


# Appellate Reports and cases in brief

## *Recent cases of interest to members of the plaintiffs' bar*

By Jeffrey Isaac Ehrlich

### *Collins v. Navistar, Inc.*

(2013) __ Cal.App.4th __ (3rd Dist.)

**Who needs to know about this case?** Lawyers handling products-liability cases where third-party criminal conduct is an issue.

**Why it's important:** Holds that in a products-liability case, the fact that a third party's criminal conduct created the risk of harm, did not require the plaintiff to prove that the defendant should have been able to anticipate that particular criminal conduct. In other words, the same standard of foreseeability for strict products liability applies to the risk of harm, regardless of the source of the risk. The court also rejects the use of premises-liability principles governing the effect of criminal conduct by third parties in strict products-liability cases.

**Synopsis:** Plaintiff was injured while driving a Navistar tractor trailer on I-5, when a teenager threw a 2.5 lb chunk of concrete off an overpass, striking the truck in the windshield. Plaintiffs argued that the truck's windshield was defective, and should have either been raked more steeply to deflect road objects, or made of a more penetration-resistant material. At trial, the trial court gave jury instructions based on CACI negligence instructions that dealt with superseding cause. In particular, the instruction informed the jury that Navistar was not liable if it proved (1) that the criminal conduct by the teen happened after Navistar's conduct; and (2) that Navistar did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by Navistar's conduct to commit this type of act." The court also gave a modified version of CACI 411, a negligence instruction, which told the jury that every person has a right to expect that every other person will use reasonable care and will not violate the law, unless he or she knows or should know that the person will not use reasonable care or will violate the law.

The special verdict form asked the jury whether Navistar could have known or reasonably foreseen that a person would be likely to take advantage of Navistar's conduct to commit this type of act. The jury answered "no" and did not reach any other questions on the form.

On appeal, Collins argued that the criminality of the rock throwing did not require a different standard of foreseeability than if the rock had been cast negligently or by an act of nature. Navistar contended that product manufacturers need not anticipate third-party criminality when designing their products. The court held that, based on settled case law, that the same standard of foreseeability for strict products liability applies to the risk of the harm, regardless of the source of the risk. Hence, "So long as the road hazard is reasonably foreseeable, the manufacturer must take steps to address common risks caused by negligent drivers, debris thrown into roads by acts of nature, and even third-party criminal acts." The court further explained, "In the case of a rock hitting a windshield, liability for a defective design does not depend on whether the projectile falls from a rock outcropping, passing gravel truck, or the hands of a juvenile delinquent. A windshield is not any less defective because it is pierced by an intentionally, rather than an unintentionally, thrown rock."

The court agreed that "manufacturers need not foresee the unforeseeable." But to prove a risk was unforeseeable, a manufacturer must show that the intervening act – produced harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him or her responsible.

The court was also critical of the use of premises-liability concepts concerning the effect of third-party criminal conduct in strict products-liability cases. The court explained that the involvement of criminal conduct is relevant in a premises-liability case because a landlord has – the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures. By contrast, in this case it made little sense to ask whether a product's design invited criminal behavior against the product's user. "Here, the jury was asked the nonsensical question of whether Navistar's design allowed Daniel to take advantage of the windshield rake. The evidence showed Daniel engaged in reckless, juvenile behavior by throwing rocks and concrete at random vehicles – not to take advantage of the possibly insufficient slope of Navistar truck windshields.

### *Compton v. American Management Services, Inc.*

(2013) __ Cal.App.4th __ (2d Dist., Div. 8)

**Who needs to know about this case?** Lawyers challenging arbitration agreements as unconscionable because they are not sufficiently bilateral.

**Why it's important:** First case to address whether the California rule that arbitration agreements that are not sufficiently bilateral are unconscionable and will not be enforced survives the U.S. Supreme Court's *Concepcion* decision. Holds, in a 2-1 decision, that *Concepcion* did not abrogate the rule.

**Synopsis:** Compton sued her employer, AMS, in a class action alleging violations of various labor laws, including

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overtime, minimum wage, and rest and meal breaks. The trial court compelled arbitration of her claim based on an agreement she signed when she was hired at AMS. Treating her appeal as a writ petition, the appellate court held that the Supreme Court's decision in *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, did not abrogate California's rule that arbitration agreements that are not sufficiently bilateral – that is, that do not apply equally to both sides, and therefore allow the stronger party to litigate the claims that are important to it in court, while relegating the weaker party's claims to arbitration, are unconscionable and need not be enforced.

## Short(er) takes

**Class actions, FRCP 23** *Comcast Corp. v. Behrend* (2013) __ US __ (U.S. Supreme).

Plaintiffs sued Comcast in an antitrust class action, based on the way Comcast "clustered" its cable television operations within a particular region, by swapping their systems outside the region for competitors' systems within the region. The district court certified the class, and the Third Circuit affirmed. Reversed. A party seeking class certification must satisfy Rule 23's requirements with evidentiary proof. The court's analysis of whether the requirements are satisfied may frequently overlap with the merits of the plaintiff's underlying claim. The lower courts erred in refusing to entertain arguments against the plaintiff's damages model that bore on the issue of class certification because they would also be relevant to the merits determination. Rule 23 must be satisfied, even if that requires an inquiry into the merits of the claim.

**Disentitlement doctrine; dismissal of appeal; contempt:** *Stoltenberg v. Ampton Investments, Inc.* (2013) _ Cal.App.4th __ (2d Dist., Div. 5.)

Stoltenberg obtained an $8.5 million judgment in California against Ampton Investments ("Ampton"). Ampton filed a timely appeal, but did not post a bond to stay enforcement of the judgment. Stoltenberg registered the judgment in New York, and propounded discovery there on Ampton. Ampton refused to comply, and was held in contempt by the New York trial court. Ampton continued to refuse to comply. Based on the contempt finding, Stoltenberg moved to dismiss Ampton's appeal under the disentitlement doctrine. That doctrine allows an appellate court to dismiss a party's appeal if that party fails to cooperate with a lower court's order. Based on that doctrine, the appellate court dismissed Ampton's appeal. In doing so, it rejected the arguments that the doctrine should not be applied because the New York trial court's orders were invalid and on appeal. The court stated, "This is the worst kind of bootstrapping." Trial court orders are presumed valid, and must be complied with until they are reversed on appeal. The court also rejected the argument that the doctrine should not be applied where the appellant has violated the order of a trial court in another jurisdiction, instead of California. The court held that under the full-faith and credit clause in Article IV, section 1 of the U.S. Constitution, judicial proceedings in other states are entitled to the same treatment in every court in the U.S.

**Public entities; respondeat superior; negligent supervision; civil rights violations:** *Perry v. County of Fresno* (2013) __ Cal.App.4th __ (5th Dist.)

Perry was injured in an auto accident involving a vehicle owned by Alejandro Vital and driven by his stepson. Vital was employed as a correctional officer for Fresno County. After Perry sued him and his stepson, Vital accessed the County's computer system to obtain information about various jail inmates, and then wrote fake letters purportedly from the inmates to Perry and to various third parties, all in an attempt to try to frighten Perry into dropping the lawsuit. Perry sued the County for state-law tort and federal civil rights violations. The trial court dismissed some of Perry's claims on demurrer, and the balance on summary judgment. Affirmed.

Under the respondeat superior doctrine, an employer is liable for the torts of its employees committed within the scope of the employment. An employee's willful, malicious and even criminal torts may fall within the scope of his or her employment, even though the employer did not authorize the employee to commit crimes or intentional torts. But before such liability will be imposed on the employer there must be a connection between the employee's intentional tort and the employee's work. An employer is not strictly liable for all actions of its employees during working hours. Rather, there must be a causal nexus between the tort and the employee's work, i.e., the tort (the letters) must be engendered by or arise from the work. The court held that element was missing in this case. If the employee acts out of personal malice unconnected with the employment, the employee is not acting within the scope of employment. The mere fact that an employee has an opportunity to abuse facilities or authority necessary to the performance of that employee's duties does not render the employer vicariously liable. A tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions. An employee who abuses job-created authority over others for purely personal reasons is not acting within the scope of employment. Since Vital's dispute with Perry had no connection to Vital's employment, and his letter-writing scheme had no connection to Vital's employment, the requisite causal nexus was missing.

**Code of Civil Procedure section 998; statutory offers to compromise; joint offers; wrongful death claims:** *McDaniel v. Asuncion* (2013) __ Cal.App.4th __ (5th Dist.)

Plaintiffs Amy Jo and Melissa McDaniel were the surviving wife and daughter of decedent Steven McDaniel, who was killed in an auto accident. Plaintiffs filed a wrongful death claim, against several defendants, including Asuncion. Before trial Ascunsion made a $100,000 section 998 demand on the plaintiffs. Plaintiffs rejected it and went to trial against Ascuncion and another defendant. They won a $3.3 million verdict on their claim against the other defendant, but the jury returned a defense verdict for Ascunsion. The trial

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court later awarded him expert-witness fees as costs based on the plaintiffs' rejection of his 998 offer. Affirmed.

The plaintiffs argued that the 998 offer was invalid because it was a single offer made to two plaintiffs. While such offers may be invalid in some cases, they are not invalid in a wrongful death context, which is a single cause of action held by all the heirs, and which must be rendered in a single lump sum. There is no difficulty in comparing the unitary verdict to the joint offer to determine that the defendant achieved a more favorable outcome than what was offered before trial.

**Fourth amendment, reasonable search and seizure; drug sniffing dogs; curtilage.** *Florida v. Jardines* (2013) __ U.S. __ (U.S. Supreme).

Miami-Dade police received a tip that Jardines was cultivating marijuana in his home. Because no activity could be observed from outside, a detective approached the home accompanied by a drug-sniffing dog and his handler. When they reached the house's porch, the dog alerted. Based on the alert, the police obtained a warrant to search Jardines's house, and found marijuana plants. The state trial court suppressed the evidence, the appellate court reversed, and the Florida Supreme Court held that the search violated the fourth amendment. Affirmed.

When the government obtains information by physically intruding on persons, houses, papers or effects, a search within the meaning of the Fourth amendment has occurred. The Fourth amendment not only protects the home itself, but the area immediately surrounding and associated with the house – the curtilage. The front porch of the house is part of the curtilage. A police officer may approach a home without a warrant in the hopes of speaking with its occupants, because this is no more than any private citizen might do. But the scope of the license is limited not only to a particular area, but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search. (Opinion by Scalia, joined by Thomas, Ginsburg, Sotomayer, and Kagan. Alito filed a dissent, which was joined by Roberts, Kennedy, and Breyer.)

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