

In The News

Attorneys Investigating Potential Claims Should Word Their Advertisements With Care
Simpson Strong-Tie Co., Inc. v. Gore (2008) 2008 WL 1886602
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In *Simpson Strong-Tie Co., Inc. v. Gore* (2008) 2008 WL 1886602, the California Court of Appeal has issued an opinion that can give guidance to attorneys in two important areas. 1) When does language in an advertisement soliciting clients for potential claims cross the line and become defamation? 2) What types of materials and supplies should one use when building a backyard deck?

It seems that certain types of galvanized screws should not be used when constructing a deck out of pressure-treated wood. Home decks are often constructed with such wood, which is resistant to weathering. The chemicals in this type of wood can react with certain galvanized steel products, including galvanized screws which are used in construction, causing corrosion and potential failure of the structure. This problem has been magnified in recent years because the pressure-treated wood industry has abandoned the use of chemicals which are harmful to humans in favor of chemicals that are harmful to steel. Consumers need to be aware of this problem so that they can select the proper screws for use in deck construction such as, for example, stainless steel screws.

Attorney Gore published a newspaper advertisement stating that users of certain brand-name galvanized screws under specified circumstances "may" have legal rights to compensation or other relief. Gore identified screws that were manufactured by three specific companies in this advertisement. Gore did not state that the screws were defective and did not state that consumers might have rights against the named manufacturers.¹ Nevertheless, one of the named manufacturers sued Gore for defamation, trade libel and related claims, asserting that the ad falsely stated that its screws were defective.

Gore moved to strike the complaint under California's anti-SLAPP statute, which permits a party who has been sued for activity arising out of the exercise of a constitutional right to seek an order of dismissal unless the plaintiff can prove a probability of success on the merits.² The trial court granted the motion. After first determining that the manufacturer's claims against Gore were in fact subject to the scrutiny of the anti-SLAPP statute, the Court examined the heart of the matter, i.e., whether the statement was defamatory and, if so, whether it was privileged under California law.

The manufacturer based its defamation theory in large part on its assertion that the advertisement conveyed the impression that its screws were "defective" when, in fact, they were not defective under controlling California product liability law. The manufacturer argued that since it would prevail in any product liability case asserting that the screws were defective, any statement to the contrary was false and, therefore, defamatory.

The Court rejected this analysis and stated that in order to determine whether the advertisement was defamatory, the Court would look to the effect of the words on an average reader as opposed to the effect on a reader schooled in product liability doctrine. In other words, the defamatory effect of a statement must be determined by its common usage, not its legal definition.

Furthermore, the Court noted that Gore had been careful not to use the word "defective" in his advertisement and had not stated that a consumer might have a claim against any particular manufacturer (or any other party, for that matter).³ The Court stated that the advertisement at most suggested that some types of screws might be unsuitable for use in some specified instances and that a person who used such unsuitable screws might have a remedy against some unspecified person. The advertisement did not say that all of the manufacturer's screws were defective. It did not even say that all galvanized screws were defective. In fact, it did not even say that any screws were defective. Similarly, the advertisement did not say that a claim existed against any particular manufacturer or that anyone had any claim at all. Thus, since the advertisement was an assertion of a possibility, not of a fact, it could not be considered defamatory and could not form a basis for any of the manufacturer's claims.

Practice Note: Attorneys who are seeking potential claimants should carefully consider the impact of an advertisement on the average reader. Care should be given to avoiding assertions of fact. And when building an outdoor deck, consult with the manufacturers of the component parts to determine whether they compliment each other. Or make sure that the contractor has considered these factors.

¹ The advertisement stated as follows: "If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck. Please call if you would like an attorney to investigate whether you have a potential claim."

² See California Code of Civil Procedure § 425.16.

³ From the advertisement, one could conclude that consumers might have rights against the screw manufacturers, the pressurized-wood manufacturers, or even the contractor who constructed the deck and used the wrong combination of materials.