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A cite for sore eyes: *Buell-Wilson I*

The case against Ford Motor Co. remains valid authority precluding introduction of comparative vehicle evidence to negate a design defect

With some frequency, defendants in products-liability actions (largely involving automobiles) seek to introduce statistical evidence of how safely other vehicles produced by other manufacturers perform. These defendants assert that, since their vehicle performed no worse than other vehicles, no defect exists. This questionable evidence is proffered, even though a published opinion directly on point holds that comparative-vehicle evidence such as this is not admissible to attempt to prove the lack of a defect.

According to these defendants, however, due to the subsequent appellate history of this published opinion, trial courts are required to disregard this direct holding. As explained in this article, these defendants are mistaken. The opinion remains binding citeable precedent on the issue of the inadmissibility of comparative-vehicle evidence.

Trial court's evidentiary rulings upheld

In *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 544-546 [46 Cal.Rptr.3d 147, 163-165], vacated on other grounds *sub nom. Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [127 S.Ct. 2250] (hereinafter referred to as *Buell-Wilson I*) the driver of a Ford Explorer SUV made an emergency maneuver while driving on an interstate highway in order to avoid an obstacle in the road. The vehicle fishtailed out of control and rolled over several times. The driver of the Explorer was rendered a paraplegic as a result of the spinal cord injuries she suffered in the rollover. The plaintiff asserted that the Explorer had been designed defectively because (a) the Stability Index was dangerously low on account of the vehicle's overly narrow track width and high center of gravity which, in turn, made the vehicle unstable and prone to rollovers; and (b) the roof was inadequately supported such that it would crush into the passenger compartment when a foreseeable rollover occurred. (*Id.* at p. 535.)

The *Buell-Wilson* jury found that the Explorer's design was defective and returned a verdict in favor of the plaintiff. On appeal, Ford complained that, among other things, the punitive damages award was constitutionally excessive; and that the trial court erred when it excluded evidence proffered by Ford that compared the rollover rates and accident statistics of the Explorer to other vehicles. In finding that the trial court did not abuse its discretion by excluding this evidence, the *Buell-Wilson I* court explained:

> Ford asserts that expert testimony concerning the Explorer's comparative rollover rate was admissible to demonstrate that the Explorer 'is a reasonably safe vehicle that is not unusually prone to roll over in comparison to other vehicles.' However, such evidence was irrelevant and inadmissible.
>
> A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety. [Citations.] In fact, admission of such evidence is reversible error. [Citation.] This is because in strict liability actions, 'the issue is not whether defendant exercised reasonable care.' [Citation.] Rather, the issue is whether the product fails to perform as the ordinary consumer would expect. [Citation.]
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> ***
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> Thus, the court properly excluded evidence whereby Ford sought to prove that the Explorer's rollover rate was comparable to other vehicles on the road. That was evidence that improperly sought to show that it met industry standards or custom for rollovers.
>
> Ford asserts that the comparative rollover rate was relevant to the 'risk/benefit' analysis that must be considered in determining if a product is defective, citing *Barker* [*v. Lull Engineering Co.* (1978)], *supra*, 20 Cal.3d 413. However, as explained in *Grimshaw* [*v. Ford Motor Co.* (1981) 119 Cal.App.3d 757], the *Barker* risk/benefit analysis does not allow admission of such evidence: 'The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate considerations.' [Citation.]

(*Buell-Wilson v. Ford Motor Co., supra*, 141 Cal.App.4th at pp. 544-546.)

Punitive-damages issue

In *Buell-Wilson I* the Court of Appeal further concluded that the punitive damages award as remitted by that Court (to $55 million) was not constitutionally excessive. Ford filed a petition for review in the California Supreme Court, which was denied. After the California Supreme Court denied review, the United States Supreme Court granted certiorari as to *Buell-Wilson I* on the limited issues relating to the constitutionality of the punitive damages award only. Ultimately, the Court remanded the matter to the Fourth District Court of Appeal to reconsider its decision as to the punitive damages award in light of *Philip Morris USA v. Williams* (2007) 549 U.S. 346 [127 S.Ct. 1057]. (See *Ford Motor Co. v. Buell-Wilson, supra*, 550 U.S. 931.)

Following that remand, the Court of Appeal issued a second opinion reaffirming the remitted punitive damage award. (*Buell-Wilson v. Ford Motor Co.* (2008) 160

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Cal.App.4th 1107 [73 Cal.Rptr.3d 277], hereinafter referred to as *Buell-Wilson II*.) The California Supreme Court then granted review as to *Buell-Wilson II* and deferred briefing. The Court then dismissed review, ruling: "The United States Supreme Court having dismissed the writ of certiorari in *Philip Morris USA, Inc. v. Williams* (No. 07-1216) on March 31, 2009, plaintiffs' motion to dismiss review in this matter is granted." (*Buell-Wilson (Benetta) v. Ford Motor Company* (2009) 207 P.3d 1, 93 Cal.Rptr.3d 536.)

Why *Buell-Wilson* remains citeable

Defendants now routinely argue that because of its subsequent appellate history, no portion of the *Buell Wilson I* opinion can be cited – including the opinion's discussion of comparative rollover rates of other vehicles, which was not involved in the subsequent appellate history.

This is incorrect. The portion of *Buell-Wilson I* concerning comparative rollover rates remains citeable. To understand why this is the case, two inquiries need to be considered: (1) did the subsequent appellate history of *Buell-Wilson I* render that opinion non citeable under the California Rules of Court; and (2) did that subsequent appellate history render all aspects of that opinion no longer valid law under principles of stare decisis?

As to the first inquiry, California Rules of Court 8.1105(e)(1) is dispositive. That rule provides that "an opinion is no longer considered published if the Supreme Court [referring to the California Supreme Court] grants review or the rendering court grants rehearing." The rule says nothing about the change in publication status if the United States Supreme Court grants certiorari. Here, as to *Buell-Wilson I*, the Court of Appeal did not grant rehearing and the California Supreme Court denied review. Therefore, nothing about the post-filing history of that opinion altered its publication status.

Next, nothing in the California Rules of Court provides that if, following remand, the California Supreme Court grants review as to a second opinion issued by the Court of Appeal, that the effect of review being granted as to that second opinion is to retroactively depublish the first opinion that had been issued by the Court of Appeal (even though the California Supreme Court had denied review of that earlier opinion). There is no rule nor any reason why such a rule should be based upon any similarity between the first Court of Appeal opinion (here *Buell-Wilson I*) and the second Court of Appeal opinion (*Buell-Wilson II*).

Absent anything in the Rules of Court, which contain the exclusive criteria for determining when a published opinion becomes decertified for publication, *Buell-Wilson I* remains published and therefore citeable under Rule 8.1115.

The second inquiry concerns whether the state-law principles articulated in *Buell-Wilson I* remain valid precedent in view of the subsequent appellate history of that matter. First, the fact that the United States Supreme Court granted certiorari as to federal issues relating to the constitutionality of the punitive damage award did not impact the non-federal issues resolved in *Buell-Wilson I*. The California Supreme Court and the California Courts of Appeal have consistently recognized that a state court opinion which is vacated by the United States Supreme Court and remanded for reconsideration remains valid as binding precedent concerning the non-federal issues contained in the state court's opinion.

For example, in *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 744 [6 Cal.Rptr.3d 793, 797], footnote 1, disapproved on other grounds in *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1205-1207, 1213 [29 Cal.Rptr.3d 401], the Court stated:

> The California Supreme Court denied defendant's petition for review and request for depublication of our original opinion on October 23, 2002. (See *Romo v. Ford Motor Co., supra*, 99 Cal.App.4th at p. 1152.) Although the judgment in this case was vacated by order of the United States Supreme Court, that action affected only limited – albeit important – portions of the case. Our original opinion, except for the section of the discussion entitled 'Review Under Federal Constitution' (See *id.* at p. 1149-1152), was not affected by the Supreme Court's action: the decision retains the ordinary precedential value of a published opinion of an intermediate appellate court and it remains the law of the case on all points other than the federal constitutional issue. (See generally *People v. Shuey* (1975) 13 Cal.3d 835, 841 [120 Cal. Rptr. 83, 533 P.2d 211]; *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309 [126 Cal.Rptr.2d 516].)

Similarly, in *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 848 [185 Cal.Rptr. 779, 782], footnote 1, the Court indicated: "[W]e refer to the [vacated] decision . . . for the continuing value of its reasoning in *nonfederal* aspects." (Original italics.)

Likewise, in *DeCamp v. First Kensington Corp*. (1978) 83 Cal.App.3d 268, 279-280 [147 Cal.Rptr. 869, 876], the Court recognized that an opinion by our Supreme Court was "still viable despite the fact that the United States Supreme Court vacated the judgment . . . ." (See also *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470 [122 Cal.Rptr. 61, 63].)

And in *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 13 [109 Cal.Rptr. 684, 692], footnote 11, our Supreme Court recognized that, even when one of its earlier opinions had been vacated following the United States Supreme Court's grant of certiorari and remand for further consideration, the holdings of the earlier opinion remain valid unless and until they are expressly overruled: "Although we thus vacated our judgment, we regard our statements of law made in *People v. Gilbert* [1965] 63 Cal.2d 690 [47 Cal.Rptr. 909] as remaining the law of this jurisdiction save insofar as specifically disapproved by this court or the United States Supreme Court."

The California Supreme Court has repeatedly cited and relied on its earlier cases even though those cases have been "vacated on other grounds." (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598 [15 Cal.Rptr.3d 743, 791-792]; *People v. Thomas* (1992) 2 Cal.4th 489, 518 [7

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Cal.Rptr.2d 199, 213]; *People v. Allison* (1989) 48 Cal.3d 879, 898-899 [258 Cal.Rptr. 208, 221-222].)

Buell-Wilson I remains citeable even though review was granted in *Buell-Wilson II*

Next, the fact that the California Supreme Court later granted review as to *Buell-Wilson II* did not affect the validity of the non federal issues in *Buell-Wilson I*. Those non federal issues were not involved in *Buell-Wilson II*. To be sure, *Buell-Wilson II* cannot be cited as precedent because the California Supreme Court granted review. (California Rules Ct., Rules 8.1105(e)(1), 8.1115(a).) But whether or not *Buell-Wilson II* can be cited does not affect whether *Buell-Wilson I* remains valid law.

Moreover, the issues which were pending before the California Supreme Court in its review of *Buell-Wilson II* (before the dismissal of review) had no bearing on the non-federal issues decided in *Buell-Wilson I*. The California Supreme Court granted review (S163102) in *Buell-Wilson II* to decide the following issues:

> (1) What procedural protections are required by *Philip Morris USA v. Williams* (2007) 549 U.S. __, 127 S.Ct. 1057, which held that due process requires that a jury not award punitive damages to punish for harm to third parties; and under what circumstances can those constitutional rights be deemed forfeited? (2) Are punitive damages prohibited in product liability cases where the manufacturer's design conforms to governmental safety standards and industry standards and custom, and there is a 'genuine debate' about what the law requires? (3) Is the amount of the punitive damage award in this case unconstitutionally excessive and arbitrary?

(http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1894780&doc_no=S163102)

In short, nothing about the subsequent history of *Buell-Wilson I* renders the portion of that opinion concerning the inadmissibility of comparative rollover data, non-citeable. That aspect of the decision remains binding on trial courts in this state as to why such comparative vehicle data may not be used by a defendant-manufacturer in an effort to prove that there was no product defect.

Distinguishing state-of-the-art evidence

Some defendants may seek to sidestep *Buell-Wilson I* by claiming that the comparative- vehicle evidence is admissible as state-of-the-art evidence. In *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735 [226 Cal.Rptr. 299, 306], the court held that, "[u]nlike evidence of industry custom *which is improperly offered to negate the existence of a defect*, evidence that a product is designed in accordance with the existing state of the art is relevant in a risk-benefit analysis." (Italics added.)

State-of -the- art evidence would encompass what was scientifically known at the time a particular product was designed and/or placed into the stream of commerce. But evidence that merely compares various vehicles that were on the market and calculates how those other vehicles fare compared to the vehicle is not evidence that demonstrates what was scientifically feasible at a given point in time. Instead, it merely shows what the automobile industry was doing in terms of design at that time, with respect to the models offered for comparison.

It has been uniformly recognized that, "[i]n a strict products liability case, industry custom or usage is irrelevant to the issue of defect." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803 [174 Cal.Rptr. 348, 378], citing *Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372 [154 Cal.Rptr. 122]; *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470 [128 Cal.Rptr. 545]; and *Cronin v. J.B.E. Olson Corp*. (1972) 8 Cal.3d 121 [104 Cal.Rptr. 433]; see also *Buell-Wilson v. Ford Motor Co., supra*, 141 Cal.App.4th at p. 545.)

As the court in *McLaughlin v. Sikorsy Aircraft* (1983) 148 Cal.App.3d 203, 210 [195 Cal.Rptr. 764, 767], admonished: *"The distinction between what are the capabilities of an industry and what practice is customary in an industry must be kept in mind*." (Italics added.)

Simply put, just because other manufacturers happened to have designed their vehicles in a particular way does not mean that that particular design was the state of the art. Otherwise, the prohibition against introducing custom-and-practice evidence in strict-liability actions would be swallowed by the narrow allowance of state-of- the-art evidence.

Conclusion

In sum, *Buell-Wilson I* remains valid authority precluding the introduction of comparative vehicle evidence in an effort to negate the existence of a defect, and that evidence should not be introduced under the guise of "state of the art" evidence.

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