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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COALITION AGAINST DISTRACTED DRIVING et al., Plaintiffs and Appellants, v. APPLE INC. et al., Defendants and Respondents.	B278992 (Los Angeles County Super. Ct. No. BC578915)

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Law Office of Stephen L. Joseph and Stephen L. Joseph for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Christopher Chorba and Jessica R. Culpepper for Defendant and Respondent Apple Inc.

Wilson Sonsini Goodrich & Rosati, David H. Kramer and Lauren Gallo White for Defendant and Respondent Google LLC.

Willenken Wilson Loh & Delgado, William A. Delgado and Aarti K. Wilson for Defendant and Respondent Microsoft Corporation.

Bird Marella Boxer Wolpert Nessim Drooks & Lincenberg, & Rhow, Ekwan E. Rhow and Thomas V. Reichert for Defendant and Respondent Samsung Electronics America, Inc.

Plaintiffs Coalition Against Distracted Driving (CADD) and Stephen Joseph (Joseph) (collectively, plaintiffs) appeal from an order of dismissal entered after the trial court sustained defendants' demurrer to the third amended complaint, which alleges public nuisance and violations of the California Unfair Competition Law (UCL) based on defendants' failure "to adequately warn their customers about the potential safety risks and dangers of using smartphones and smartwatches while driving." We affirm.

BACKGROUND

Original, First Amended, and Second Amended Complaints

As alleged in the operative third amended complaint (TAC), on January 1, 2015, Joseph founded CADD, "an unincorporated association" whose "mission is to promote effective and ongoing public education about the risks and dangers of distracted driving, thereby preventing injuries and saving lives." Joseph, an attorney, is acting in propria persona and also representing CADD in this litigation.

On April 20, 2015, a few months after CADD was formed, plaintiffs filed this action against Apple Inc., Samsung

Electronics America, Inc., Google Inc.,[1] and Microsoft Corporation (collectively, defendants), asserting a cause of action for public nuisance. In the prayer for relief, plaintiffs sought a "permanent injunction requiring Defendants to fund an effective and ongoing national public education campaign through one or more third parties, effectively explaining the risks of using a smartphone or smartwatches [while] driving, especially the Apple Watch and other smartwatches, in an amount not less than $1 billion annually." Plaintiffs did not serve the original complaint on defendants. In June 2015, plaintiffs filed a first amended complaint (FAC) also alleging public nuisance, which they declined to serve on defendants.

In August 2015, the trial court granted plaintiffs leave to file a second amended complaint (SAC). In the SAC, which plaintiffs served on defendants, they again asserted a cause of action for public nuisance and sought a permanent injunction requiring defendants to fund a $1 billion national public education campaign explaining the risks of using smartphones and smartwatches while driving. On February 9, 2016, the trial court sustained with leave to amend defendants' jointly-filed demurrers to the SAC, which plaintiffs opposed. The court concluded plaintiffs failed to allege "personal, individualized harm as a result of distracted driving from one of the Defendants' devices, and therefore they lack[ed] standing to pursue a public nuisance claim." At the hearing, Joseph represented that he planned to amend the SAC to add an individual plaintiff who had

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[1] During the pendency of this litigation, Google Inc. changed its name to Google LLC and is now referred to in this appeal by the latter name.

standing to bring causes of action for both public nuisance and violations of the UCL. Accordingly, the court specifically noted in its written ruling that it granted plaintiffs leave to amend "to add in additional plaintiffs and a UCL claim."

Third Amended Complaint

On March 11, 2016, plaintiffs filed the operative third amended complaint (TAC), asserting causes of action against defendants for violations of the UCL and public nuisance. Despite the trial court's grant of leave to amend to add plaintiffs, the TAC did not name any new plaintiffs. Joseph and CADD remain the only plaintiffs.

The TAC alleges defendants' customers do not understand the specific risks and dangers of using a smartphone or smartwatch while driving and "need adequate warnings of the facts, risks, and dangers in order to make informed safety decisions to abstain from using their smartphones and smartwatches while driving." The TAC includes a list of more than 10 items plaintiffs assert defendants' customers "do not know, understand, realize, or appreciate." For example, plaintiffs allege: defendants' "customers do not know, understand, realize, or appreciate that the road may be invisible to them for many seconds, or even ten seconds or more, while they are using a smartphone or smartwatch. This is not obvious to drivers who falsely believe that they can multitask, that is they falsely believe that they can see the road and use their smartphone or smartwatch at the same time. It is a dangerous delusion. Even one or two seconds of distraction is enough time to cause a crash." Plaintiffs assert defendants have failed to warn their customers about the facts, risks, and dangers plaintiffs listed in the TAC and further "have conspired and agreed to withhold adequate

warnings from their customers." (Capitalization omitted.) Plaintiffs seek an injunction requiring defendants to provide 14 different warnings, including, "[i]t is extremely dangerous to view texts, e-mails, messages, or notifications of any kind or browse the Internet on your smartphone or smartwatch while driving," and "[y]our mind may be hijacked by texting or use of an app on your smartphone or smartwatch while driving. You may become fixated on the smartphone or smartwatch and forget that you are driving. This is the cause of many crashes that have resulted in serious injuries and deaths."

The first cause of action in the TAC for violation of the UCL alleges defendants have committed an unlawful business act or practice. Plaintiffs assert that by failing "to give adequate warnings," defendants intentionally facilitate or encourage several "Vehicle Code crimes," including but not limited to typing texts while driving and use of a smartphone by drivers under 18, and therefore "are criminally liable for the natural and reasonably foreseeable consequences of" these crimes pursuant to Penal Code section 31.[2] Plaintiffs also assert defendants' "failure and refusal to give adequate warnings . . . breaches the strict liability requirement and/or duty of care to give adequate warnings."

The second cause of action in the TAC for violation of the UCL alleges defendants have engaged in an unfair business act

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[2] Penal Code section 31 provides in pertinent part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed."

or practice. Plaintiffs assert: "Defendants claim that they are legally immune from lawsuits for damages that are based on strict liability or the duty of care to adequately warn their customers and in fact they are effectively immune. Defendants take unfair advantage of this claimed and effective immunity to avoid giving adequate warnings to their customers. This is an unfair business act and practice that has resulted in thousands of their California customers being seriously injured or killed, and will result in thousands more of their California customers being seriously injured or killed in the future." (Boldface and underscore omitted.) Plaintiffs further assert: "Defendants' refusal and failure to give such adequate warnings violates the policy, purpose, and spirit of (i) the Vehicle Code sections cited . . . above and Penal Code[,] [section] 31; and/or (ii) the strict liability requirement and duty of care to give adequate warnings."

The third cause of action in the TAC for public nuisance alleges defendants' "unlawful and unfair act and practice of failing and refusing to adequately warn, as alleged in the First and Second Causes of Action, is a public nuisance as defined by Civ. Code[,] [sections] 3479 and 3480 in that it is injurious to health, interferes with the comfortable enjoyment of life, unlawfully obstructs the free passage or use in the customary manner of streets and highways, and affects at the same time an entire community or neighborhood, or any considerable number of persons."

The TAC includes allegations about plaintiffs' purported standing to bring these causes of action based on their alleged injuries. Plaintiffs allege between 2007 and the time they filed the TAC, Joseph purchased defendants' smartphones and

smartwatches and installed their applications on his smartphones and smartwatches. Plaintiffs assert Joseph's "losses include all of the money that he spent on purchasing Defendants' smartphones and smartwatches, because Defendants omitted to give adequate warnings about using them while driving" and "he paid for and reasonably expected safe and non-defective products complete with safety warnings." Plaintiffs further allege: "To ensure that he would not engage in unsafe driving using Defendants' smartphones and smartwatches and to assist him in educating the public through Plaintiff CADD, Plaintiff Joseph spent over 40 hours researching on the Internet, reading articles, and engaged in phone conversations with the National Safety Council, the U.S. Government, and others to investigate, research, and discover the risks and dangers of using a smartphone or smartwatch while driving. Said research and investigation was conducted at various times from January 1, 2015 to February 2016.[3] It was triggered by his concern that using an Apple Watch would be dangerous if viewed or used while driving. As a result of said research and investigation, he discovered the facts, risks, and dangers regarding mental distraction stated in . . . the Prayer for Relief, which he had not known, understood, realized, or appreciated previously." Plaintiffs claim if defendants had provided adequate warnings, the 40 hours Joseph spent on "research and investigation would have been unnecessary and he would have spent (i) approximately half of that time performing legal services for his billable clients; and (ii) approximately half of that time

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[3] As set forth above, Joseph filed this action on behalf of himself and CADD in April 2015.

designing and building Plaintiff CADD's planned new website." The TAC also highlights that "[i]n February 2016, Plaintiff Joseph paid $10 from his personal funds on behalf of himself and Plaintiff CADD to Highwire Press for a copy of an article about using a smartphone or smartwatch while driving, as part of said research and investigation. . . . Said expenditure was caused and made necessary by Defendants' failure to give such adequate warnings to its customers, including but not limited to Plaintiff Joseph." (Capitalization omitted.)

Plaintiffs allege CADD has standing to bring the causes of action in the TAC based on injuries to alleged members of CADD, who were not referenced in the original complaint, the FAC or the SAC. Plaintiffs allege Howard Mauer is a member of CADD whose 23-year-old daughter Deanna Mauer was killed in April 2011 when the vehicle she was driving was stopped in traffic on the freeway and she was struck from behind by a vehicle traveling more than 85 miles per hour in which the driver was texting on her "Google Android smartphone." Mauer used his own funds to temporarily place a billboard on a freeway in Orange County in August 2015, which read "SOMEONE TEXTING & DRIVING KILLED OUR DAUGHTER [¶] IN LOVING MEMORY DEANNA MAUER [¶] YOUR TEXT CAN WAIT." Plaintiffs assert Mauer "made the expenditure for the billboard and spent . . . approximately 10 hours as a result of, and to combat and counteract, Defendants' unlawful and unfair business practice and the public nuisance of failing and refusing to give adequate warnings to their customers of the risks and dangers in . . . the Prayer for Relief." Mauer became a member of CADD in February 2016.

Plaintiffs further allege Safe Roads Alliance (SRA), a Massachusetts nonprofit corporation and member of CADD, was formed in 2006 to educate "the public about safe driving." Plaintiffs claim that "[s]ince 2010 SRA has diverted hundreds of hours of staff time, including but not limited to hundreds of hours of its President Emily Stein's time, and other economic resources including money, from its core missions and projects" as a result of defendants' failure to provide adequate warnings about the risks and dangers of using smartphones while driving. Plaintiffs also allege that Stein's "father Howard Stein was killed by a 17-year-old who was distracted while driving." Plaintiffs do not allege Stein is a member of CADD.

Demurrers to TAC

In their jointly-filed demurrers to the TAC, defendants argued plaintiffs cannot state a cause of action for public nuisance because they cannot allege the requisite injury or that defendants caused any injuries. They also argued plaintiffs cannot state a cause of action under the UCL because they "cannot contend that they suffered any actual injury caused by" defendants and cannot plead any unlawful or unfair conduct by defendants. Plaintiffs opposed the demurrers.

On October 7, 2016, after hearing oral argument and taking the matter under submission, the trial court sustained the demurrers without leave to amend as to the public nuisance cause of action and with leave to amend as to the UCL causes of action. The court concluded plaintiffs did not have standing to bring a public nuisance cause of action because they cannot allege a " 'special' " or " 'unique' " injury and CADD cannot rely on its members' injuries to obtain standing. The court found the UCL causes of action were deficient because plaintiffs (1) failed to

plead an economic injury or that they "were unaware of the danger of distracted driving upon purchase such that warnings would have been informative of matters not known," (2) failed to show a causal connection between failure to warn and injury, and (3) failed to show a duty to warn. The court denied plaintiffs' request for leave to amend to include Mauer, SRA and Stein as plaintiffs because the court already granted plaintiffs an opportunity to add these parties and plaintiffs "made no showing that a cause of action brought by an additional party can be timely alleged." The court granted plaintiffs leave to amend the UCL causes of action.

Plaintiffs chose not to amend and appealed.[4]

DISCUSSION

In reviewing the trial court's order sustaining the demurrer, "we examine the complaint de novo." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) " 'We also consider matters which may be judicially noticed. " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "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

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[4] Plaintiffs filed their notice of appeal from a nonappealable minute order, but later obtained an order of dismissal of the TAC.

cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba*, at p. 865.)

Plaintiffs contend the trial court abused its discretion in refusing to grant them leave to amend to add additional parties as plaintiffs who could allege injuries sufficient to establish standing to assert causes of action against defendants for public nuisance and violations of the UCL (Mauer, SRA and Stein). The court already granted plaintiffs leave to amend to add these parties when it sustained defendants' demurrers to the SAC. Plaintiffs chose not to add new parties when they filed the TAC. They will not be heard to complain about this issue now.

In any event, we need not address whether Joseph or CADD has alleged the type of injury that is sufficient to state a cause of action for public nuisance or violation of the UCL[5] (or whether Mauer, SRA or Stein could allege such an injury) because plaintiffs cannot show a causal connection between any injury and defendants' failure to warn.

To state a cause of action for public nuisance, a private plaintiff must show a defendant's "acts are likely to cause a significant invasion of a public right." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988.) Under the UCL, a private party must " 'show that [the] economic injury was the result of,

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[5] To state a cause of action for public nuisance, a "private person" must show the nuisance "is specially injurious to himself, but not otherwise." (Civ. Code, § 3493.) Under the UCL, a private plaintiff must " 'establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*.' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, quoting *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.)

i.e., *caused by*, the [unlawful] or unfair business practice . . . that is the gravamen of the claim.' " (*Veera v. Banana Republic, LLC*, *supra*, 6 Cal.App.5th at p. 916, quoting *Kwikset Corp. v. Superior Court*, *supra*, 51 Cal.4th at p. 322.)

Smartphones and smartwatches were not the cause of the accidents plaintiffs described in the TAC. Drivers engaged in conduct prohibited by law were the cause of those accidents. Defendants' products do not cause consumers to violate the law. There is no valid ground on which to hold defendants liable for the poor choices drivers make. By manufacturing and selling their products, defendants do not facilitate or encourage drivers' violations of the law. Defendants have no duty to educate consumers about why they should refrain from violating the law.

The trial court did not err in sustaining defendants' demurrers to the TAC. Plaintiffs cannot show smartphones and smartwatches, when used properly in compliance with law, cause accidents. Plaintiffs' quest to raise awareness about the dangers of distracted driving is a noble one. But they have no just cause to place the burden of warning consumers about distracted driving upon the manufacturers and sellers of smartphones, smartwatches, and applications.

DISPOSITION

The order of dismissal is affirmed. Apple Inc., Samsung Electronics America, Inc., Google Inc., and Microsoft Corporation are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

EPSTEIN, J.*

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* Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.