

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

RICHARD K. FOLSOM and JAN L.
FOLSOM, individually and as co-
administrators of the estate of
SETH ELLIS FOLSOM, deceased,

Plaintiffs,

v.

KAWASAKI MOTORS CORP., U.S.A.;
KAWASAKI HEAVY INDUSTRIES,
LTD.; KAWASAKI MOTORS
MANUFACTURING CORP., U.S.A.;
JOE HOLLIFIELD; BRADY A.
STEVENS; and Z.S., a minor,

Defendants.

Civil Action
File No. 3:04-CV-42(CDL)

KAWASAKI DEFENDANTS' BRIEF
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
ON NEGLIGENCE *PER SE* AND PUNITIVE DAMAGES

Defendants KAWASAKI MOTORS CORP., U.S.A., KAWASAKI HEAVY INDUSTRIES, LTD., and KAWASAKI MOTORS MANUFACTURING CORP., U.S.A. ("Kawasaki") are entitled to judgment as a matter of law on Plaintiffs' claims for negligence *per se* and for punitive damages.

STATEMENT OF THE CASE

Plaintiffs' son Seth Folsom was killed when a 14 year old drove a Kawasaki 900STX Jet Ski® at him in an attempt to splash

water on him. (Complaint). However, he made the splashing maneuver too close, he hit the throttle, the back of the boat swung around, hit Folsom in the head, knocking him unconscious, resulting in death by drowning. Plaintiffs sue the minor driver, adult owner and adult passenger of the Jet Ski on negligence theories, and they also sue Kawasaki on product liability theories of recovery. (Complaint).

The "Second Claim for Relief" in Plaintiffs' Complaint contends that Kawasaki is negligent *per se* because it violated 46 USC § 4307 of the Federal Safety Boating Act of 1971 ("FBSA"), by not initiating a recall or retrofit of the Kawasaki Jet Ski for not having a rudder. However, this claim fails because the Coast Guard considered the question of whether the steering characteristics (upon which the plaintiff's defect theory is premised) warrants a recall; and has concluded that it does not. The Coast Guard is the exclusive federal agency designated by Congress to make the determination as to whether a recall is required. A jury in Georgia is not a federally designated group for making that decision. Therefore, Kawasaki cannot be sued by these plaintiffs for failing to do what the Coast Guard has said is not required.

ARGUMENT AND CITATION OF AUTHORITY

Defendants are entitled to judgment as a matter of law on Plaintiffs' claim of negligence *per se*. The United States Coast Guard has determined that the steering characteristics that plaintiff lawyers call "Off Thrust Steering," (that is the notion that releasing the throttle on a water jet propelled Jet Ski reduces the ability to steer) does not constitute a design defect. In order to prevail on negligence *per se*, the Plaintiffs would have to prove that Kawasaki violated an order of the Coast Guard, which they cannot do.¹

Georgia law allows the adoption of a statute as a standard of conduct so that its violation becomes negligence per se. [Cit.] The standard of review to determine whether the violation of a statute is negligence per se is two-fold. . . . "It is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against. (Cits.)". . . For a violation of the statute to be negligence per se, the violation "must be capable of having a causal connection between it and the damage or injury inflicted upon the other person." [Cit.] . . . This refers not to the proximate cause element of the negligence action, which [Rockefeller] must still prove by a preponderance of

¹The Court is of course aware that under Georgia law, compliance with federal standards may not preempt state law tort claims, and may not absolve a product manufacturer from liability under some state law claims, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (U.S. 2002). But proof of compliance is a complete defense to negligence *per se* and punitive damages under Georgia law.

the evidence, but rather to the character of the legal duty involved. Is this statutory duty one which, if breached, is capable of producing injury[.]

Rockefeller v. Kaiser Found. Health Plan, 251 Ga. App. 699, 702-703 (2001). Plaintiffs here are aware that the Coast Guard has determined that a recall is not required for the Kawasaki 900STX. See Exhibit _____. Given this undisputed fact, Plaintiffs cannot carry their burden of proving that Kawasaki violated any aspect of the FBSA, including 46 USC § 4307. Kawasaki's compliance with the FBSA is a complete defense to the negligence per se cause of action.

- 1. The Federal Boat Safety Act of 1971 does not create a private right of action to these plaintiffs or require the recall of the 900STX.**

The Federal Boat Safety Act, first enacted by Congress in 1971, authorizes the Coast Guard, as the delegate of the Secretary of Commerce, to prescribe regulations for establishing uniform safety standards and requirements for all "recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards." The Act provides for fines to penalize manufacturers and sellers of vessels that do not comply with safety standards promulgated under the Act, or which have a safety defect identified by the Coast Guard. It does not provide for compensation to persons

injured by a nonconforming or defective vessel. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (U.S. 2002).

Section 5 of the Federal Boat Safety Act of 1971 (FBSA), 46 U.S.C.S. § 4301 et seq., specifically 46 U.S.C.S. § 4302, authorizes the Secretary of Transportation to issue regulations for establishing uniform safety standards and requirements for all "recreational vessels and associated equipment. The Secretary has delegated this authority to the Coast Guard. 49 C.F.R. § 1.46(n)(1) (1997). Before exercising that authority, the Coast Guard must consider certain factors, such as the extent to which the proposed regulation will contribute to boating safety, and must consult with a special National Boating Safety Advisory Council appointed pursuant to § 33 of the FBSA, codified at 46 U.S.C.S. § 13110. The Advisory Council consists of 21 members, seven representatives from each of three different groups: (1) state officials responsible for state boating safety programs, (2) boat and equipment manufacturers, and (3) national recreational boating organizations and the general public. § 13110(b). The Coast Guard may also issue exemptions from its regulations if it determines that boating safety will not be adversely affected. 46 U.S.C.S. § 4305.; *Sprietsma*.

The Coast Guard has extensively studied the issue of off throttle steering. Several BSAC reports have been issued on the topic (see motion for summary judgment on pre-emption) and the Coast Guard has issued several research grants on the same topic (Id.). In addition, the Coast Guard empanelled an SAE Committee to develop a new off throttle steering standard, effective for the 2006 model year. In conjunction with the development of that standard, the Coast Guard considered the question of whether it should order a recall and make the standard retroactive to all models prior to 2006. The Coast Guard rejected that position in August of 2002. (See Exhibit __, head of the Coast Guard Office of Boating Safety, Captain Evans).

2. Kawasaki is under no legal duty to recall the 900STX.

A. The Restatement does not require Kawasaki to recall the 900STX

Nor does the law supply any independent duty for a recreational boat manufacturer such as Kawasaki to be liable here. Under the *Restatement (Third) of Torts: Products Liability* §11 (1998), "One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:(a) (1) a

governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or (2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and (b) the seller or distributor fails to act as a reasonable person in recalling the product.

Plaintiffs have no evidence in support of a claim under the Restatement. It is undisputed that the Coast Guard has never required the recall of the product, and there is no evidence that Defendants undertook a voluntary recall. The evidence is to the contrary: that no Personal Water Craft in 1998 had rudders, and that the rudders advocated by Plaintiff's alleged experts have been rejected by every watercraft manufacturer that has tested them.

B. Georgia law does not require Kawasaki to recall the 900STX

Georgia courts have discussed whether a legal duty to recall arises under Georgia law, but have never ruled definitively as a matter of law. In *Mack Trucks, Inc. v Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993) the Georgia Supreme Court first noted, without any analysis, that a negligent failure to issue a recall or a post-sale warning is cognizable as a product

liability claim. Since then other courts have also at least noted such claims without disapproving of them. One example is *Smith v Garden Way, Inc.*, 821 F.Supp. 1486, 1488 (NDGa 1993)(aff'd 11th Circuit at 12 F.3d 220)(allowing plaintiff to amend complaint to include failure to recall count). Most recently, the subject of a legal duty to recall was discussed in *Smith v Ontario Sewing Machine, Inc.*, 249 Ga.App. 364, 548 S.E.2d 89 (2001). Reversing a trial court grant of summary judgment to the manufacturer, the Georgia Court of Appeals noted in dicta a duty to recall a dangerous product. That case dealt with a complex factual record involving an actual recall that the plaintiff's employer ignored, leading to his injury. The Georgia Supreme Court granted cert on the issue of legal duty to recall, but did not decide that issue, instead finding that questions of fact remained as to proximate cause, so it was not necessary to address the way the Court of Appeals ruled on the other legal issues regarding the duties of manufacturers. *Ontario Sewing Machine, Inc. v Smith*, 275 Ga. 683, 572 S.E.2d 533 (2002).

In this case, Plaintiffs cannot show that the 900STX violates the FBSA, in fact, the Coast Guard has reached the contrary conclusion. Moreover, given that the agency designated by Congress for making this decision has decided that no recall

is required, under the preemption clause of the Federal Boat Safety Act, a jury in Georgia should not be permitted to reach a decision inconsistent with the decision already reached by the Coast Guard, because in such a situation that jury, under state law, would be establishing a safety requirement that is not "identical" to the requirements under the Act.

3. Plaintiffs' evidence fails to support punitive damages

Punitive damages are not usually recoverable in a wrongful death case in Georgia. In this case, the victim was knocked under the water for fifteen minutes, and died at the hospital without ever regaining consciousness. Plaintiff has failed to put forth evidence to warrant a punitive damages award against Kawasaki, the Court may rule on these claims as a matter of law.

Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

O.C.G.A. § 51-12-5.1(b). Georgia courts have defined the expression "conscious indifference to consequences" as "an intentional disregard of the rights of another, knowingly or willfully disregarding such rights." *Gilman Paper Co. v. James*, 235 Ga. 348 (1975); *Assoc. Health Systems, Inc. v. Jones*, 185 Ga. App. 798 (1988).

The Georgia Supreme Court has held that "an award of punitive damages cannot be imposed without a finding of some form of culpable conduct." *Colonial Pipeline Co. v. Brown*, 258 Ga. 115 (1988). Something more than the mere commission of a tort is always required for punitive damages. *Id.* Accordingly, Georgia courts have routinely required some affirmative defense of fact showing aggravating circumstances. "There must be circumstances of aggravation or outrage such as spite or malice or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as gross . . ." *Id.*

The evidence shows that the design of the Jet Ski about which Plaintiffs complain complies with the industry wide state of the art in 1998 when the 900STX was manufactured, and meets or exceeds federal standards and regulations. A manufacturer's proof of compliance with industry-wide practices, state of the art, or federal regulations does not eliminate conclusively its liability for its design of allegedly defective products. *Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994). But "punitive damages, the purpose of which is to 'punish, penalize

or deter,' are, as a general rule, improper where a defendant has adhered to applicable environmental and safety regulations." *Stone Man, Inc. v. Green*, 263 Ga. 470, 471, 435 S.E.2d 205 (1993). This is because "such compliance does tend to show that there is no clear and convincing evidence of 'willful misconduct, malice, fraud, oppression, or that entire want of care which would raise the presumption of [a] conscious indifference to the consequences. *Id.* at 472; *Barger v. Garden Way*, 231 Ga. App. 723, 728 (1998)

In this case, Kawasaki has demonstrated that the Plaintiffs' experts are unqualified and that their opinions are not admissible under the law. There is no evidence that the Coast Guard has found a defect or ordered a recall because PWCs are jet propelled boats whose ability to steer is reduced when the throttle is released. There is no evidence that Kawasaki has consciously and deliberately disregarded the interest of Seth Folsom or of any person in the design of the 900STX.

CONCLUSION

Plaintiffs cannot prove that the Coast Guard ordered a recall of the 900STX, or that Kawasaki has acted so outrageously and wantonly in this case so as to be subject to the imposition of punitive damages. Kawasaki is entitled to judgment on the

claims for negligence *per se* and punitive damages, as a matter of law.

Respectfully submitted,
HAWKINS & PARNELL, LLP

Michael J. Goldman
Georgia Bar No.: 300100

Attorneys for Kawasaki
Defendants

4000 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, Georgia 30308-3243
P: (404) 614-7400
F: (404) 614-7500
E: mgoldman@hplegal.com

Of Counsel:

Richard Alan Mueller
Missouri State Bar No.: 3909
Thompson Coburn
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in this action with a copy of the foregoing **Brief in Support of Motion for Partial Summary Judgment on Negligence per se and Punitive Damages** by depositing in the United States Mail a copy of same in envelopes with adequate postage thereon, addressed as follows:

Frank A. Cassiano, Jr.
Law Offices of Frank A. Cassiano, Jr.
Post Office Box 7383
Greenville, NC 27835-7383

Charles H. Rabon, Jr.
Wells Daisley Rabon, P.A.
1616 Cleveland Avenue
Charlotte, NC 28203

Weymon H. Forrester
Forrester & Brim
Post Office Box 1688
Gainesville, Georgia 30503

This ___ day of _____, 2006.

Michael J. Goldman