

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

TRENT J. FORD,

Plaintiff and Appellant,

v.

THE HERTZ CORPORATION et al.,

Defendants and Respondents.

G045714

(Super. Ct. No. 30-2010-00404154)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Robert J. Moss, Judge. Affirmed.

Trent J. Ford, in pro. per., for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Robert L Reisinger, Maxine J. Lebowitz
and K. Michele Williams for Defendants and Respondents.

*

*

*

INTRODUCTION

Defendant Kristi Michelle McGowan used the navigation system in a car she had rented from defendant The Hertz Corporation, as she drove to a business meeting. She failed to stop at a red light and her car collided with a car driven by plaintiff Trent J. Ford. He sued McGowan, her employer, defendant Morgan Stanley & Co. Incorporated (Morgan Stanley), The Hertz Corporation, and defendant Hertz Claims Management Corporation for damages he alleged he suffered as a result of the accident. (We refer to The Hertz Corporation and Hertz Claims Management Corporation collectively as the Hertz defendants.)

Plaintiff's first amended complaint asserted, *inter alia*, the Hertz defendants were negligent and strictly liable to plaintiff for his damages because the navigation system McGowan used did not automatically become disabled upon the motion of the rental car and the Hertz defendants failed to warn McGowan that her use of the navigation system, while driving, might result in her causing a traffic accident. The trial court sustained the Hertz defendants' demurrer to those claims without leave to amend.

We affirm. As discussed in detail *post*, Vehicle Code section 27602 permits the operation of a global positioning display and a mapping display which are visible to the driver while driving a vehicle. Vehicle Code section 26708, subdivision (b)(12) permits the use of a portable global positioning system for door-to-door navigation during the operation of a vehicle. In light of these statutes, the Hertz defendants did not owe a duty to install a navigation system in the rental car which became disabled upon movement of the car.

Plaintiff failed to state a claim for strict liability based on product design defect or failure to warn. The operability of the navigation system while driving did not constitute a product design defect. The Hertz defendants were not strictly liable for failing to warn McGowan that distracted driving, whether by using the navigation system

or otherwise, might result in her causing a traffic accident, as that risk was not one unknown to a reasonable person or inherent in the navigation system itself.

Plaintiff does not argue the trial court should have granted him leave to amend, or state how the first amended complaint might be amended to allege sufficient facts to state a claim.

BACKGROUND

I.

PLAINTIFF'S COMPLAINT; TRIAL COURT SUSTAINS THE HERTZ DEFENDANTS' DEMURRER TO THE COMPLAINT WITH LEAVE TO AMEND.

In a verified complaint, plaintiff alleged that on November 10, 2009, he was stopped at a red light in Newport Beach, when he was “abruptly and violently rear-ended by the motor vehicle operated by MCGOWAN.” McGowan had rented the vehicle she was driving from The Hertz Corporation. The complaint alleged McGowan admitted to plaintiff she was using “the navigation system while driving the car as she was attempting to obtain directions to a meeting in connection with her employment with [Morgan Stanley]. She further stated that her use of the navigation system caused her [to] fail to stop at the traffic signal pursuant to the ‘red light’, as other motorists, including [plaintiff], had done.”

The complaint asserted a negligence claim against McGowan and Morgan Stanley, and claims for negligence, intentional and negligent misrepresentation, intentional infliction of emotional distress, and unfair business practices, against the Hertz defendants. The Hertz defendants filed a demurrer challenging each of the claims asserted against them on the ground plaintiff failed to state a cause of action.

The trial court sustained the demurrer in its entirety, stating: “Regarding the second (negligence) cause of action the complaint does not state facts sufficient to demonstrate how a defective navigation system could cause a rear-end collision. The fact

that defendant driver may have been distracted by the navigation system is not enough. There are myriad distractions to any driver and it is the driver's duty to maintain control of the car despite distractions. Regarding the fraud causes of action, there is no allegation of justifiable reliance. . . . Regarding the [intentional infliction of emotional distress] claim, there is no allegation of outrageous conduct. With respect to the [unfair business practices] claim, there is no predicate wrong upon which to base such a claim. Although the court is doubtful plaintiff will be able to plead additional facts to rescue these claims, leave to amend is granted.”

II.

PLAINTIFF FILES THE FIRST AMENDED COMPLAINT; THE TRIAL COURT SUSTAINS THE HERTZ DEFENDANTS' DEMURRER WITHOUT LEAVE TO AMEND; PLAINTIFF APPEALS.

Plaintiff filed a verified first amended complaint for damages, containing a negligence claim against McGowan and Morgan Stanley. The first amended complaint also contained a negligence claim, a strict liability claim based on a theory of product design defect, and a strict liability claim based on a theory of product warning defect, against the Hertz defendants.

The first amended complaint alleged the Hertz defendants “breached their duty of care by intentionally and negligently modifying and retrofitting the RENTAL VEHICLE with their own, proprietary, third-party, [navigation system] at the time it was added to their rental fleet.” It also alleged that but for the Hertz defendants' installation of the navigation system in the rental car, “MCGOWAN would not have been distracted, and the resulting traffic collision would not have occurred.”

The first amended complaint further alleged the rental vehicle possessed a design defect in that it “allowed for the operation of the [navigation system] by the operator of a motor vehicle while the vehicle was in motion.” The first amended complaint stated the rental car and navigation system were also defective “in that

inadequate warnings, if any, were given to MCGOWAN concerning the substantial risk of causing a traffic collision with another vehicle or pedestrian if the [navigation system] was used while the vehicle was in motion, and resulting injuries therefrom.”

The Hertz defendants demurred to the claims asserted against them on the ground plaintiff failed to state a cause of action. The trial court sustained the Hertz defendants’ demurrer without leave to amend. The court explained the installation of a navigation system in an automobile “is neither negligent nor a product defect, as a matter of law.” At the hearing on the demurrer, the trial court asked plaintiff whether there was a reason the court should grant leave to amend; plaintiff did not request leave to amend the first amended complaint.

The trial court granted the Hertz defendants’ motion to dismiss them from plaintiff’s lawsuit pursuant to Code of Civil Procedure section 581, subdivision (f)(1). Plaintiff filed a notice of appeal.

This court notified plaintiff that the appellate record did not contain an appealable order, and ordered plaintiff to file a signed order of dismissal or the appeal would be dismissed. Plaintiff thereafter filed an appealable order granting the motion to dismiss the action as to the Hertz defendants and bearing the signature of the trial judge.

DISCUSSION

I.

STANDARD OF REVIEW

“We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] ‘We affirm the judgment if it is correct on any ground

stated in the demurrer, regardless of the trial court's stated reasons. [Citation.]" [Citation.]" (*Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 837.)

II.

THE TRIAL COURT DID NOT ERR BY SUSTAINING THE HERTZ DEFENDANTS' DEMURRER.

The first amended complaint asserts a negligence claim and strict product liability claims (based on design defect and failure to warn theories) against the Hertz defendants. For the reasons we will explain, the first amended complaint failed to allege sufficient facts to state any of those claims against the Hertz defendants.

A.

The Negligence Claim

The elements of a negligence cause of action are duty, breach of duty, proximate cause, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) The first amended complaint alleged McGowan stated she failed to stop at a red light and struck plaintiff's car because she was attempting to obtain directions using the navigation system in the rental car. The first amended complaint did not allege any facts showing the navigation system was not working properly or was otherwise defective in its installation or operation.

Plaintiff argues he stated a claim for negligence against the Hertz defendants by alleging they installed an aftermarket navigation system that did not contain a "lock-out" safety feature which would prevent the operation of the navigation system while the car was in motion. Plaintiff contends that the Hertz defendants consequently breached a duty to him because had the navigation system contained the lock-out safety feature, the accident would not have happened. Vehicle Code

sections 27602 and 26708 undermine plaintiff's duty argument. Section 27602 expressly permits the operation of a "global positioning display" (Veh. Code, § 27602, subd. (b)(2)) and "[a] mapping display" (*id.*, § 27602, subd. (b)(3)) that are visible to the driver while driving the vehicle. Section 27602, subdivision (b)(5)(A) provides that "an interlock device," which disables visual displays while a vehicle is driven, need not disable global positioning and mapping displays.

Vehicle Code section 27602, subdivision (a) provides: "A person shall not drive a motor vehicle if a television receiver, a video monitor, or a television or video screen, or any other similar means of visually displaying a television broadcast or video signal that produces entertainment or business applications, is operating and is located in the motor vehicle at a point forward of the back of the driver's seat, or is operating and the monitor, screen, or display is visible to the driver while driving the motor vehicle." Subdivision (b) of section 27602 provides, in pertinent part, that subdivision (a) "does *not* apply to the following equipment when installed in a vehicle: [¶] (1) A vehicle information display. [¶] (2) A *global positioning display*. [¶] (3) A *mapping display*. [¶] (4) A visual display used to enhance or supplement the driver's view forward, behind, or to the sides of a motor vehicle for the purpose of maneuvering the vehicle. [¶] (5) A television receiver, video monitor, television or video screen, or any other similar means of visually displaying a television broadcast or video signal, if that equipment *satisfies one of the following requirements*: [¶] (A) The equipment has an *interlock device* that, when the motor vehicle is driven, disables the equipment for all uses *except as a visual display as described in paragraphs (1) to (4), inclusive*. [¶] (B) The equipment is designed, operated, and configured in a manner that prevents the driver of the motor vehicle from viewing the television broadcast or video signal while operating the vehicle in a safe and reasonable manner." (Italics added.)

Vehicle Code section 26708, subdivision (b)(12) allows for the mounting of "[a] portable Global Positioning System (GPS)" of a certain size in a lower corner of the

windshield “if the system is used only for door-to-door navigation while the motor vehicle is being operated.” Plaintiff does not cite any statute or regulation proscribing the use of the type of navigation system installed in the rental car, while driving.

Plaintiff offers no legal authority supporting his argument that the Hertz defendants owed him a legal duty to have only installed a navigation system containing a lock-out safety feature. That some manufacturers of navigation systems have included that feature does not establish a legal duty to do so, particularly in light of the above quoted Vehicle Code sections. The trial court did not err by sustaining the demurrer as to the negligence claim.

B.

The Strict Liability Claims Based on Product Design Defect and Product Warning Defect

The first amended complaint contained strict liability claims against the Hertz defendants, based on theories of product design defect and product warning defect. The California Supreme Court has recently explained: “Strict liability has been imposed for three types of product defects: manufacturing defects, design defects, and “warning defects.” [Citation.] . . . A bedrock principle in strict liability law requires that ‘the plaintiff’s injury must have been caused by a “defect” in the [defendant’s] product.’ [Citation.]” (*O’Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347.) A product is defective in design “if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner” or “if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.” (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432.) The third category of defects, referred to as warning defects, “describes ‘products that are dangerous because

they lack adequate warnings or instructions.’ [Citation.]” (*O’Neil v. Crane Co.*, *supra*, at p. 347.)

Plaintiff’s strict liability claim based on a product design defect was premised on the allegation the rental car’s navigation system “had a manufacturing design defect in that, among other things, [it] allowed for the operation of the [navigation system] by the operator of a motor vehicle while the vehicle was in motion.” Plaintiff did not allege facts showing that the navigation system failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Furthermore, the Legislature has already determined, in codifying Vehicle Code sections 27602 and 26708 discussed *ante*, that the benefits gained by permitting drivers to use a global positioning or mapping system while driving outweigh the inherent risks of such use.

As plaintiff did not allege any other defect in support of his claim, the trial court did not err by sustaining the demurrer as to the strict liability claim based on an alleged product design defect.

Plaintiff also asserted a strict liability claim based on the Hertz defendants’ failure to warn McGowan of the dangers associated with using the navigation system while driving the rental car. Plaintiff alleged: “The [navigation system] rented with the RENTAL VEHICLE by MCGOWAN from [the Hertz defendants] possessed a defect in that inadequate warnings, if any, were given to MCGOWAN concerning the substantial risk of causing a traffic collision with another vehicle or pedestrian if the [navigation system] was used while the vehicle was in motion, and resulting injuries therefrom.” Plaintiff further alleged, “the [navigation system] was defective in that, among other things, use of the [navigation system] in a reasonably foreseeable manner involved a substantial danger that would not be recognized by the ordinary use of the product, and [the Hertz defendants] knew or should have known of the danger but failed to give adequate warning of such danger.”

In *O'Neil v. Crane Co.*, *supra*, 53 Cal.4th at page 351, the California Supreme Court stated: “Generally speaking, manufacturers have a duty to warn consumers about the hazards inherent in their products. [Citation.] The requirement’s purpose is to inform consumers about a product’s hazards and faults of which they are unaware, so that they can refrain from using the product altogether or evade the danger by careful use. [Citation.]”

Plaintiff alleged the Hertz defendants should be held liable for failing to warn McGowan that using the navigation system might distract her while driving and distracted driving might cause an accident. That distracted driving might cause an accident was not a hazard inherent to the navigation system in the rental car. The first amended complaint thus failed to allege facts sufficient to state a claim against the Hertz defendants for strict liability based on a product warning defect.

III.

THE TRIAL COURT DID NOT ERR BY SUSTAINING THE HERTZ DEFENDANTS’ DEMURRER WITHOUT LEAVE TO AMEND.

When a demurrer 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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiff does not argue the trial court should have granted him leave to amend the first amended complaint, and he does not otherwise argue there is a reasonable possibility the defects in the pleading of his claims can be cured by amendment. We therefore conclude the trial court did not abuse its discretion by sustaining the Hertz defendants’ demurrer to the claims without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.