

FEATURED VERDICT

Premises Liability

Mechanic lost fingers when unguarded mechanism started

Verdict \$4,578,915
Actual \$3,271,608

Mullin v. Jelly Belly Candy Co.

Solano County Superior Court,
Fairfield

Plaintiff's Attorneys Robert E. Barnett and Benjamin W. Scott; Barnett & Bennett Law Firm; Fairfield, Calif.

Defense Attorney Christopher A. Appleton; Law Offices of Helen Santana; San Francisco

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CASES of NOTE

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SAN DIEGO COUNTY**TOXIC TORTS**

Hazardous Waste — Negligent Repair and/or Maintenance

Lead pellets at shooting range not hazardous: defense**DECISION Defense**

CASE Otay Land Company, LLC and Flat Rock Land Company v. U.E. Limited, L.P., United Enterprises, Ltd., United Enterprises, Inc., John T. Knox, The Otay Ranch, L.P., Baldwin Builders, Sky Communities, Inc., Sky Vista, Inc., Olin Corporation, Phil G. Scott, Ray M. Enniss and Estate of Patrick J. Patek, with Rose B. Patek as Executrix of the Estate, No. GIC869480

COURT Superior Court of San Diego County, San Diego

JUDGE Richard E.L. Strauss

DATE 2/17/2015

PLAINTIFF

ATTORNEY(S) Brian A. Rawers, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA
Devin T. Shoecraft, Shoecraft Burton, LLP, San Diego, CA
Robert D. Shoecraft, Shoecraft Burton, LLP, San Diego, CA

DEFENSE

ATTORNEY(S) Barbara Suzanne Farley, Law Office of Barbara Suzanne Farley, Piedmont, CA (U.E. Limited LP, Estate of Patrick J. Patek, John T. Knox, United Enterprises Inc., United Enterprises LTD.)
Brian A. Rawers, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA (U.E. Limited LP, Estate of Patrick Patek, John Knox, United Enterprises Inc., United Enterprises LTD.)
R. Gaylord Smith, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA (U.E. Limited LP, Estate of Patrick Patek, John Knox, United Enterprises Inc., United Enterprises LTD.)
Stephen A. Sunseri, Gatzke Dillon & Ballance LLP, Carlsbad, CA (Baldwin Builders, Sky Communities Inc., Sky Vista Inc., The Otay Ranch LP)
Stephen F. Tee, Gatzke Dillon & Ballance LLP, Carlsbad, CA (Baldwin Builders, Sky Communities Inc., Sky Vista Inc., The Otay Ranch LP)

FACTS & ALLEGATIONS On Oct. 15, 1998, plaintiff Otay Land Co., a real estate developer, bought about 4,795 acres of land in San Diego county, part of which (69 acres) had served as a public trap and skeet range between 1965 and 1997. Otay Land Co., which was aware that the range had operated on the property, after the purchase found lead shot and clay targets on the ground.

In December 2003, Otay Land Co. transferred ownership of the range site to a subsidiary, Flat Rock Land Co. LLC. (both are units of affiliated entities HomeFed Corp. and Leucadia National Corp.)

The same month, the companies sued the former owners and operators of the range in federal court, seeking to recover the costs of finding and removing the lead pellets and clay target debris, and naturally occurring perchlorate dirt and some wood debris. (No federal, state, or local agencies had ordered that the site be cleaned up.)

Plaintiffs asserted claims under federal environmental contamination laws, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA"), and California's environmental statutes.

The federal court, in 2006, granted the defendants' motions for summary judgment, finding that the range was not a hazardous waste "facility" under CERCLA, and that the range debris was not "solid waste" as defined by the RCRA.

The plaintiffs appealed to the 9th Circuit. In 2009, the court vacated the district court's summary judgment, and remanded the case for dismissal, stating that the claims were not ripe for adjudication. It held that remediation had not been ordered by any agency, the land was not considered a hazard, and plaintiffs hadn't demonstrated a reliable calculation of costs for the cleanup.

After the plaintiffs' failed in federal court, they filed suit in the Superior Court of San Diego County, alleging violations under California's superfund law: The Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"). They also alleged nuisance, trespass, unfair competition, and other equitable claims. Plaintiffs conducted health-risk assessment to determine the toxicity of the lead pellets, and claimed the pellets could potentially threaten flora and fauna, as well as human health.

The defendants in the state case were U.E. Limited LP, United Enterprises LTD., United Enterprises Inc., John T. Knox, The Otay Ranch LP, Baldwin Builders, Sky Communities Inc., Sky Vista Inc., Olin Corp., Phil G. Scott, Ray M. Enniss, and the estate of Patrick J. Patek.

Prior to trial, Olin Corp., Phil G. Scott, Ray M. Enniss settled out, leaving the former property owners in the case.

At trial, the defendants contended that the HSAA barred plaintiffs' claims, because of the "permitted release" exception for certain waste; that the shooting range was not a hazardous waste "facility" as defined under CERCLA; that no "disposal" activities took place as defined under CERCLA and RCRA; that plaintiffs' costs did not constitute "remedial action costs," as defined under HSAA and CERCLA; and

that application of the HSAA against the defendants was barred by the statute of limitations.

Defendants also argued that they were “assigns” and “affiliates” to the contracting parties in plaintiffs’ purchase and sale agreement, which contained a waiver and release of claims provision.

Moreover, the defendants maintained that the plaintiffs had purchased the property “as is” and “subject to” all environmental conditions, and therefore could not rely on the requisite “lack of consent” needed to support their claims that the defendants’ actions were not permitted.

In addition, the defendants argued that equitable allocation under the HSAA supported the contention that any and all cleanup costs should be paid by plaintiffs, because they were fully informed of the property’s condition prior to purchase.

Plaintiffs also admittedly took a “calculated risk” in purchasing the property, which paid off, because they stood to gain nearly \$500 million in revenues from their purchase and development, according to the defendants. Finally, they claimed that the plaintiffs significantly disturbed the alleged contaminants on the property after purchasing it by using heavy earthmoving equipment without regulatory oversight or supervision.

INJURIES/DAMAGES The plaintiffs sought in excess of \$25 million in cleanup costs, including attorney fees. Defendants argued that plaintiffs’ alleged remediation costs were unreasonable, unnecessary, and/or unrecoverable under the HSAA.

RESULT The court ruled in favor of the defendants on all causes of action: the former property owners were not liable under the HSAA, and were not liable for claims of nuisance, trespass, unfair competition, unjust enrichment, equitable indemnity, or declaratory relief.

In regard to the HSAA claim, the court decided the shooting range was permitted to operate by the county of San Diego, and the valid permits precluded liability through the HSAA’s “permitted release” exclusion.

In addition, the court ruled that the range was not a hazardous waste “facility” as defined under CERCLA and the HSAA, which excludes “consumer products in consumer use.”

The court determined that lead shot and targets were historically used as a part of recreational activities, and did not result from any hazardous waste “disposal” activity.

The court also found the defendants were “assigns” and “affiliates” of the plaintiffs’ purchase agreement, which contained a comprehensive release and waiver of claims provision.

In regard to the nuisance and trespass claims, the court stated that the plaintiffs failed to establish the “lack of consent” needed to establish those claims. The plaintiffs, according to the court, had extensive pre-purchase disclosures about the condition of the property, as well as information obtained from their own environmental consultants notifying them of the property’s condition before the sale.

Equitable factors also influenced in the court’s decision, as the HSAA allows a court to balance the equities when making a determination. In this case, the plaintiffs originally purchased the entire 4,795 acres for \$19.5 million, which has since generated more than \$35 million in sales. The court determined the benefits for remediating the range far exceeded the money the plaintiffs spent cleaning it up. Further, the plaintiffs ultimately will receive a net profit from their original purchase of the property of approximately \$176 million, which suggested to the court that the plaintiffs originally discounted the property due to its condition.

In addition, the court learned that the plaintiffs substantially caused much of their own cleanup costs, by using heavy earth moving equipment on the property unsupervised by the local environmental agencies, who ultimately oversaw the eventual cleanup. In balancing the equities, these facts heavily favored the defendants.

EDITOR’S NOTE This report is based on information that was provided by defense counsel. Plaintiffs’ counsel did not respond to the reporter’s phone calls.

—Priya Idiculla

SANTA BARBARA COUNTY

PREMISES LIABILITY

Dangerous Condition — Store — Slips, Trips & Falls — Trip and Fall

Below-the-knee amputation not related to fall, defense argued

VERDICT	\$76,577
ACTUAL	\$57,433
CASE	Moises Lopez and Gorgonia Lopez v. Boone Street Market, Inc., No. 1458343
COURT	Superior Court of Santa Barbara County, Santa Maria
JUDGE	Jed Beebe
NEUTRAL(S)	R.A. Carrington
DATE	12/2/2014
PLAINTIFF	
ATTORNEY(S)	Greg A. Coates, Coates & Coates LLP, San Luis Obispo, CA Tana L. Coates, Coates & Coates LLP, San Luis Obispo, CA
DEFENSE	
ATTORNEY(S)	David K. Dorenfeld (lead), Snyder Dorenfeld LLP, Agoura Hills, CA Michael W. Brown, Snyder Dorenfeld LLP, Agoura Hills, CA