

YUKEVICH CALFO & CAVANAUGH

RECENT YCC VERDICTS

**HONDA NOT
LIABLE IN
\$8 MILLION
PRODUCT
LIABILITY
LAWSUIT**

YCC Attorneys
James J. Yukevich
Todd A. Cavanaugh
Delmar S. Thomas

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LAWRENCE AND BARBARY GAUDRY V. AMERICAN HONDA MOTOR CO., INC., HONDA R&D CO., LTD., HONDA MOTOR CO., LTD., AND THOUSAND OAKS HONDA Los Angeles Superior Court, Burbank, California (December 2007)

After a four week trial, a Los Angeles County jury returned a verdict for defendant Honda Motor Co. in a suit alleging that Honda failed to adequately warn about maintenance and replacement of a drive belt on a Honda Reflex scooter. The jury concluded that the accident was not caused by a failure to adequately warn on the part of Honda.

The case arose out of a two-vehicle accident that took place on the evening of January 6, 2005, involving the subject 2003 Honda Reflex scooter and a 1990 Honda Accord driven by a teenage motorist. Plaintiff Lawrence Gaudry, age 61, was riding the scooter at approximately 65 m.p.h. in the no. 2 lane of a four-lane interstate freeway when the scooter began to decelerate. He attempted to cross the nos. 3 and 4 lanes to the right shoulder. As he entered the no. 4 lane, he was struck by the Honda Accord. Mr. Gaudry sustained a leg injury resulting in a below-the-knee amputation. He and his wife sought \$8 million in damages against Honda.

During discovery, it was determined that the drive belt separated prior to the accident, causing the deceleration. Prior to the accident, the drive belt had never been replaced by Mr. Gaudry. The Honda Owner's Manual specifically

instructed that the drive belt must be replaced at 12,000 miles. The Owner's Manual further warned that "failure to follow the maintenance schedule could cause serious injury or death." The accident occurred at 15,219, more than 3,000 miles beyond the replacement interval for the drive belt.

At trial, Plaintiffs argued that the Honda Owner's Manual should have provided additional warnings regarding maintenance and replacement of the drive belt. Through expert testimony, Honda established that the Manual was understandable and adequate in its presentation of information and warnings. On cross-examination of Mr. Gaudry, the Defense established that Mr. Gaudry was an experienced rider with more than 40 years of continuous experience in owning, operating and maintaining two-wheeled motorized vehicles. Mr. Gaudry admitted that he knew the vehicle was due for service and replacement of the drive belt at 12,000 miles, yet, he ignored Honda's warnings. Mr. Gaudry's credibility was called into question when he testified at trial that he was confused by the language of the Owner's Manual. The Defense impeached Mr. Gaudry by introducing his videotaped deposition testimony wherein

RECENT YCC VERDICTS

HONDA NOT LIABLE CONTINUED FROM PAGE 1

he admitted that he “read and fully understood” the Owner’s Manual, cover to cover. The Defense also established that Mr. Gaudry ignored other clear warnings from Honda regarding maintenance, including replacement of the rear tire, which was completely bald at the time of the accident.

Regarding the cause of the accident, the Defense successfully established through expert testimony that Mr. Gaudry had ample time to maneuver the scooter to safety after the belt separation. The Defense also pointed out that after the belt separation, Mr. Gaudry had full braking and steering function on the scooter and that the teenage motorist could have avoided the accident had she observed the road conditions in front of her. ■

CRANE COMPOSITES SUCCESSFULLY TRIES \$128 MILLION BREACH OF CONTRACT AND FRAUD ACTION

YCC Attorneys
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James J. Yukevich
Sean A. Topp

NATIONAL RV, INC. V. CRANE CO., INC., CRANE COMPOSITES, INC. AND KEMLITE CO., INC.

United States District Court for the Central District of California, Eastern Division, Riverside, California (February 2008)

In this breach of contract and fraud action, the nation’s sixth largest recreational vehicle manufacturer, Plaintiff National RV, sought \$28 million in compensatory damages and punitive damages in excess of \$100 million against our client, Crane Composites, Inc. Crane Composites is one of the world’s largest manufacturers of fiberglass and plastic materials. National RV was represented by Daniel Petrocelli of O’Melveny & Meyers, known for defending Jeffrey Skilling and representing the Goldman family against O.J. Simpson.

In January 2006, Crane Composites began supplying National RV with a new fiberglass sidewall product. National RV contended that Crane Composites supplied a defective fiberglass sidewall product that caused the sides of the RVs to have a concave appearance. National RV further claimed the RVs manufactured and sold with the sidewall material irreparably damaged the company’s reputation and directly caused National RV’s subsequent bankruptcy and liquidation of assets. Crane Composites acknowledged the potential problem with the sidewall material and made repeated attempts to make National RV whole prior to the initiation of the litigation.

To support its punitive damage claim at trial, Petrocelli argued on behalf of National RV that Crane Composites knew of the problems with the new sidewall material before supplying it to National RV, but

nevertheless sold the sidewall material to make a profit. Petrocelli also argued that Crane Composites failed to disclose the fact that the sidewall material was still in its developmental stages.

In response, YCC attorney Alexander Calfo introduced evidence that Crane Composites had entered into a joint partnership with National RV to prototype and develop the sidewall material to mutually benefit both companies. He further demonstrated through the testimony of a forensic economist that National RV had been a financially troubled company since 2001, years before it had any business relationship with Crane Composites, and that the allegedly defective sidewall material was not the cause of National RV’s subsequent bankruptcy.

Following a six-week trial, the jury found unanimously in favor of Crane Composites on the claims of breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, intentional misrepresentation, and concealment. The jury awarded National RV only \$3.1 million (the cost to repair and discount the RV units affected by the product) in compensatory damages on the claim of breach of express warranty and rejected National RV’s punitive damages claim. The verdict was significantly less than the Crane Composites’ pre-litigation offer to settle and significantly less than the last settlement offer. ■

**COURT GRANTS
FORD MOTOR
COMPANY'S
MOTION FOR
SUMMARY
JUDGMENT IN
CASE OF FIRST
IMPRESSION**

YCC Attorney
Steven D. Smelser

KRISTYN CHASE, ET AL. V. FORD MOTOR COMPANY, ET AL.

Santa Barbara County Superior Court, Santa Barbara, California (May 2008)

Santa Barbara County Superior Court Judge Thomas P. Anderle granted Ford Motor Company's motion for summary judgment and dismissed Plaintiffs' action against Ford in its entirety, accepting Ford's argument that under the latest revisions to the Federal Motor Vehicle Safety Standards (FMVSS), Plaintiffs' state law tort action was impliedly preempted because it conflicted with the federal government's automobile safety regulatory framework.

The litigation arose from a motor vehicle accident in which Plaintiff Kristyn Chase allegedly sustained severe head injuries. Ms. Chase claimed she had been driving her Ford Excursion through an intersection when her vehicle was struck on the driver's side by another vehicle that failed to stop at a red light. Plaintiffs asserted that the absence of a "side airbag with head protection" in the Ford Excursion's occupant protection system constituted a design defect that caused or contributed to Ms. Chase's injuries.

The Court first granted Ford's summary judgment motion in January 2008. Following Plaintiffs' motion for reconsideration, the Court vacated its ruling and requested supplemental briefing from Ford to address additional

legal arguments that Plaintiffs had not raised in their original opposition to Ford's motion. After considering the supplemental briefing, the Court issued a six-page written ruling in which it granted Ford's motion for summary judgment again.

Plaintiffs contended that the FMVSS generally establish only "minimum safety standards," and that legislation authorizing the federal government to promulgate automobile safety regulations expressly provides that FMVSS compliance does not insulate manufacturers from tort liability. But Ford persuaded the Court that FMVSS 208, which sets out compliance options for meeting specific "occupant crash protection" performance requirements, deliberately gives manufacturers the choice to meet those requirements by implementing side impact airbags or by employing alternative means.

In his opinion, Judge Anderle wrote "a rule of state tort law imposing a duty [upon Ford] to choose a particular passive restraint system, and thereby foreclosing other options, would present an obstacle to the variety and mix of devices that the federal regulation sought." As a result, Plaintiffs' claim was preempted by federal law. ■

**CALIFORNIA
SUPREME
COURT
AFFIRMS
ETHICS
DECISION**

YCC ATTORNEY
JIM YUKEVICH
ARGUES LANDMARK
ETHICS CASE BEFORE
SUPREME COURT

ZERLENE RICO, ET AL. V. MITSUBISHI MOTORS CORPORATION, ET AL. (2007) 42 CAL. 4TH 807

The California Supreme Court's recent decision in the matter of *Rico v. Mitsubishi Motors* significantly clarified California law regarding what duties arise when an attorney inadvertently receives privileged material from opposing counsel, which might be beneficial to the receiving attorney's representation. This issue has been a prevailing topic at the forefront of modern legal ethics for some time. While the issue before the Supreme Court seems to pit two pillars of ethics against each other—the duty of loyalty and diligent representation owed to one's client, versus the duty of candor owed to opposing counsel—the *Rico* Court's recent decision is clear: an attorney who accidentally receives privileged

information from opposing counsel may only examine the document enough to determine that a privilege applies, then, without further review, must return the document and notify opposing counsel. The *Rico* decision has been touted by legal pundits as possibly the Court's most important ethical decisions in years.

The facts which gave rise to the ethical issues in the *Rico* case began in 2002 when on the eve of trial, attorney James Yukevich brought his notes containing Mitsubishi's experts' opinions as well as his own impressions,

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to the deposition of one of Plaintiffs' expert witnesses. Mr. Yukevich left his briefcase containing the notes in the deposition conference room while he briefly stepped out. Upon returning, Mr. Yukevich found that Plaintiffs' counsel, Raymond Johnson, had locked the conference room door.

How Mr. Johnson obtained the notes is disputed. Despite later admitting that he knew Mr. Yukevich never intended to disclose the subject notes, Mr. Johnson almost immediately made tactical use of the twelve-page document. Johnson, claiming the notes could serve as a "powerful impeachment document," not only reviewed the entire set of notes himself, but in addition, provided copies of the document to Plaintiffs' experts and co-counsel for their use in the case. A week later, Plaintiffs' counsel used the notes to assist in deposing one of Mitsubishi's experts. Upon realizing that Plaintiffs' counsel had a copy of his notes, Mr. Yukevich immediately sought to disqualify Plaintiffs' counsel on the grounds that he had unethically used defense attorney work-product.

Plaintiffs' counsel relied on *Aerojet-General Corp. v. Transport Indemnity Ins.* (1993) 18 Cal.App.4th 996, for the proposition that even if portions of Mr. Yukevich's notes were privileged, Johnson was under a duty to utilize the non-privileged portions of the notes to diligently represent his client. Mitsubishi relied on *State Compensation Fund v. WPS Inc.* (1999) 70 Cal.App. 4th 644, which held that an attorney who receives inadvertently disclosed materials may only examine the document in order to verify that the document is privileged, and upon determining a privilege applies, must notify opposing counsel. Los Angeles Superior Court Judge Ben Kayashima ruled in Mitsubishi's favor, holding that the notes were privileged and confidential work product, and could not be used against Mitsubishi. The Trial Court disqualified Plaintiffs' counsel and experts upon finding that Plaintiffs' counsel had acted unethically in his use of the notes. The Court of Appeals affirmed the Trial Court's ruling.

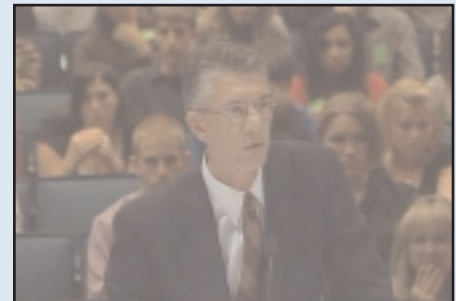
Given the significance of the issue, the California Supreme Court granted *certiorari* to hear the matter. At the hearing, Mr. Yukevich argued that "Attorney's notes should be what they are: privileged." Mr. Johnson, then represented by Norman Pine of the firm Pine & Pine, countered

with the notion that using an opposing party's privileged information—even when accidentally obtained—provides a "surprise factor" which is beneficial to the receiving party's ability to impeach opposing counsel's witnesses. Upon hearing plaintiffs' counsel's argument, Chief Justice Ronald George inquired of Mr. Pine, "So the surprise factor is more important than the integrity of the Court?" It was clear that Pine's argument was not well-accepted by the Court.

Several months following oral argument, the California Supreme Court affirmed the lower Courts' decisions. In doing so, it adopted the *State Fund* rule: that an attorney who accidentally receives privileged material from opposing counsel may only examine the material enough to verify that the document is in fact privileged. The Supreme Court also held that Mr. Yukevich's notes were privileged in their entirety, and that as such, Plaintiffs' counsel was precluded from using the document for *any* reason—including for purposes of "surprise" impeachment. Finally, the Supreme Court held that Mr. Johnson's disqualification was proper given the irreversible nature of the prejudice caused by Johnson's unethical use of Mr. Yukevich's notes.

In its decision, the *Rico* Court provided clear guidance with respect to what an attorney must do upon receiving unintentionally disclosed material from opposing counsel. The Court's ruling emphasized the importance of trust and professionalism between fellow members of the Bar. ■

"(A)N ATTORNEY WHO ACCIDENTALLY RECEIVES PRIVILEGED MATERIAL FROM OPPOSING COUNSEL MAY ONLY EXAMINE THE MATERIAL ENOUGH TO VERIFY THAT THE DOCUMENT IS IN FACT PRIVILEGED."



JIM YUKEVICH ARGUES THE RICO MATTER BEFORE THE CALIFORNIA SUPREME COURT.

CALIFORNIA SUPREME COURT ADOPTS SOPHISTICATED USER DOCTRINE

The California Supreme Court made an important clarification of product liability law in April with its decision in *Johnson v. American Standard, Inc. et al.*, Case No. S139184. The Court recognized the “sophisticated user doctrine” as an affirmative defense in actions against manufacturers alleging failure to warn users of a known hazard associated with a product.

The sophisticated user doctrine establishes an exception to a manufacturer’s general duty to warn consumers of hazards associated with its products. If a plaintiff is employed in a trade or profession where the plaintiff may be presumed to know of a particular hazard by virtue of training or experience, then that plaintiff may be characterized as a sophisticated user. The new rule enunciated in *Johnson* means that manufacturers have no duty to warn sophisticated users of dangers that are generally understood by such users.

The facts of the *Johnson* case provide a practical illustration of the sophisticated user doctrine. Plaintiff William Johnson was a heating, ventilation and air conditioning (HVAC) technician. He had received more than a year of formal vocational training and had accumulated six years of work experience in the trade. He had obtained the highest HVAC proficiency certification available—the Environmental Protection Agency’s “Universal” HVAC certification, which is conferred only upon technicians who are able to pass a comprehensive five-part examination. The “Universal” certification entitled Mr. Johnson to work on the largest and most dangerous commercial and industrial HVAC systems.

Mr. Johnson contended that he developed pulmonary fibrosis, a potentially fatal lung disease, due to his exposure to phosgene, a gas that is sometimes emitted when R-22 refrigerant is exposed to high temperatures in the course of maintenance or repair of certain HVAC systems. It was undisputed that properly trained HVAC technicians could reasonably be expected to know about the hazard posed by phosgene, notwithstanding the fact that Mr. Johnson contended he was not personally aware of the hazard.

Because the danger was obvious and generally understood in the trade, the Court found the question of whether Mr. Johnson actually was aware of the hazard to be immaterial. Writing for a unanimous Court, Justice Ming Chin noted that “[i]t would be nearly impossible for a manufacturer to predict . . . whether a given [sophisticated user] actually has knowledge of the dangers because of the infinite number of user idiosyncracies. [Individual] users may have misread their training manuals, failed to study the information in those manuals, or simply forgotten what they were taught. However, individuals who represent that they are . . . members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class. If they do not actually possess that knowledge and skill, that fact should not give rise to liability on the part of the manufacturer.” The court explained that the appropriate inquiry for making a determination of user sophistication is whether the “expected user population is generally aware of the risk,” as opposed to “case-by-case hindsight examinations of the particular plaintiff’s subjective state of mind.”

Justice Chin discussed the public policy motivations behind the sophisticated user doctrine. “Not all warnings . . . promote user safety. Requiring manufacturers to warn . . . users [of every conceivable hazard] would place an onerous burden on them and would invite mass consumer disregard and ultimate contempt for the warning process . . . The sophisticated user defense fits into this understanding of the role of warnings; it helps ensure that warnings will be heeded.” ■

JAMES YUKEVICH JOINS ADVISORY BOARD OF LOS ANGELES REGIONAL FOODBANK



YCC ATTENDS FUNDRAISER FOR THE LOS ANGELES REGIONAL FOODBANK. LEFT TO RIGHT: ALEXANDER CALFO, JAMES YUKEVICH, VIVIAN POWERS, THOMAS BORNCAMP, CRISTINA CIMINELLI, EMILY HICKS.

YCC is pleased to announce that James Yukevich has joined the advisory board of the Los Angeles Regional Foodbank. The Los Angeles Regional Foodbank is a nonprofit charitable organization that has been serving the disadvantaged of Los Angeles for 35 years. The Foodbank is the center of a food distribution network that includes nearly 900 charitable agency sites in Los Angeles County, including abused and abandoned children homes,

battered women shelters, senior centers, local food pantries, soup kitchens, AIDS hospices and more. In 2007, the Foodbank distributed 34 million pounds of food for the hungry in Los Angeles County. The Foodbank is also connected to and cooperates with food banks throughout the country. As a member of the advisory board, Mr. Yukevich will provide guidance and oversight for Foodbank activities. ■

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