Appellate Reports and cases in brief

New holdings on expert medical testimony in district courts and on the component-parts doctrine in state courts. Also, Ennabe v. Manosa *discusses alcohol served at private parties.*

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Messick v. Novartis Pharmaceuticals Corp.

__ F.3d __ (9th Cir. 2014)

Who needs to know about this case? Lawyers attempting to introduce expert medical testimony in district courts within the Ninth Circuit.

Why it's important: Holds that a qualified physician's differential diagnosis meets the *Daubert* and *Kumho Tire* standards for admissibility. Holds the district court abused its discretion in excluding plaintiff 's medical experts in products-liability case against drug manufacturer.

Synopsis: Linda Messick developed osteoporosis after chemotherapy for breast cancer and was treated with the drug Zometa for several months in 2002. Zometa is a bisphosphonate, a class of drug commonly used to treat multiple myeloma. Such drugs are used to reduce or eliminate the possibility of skeletal-related degeneration and injuries to which cancer patients are particularly susceptible.

After Messick encountered several dental problems, two oral specialists examined her in November 2005 and discovered osteonecrosis near three of her teeth. Both doctors treated her under the assumption that she was suffering from bisphosphonate-related osteonecrosis of the jaw ("BRONJ"), a condition recognized by the American Association of Oral and Maxillofacial Surgeons ("AAOMS"). Other potential causes of osteonecrosis of the jaw (ONJ) include: peridontal and dental disease, osteomyelitis, corticosteroid use, cancer, radiation therapy, compromised immunity, and trauma. While ONJ may be caused by many factors, the AAOMS' diagnostic definition of BRONJ sets out its unique features: it lasts more than eight weeks and is not related to radiation therapy.

Messick's BRONJ healed between March and October 2008, about three years after diagnosis. She and her husband brought suit against Novartis for strict products liability, negligent manufacture, negligent failure to warn, breach of express and implied warranty, and loss of consortium. Novartis moved for summary judgment, and to exclude the testimony of her experts, including Dr. Jackson, a board-certified oral and maxillofacial surgeon. Messick offered Dr. Jackson's testimony on ONJ and BRONJ generally, and on the causal link between her bisphosphonate treatment and later development of BRONJ. Dr. Jackson has extensive experience diagnosing and treating ONJ, including ONJ in patients who had been treated with bisphosphonates, and he is the primary oral and maxillofacial surgeon managing ONJ in the Sacramento area.

The district court excluded Dr. Jackson's testimony as irrelevant because of its view that his "differential diagnosis only determines that Ms. Messick's ONJ was *related* to her bisphosphonate use, and he admitted that a diagnosis of BRONJ does not mean that bisphosphonates *caused* her ONJ." Reversed.

The Ninth Circuit held that the district court applied too high a relevancy standard without reference to California law, which required only that the plaintiff prove that Messick's bisphosphonate use was a substantial factor in her development of BRONJ.

The district court also abused its discretion in finding that Dr. Jackson's testimony was unreliable. The reliability threshold requires that the expert's testimony have "a reliable basis in the knowledge and experience of the relevant discipline." (*Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 149, 119 S.Ct. 1167.) While the district court has a duty to act as a "gatekeeper" to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards, a differential diagnosis made by a qualified physician meets the standard of reliability. In response to the district court's finding that Dr. Jackson failed to explain the scientific basis for his conclusion that Messick's BRONJ was related to her treatment with bisphosphonates, the appellate court explained, "Dr. Jackson repeatedly referred to his own extensive clinical experience as the basis for his differential diagnosis, as well as his examination of Messick's records, treatment, and history. Medicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis. Dr. Jackson also relied on the AAOMS' definition of BRONJ in reaching his diagnosis and causation conclusions, which itself persuasively uses the three elements to distinguish BRONJ from other ONJ or delayed healing conditions. These sources form an appropriate scientific basis for his opinions, and the district court abused its discretion in concluding otherwise."

Ramos v. Brenntag Specialties, Inc.

(2014) __ Cal.App.4th __ (2d Dist., Div. 4.)

Who needs to know about this case? Lawyers litigating products-liability cases where the component-part defense is asserted.

Why it's important: Holds, at the demurrer stage, that the component-parts doctrine does not bar a worker's product-liability claims against suppliers of metal alloys and mold materials. Declines to follow the decision *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, which applied the component-part doctrine to similar claims.

Synopsis: *Maxton* affirmed a judgment for the manufacturers of raw-metal products, based on the component-parts doctrine, finding that the raw materials supplied by the defendants were not inherently defective or dangerous in themselves, and that the manufacturers had no duty to warn the workers, and could not be held liable for failing to warn. In *Ramos*, the plaintiff alleged that he had worked as a mold maker, machine operator, and laborer for Supreme Casting & Pattern, which manufactured metal parts through a foundry and fabrication process. He alleged that while employed by Supreme, he worked "with and around" metals, plaster and minerals that respondents supplied to Supreme. Some of the respondent defendants provided metal products (metal suppliers), which were melted in furnaces to form metal castings. The casting process used molds created from plaster, sand, limestone and marble supplied by the remaining defendants, (mold material suppliers). According to the complaint, Ramos developed interstitial pulmonary fibrosis as the result of his exposure to, inter alia, fumes from the molten metal and dust from the plaster, sand, limestone and marble.

The defendants obtained judgment on the pleadings under *Maxton*. Reversed.

California courts have limited a supplier's strict products liability for injury arising from certain uses or applications of its product under three distinct but potentially overlapping doctrines. Two of these doctrines – often called the "bulk supplier" and "sophisticated buyer" rules – focus on whether the product, before causing injury, passed to, or through, a party who knew (or should have known) of the product's hazards. The first doctrine is ordinarily invoked when a supplier, upon selling a product in bulk to an intermediary who passes it on, warns the intermediary of the product's hazards. In contrast, the second doctrine is ordinarily invoked when the supplier provides the product to a purchaser – either an intermediary or an end user – who knows (or should know) of the hazards, regardless of any warning to the purchaser. Although conceptually distinct, the two rules are sometimes combined under the term, "bulk sales/sophisticated purchaser doctrine."

The third doctrine is known as the "component parts" or, where applicable, "raw materials" doctrine. Under that doctrine, suppliers of component parts or raw materials integrated into an "end product" are ordinarily not liable for defects in the end product, provided that their own parts or materials were nondefective, and they did not exercise control over the end product. The doctrine is reflected in section 5 of the Restatement Third of Torts, Products Liability, which states that a component part supplier is subject to liability for harm caused by the end product only when the component itself has a defect that results in injury, or the supplier plays a material role in integrating the component into the end product whose defects cause injury. (Rest.3d Torts, Products Liability, § 5.)

The court held that Ramos's complaint (FAC) adequately pleads strict liability and negligence claims predicated on warning and design defects. Regarding the warning defect claims, the FAC alleges that respondents' products were specialized materials used as respondents specifically intended in Supreme's manufacturing process. The FAC further alleges that respondents' metal products were "inherently dangerous" in themselves when melted during the casting process, as they released metallic toxins known to cause interstitial pulmonary fibrosis. The FAC also alleges that respondents' plaster, sand, limestone and marble were "inherently dangerous," as they released silica dust and other known causes of interstitial pulmonary fibrosis when Ramos scooped them out of bags, poured them into containers, and handled them in other ways.

According to the FAC, although state and federal regulations identified the products or their constituents as hazardous, respondents provided no warnings to Ramos. In addition, respondents failed to comply with their statutory duty to provide appropriate material safety data sheets to his employer, Supreme. The FAC further asserts that Supreme was not a sophisticated purchaser, as it was "a small unsophisticated company with a relatively small number of employees," none of whom was aware of the hazards of working with respondents' products.

In the court's view, those allegations were sufficient to state "defective warning" claims as well as claims for strict liability predicated on a defective design.

To the extent that *Maxton* can be read to conclude that the component parts doctrine is ordinarily applicable to the type of claim asserted in the FAC, the court disagreed with its rationale. Ramos alleges a direct injury from the intended use of respondents' products – not from any finished product, manufacturing system into which the products were integrated, or apparatus built to the employer's specifications. Hence, the component-part doctrine does not apply. In addition, the claims asserted in the FAC do not fit within the doctrine's rationale, because the FAC alleges that Ramos suffered injuries not from a defective "integrated product" that incorporated respondents' products, but from those products themselves, which he used as respondents intended in the course of Supreme's manufacturing process.

The court also rejected the defendants' argument that Supreme's lengthy use of the foundry, standing alone, would establish that it was a sophisticated

purchaser as a matter of law. And when a worker asserts defective-warning claims against a product supplier, the employer's status as a sophisticated purchaser does not shield the supplier from liability as a matter of law; the supplier must also show that it had some reason to believe the worker knew, or should have known, of the product's hazards.

Ennabe v. Manosa

(2014) __ Cal.4th __ (Cal. Supreme).

Who needs to know about this case: Lawyers handling cases with alcohol-related injuries when the alcohol was served at a private party.

Why it's important: Holds that statute providing exceptions to tort immunity to persons who sell or furnish alcohol that results in injuries is not limited to commercial enterprises; and that a host who collects money at a private party can be held potentially liable for the "sale" of alcohol to an obviously intoxicated minor.

Synopsis: In a trio of cases decided between 1971 and 1978, the California Supreme Court reversed decades of previous law and recognized, for the first time, that sellers or furnishers of alcoholic beverages could be liable for injuries proximately caused by those who imbibed. In 1978 the Legislature abrogated those cases, largely reinstating the prior common-law rule that the consumption of alcohol, not the service of alcohol, is the proximate cause of any resulting injury. (Bus. & Prof.Code, § 25602, subd. (c); Civ.Code, § 1714, subd. (b).) The Legislature's action in essence created civil immunity for sellers and furnishers of alcohol in most situations. The Legislature also enacted Business & Professions Code section 25602.1, which created some narrow exceptions to this broad immunity. In addition to permitting liability in some circumstances for the provision of alcohol (i.e., the sale, furnishing or giving away of alcoholic beverages) by those licensed to sell alcohol (or who are required to be licensed), section 25602.1 also states that "any other person" who sells alcoholic beverages (or causes them to be sold) to an obviously intoxicated minor loses his or her civil immunity and can be liable for resulting injuries or death. Liability of such "other person[s]" is limited to those who sell alcohol; civil immunity is still the rule for nonlicensees who merely furnish or give drinks away.

In April 2007, Jessica Manosa, a minor, hosted a party at a vacant rental house owned by her parents, without their consent. The party was publicized by word of mouth, telephone, and text messaging. Forty to sixty people attended. She personally provided $60 for the purchase of rum, tequila, and beer, and also provided cups and cranberry juice, but nothing else. Two of her friends also contributed money for the initial purchase of alcohol. She asked one of her friends to charge people he didn't know some money to get into the party. He charged uninvited guests $3 to $5 per person. Once inside, guests could help themselves to the alcohol. Ultimately, approximately $60 was collected from the guests at the door, and used to purchase more alcohol.

One of the guests who was charged admission, Thomas Garcia, was intoxicated when he arrived and drank more at the party. Because he was rowdy, aggressive and obnoxious, he was asked to leave. An invited guest, Ennabe, and some other guests escorted Garcia out and to his car. One of Garcia's friends spat on Ennabe, who chased him into the street. Garcia, who was at this time driving away, ran over Ennabe, fatally injuring him.

Ennabe's parents filed a wrongful-death action against Manosa and her parents. The defendants moved for summary judgment, which the trial court granted, and the Court of Appeal affirmed. Reversed.

The Supreme Court accepted the plaintiffs' argument that, by charging an entrance fee, Manosa had "sold" alcohol to party guests and was thus not entitled to civil immunity. The Court held that Business & Professions Code section 25602.1 was not limited to commercial enterprises. The Court held that the final category within that statute, referring to "any other person" within the category of persons who sell or provide alcohol, includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks.

The Court also held that the collection of money as the guests entered the party was sufficient to constitute a "sale" within the meaning of the statute. The Court examined various authorities and concluded that a "sale" could include a cover charge to a party where alcohol was available. "Because she sold Garcia alcoholic beverages at her party, section 25602.1 permits 'a cause of action [to] be brought [against her] by or on behalf of any person who has suffered injury or death.'" The Court declined to read a financial profit or commercial gain requirement into the phrase "sells, or causes to be sold," as used in section 25602.1.

The Court framed its holding in these terms: "In sum, we conclude that if, as indicated by plaintiff's evidence in opposition to the summary judgment motion, defendant Manosa charged an entrance fee to her party which enabled party guests to drink the alcoholic beverages she provided, she sold such beverages (or caused them to be sold) within the meaning of section 23025, and can be liable for Ennabe's death under 25602.l's exception to immunity for persons who sell alcoholic beverages to obviously intoxicated minors."

Short(er) takes:

Attorney's fee awards; *in camera* review of billing records; due process violations: *Concepcion v. Amscan Holdings, Inc*. (2014) 223 Cal.App.4th 1309 (2d Dist., Div. 7.)

Plaintiffs brought a class action against a retailer for requesting personal

identification information in violation of the Song-Beverly Credit Card Act. The case settled, and the Superior Court Judge, Kenneth Freeman, approved the settlement and awarded fees and costs to class counsel. In ruling on the fee application, Judge Freeman relied on an in-camera review of class counsel's timesheets, which were not made available to the retailer's counsel for review. Reversed. "Under our adversarial system of justice, once class counsel presented evidence to support their fee request, [defendant] was entitled to see and respond to it and to present its own arguments as to why it failed to justify the fees requested." The court also rejected the suggestion that the billing records contained privileged information, warranting in-camera review. The court doubted that all – or even much – of the information was privileged. And if it was, it could be redacted.

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