

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ANDRES RAMIREZ,

Plaintiff and Appellant,

v.

COLUMBIA MACHINE, INC. et al.,

Defendants and Respondents.

F061169

(Super. Ct. No. CV266059)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Law Offices of Smith & Behling, Stuart A. Smith, Jeanne Behling; and Donna Bader for Plaintiff and Appellant.

Slade Neighbors, Slade J. Neighbors and Marla B. Shah, for Defendants and Respondents Desert Block Company, Inc.

-ooOoo-

INTRODUCTION

In this case appellant Andres Ramirez contends the trial court erred in refusing to allow him to amend his personal injury complaint to add a cause of action against respondent Desert Block Company, Inc. (Desert Block) for negligent spoliation of

evidence. As we shall explain, the trial court did not commit prejudicial error in denying appellant's motion to amend, because California does not recognize negligent spoliation of evidence as an actionable tort. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Ramirez's complaint alleged that on or about January 14, 2007, while in the course and scope of his employment as a laborer, he was in the vicinity of a hydraulic pumping unit when the unit exploded. The explosion caused hydraulic fuel to be discharged and a fire to erupt. Ramirez suffered serious injury, including burns on his face, neck and hands. The complaint named seven defendants, including Desert Block, and alleged three causes of action against all seven defendants: negligence, breach of warranties, and strict liability in tort.

Desert Block moved for summary judgment or, in the alternative, summary adjudication, arguing that Ramirez could not recover from Desert Block on any of his three causes of action, since his claims are barred by the exclusive workers' compensation remedy provisions of California Labor Code section 3601. While Desert Block's motion was pending, Ramirez filed a motion for leave to file a first amended complaint to add a cause of action, against Desert Block only, for "negligent spoliation of evidence."

The proposed amended complaint alleged that Ramirez "was working as a temporary laborer hired from [codefendant] Labor Ready and was, at the time of the accident under the direct supervision and control of defendant DESERT BLOCK CO, INC. That in this capacity plaintiff, ANDRES RAMIREZ, and defendant DESERT BLOCK CO., INC. were in a special relationship such that defendant DESERT BLOCK CO., INC. was obligated to preserve and protect the property interests of plaintiff ... in the PUMP and component parts, in that such items would be necessary for [plaintiff's] opportunity to prevail in a third party action against the manufacturers, distributors and retailers of the pump and component parts" and that Desert Block "was under a duty as a

matter of law to preserve evidence needed by plaintiff ... to establish third party liability and to protect the evidence from subsequent spoliation.” It further alleged that Desert Block “initially preserved the PUMP and its component parts, but within 5-10 days after the accident negligently and carelessly discarded, disposed or otherwise destroyed the evidence without substantial justification or reason.”

Desert Block’s opposition to Ramirez’s motion to amend argued that the motion was untimely and that there is no tort cause of action for negligent spoliation of evidence in California.

On June 11, 2010, the court heard Ramirez’s motion to amend his complaint and Desert Block’s motion for summary judgment. On Ramirez’s motion to amend, the court stated “[a]s to the spoliation, I don’t believe there is such a cause of action.” Ramirez’s counsel argued that Ramirez should be permitted to amend his complaint, and that the viability of a cause of action for negligent spoliation of evidence could be addressed in an attack on the amended pleading after it was permitted to be filed. The court rejected this suggestion, and denied the motion to amend, stating “[i]n addition to the authority cited by the defendant, the Court is relying on Civil Code [section] 3532.” That code section is one of the maxims of jurisprudence found in the Civil Code at sections 3509 et seq. and states: “The law neither does nor requires idle acts.” (Civ. Code, § 3532.)

The court then heard and granted Desert Block’s motion for summary judgment. The court concluded that Ramirez’s exclusive remedy was workers’ compensation insurance and that “there is no material issue of fact on that affirmative defense which defeats the entirety on [*sic*] all three causes of action.”

At the end of the hearing, the court stated “I will charge Desert Rock with preparing a formal order that will be reviewed pursuant to the Rules of Court” Apparently, a proposed order was submitted to the court and objected to by Ramirez, but no signed order appears in the record on appeal. A June 11 minute order states that Desert Block’s motion for summary judgment was granted, but makes no mention of the

court's ruling on Ramirez's motion for leave to amend his complaint. A later July 16, 2010, minute order, apparently generated on the court's own initiative, stated in part:

“The Court makes the following further and supplemental ruling on Defendant Desert Block Co.'s MSJ. The previously stated ruling, which granted the motion remains the ruling of the Court... [¶] The Court believes it appropriate and possibly necessary, to discuss its failure or refusal to consider the major thrust of Plaintiffs opposition, his claim that there was negligent spoliation of evidence. That issue was not raised in the complaint, and thus the 'easy' explanation for why the theory was not addressed. However, the Court is mindful that Plaintiff sought to amend his complaint to state a negligent spoliation cause of action which motion was denied on the basis that [*Lueter v. State of California* (2002) 94 Cal. App.4th 1285 (*Lueter*)]; rather than [*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740 (*Gomez*)], is controlling on whether there is a cause of action for negligent spoliation. If such a cause of action does still exist in California, then Plaintiff should be allowed to amend, and in that case, there may well be triable issues of [m]aterial fact. [¶] The proposed order granting summary Judgment is executed. Judgment to issue accordingly, counsel for Desert Block to prepare, circulate and submit the same.”

The court then entered judgment in favor of Desert Block. Ramirez has appealed from that judgment. He contends that “Desert Block's motion for summary judgment should have been denied because Ramirez presented evidence of a triable issue of fact as to a viable cause of action for negligent spoliation of evidence” and “[t]he trial court abused its discretion in refusing to allow appellant to amend his complaint to state a cause of action for negligent spoliation of evidence.” (Emphasis omitted.)

STANDARD OF REVIEW

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Ramirez contended in the superior court, and contends here, that he presented evidence demonstrating the existence of a triable issue of

fact as to whether he can recover on a theory of negligent spoliation of evidence. As the superior court expressly noted, however, his complaint contained no cause of action for negligent spoliation of evidence, and he was not permitted to amend his complaint to add such a cause of action. A sufficient motion for summary judgment “cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings” (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257, fn. 6.)

The superior court’s ruling stated that the court would have granted Ramirez leave to amend his complaint to add the negligent spoliation cause of action if the court had been of the view that negligent spoliation of evidence is an actionable tort in California. Thus, the real issue in this case is not whether the court ruled correctly on Desert Block’s motion for summary judgment, but rather whether the superior court committed a prejudicial abuse of discretion in refusing to permit Ramirez to amend his complaint.

“The court may ... in its discretion, and after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading” (Code Civ. Proc., § 473, subd. (a)(1).) California recognizes a “general rule of ... liberal allowance of amendments” (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) It has also long been recognized that “even if the proposed legal theory is a novel one, ‘the preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings.’” (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048; see also *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281, disapproved on another ground in *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 407, fn. 11.) Even if we were to assume, however, without deciding the issue, that the superior court erred in refusing to allow

Ramirez to amend his complaint, such a presumed error would not warrant reversal of the judgment unless the error was prejudicial to Ramirez.

“No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13; see also Code Civ. Proc., § 475.) A “‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; accord, *Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.) “We have made clear that a ‘probability’ in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; accord, *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682.) This “so-called *Watson* standard applies generally to all manner of trial errors occurring under California law, precluding reversal unless the error resulted in a miscarriage of justice.” (*Cassim v. Allstate Ins. Co.*, *supra*, at p. 801; see also *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) Thus, “[a]lthough the *Watson* standard is most frequently applied in criminal cases, it applies in civil cases as well.” (*Cassim v. Allstate Ins. Co.*, *supra*, at p. 801.)

To state the matter more simply, if the trial court was correct that there is no tort of negligent spoliation of evidence in California, there is no prejudicial error in refusing to permit Ramirez to amend to attempt to allege such a non-existent tort.

DISCUSSION

1. Tort of Intentional Spoliation of Evidence

Prior to the California Supreme Court's 1998 decision in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 (*Cedars-Sinai*), some Court of Appeal decisions, beginning with *Smith v. Superior Court* (1984) 151 Cal.App.3d 491, had recognized the tort of intentional spoliation of evidence - "that is, intentional destruction or suppression ... of evidence." (*Cedars-Sinai, supra*, at p. 4.) In *Smith*, the plaintiff had been injured while driving her car when the left rear wheel of an oncoming van flew off the van and crashed into the windshield of the plaintiff's car. The plaintiff alleged that after the accident, the van had been towed to a dealer that had previously worked on the van, that the dealer promised the plaintiff's counsel that it would "maintain securely in their care, possession, custody and control for later examination and testing by Plaintiff's technical experts" the left rear wheel, tire, lug bolts, lug nuts and brake drum of the van. (*Smith, supra*, 151 Cal.App.3d at p. 495.) It thereafter intentionally lost or destroyed those items. The *Smith* court quoted Dean Prosser's observation that "[n]ew and nameless torts are being recognized constantly" (*ibid.*), and directed the trial court to vacate its order sustaining the dealer's demurrer to the plaintiff's cause of action for intentional spoliation.

Our own court recognized the tort in *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, a case in which the plaintiff was a man who had owned his own tractor repair business for 20 years and was injured when a tractor he was repairing "took off" in reverse" after he started the engine. (*Id.* at p. 898.) Although the plaintiff in *Willard* was successful in his products liability action against the tractor manufacturer, and obtained a judgment of \$578,549.05 (after his damages of \$1,157,098.11 were reduced by 50% because the jury found the plaintiff to be 50% at fault), the jury also found that the manufacturer had intentionally destroyed "design documents" and that "plaintiff's ability to prove his case was substantially impaired by the destruction of the documentation."

(*Id.* at pp. 895, 906.) The manufacturer’s destruction of the design documents had occurred years before the plaintiff’s accident. We held that, under the facts of that particular case, the trial court had erred in submitting to the jury the cause of action for intentional spoliation of the manufacturer’s design documents. (*Id.* at p. 895.)

In *Cedars-Sinai*, the court held that “there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.” (*Cedars-Sinai, supra*, 18 Cal.4th at pp. 17-18, fn. omitted.) In a footnote, the *Cedars-Sinai* court also stated “[w]e do not decide here whether a tort cause of action for spoliation should be recognized in cases of ‘third party’ spoliation (spoliation by a nonparty to any cause of action to which the evidence is relevant) or in cases of first party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action” and “[w]e disapprove of *Willard v. Caterpillar, Inc., supra*, 40 Cal.App.4th 892 and *Smith v. Superior Court, supra*, 151 Cal.App.3d 491 to the extent they are inconsistent with our decision here.” (*Cedars-Sinai, supra*, at p. 18, fn. 4.)¹

One year after *Cedars-Sinai*, the Supreme Court in *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 (*Temple*) decided one of the issues it had left open in its *Cedars-Sinai* footnote, and held that “no tort cause of action will lie for intentional third party spoliation of evidence.” (*Temple, supra*, at p. 466.)

¹ First party spoliation occurs when the spoliator is a party to the lawsuit. Third party spoliation occurs when the spoliator is not a party to the action. (*Lueter, supra*, 94 Cal.App.4th at p. 1293.)

2. *Tort of Negligent Spoliation of Evidence*

After *Cedars-Sinai* and *Temple*, some litigants have attempted to avoid the holdings of those cases by alleging that a defendant's alleged spoliation of evidence was not "intentional" but "negligent." However, every reported case to address this issue has concluded that labeling the alleged spoliation as "negligent" rather than "intentional" will make no difference.

"A tort cause of action for negligent spoliation of evidence cannot be maintained. We believe that this conclusion follows inexorably from two recent decisions from our Supreme Court: [*Cedars-Sinai, supra*,] 18 Cal.4th 1 ..., holding that no tort cause of action lies for first party intentional spoliation of evidence, and [*Temple, supra*,] 20 Cal.4th 464 ..., holding that no tort cause of action will lie against a third party for intentional spoliation of evidence." (*Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1401-1402 (*Farmers Ins. Exchange*)). "Farmers' position is simply stated: If a party cannot be held liable for intentionally destroying or suppressing evidence that would be relevant to a lawsuit, surely the party cannot be held liable if it negligently commits these acts. We agree." (*Id.* at p. 1404.)

"We conclude the policy considerations that caused the court in *Cedars-Sinai* and *Temple Community* to find that there is no tort remedy for intentional spoliation of evidence also compel the conclusion that there is no tort remedy for negligent spoliation." (*Coprigh v. Superior Court* (2000) 80 Cal.App.4th 1081, 1083.) "[Respondent] does not suggest negligent spoliation should be treated any differently than intentional spoliation under *Cedars-Sinai*. Nor do we see any basis upon which to draw such a distinction, in light of recent decisions holding there is no cause of action for negligent spoliation. [Citations.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1348, fn. 8 (citing *Farmers Ins. Exchange, supra*, 79 Cal.App.4th 1400 and *Coprigh, supra*, 80 Cal.App.4th 1081 and reversing a \$10,000 jury award for negligent spoliation).) "The viability of appellants' claim of spoliation of evidence has been resolved by the decisions

in *Cedars-Sinai* ... (no tort remedy for the intentional spoliation of evidence by a party to the cause of action); *Temple* ... (no tort cause of action for intentional spoliation against person who is not a party to lawsuit); and *Coprigh* ... (no tort remedy for negligent spoliation).” (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1238-1239.)

“[T]here is no tort cause of action for the negligent spoliation of evidence.” (*Lueter, supra*, 94 Cal.App.4th at p. 1289.) “[W]e must be mindful of the fact that recognizing a tort cause of action for negligent spoliation would, in many if not all instances, effectively abrogate the Supreme Court’s decisions in *Cedars-Sinai* and *Temple Community*. This is so because most types of conduct that could be called intentional can also be rephrased in terms of negligence. [Citation.] In this light, the recognition of a negligent spoliation cause of action would provide a loophole that effectively could swallow the holdings of *Cedars-Sinai* and *Temple Community*.” (*Lueter, supra*, 94 Cal.App.4th at p. 1296.) “In our view, the decisions discussed *ante* [the same decisions cited above in this opinion] establish beyond reasonable dispute that there is no tort cause of action against a litigant or third party for intentional or negligent destruction of evidence.” (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 57.) “Various Courts of Appeal have held there is no cause of action for negligent spoliation of evidence.” (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1346, fn. 4.)

After *Cedars-Sinai* and *Temple*, “[l]ater appellate decisions ... refused to recognize a cause of action for either first party or third party negligent spoliation based on the same policy considerations discussed in *Cedars-Sinai* and *Temple*.” (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 460 (*Rosen*) (affirming judgments entered in favor of defendants after the sustaining of a demurrer without leave to amend, and concluding that plaintiff/appellant’s variously named causes of action (*id.* at p. 457) actually “constituted spoliation of evidence claims” (*id.* at p. 455).)

“Although the state’s high court has not had the occasion to rule on the viability of the tort of negligent spoliation of evidence, appellate courts have concluded, in reliance on *Cedars-Sinai* ... and *Temple* ..., that the tort of negligent spoliation, whether of the first party or third party variety, is no longer viable. [Citations.] We agree with the reasoning of these cases and note, as did the court in *Coprigh, supra*, [80 Cal.App.4th] at page 1089, that ‘it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally.’” (*Strong v. State of California*(2011) 201 Cal.App.4th 1439, 1458-1459, fn. omitted.)

3. *Special Relationship Claim*

Ramirez argues that because Desert Block is alleged to be his employer, we should recognize the employer-employee relationship as a “special relationship” and impose, as a matter of law, a duty upon his employer to preserve items that he now contends, after they have been lost, would be significant evidence in an action against a manufacturer or seller of those items. He does not explain, however, how we could do this without defying the rationale of *Cedars-Sinai* when, “as here, the spoliation victim knows ... of the alleged spoliation before the trial or other decision on the merits of the underlying action.” (*Cedars-Sinai, supra*, 18 Cal.4th at pp. 17-18, fn. omitted.)

Ramirez relies on the pre-*Cedars-Sinai* and pre-*Temple* cases of *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal.App.3d 1273, and *Gomez, supra*, 50 Cal.App.4th 740, and on the pre-*Temple* case of *Johnson v. United Services Automobile Assn.* (1998) 67 Cal.App.4th 626 (*Johnson*). Both *Coca-Cola Bottling Co.* and *Gomez* held that tort claims against an employer for spoliation of evidence were not barred by the exclusive remedy provisions of workers’ compensation law (see Lab. Code, §§ 3600, 3602). The alleged negligent spoliation of the automobile the plaintiff in *Coca-Cola Bottling Co.* had been driving when he was injured “is not an injury (physical, emotional or both) to the *person* of Jones, the injured employee” but instead “is an injury to ... property interests” (*Coca-Cola Bottling Co., supra*, at p. 1289.) “When a worker loses

the opportunity to prevail in a third party action, such as Gomez's action against the manufacturer and distributor of the posthole digger, he or she suffers an injury to his or her property interests, not to the person. [Citations.] The exclusive remedy rule does not apply to this property damage because the damage is not an 'injury' within the meaning of [Labor Code] sections 3208 and 3600. [Citation.]" (*Gomez, supra*, 50 Cal.App.4th at p. 749.)

Coca-Cola Bottling Co. and Gomez, did not directly address the issue of whether there was such a thing as an actual tort of negligent spoliation of evidence. They merely assumed the existence of the tort, and concluded that an alleged tort of spoliation is not barred by the exclusive remedy rule. As we have already explained, however, there is no tort of negligent spoliation of evidence in California, so it does not matter whether such a tort, if it existed, would or would not be barred by the exclusive remedy provisions of the Labor Code.

Johnson was decided after *Cedars-Sinai* and before *Temple*, and held that "there is a limited cause of action for negligent spoliation of evidence by a third party spoliator." (*Johnson, supra*, 67 Cal.App.4th at p. 629.) Any precedential value this case might have had was lost after the California Supreme Court decided in *Temple* that "no tort cause of action will lie for intentional third party spoliation of evidence" (*Temple, supra*, 20 Cal.4th at p. 466) and after the Third Appellate District, which had decided *Johnson*, held: "(1) this court's decision in [*Johnson*], *supra*, 67 Cal.App.4th 626, does not survive the rationale of the Supreme Court's subsequent holding in [*Temple*], *supra*, 20 Cal.4th 464, and (2) there is no tort cause of action for the negligent spoliation of evidence." (*Lueter, supra*, 94 Cal.App.4th at p. 1289.)

"[G]eneral, preexisting relationships are not sufficient to support a spoliation of evidence claim." (*Rosen, supra*, 193 Cal.App.4th at p. 463.) Indeed, even a medical provider owes no tort duty to preserve a patient's medical records as evidence. (*Cedars-Sinai, supra*, 18 Cal.4th 1.) The cases have recognized that a contractual agreement to

preserve evidence is valid, and that a defendant who expressly promises to preserve evidence can be held liable on a theory of promissory estoppel. (*Temple, supra*, 20 Cal.4th at p. 477; *Lueter, supra*, 94 Cal.App.4th at p. 1299, fn. 3; *Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 892; *Rosen, supra*, 193 Cal.App.4th at pp. 460-461; *Strong, supra*, 201 Cal.App.4th at p. 1459, fn. 12.) No such contractual agreement or promise was alleged by Ramirez, however, and he makes no contention that there was any such agreement with or promise by Desert Block. “It is true that a special-relationship limitation on a tort of negligent spoliation of evidence, as espoused in *Johnson, supra*, 67 Cal.App.4th 626, would tend to restrain somewhat the ‘endless spiral of lawsuits’ that *Temple Community* feared. [Citation.] ... But the majority refused to recognize a tort claim for spoliation even with this significant limitation. Moreover, the majority refused to recognize a tort based upon statute or regulation, observing that, to the extent such a duty may be found, the Legislature or regulatory body that imposed the duty will possess the authority to devise an effective sanction for its violation. [Citation.] It follows that an amorphous requirement of a ‘special relationship’ would not be sufficient to overcome the concerns of the *Temple Community* majority.” (*Lueter, supra*, 94 Cal.App.4th at pp. 1296-1297.)

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Dawson, Acting P.J.

Kane, J.