Filed 12/20/12 Brem v. Petersen CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BARBARA BREM, Plaintiff and Appellant, v. GRANT PETERSEN et al., Defendants and Respondents.	B231671 (Los Angeles County Super. Ct. No. EC048594)

APPEAL from an order of the Superior Court of Los Angeles County. David S. Milton, Judge. Affirmed.

Thon Beck Vanni Callahan & Powell, Daniel P. Powell; Esner, Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant.

Squire Sanders (US), Adam R. Fox, Helen H. Yang and Adrienne R. Salerno, for Defendant and Respondent Grant Petersen.

Plaintiff sued Bridgestone Cycle, U.S.A. (Bridgestone USA) and one of its former employees for products liability, alleging they designed, manufactured and sold a bicycle that was defectively designed. The trial court sustained the employee's demurrer without leave to amend on the ground that the products liability doctrine does not extend strict liability to a manufacturer's employees.

We agree, and therefore affirm.

BACKGROUND

Plaintiff Barbara Brem was thrown from her Bridgestone RB-1 bicycle when the front wheel of the bicycle disengaged from the fork as she was attempting to ride over an electrical cable placed in the roadway. She filed a form complaint alleging products liability against Bridgestone Cycle Co., Ltd. (Bridgestone Japan), Bridgestone USA (Bridgestone Japan's American subsidiary), and other Bridgestone entities as the manufacturers and distributors of the bicycle, and negligence against several movie production entities alleged to have placed the electrical cable in the roadway.

Plaintiff alleged products liability under three theories: strict liability, negligence and breach of warranty. She alleged the Bridgestone entities and Does 1 to 25 designed, manufactured, assembled and sold, and breached an implied warranty. Plaintiff alleged the movie production entities and Does 1 to 25 negligently covered electrical cables placed upon the roadway while filming.

During jurisdictional discovery pertaining to Bridgestone Japan, plaintiff deposed Grant Petersen, a former Bridgestone USA employee, who testified he had offered suggestions to Bridgestone Japan engineers for the design of the RB-1 bicycle. Plaintiff subsequently substituted Petersen for fictitiously named defendant Doe No. 6. Petersen appeared by demurrer.

The trial court sustained Petersen's demurrer with leave to amend, finding it was uncertain whether plaintiff intended to allege Petersen both defectively designed the RB-1 bicycle and negligently placed movie cables in the roadway.

Plaintiff amended the complaint to allege products liability against Petersen, Bridgestone USA, and Does 1 to 10, and negligence against the movie production defendants and Does 11 to 25.

Under products liability theories of strict liability, negligence and breach of warranty, plaintiff alleged Bridgestone USA and Petersen "manufactured or assembled" the bicycle, "designed and manufactured component parts supplied to the manufacturer," sold the bicycle, and "breached an implied warranty." The "bicycle contained a manufacturing defect or was defectively designed or did not include sufficient instructions or warnings of potential safety hazards." It "did not perform as safely as an ordinary consumer would have expected it to perform," and plaintiff was injured while "using the RB-1 bicycle in a reasonable foreseeable way." Plaintiff alleged "the benefits of the design of the RB-1 bicycle were outweighed by the risks inherent in the defective design," and defendants "failed to consider (a) the gravity of the potential harm resulting from the use of the RB-1 bicycle; (b) the likelihood that this harm would occur; (c) the foreseeability of an alternative safer design at the time of manufacture, the costs of an alternative design and the disadvantages of an alternative design . . . ." The bicycle "lacked sufficient instructions or warnings of potential risks including that the front wheel could become disengaged from the bicycle during normal anticipatable use," and the risks "were known or knowable by the use of scientific knowledge reasonabl[y] available at the time of the manufacture, design, sale and distribution" of the bicycle. Plaintiff alleged the bicycle "presented a substantial danger" to its users, a danger "an ordinary consumer would not have recognized," but defendants "failed to adequately warn or instruct of the potential risks."

Plaintiff also alleged the Bridgestone entities and Does 1 to 10 "failed to use the amount of care that a reasonably careful designer and/or manufacturer would use in similar circumstances to avoid exposing others to a foreseeable risk of harm." In particular, they "failed to include positive front wheel retention devices, which were readily available" for the RB-1 bicycle. She alleged that "a reasonable designer and/or manufacturer, distributor or seller under the same or similar circumstances would have

warned of the danger that the front wheel may become disengaged from the front fork because the product did not contain a positive front wheel retention device."

Specifically as to Petersen, plaintiff alleged that "as far as the American bicycle riding public media was aware," "he was a designer of the RB-1 bicycle and his role was the strongest influence over most of the design . . . . [I]n a collaborative effort with engineers in Japan, [he] came up with the final Bridgestone RB-1 product. . . . [He] knew or should have known that there were other accidents caused when the front wheel of the bicycle became disengaged from the fork drop outs when the quick release mechanism failed and/or was not properly secured. . . . [He] knew or should have known that a device known as a positive front wheel retention device was an alternative design to keep the front wheel on in the event of quick release failure and/or improper quick release application. [He] discussed positive front wheel devices with Defendant [Bridgestone Japan] and . . . those devices were used on other Bridgestone bicycle product[s]." Plaintiff alleged Petersen "has and currently sells bicycles with positive front wheel retention devices," and lack of such a device on her bicycle caused her injuries.

Petersen demurred to the first amended complaint, arguing, among other things, that an employee of a manufacturer cannot be held personally liable for injuries caused by a defect in the employer's product. Plaintiff opposed the demurrer. In her opposition, plaintiff ignored her negligence and breach of warranty theories, arguing only that she had made "all inclusive and detailed allegations of products liability against Mr. Petersen." She argued strict liability was "exactly why" Petersen was brought into the lawsuit.

The trial court sustained Petersen's demurrer without leave to amend and entered a judgment of dismissal, from which plaintiff appeals.

DISCUSSION

I. Petersen's Demurrer was Properly Sustained.

"The function of a demurrer is to test the legal sufficiency of the challenged pleading by raising questions of law. The demurrer tests the pleading alone and not the evidence or other extrinsic matters. The demurrer lies only where the defects appear on

the face of the pleading." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc*. (1993) 18 Cal.App.4th 1, 17.) On review, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." *(Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Although by checked boxes on the first amended form complaint plaintiff alleged products liability grounded on theories of strict liability, negligence, and breach of warranty, she mentioned neither negligence nor breach of warranty in her opposition to Petersen's demurrer and ignores those theories in her briefs on appeal.[1] She argued below and maintains here only that Petersen is strictly liable. We therefore deem her claims of negligence and breach of warranty to be abandoned.

"'Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others . . . for losses of various kinds resulting from so-called defects in those products.' [Citation.]" (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 478; Rest.3d Torts, Products Liability, §1, p. 5 ["One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."].) "[A] plaintiff may seek recovery in a 'products liability case' either 'on the theory of strict liability in tort or on the theory of negligence.' [Citations.]" (*Merrill v. Navegar*, *supra*, 26 Cal.4th at p. 478.) "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc*. (1963) 59 Cal.2d 57, 62 (*Greenman*).) "Under a negligence

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[1] None of these words appears anywhere in plaintiff's opposition to Petersen's demurrer or in her briefs on appeal: "negligent"; "negligence"; "duty"; "breach"; or "breach of warranty."

theory, a plaintiff must also prove 'an additional element, namely, that the defect in the product was due to negligence of the defendant.' [Citations.]" (*Merrill v. Navegar, supra*, at p. 479.) "A plaintiff may base a products liability claim on a defect in either the design or manufacture of a product." (*Ibid*.)

Plaintiff alleges in boilerplate that "defendants" manufactured her RB-1 bicycle and Peterson is an employee of Bridgestone USA. In particularized allegations pertaining specifically to Petersen, she alleges he designed the bicycle. It is thus clear from the complaint that Petersen is not alleged to have manufactured or distributed the bicycle, i.e., to have fabricated it or placed it on the market.

No authority cited by plaintiff, and none of which we are aware, extends strict liability to an employee of the manufacturer of a defective product.

The purpose of strict liability is to insure that the costs of injuries resulting from defective products are borne by the "overall producing and marketing enterprise." (*Vandermark v. Ford Motor Co*. (1964) 61 Cal.2d 256, 262 (*Vandermark*).) The first entity in any producing and marketing enterprise is the manufacturer itself. But "[b]eyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability. [Citation.] Accordingly, retailers engaged in the business of distributing goods to the public are strictly liable in tort for personal injuries caused by defects in those goods. [Citation.] This works no injustice to the manufacturer and retailer because they can apportion the costs of such protection in the course of their continuing business relationship. Moreover, such strict liability leads to enhanced product safety since retailers are in a position to exert pressure on manufacturers." (*Arriaga v. CitiCapital Commercial Corp*. (2008) 167 Cal.App.4th 1527, 1534 (*Arriaga*).)

"Similarly, courts have applied the doctrine to others involved in the vertical distribution of consumer goods. Thus, lessors of personal property, wholesale and retail distributors, and licensors are subject to strict products liability. [Citation.] Although not necessarily involved in the manufacture or design of the final product, these defendants were responsible for passing the product down the line to the consumer and are able to

bear the cost of compensating for injuries. [Citation.] [¶] Strict liability also applies where a nonmanufacturing party is 'outside the vertical chain of distribution' of the product, but plays 'an integral role in the "producing and marketing enterprise" of a defective product and profit[s] from placing the product into the stream of commerce.' [Citation.] 'Imposing strict liability under these circumstances is "an expression of policy that once an entity is instrumental in placing a defective product . . . into the stream of commerce, then liability [should] attach[] without regard to conduct (fault)."' [Citation.]" (*Arriaga*, *supra*, 167 Cal.App.4th at p. 1535.)

But where the policies of "enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants" will not be served, "the courts have refused to hold the defendant strictly liable even if that defendant could technically be viewed as a '"link in the chain"' in getting the product to the consumer market." [Citation.] In other words, the facts must establish a sufficient causative relationship or connection between the defendant and the product so as to satisfy the policies underlying the strict liability doctrine." (*Arriaga*, *supra*, 167 Cal.App.4th at p. 1535.) Thus, a defendant involved in the marketing and distribution enterprise may be held strictly liable only if: "(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 778 (*Bay Summit*).)

Plaintiff alleges no facts showing that Petersen received a direct financial benefit, e.g., royalties, from sales of RB-1 bicycles, that his conduct was a necessary factor in bringing the bicycles to the consumer market, or that he could control or substantially influence Bridgestone USA's or Bridgestone Japan's manufacturing processes. She alleges no facts indicating Petersen was in a position to apportion costs to Bridgestone in their continuing business relationship or exert financial pressure on Bridgestone to

produce safer bicycles. In short, none of the policy considerations supporting imposition of strict liability against a nonmanufacturer defendant would support such liability here.

Plaintiff argues Petersen was "integral" to the manufacturing process because he actually designed the RB-1 bicycle. That is not what is meant by an integral role in the business enterprise. "The fact an entity was a 'link in the chain of getting goods' to the market or that it 'particpat[ed]' in marketing a defective product is not enough to establish the defendant should be held strictly liable." (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 778.) One who plays an integral role can be a manufacturer (*Greenman*, *supra*, 59 Cal.2d at p. 62), distributor (*Vandermark*, *supra*, 61 Cal.2d at p. 262), supplier (*Edwards v. A. L. Lease & Co*. (1996) 46 Cal.App.4th 1029, 1033), lessor (see *Price v. Shell Oil Co*. (1970) 2 Cal.3d 245, 253), developer (*Kriegler v. Eichler Homes, Inc*. (1969) 269 Cal.App.2d 224, 227), wholesale or retail distributor (*Barth v. B.F. Goodrich Tire Co*. (1968) 265 Cal.App.2d 228, 253-254), franchisor (*Kasel v. Remington Arms Co*. (1972) 24 Cal.App.3d 711, 725), or licensor of a product (*Becker v. IRM Corp*. (1985) 38 Cal.3d 454, 459; *Garcia v. Halsett* (1970) 3 Cal.App.3d 319, 325-326).

One may also play an integral role who controls the cause of the defect, i.e., controls the product's design. (*Fortman v. Hemco, Inc.*, *supra*, 211 Cal.App.3d at p. 252.) But Petersen is not alleged to have controlled the RB-1 design. Plaintiff alleges only that he was *a* designer of the RB-1 bicycle, "his role was the strongest influence over most of the design," and he designed the bicycle "in a collaborative effort with" Bridgestone Japan designers. None of this indicates Petersen's conduct was a "necessary factor in bringing the product to the initial consumer market," i.e., that the RB-1 bicycle would not have existed without him. (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 778.)

Plaintiff cites *Gehl Brothers Manufacturing Co. v. Superior Court* (1986) 183 Cal.App.3d 178 for the proposition that the designer of a product may be subject to strict liability for injuries caused by a defective design. But there, the designers in question were Gehl Brothers Manufacturing Company and Selma Trailer & Manufacturing Co., both of which controlled the design of and manufactured the farm machinery that

contributed to the plaintiff's injuries. (*Id*. at p. 181.) The appellate court characterized their relationship as being "like that of joint business venturers who collaborate variously to create one marketable product." (*Id*. at p. 184.) No individual employee of either company was a defendant and neither company limited its participation only to the final product's design. *Gehl* is therefore of no assistance to plaintiff.

In any event, just playing an integral role in the RB-1 design would not be enough. As discussed above, to be subject to strict liability a defendant's role must have been integral to the manufacturer's *business enterprise*. Further, the defendant must have received a direct financial benefit from the sale of the product and must have had a substantial ability to influence the manufacturing process. At bottom, imposition of strict liability is a matter of policy. Here, no recognized policy underlying the strict liability doctrine would be furthered by imposing strict liability on a manufacturer's employee who did not control the defective product's design.

That is not to say Petersen could not be held liable were plaintiff able to plead and prove his negligence. But as stated above, plaintiff has abandoned her negligence theory. Even if she had not, to state a cause of action for negligence she must plead facts sufficient to show Petersen owed her a duty of care and breached that duty, which caused her injury. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 292.) Here, by checking boxes in the form complaint plaintiff alleged only the legal conclusion that Petersen "owed a duty" to her. She alleged no facts describing the extent of the duty or its source.

Petersen's demurrer was therefore properly sustained.

II. The Trial Court Did Not Err in Denying Leave to Amend.

Where a demurrer is sustained without leave to amend, we must determine whether there is a reasonable possibility that the defect in the complaint can be cured. The plaintiff has the burden of showing such a possibility exists. (*Blank v. Kirwan*, *supra,* 39 Cal.3d at p. 318.)

Plaintiff did not request leave to amend below, but on appeal she represents that if given leave to amend she would "allege further facts to which Petersen testified in his deposition . . . which specifically support [his] role as designer of the RB-1."

When questioned during his deposition on his role at Bridgestone USA, Petersen testified, "I made recommendations on not every little detail of the bikes, but on many of them, you know. I guess superficially I was the designer of record, but digging deeper than that, everything that I designed or recommended had to be run through the, I guess, the engineers or the designers in Japan, and if it made sense, they'd say sure. [¶] . . . [¶] I was a little marketing manager, marketing director, a sort of tech guy who was saying, let's put this angle here, this angle there, let's make the chain stay this long, things like that, you know. And so I — I didn't do every last detail on them and I didn't get my way every time." He testified, "I had a lot of input on the specifications of the geometry and some of the components of the bike, not everything. But, you know, my role as far as the American bicycle riding public media was concerned was that I was the designer. My role in fact was that I was the strongest influence over most of the design. [¶] There were some aspects of the design, some details that I didn't care about, I didn't get involved in; so I was sort of picking the parts of the bicycle that I—that I thought needed fixing or needed tweaking here and there. And then I would—again, it was a case of making recommendations. I mean, they have crackerjack engineers and designers back there." Petersen testified design of the RB-1 bicycle was a collaborative effort between him and the engineers in Japan.

As discussed, Petersen would not be subject to strict liability absent some indication he controlled the RB-1 design. That he influenced the design and was perceived in the public's eye to be the designer does not make him a designer in fact, much less the controlling designer. Because plaintiff has never maintained that Petersen controlled the RB-1's design, and his testimony does not indicate he did, leave to amend to state a cause of action either for strict liability or negligence was properly denied.

DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.