



1 of 2 DOCUMENTS

JESSICA M. KRAMER, Plaintiff, And DAVID GELBER, Plaintiff - Appellant, v. TOYOTA MOTOR CORPORATION, a Japanese corporation / a foreign corporation, DBA Toyota Motor North America, Inc.; TOYOTA MOTOR SALES, U.S.A., INC., a California corporation / a foreign corporation, Defendants - Appellees.

No. 13-56433

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2016 U.S. App. LEXIS 16280

October 23, 2015, Argued and Submitted, Pasadena, California
September 2, 2016, Filed

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Central District of California. D.C. No. 8:10-ml-02172-CJC-RNB. Cormac J. Carney, District Judge, Presiding.

In re Toyota Motor Corp. Hybrid Brake Mktg., 2013 U.S. Dist. LEXIS 112923 (C.D. Cal., July 30, 2013)

In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig., 959 F. Supp. 2d 1244, 2013 U.S. Dist. LEXIS 112924 (C.D. Cal., 2013)

DISPOSITION: AFFIRMED.

COUNSEL: For DAVID GELBER, Plaintiff - Appellant: Paul R. Kiesel, Esquire, Attorney, KIESEL BOUCHER & LARSON, Beverly Hills, CA; Paul Oliva Paradis, Esquire, Attorney, Michael Adam Schwartz, Attorney, Gina Marie Tufaro, Horwitz Horwitz & Paradis, Attorneys at Law, New York, NY.

For TOYOTA MOTOR CORPORATION, a Japanese corporation / a foreign corporation, DBA Toyota Motor North America, Inc., TOYOTA MOTOR SALES, U.S.A., INC., a California corporation / a foreign corporation, Defendants - Appellees: Kurt Christopher Kern, Esquire, Attorney, Cary Alan Slobin, Attorney, Bowman and Brooke, LLP, Dallas, TX; Michael Lawrence Malloy, Esquire, Sidley Austin LLP, Los Angeles, CA; Theodore J. Boutrous, Jr., Esquire, Attorney, Blaine H.

Evanson, William Edward Thomson, III, Esquire, Gibson Dunn & Crutcher LLP, Los Angeles, CA.

JUDGES: Before: KLEINFELD, RAWLINSON, and NGUYEN, Circuit Judges.

OPINION

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

David Gelber appeals the district court's grant of summary [*2] judgment in favor of the defendants on claims under the California Consumer Legal Remedies Act, *Cal. Civ. Code § 1750* (CLRA), the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200* (UCL), and breach of implied warranty under the *Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1794*. Gelber also appeals the district court's denial of class certification of all consumers who "purchased or leased a [Gen II] Prius Vehicle from an authorized Toyota dealer in the State of California and who currently own or lease such Prius vehicle[s]" under *Fed. R. Civ. P. (23)(b)(3)*. We have jurisdiction pursuant to 28 U.S.C. § 1291.¹ We affirm the district court's grant of summary judgment, and its denial of class certification.

1 "To the extent that we refer here to facts contained exclusively in [documents filed under seal], we pro tanto lift the order sealing that document." *United States v. Pimentel-Lopez*,

2016 U.S. App. LEXIS 13019, 2016 WL 3874414, at *4 n. 3 (9th Cir. July 15, 2016).

1. To prevail on his theories under the CLRA, the UCL, and the Song-Beverly Act in this case, Gelber needed to establish that the Gen II Prius contained a specific defect that rendered the product unsafe. See *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 51 Cal. Rptr. 3d 118, 127 (Ct. App. 2006) (explaining that under the CLRA, any supposed defect must pose "safety concerns"); *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (holding that under the UCL, there is no duty to disclose any defect that is not contrary to any affirmative statements made [*3] by the seller and does not affect the safety of the product); *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (rejecting claim under the Song-Beverly Act where plaintiffs did not allege that iPods were unsafe for listening to music or otherwise defective).

Gelber asserts that the Advanced Braking System of the Gen II Prius prevents the car from stopping quickly enough. Gelber cites his own near-accident and the expert testimony of Dr. Limpert in support of this theory. The district court excluded much of Dr. Limpert's testimony because he did not provide any source for his benchmark of an unsafe stopping distance. *Kumho Tire*

Co., Ltd. v. Carmichael, 526 U.S. 137, 149-52, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The district court did not abuse its discretion. *Id.* at 142. Because of this, and other methodological flaws in his testing, Dr. Limpert's testimony did not tend to show that the Gen II Prius is defective. Gelber's testimony also fails to demonstrate the existence of a defect. See *Daugherty*, 51 Cal. Rptr. 3d at 129; *Wilson*, 668 F.3d at 1141-45; *Birdsong*, 590 F.3d at 962.

The district court did not err in granting summary judgment, because the cognizable evidence did not establish a genuine issue, with regard to the material issue of whether the brakes were defective. We cannot fault the district court's careful decision on the evidentiary issue and careful analysis of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

2. We also affirm the district [*4] court's denial of class certification. Without any evidence of a common defect, there are no "common questions of law or fact" binding the proposed class together. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013).

AFFIRMED.

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Send To: Beatty, R. Locke
MCGUIRE WOODS LLP
201 N TRYON ST STE 3000
CHARLOTTE, NC 28202-2146