CAIIA Status Report

MAY 2007

Litigation

Submitted by Knapp, Peterson & Clarke, Glendale, CA

NEGLIGENT ENTRUSTMENT: When Does Giving Someone the Keys to Your Car Land You in Legal Trouble?

Imagine the following scenario: It is New Year's Eve and you are having a small gathering of friends at your home. You decide that more wine is needed to go with the bread and cheese. Bob, a friend of your who lives down the street, volunteers to pick some up form the local grocery store and asks to borrow your car for the venture.

Bob had been pulled over several years ago for driving under the influence, but those days are a thing of the past, or so you thought. You lend him your keys, however, he already had a few beers at home before walking over. On his was to the grocery store he runs down a pedestrian and disables her for life. Several months pass and your are served with a complaint alleging, in addition to your liability as owner of the vehicle, you are liable for the negligent entrustment of your vehicle to Bob.

In this nightmare New Year's Eve scenario, you may be held *vicariously* liable for Bob's negligent driving that fateful night. California Vehicle Code section 17150 provides that the owner of a motor vehicle is vicariously liable for death or injury to person or property resulting from the wrongful (negligent or intentional) operation of the vehicle by any person using it with the owner's express or implied permission.

Additionally, you may be charged *directly* with your *own* negligence in entrusting your vehicle to Bob, a person known to be likely to create an unreasonable risk of harm. Under the common law "negligent entrustment" theory, one who "entrusts" a motor vehicle to another who is *known*, or from the circumstances *should be known*, to be incompetent or unfit to drive may be liable for injuries inflicted by the driver that were proximately caused by the driver's incompetence.

In a negligent entrustment cause of action the threshold issue is whether the defendant who entrusted the vehicle had knowledge that the driver was incompetent or unfit to operate it. The "knowledge" requirement is satisfied if the defendant either *actually* knew that the driver was incompetent or had knowledge of *circumstances reasonably indicating* that the driver would create an unreasonable risk of harm to others. Here, if you knew about Bob's prior incident of driving under the influence, or had any indication that he had a few drinks earlier, then you may be found liable for the negligent entrustment of your car to him.

Liability for negligent entrustment amounts to a determination whether a duty exists to anticipate and guard against the negligence of others. In *Lindstrom v. Hertz Corp.*, the Second Appellate District held that a rental car company is not required to investigate its customer's driving records or inquire as to their knowledge of traffic laws before leasing them a car. The court found in *Lindstrom* that a rental agency had no duty to determine whether a driver from a foreign country was familiar with California's

Continued on page 3

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Inside This Issue

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■ PRESIDENT'S MESSAGE

Spring has arrived and with it the 2007-2008 dues notice.

Every now and again the same question pops up. What does the CAIIA do for me? The CAIIA continues to be a strong and growing organization. We currently have over 75 members with more applications in progress. Our main focus this year is on education and awareness of our association.

Since 1994 the CAIIA has held annual re-certifications and has certified or re-certified thousands of claims handling personnel. Currently we have set aside the dates of June 12, 2007, in Glendale and June 15, 2007, in San Ramon for the FCSPR. In addition, we have added the SEED seminars currently scheduled for June 6, 2007, in Sacramento and June 27, 2007, in Orange County. This year we are pleased to announce we will be holding the first SIU training as required by the Department of Insurance. This will be held at the SEED locations. Please see the application elsewhere in this issue for other dates and locations.

Our Status Report contains a mailing and emailing list of over 1100 individuals. We also continue a presence, en mass, at the CCC and the CCNC. Members who are at the booth at either of these get free admission. We advertise on the web with our own website and in Best Directory. Visit www.ambest.com/legal to see all of our members listed.

In addition, we have received at least four inquiries from the DOI, asking for the input and opinion of

the CAIIA. We have Norwood, our legislative analyst, who can be contacted by our members when necessary, usually without charge for the initial consultation.

What about the many memorable meetings? In the past we have gone on a cruise, gone to a Casino with a side trip to Yosemite, and we just held our mid-term in the wine country. This year our convention will again be held at the Disneyland Grand Californian (October 17-19). We have added the first annual golf tournament to the event which will be at the Anaheim Hills Golf Course. We hope to see many more of our member as well as company claims handling personnel at the convention, people that you may know and have worked with over the years.

The question is not what does the CAIIA do for me, but what doesn't it do for me?

SHARON GLENN
President - CAIIA 2006-2007

Litigation

Submitted by Knapp, Peterson & Clarke, Glendale, CA

Continued from page 1

"rules of the road", nor was the agency required to furnish the driver with a copy of those rules. Similarly, a rental car agency has no duty to ask whether an apparently fit customer, who shows valid license, has a drunk driving record or intends to drive while intoxicated.

Other examples of the legal duty limitation include a commercial lender typically having no duty in investigate a driver's incompetence before financing a vehicle's purchase. However, no reported case has yet decided whether negligent entrustment liability may lie against a lender who knew the purchaser was a dangerous driver likely to cause harm to others.

Further, bailees, such a valet parking attendants, are not exposed to negligent entrustment liability, even if the bailee has knowledge that the bailor is intoxicated and in an unfit condition to drive. This is so because bailees at best have "transitory control" over bailor's automobile, which is not sufficient to give them a legal duty to act to prevent the bailor from causing harm to others.

Unlike these prior examples, a private owner of a vehicle is not exempt from his or her legal duty to anticipate and guard against the negligence of others. In fact, negligent entrustment liability even may lie against one co-owner for the negligent driving of the other. The court in *Mettelka v. Superior Court* held that a negligent entrustment action could be stated against a father who co-owned a vehicle with his son. The court found that a negligent entrustment claim is stated if the co-owner had power over use of the vehicle by the other, and the negligent co-owner drove with the express or implied consent of the controlling co-owner who knew of the driver's incompetence.

Although negligent entrustment claims typically arise from the use of automobiles, this common law tort can potentially spring from the use of various other forms of chattel (movable articles of personal property). The Restatement (Second) of Torts, section 390 states that:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier *knows* or *has reason to know* to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Negligent entrustment claims often arise, as easily imagined, from the use of dangerous instrumentalities such as firearms, explosives, boats and aircraft. Therefore, the next time you lend a friend your car, motorboat or other potentially dangerous instrumentality, think twice. You may be directly charged with the knowledge you have about that person's incompetence or unfitness to operate your personal property. Ignorance may be bliss, after all, as far as avoiding negligent entrustment claims. Therefore, the more you know – the greater *your* responsibility.

Newhall Man Arranges for "Theft" of His Truck; "Thief" Turns Out to Be Undercover Officer

LOS ANGELES - Insurance Commissioner Steve Poizner announced today that investigators with the California Department of Insurance (CDI) Fraud Division have arrested a Newhall man for allegedly staging the theft of his high-end pickup truck in a scheme to defraud his auto insurance carrier of $45,000.

Eric Joseph Horvat, 28, was arrested on February 23, 2007 on one felony count of insurance fraud and one felony count of perjury stemming from a stolen vehicle report he made concerning his customized 2006 Ford F-150 pickup truck.

Investigators say they received a tip that Horvat was looking for someone to help him stage the theft of his vehicle. An undercover officer contacted Horvat and arranged a series of meetings, during which the accused indicated that he no longer wanted his truck and wanted to stage its theft so his insurer, Mercury Insurance, would pay off the $45,000 balance he owed on it.

According to investigators, Horvat also asked the undercover officer to pay him $3,000 for the right to "steal" the truck. On January 19, 2007, Horvat took the $3,000 and voluntarily turned over his truck to the undercover officer. A few days later, he contacted the Los Angeles County Sheriff's Department and reported his truck stolen, then relayed the same story to Mercury Insurance, which had already been notified of the investigation.

"This is excellent work by the CDI Fraud Division's investigators," said Insurance Commissioner Steve Poizner. "Let this be a lesson for anyone with 'buyer's remorse' considering a similar stunt: we will not tolerate insurance fraud in this state."

Horvat was booked on $30,000 bail at the Los Angeles County Main Jail. If convicted, he faces up to 5 years in state prison, and up to $50,000 in fines.

The Los Angeles County District Attorney's Office will prosecute the case.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Civil Procedure – Statutory Offers – Attorney's Fees

William R. Duale v. Mercedes-Benz USA, LLC , Court of Appeal, Third District - February 15, 2007

The interaction of claims for attorney's fees with a 998 offer provides difficulty when trying to determine how you calculate which party prevailed and which party is entitled to costs. This case provides an example of that problem.

William R and Margaret G. Duale purchased a Mercedes Benz automobile in March, 2002 for $50,750. In June, 2003, they sued Mercedes Benz seeking rescission, damages and penalties under the Song-Beverly Consumer Warranty Act. This was based upon defects in the car and the failure of the dealer to adequately service it. Mercedes Benz served a statutory offer to compromise in which they offered to take back the car in exchange for $51, 466, plus plaintiffs' reasonably incurred attorney's fees and court costs incurred to date. The Duales did not accept the offer stating they wanted to bring a motion for pre-judgment interest.

The case was tried and an award of $49,885 was made. Plaintiffs sought their attorney's fees in the sum of $57,753 as allowed under the Song-Beverly Consumer Warranty Act, and also sought pre-judgment interest of $17,459.75 based upon the amount they paid for the car to date of judgment. Mercedes Benz opposed the application for attorney's fees and costs stating that the Duales were not entitled to post offer fees and costs. The trial court granted both plaintiffs' and defendant's request for costs awarding the plaintiff pre-offer costs and defendant's post-offer costs. It also allowed plaintiffs' request for attorney fees pre and post offer on the basis they were allowed under the Act. The court denied pre-judgment interest. Both parties appealed.

The Court of Appeal reversed, holding the trial court erred in awarding plaintiff attorney's fees and costs incurred after they rejected the 998 offer. While plaintiffs were entitled to attorney's fees under the Song-Beverly Consumer Warranty Act, here the defendant offered to compromise for more than the plaintiffs' eventual award. Since plaintiffs did not recover more than the amount offered, plaintiffs were entitled only to pre-offer costs including pre-offer attorney's fees. The defendants were entitled to cost incurred after the settlement offer. The trial court correctly awarded the defendants post-offer costs, but incorrectly awarded plaintiffs both pre and post-offer attorney's fees and costs. Even though the Song Beverly Act allowed the recovery of attorney's fees, the court stated it did not overrule the provisions of Code of Civil Procedure ' 998. The trial court stated C.C.P. ' 998 limited plaintiff's recovery to their pre-offer fees and costs.

The court further held the trial court did not err in denying pre-judgment interest. The court held that the amount of damages was not certain and could not be resolved without a jury verdict. Since that was the case, pre-judgment interest was appropriately not allowed.

COMMENT

This case holds that the rule regarding recovery of attorney's fees and costs pursuant to C.C.P. ' 998 overrules any other specific provision of law. This is to encourage resolution of cases and discourage those who insist on going to trial and obtain a less favorable result.

Coverage - Single Event Causing Property Damage and Personal Injury

Safeco Insurance Co. of America v. Fireman's Fund Insurance Co , (March 14, 2007), Court of Appeal, Second District

This case arises out of a dispute between primary and excess insurance carriers concerning coverage provided under successive policies by the primary insurer. Harold Lancer owned a home at the top of a slope in the City of Encino in Southern California. The Rauch family lived at the bottom of the slope. In February 1998, the slope failed and mud and debris flowed onto the Rauchs' property. The Rauchs lost the use of their backyard and had to move personal property into storage. In February 1999, the Rauchs sued Lancer and other uphill

Continued on page 5

Continued from page 4

owners for damages and injunctive relief on theories of negligence, trespass, and nuisance. Other downslope neighbors also brought suit against uphill owners, including Lancer.

At the time of the landslide, Lancer had a homeowners insurance policy with Fireman's Fund Insurance Company (Fireman's Fund), with policy limits of $500,000. Lancer also had a personal umbrella policy with Safeco Insurance Company of America (Safeco), with policy limits of $5 million. The Fireman's Fund policy was effective from 1997 to 1998 , and was renewed annually for three years. The Safeco policy was also effective from 1997 to 1998, and was renewed annually for two years.

Fireman's Fund provided a defense to Rauchs' action. Before the Rauch action went to trial, Fireman's Fund's contributions to various settlements exceeded $500,000, and Fireman's Fund took the position that its' policy limits were exhausted. Safeco disagreed, contending that there was a continuous loss and that Fireman's Fund should be providing coverage for each year it provided homeowners insurance (1997 through 2001). Fireman's Fund continued to defend Lancer in the Rauch action, subject to a reservation of rights to recover certain post-exhaustion defense costs from Safeco.

The Rauch case proceeded to trial. In a bifurcated proceeding, the Court ordered the uphill owners, including Lancer, to pay repair costs of approximately $3.8 million. The Rauchs were also awarded approximately $88,000 in damages. In order to resolve allocation of insurance payments, Safeco filed a declaratory relief action against Fireman's Fund, claiming that Lancer was covered not only by the 1997-1998 homeowner's policy in effect on the date of the landslide, but also by the three successive policies. Safeco further contended that each primary policy provided $1 million in coverage, $500,000 for property damage and an additional $500,000 for personal injury, for a total of $4 million. Fireman's Fund cross-complained back against Safeco claiming it owed Lancer only $500,000 for a single occurrence and was entitled to reimbursement from Safeco for post-exhaustion defense costs. Both carriers filed motions for summary judgment. The trial court ruled in favor of Fireman's Fund. Safeco appealed. The Second District Court of Appeal affirmed.

The Court of Appeal held that coverage is triggered under the policy in effect during the year in which an occurrence causes property damage and/or loss of use. The Rauchs' property was damaged by the 1998 landslide. This was a single occurrence. The fact that the Rauchs' loss of use of that property continued into successive policy periods, did not mean there was coverage under Lancer's subsequent policies. A subsequent policy period that consists only of pre-existing or continuing damage, without another precipitating act or event, does not provide additional benefits. The Court, therefore, affirmed the judgment for Fireman's Fund.

COMMENT

This case provides a thorough analysis of what constitutes an "occurrence" for purposes of coverage. The fact that damages may continue on into successive coverage periods, does not mean that successive policies are triggered. The existence of one cause or event means that there is only one occurrence for determining policy limits.

Torts - Settlement Not In Good Faith Where Party's Proportionate Share of Liability

TSI Seismic Tenant Space, Inc. v. The Superior Court of San Diego County , (April 2, 2007), Court of Appeal, Fourth District

Under Code of Civil Procedure (CCP) section 877.6, any party to an action, where there are two or more joint tortfeasors, is entitled to a hearing on the good faith of a settlement entered into by the plaintiff and one or more of the joint tortfeasors. A determination by the court that the settlement was made in good faith bars any other tortfeasor from pursuing claims against the settling tortfeasor for equitable indemnity. In this construction defect action, the issue was whether a limitation of liability clause in a contract should be con-

Continued from page 6

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Continued from page 5

sidered in determining whether a settlement was in "good faith."

Defendant Geocon Inc. (Geocon) contracted with Plaintiff developer Serena Sunbow (Sunbow) to provide geotechnical services on a parcel of real property that was being prepared for construction of an apartment complex. Geocon's contract with Sunbow included a limitation of liability clause that provided that the aggregate liability of Geocon would not exceed $50,000 for negligent professional acts. Pursuant to the contract, Geocon prepared an initial soils report before any grading was done, which identified the soils as having "very low" to "medium" expansion potential. After grading work was performed, Geocon concluded that the soils had a "high expansion potential." Based on this finding, Geocon modified its recommendations for foundations and slabs.

Defendants TSI Seismic Tenant Space, Inc. (TSI) and Swanson & Associates (Swanson) were the general contractor and structural engineer on the project. Following completion of construction of the apartment complex, cracking in the interior and exterior of buildings appeared, which was attributed to movement of expansive soils. Damages were estimated to be over $6 million. Sunbow filed suit against Geocon, TSI, Swanson and others. TSI filed a cross-complaint for equitable indemnity and contribution against Geocon.

Geocon asserted that pursuant to contract, its liability was limited to $50,000. Sunbow and Geocon agreed to submit the enforceability of the limitation of liability clause to a judicial referee. The referee determined that the clause was enforceable. Thereafter, Sunbow agreed to settle with Geocon for $50,000. The settlement was conditioned upon the court finding that the settlement was made in good faith under CCP section 877.6. Geocon brought a motion for good faith settlement determination, and the trial court granted Geocon's motion. TSI and Swanson filed petitions for writ of mandate. The Fourth District Court of Appeal vacated the trial court order.

In their writ petitions, TSI and Swanson argued that $50,000 was not close to Geocon's proportionate share of liability. The Court of Appeal, looking to the non-exclusive factors for determination of "good-faith" set forth in Tech-Built, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal 3d. 488, analyzed the rough approximation of Sunbow's total recovery and Geocon's proportionate share of liability. The Fourth District focused on Geocon's proportionate share of liability, because one of the main goals of section 877.6 is to allocate costs equitably among multiple tortfeasors. Significantly, the Court of Appeal also looked at Geocon's potential culpability vis-a-vis other tortfeasors. Potential liability for indemnity to a non-settling defendant is also an important consideration under the "Tech-Built" analysis.

Here, the Court held that it was an abuse of discretion for the trial court to only consider what Geocon would pay to Sunbow by virtue of the limitation of liability clause, without also considering Geocon's potential liability to TSI, Swanson, and others for indemnity. Given that evidence presented that Geocon's potential liability could represent approximately 50% of the total damages, the Court of Appeal held that the amount paid had no rational relationship to Geocon's proportionate share of liability. The Court, therefore, issued a peremptory writ of mandate directing the trial court to vacate its order of good faith settlement determination.

COMMENT

This case holds that a trial court, in making a good-faith settlement determination under CCP section 877.6, should consider not only what the settling defendant is to pay Plaintiff, but also the settling defendant's proportionate share of culpability, and potential for liability to other defendants for indemnity.

CAIIA *Calendar*

CAIIA Annual Convention

October 18, 2007
Disney Grand California Resort
Anaheim, California
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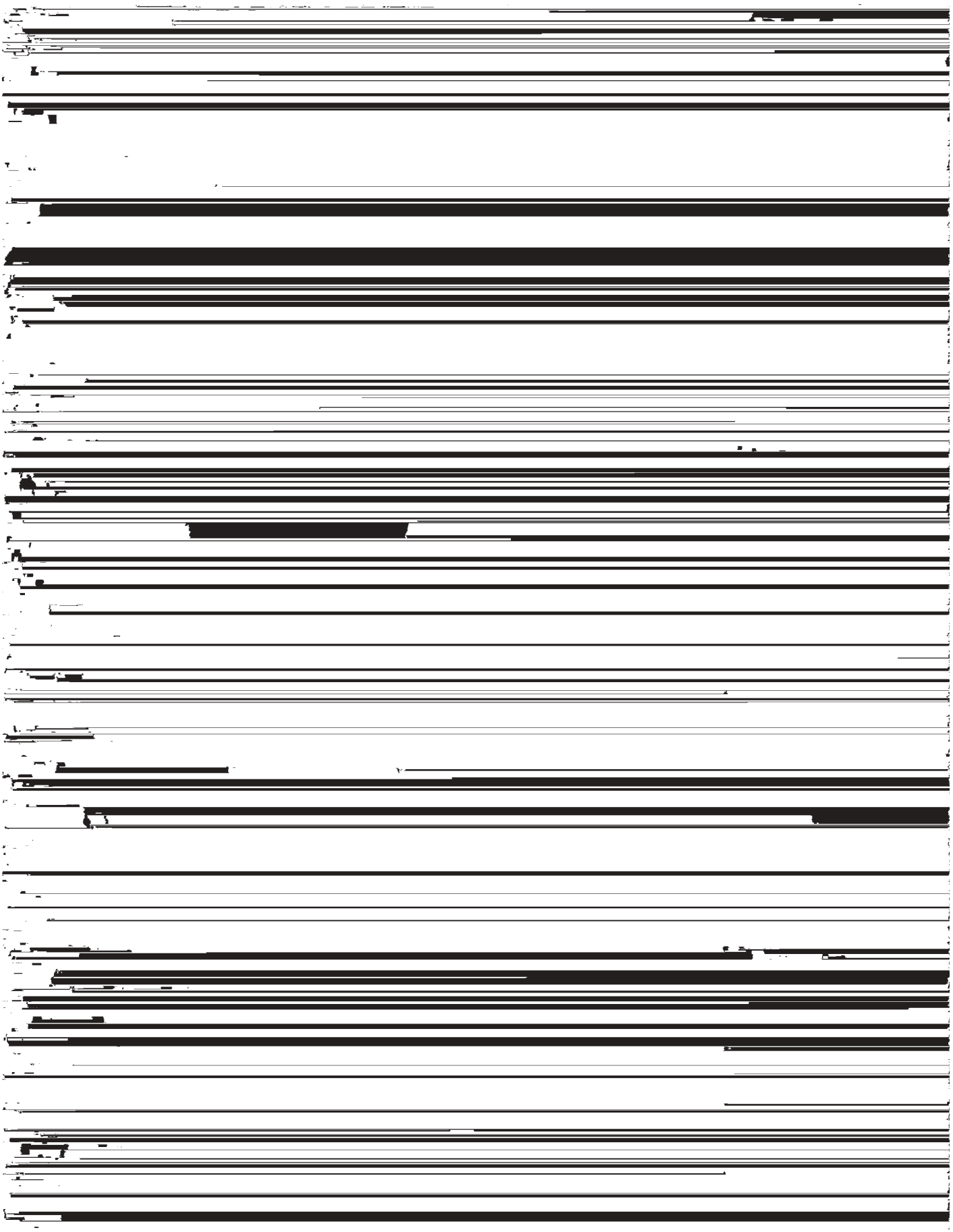

I am passing this on to you because it definitely works, and we could all use a little more calmness in our lives. By following simple advice heard on the Dr. Phil Show, you too can find inner peace. This is such a great way to inner peace, especially this time of year!

Dr. Phil proclaimed, "The way to achieve inner peace is to finish all the things you have started and have never finished." So, I looked around my house to see all the things I started and hadn't fininshed, and before leaving the house this morning, I finished off a bottle of Merlot, a bottle of Whie Zinfandel, a bottle Bailey's Irish Cream, a bottle of Kaluah, a package of Oreos, the remained of my old Prozac prescription, the rest of the cheesecake, some Doritos and a box of chocolates.

You have no idea how good I feel!