appealed. Affirmed in part and reversed in part.

The court held, on an issue of first impression, that jailers have a duty to protect inmate from foreseeable harm by third parties. In reaching this conclusion, the court surveyed treatises, cases from other states, and federal cases, which were in accord. The court held that the relationship between the jailer and prisoner is a "special relationship" which imposes a duty of care on the jailer because prisoners are both vulnerable and dependent, and unable to protect

themselves from harm inflicted by others. The court accordingly reversed the demurrer in favor of the CDCR on the inmate's negligence claim. The court affirmed the dismissal of the constitutional claim, holding that there was no private right of action for damages for violation of the prohibition in the California constitution's cruel or unusual punishment clause.

Torts/Personal injury/assumption of risk/loss of consortium

Kindrich v. Long Beach Yacht Club

(2008) 167 Cal.App.4th 1252

[84 Cal.Rptr.3d 824]

Plaintiff was injured while disembarking from a boat after participating in casting his late father's ashes into the ocean. He claimed that when boarding the boat, portable steps were made available to assist him, but upon the boat's return, there were no steps and the boat's captain asked him to jump to the dock to tie off the boat. When he jumped, he fell and injured himself. He sued for his injuries, his wife sued for loss of consortium, and his son sued for negligent infliction of emotional distress as an aural percipient witness to his father's injury. The trial court granted summary judgment based on the doctrine of primary assumption of the risk. Reversed.

The appellate court held that the doctrine of primary assumption of the risk did not apply because the plaintiff was not engaged in a sporting event subject to the doctrine. At most, his assumption of risk was secondary, and subsumed within the doctrine of comparative fault.



Whether he was at fault, and the extent of that fault, are triable issues of fact precluding summary judgment. Similarly, whether his wife suffered damages and whether his son's awareness of his father's accident qualifies him as a "bystander" entitled to recover on a theory of negligent infliction of emotional distress, also raise questions of fact.

Torts/products liability/federal preemption

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

Plaintiffs brought claims for wrongful death and personal injury arising from an automobile accident involving a 1993 Mazda MPV minivan. The decedent had been riding in the middle seat of the middle row, which had a lap-only seat belt; and not a three-point lap/shoulder belt. The plaintiffs claimed that the decedent was killed when his body jackknifed against the lap belt in the collision. The trial court sustained a demurrer to claims arising out of the lap belt, finding that they were preempted by federal law. The plaintiffs agreed to dismiss their personal injury claims and admitted that the failure to have a lap/shoulder belt was integral to their other tort claims. Affirmed.

The Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208 (2008); FMVSS 208), a regulation promulgated under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 et seq.; Safety Act), authorizes automobile manufacturers to install a lap-only seat belt at the in-board seating positions of a vehicle. Under the Supreme Court's decision in *Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861 [120 S.Ct.

1913], the appellate court held that the wrongful-death claim was preempted because it conflicts with FMVSS 208. The court further held that plaintiffs' other common-law claims were not preempted, but had been waived.

Civil Procedure/discovery/sanctions

Williams v. Russ (2008) 167 Cal.App.4th 1215 [84 Cal.Rptr.3d 813]

A former client brought a legal-malpractice action against his former lawyer and law firm. During the litigation, he obtained the lawyer's file, consisting of 36 file boxes, by asserting his right to the file under the Rules of Professional Responsibility. Before the file was transferred, the lawyer's counsel copied the correspondence with the client, but no other portions of the file. The former client copied 11 file boxes, and put the rest in a storage facility. The former client failed to keep the payments on the storage facility current, and the file was ultimately destroyed. The former client hid the file's destruction for two years, and when asked to produce the file resisted the request on the ground that it had formerly been in his lawyer's possession. The trial court, acting on a report from a discovery referee, found that the destruction of the file was intentional, was prejudicial to the lawyer, and warranted dismissal of the former client's action as a discovery sanction. Affirmed.

The appellate court reviewed the matter under an abuse-of-discretion analysis, and found that when the record was viewed in the light most favorable to the prevailing party, the trial court's findings were fully supported and that dismissal of the action as a discovery sanction was not an abuse of discretion.

Torts/products liability/federal preemption

McKenney v. Purepac Pharmaceutical Co. (2008) 167 Cal.App.4th 72 [83 Cal.Rptr.3d 810]

Carlyne McKenney brought a civil action against Purepac Pharmaceutical Company and other defendants, alleging that she had developed tardive dyskinesia, an irreversible neurological disorder, after taking the generic version of the drug metoclopramide manufactured by Purepac. She alleged that there were false or misleading statements contained in Purepac's labeling of the drug, which substantially understated and downplayed the risks of tardive dyskinesia. The trial court held that all of her claims were preempted by federal law, and sustained a demurrer without leave to amend. Reversed.

The appellate court held that the federal requirement that a generic drug have the same labeling as a reference-listed (brand name) drug does not necessarily result in federal preemption of a state tort action against the generic manufacturer for failure to adequately warn of the dangers of the drug. The court concluded that, with respect to both brand-name and generic drugs, the FDA's approval of the drug's labeling does not preempt all state product-liability claims.

Insurance/UM-UIM/pleading/genuine dispute

Brehm v. 21st Century Ins. Co. (2008) 166 Cal.App.4th 1225 [83 Cal.Rptr.3d 410]

Insured under underinsured motorist (UIM) policy brought action against insurer for breach of contract and bad faith. The insured claimed that the insurer had deliberately retained an incompetent, biased physician to conduct a defense-medical



examination for the purpose of creating a “genuine dispute” and attempted to low-ball the settlement, offering \$5,000 plus \$5,000 in med-pay benefits, against plaintiff’s \$85,000 policy-limits demand. The matter did not settle, and in a UIM arbitration, the plaintiff was awarded damages in excess of the policy limits. The trial court sustained the insurer’s demurrer without leave to amend. Reversed.

The court held that the allegations in the complaint that the insurer had dishonestly selected its medical expert, even if difficult to establish at trial, was sufficient at the pleading stage to withstand a demurrer. It further held that the fact that the carrier had ultimately paid the UIM arbitration award in full, and therefore was not in breach of any of the express terms of its policy, did not preclude a bad-faith claim based on tortious breach of the implied covenant. The court further held that the statutory provision requiring the parties to arbitrate any dispute about a UIM claim inherently included an obligation on the insurer’s part to attempt to reach a settlement of the dispute in good faith. Accordingly, Insurance

Code section 11580.26, subdivision (b), which provides that a cause of action may not be based on the fact that the insurer exercised its right to arbitrate a UIM claim did not relieve the insurer of its obligation to act reasonably in attempting to settle a UIM claim.

Torts/premises liability/public entities

Song X. Sun v. City of Oakland (2008)
166 Cal.App.4th 1177
[83 Cal.Rptr.3d 372]

Wrongful-death action against the City of Oakland arising from an auto/pedestrian collision. The decedent was crossing a four-lane road at night. The intersection where she crossed had previously been marked with a crosswalk, but at some point the City had repaved the road and had not re-installed the cross-walk. The City had not complied with Vehicle Code section 21950.5, which requires a public entity to provide public notice before removing a crosswalk. Summary judgment granted for City. Affirmed.

The court held that there was no evidence of a dangerous condition on

public property. The decedent was killed while crossing the street as one car stopped for her, and a second car came up behind it, then drove around it and struck the decedent. The City’s failure to comply with Section 21950.5 was inadvertent. Nor did the statute prevent the City from removing the crosswalk, even over public opposition. The court would not hold that the City’s inadvertent failure to comply with the statute created a dangerous condition on public property, or should automatically subject it to liability for the death of the pedestrian.



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