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Appellate Reports

INSURANCE COVERAGE FOR CLEANING-UP SMOKE AND DEBRIS WHEN PREMISES DO NOT BURN; ALSO, HEAD INJURY IN FOOTBALL AND ASSUMPTION OF THE RISK DOCTRINE

Fire insurance; coverage for cleaning smoke and fire debris

Garibian v. Wawanesa Gen. Ins. Co. (2025) _ Cal.App. 5th _ (Second District, Div. 2)

In 2019, a wildfire burned within a half-mile of the policyholders' home. Although their property did not suffer burn damage, debris from the fire entered their home and swimming pool, and the property retained a smoke smell for several months. The policyholders retained an industrial hygienist who found soot and ash present on the property. The hygienist determined that the home could be fully cleaned by wiping surfaces, HEPA vacuuming, and power-washing the outside. The opinion states, that "soot by itself does not physically damage a structure," and that "ash only creates physical damage to a structure if it is left on metal or vinyl and is then exposed to water."

The insurer's own industrial hygienist reached similar conclusions about the cleaning needed, but the parties could not agree on the nature, extent, and cost of the cleaning required. This led to litigation, culminating in summary judgment for the insurer.

The Court of Appeal affirmed, based solely on the policy's insuring clause, which promised to "insure against direct physical loss to property." The court held that "to defeat Wawanesa's motion, plaintiffs had to establish (or at least create a triable issue of fact) that their claim was covered by their insurance policy. Thus, they had to show that there was a 'direct physical loss to property.'" This is the test articulated in *Another Planet Entertainment, LLC v. Vigilant Ins. Co.* (2024) 15 Cal.5th 1106, 1117. Under this test, "direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property. The physical alteration need not be visible to the naked eye, nor must it be structural, but it must result in some injury to or impairment of the property as property." (*Id.*) The court held that, on the record before it, the dirt and debris from the fire could be cleaned easily, and that, as a result, there was no coverage for any loss under the policy.

Depublication requested by CAOC

(***Editor's note***: CAOC and other interested consumer organizations have prepared a depublication request for this case. The core point is that fire coverage is regulated by Insurance Code sections 2070 and 2071, which require a fire policy in California to insurance against "all loss by fire," a standard that is broader than the insuring clause in the Wawanesa policy.

When the policy uses a different insuring clause, that clause must provide fire coverage that is substantially equivalent to the standard-form policy. The *Gharibian* court failed to consider this issue. In addition, Los Angeles County health authorities have cautioned that debris and ash from the Palisades and Eaton fires may contain asbestos, lead, a variety of chemicals and other toxins. This undermines *Gharibian* court's view that that fire debris and ash cannot damage property.)

Wrongful death; primary assumption of risk; CTE and football

Gee v. National Collegiate Athletic Ass'n. (2025) _ Cal.App.5th _ (Second Dist., Div. 8.)

Decedent, Matthew Gee played linebacker for the USC Trojans from 1988 to 1992. Of the 12 linebackers on the 1989 depth chart, Gee was the fifth to die before he turned 50. Gee died in 2018. The coroner determined that his death was due to the combined toxic effects of alcohol and cocaine, as well as hypertensive and atherosclerotic cardiovascular disease, anomalous small coronary arteries, complications of hepatic cirrhosis, obstructive sleep apnea and obesity. Based in part on the deaths of other USC players and in part on changes in Matthew Gee's behavior before his death, his widow, Alana Gee, donated his brain to Boston University's CTE Center for study. Dr. Thor Stein examined Matthew Gee's brain and determined he had Stage II CTE, which is now referred to as low level CTE (Chronic traumatic encephalopathy).

Gee's wife, Alana, filed a wrongful-death lawsuit against the NCAA, contending that CTE was a substantial factor in her husband's death, and that the NCAA negligently failed to take reasonable steps that would have reduced his risk of contracting CTE. She chose not to name USC as a defendant. The NCAA asserted an assumption-of-the-risk defense.

The trial court instructed the jury on the assumption-of-the-risk doctrine using a modified form of CACI No. 472, which told the jury: "Alana Gee claims Matthew Gee was harmed while playing NCAA college football. To establish this claim, Alana Gee must prove the following: [¶] 1. That the NCAA either: [¶] (a) unreasonably increased the risks to Matthew Gee over and above those inherent in college football from 1988 to 1992, [¶] or [¶] (b) unreasonably failed to take a measure which would have minimized the risks to Matthew Gee without altering the essential nature of the sport. [¶] 2. That the NCAA's conduct was a substantial factor in causing Matthew Gee's harm."

In answering the questions on the verdict form, the jury found that the NCAA did not do something or fail to do something that unreasonably increased the risks to Gee over and above those risks that were inherent in playing college football. The jury also found that the NCAA did not unreasonably fail to take a measure that would have minimized the risks to Gee without altering the essential nature of college football.

On appeal, Ms. Gee argued that the assumption-of-risk doctrine did not apply

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because the term "risk" as used in that doctrine either refers to the risk of a specific injury or includes specific injuries. Under her view, for the doctrine to apply the court would have found that CTE was an inherent risk of college football. The court rejected this view.

As formulated in the seminal case on the assumption-of-risk defense, *Knight v. Jewett* (1992) 3 Cal.4th 296, the term risk does not refer to a specific injury. As the Court explained in that case: "In the sports setting, . . . *conditions or conduct* that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a *risk of harm* to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. (*Id.*, at p. 315.) There is nothing in this discussion to suggest that the application of the doctrine turns on whether a specific injury is an "integral part of the sport itself." The Court referred to dangerous "conditions or conduct" that pose a "risk of harm" to a plaintiff. The Court did not identify a specific injury that could occur from skiing moguls, let alone suggest that a defendant must show that a plaintiff's individual injury was an inherent risk of skiing.

This is confirmed by the fact that *Knight* involved a claim arising from a touch football game, in which the defendant knocked the plaintiff down and stepped on her hand, causing an injury to her finger that ultimately resulted in an amputation. This would certainly seem to be an unusual injury for that sport, but the Court mentioned the injury only in passing, and did not consider it in analyzing the plaintiff's claim. Rather, the Court focused on the co-participant's conduct to determine whether the co-participant was entitled to the protection of the assumption of the risk doctrine.

The doctrine will apply only if the plaintiff was injured by an inherent risk of the sport. Knowing that a skier suffered a broken leg from a fall while skiing is not sufficient to determine whether the doctrine applies. If the skier broke his or her leg in a fall while skiing moguls, the injury was caused by a risk inherent in the sport and the doctrine applies; if the skier broke his or her leg due to a poorly maintained towrope, the doctrine does not apply. Thus, it is not the specific injury which is determinative, it is the nature of the conduct or condition which caused it. Here, it is undisputed that the conduct which causes CTE is repeated head hits, and head hits are an inherent risk of college football. The trial court did not err in finding that the assumption of risk doctrine applied.

Jeffrey I. Ehrlich is the editor-in-chief of Advocate Magazine. He is certified by the California Bar as an appellate specialist. He is a cum laude graduate of the Harvard Law School and was CAALA's Appellate Lawyer of the Year in 2004 and 2008; was a co-recipient of CAOC's Streetfighter of the Year award in 2019; and received the Orange County Trial Lawyer's Association Trial Lawyer of the Year award for "Distinguished Achievement" in 2023.