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When does a special relationship through a contract give rise to a tort duty?

A RECENT APPELLATE DECISION SHEDS SOME LIGHT ON THE ANSWER

My firm was on the winning end of a recent published decision in *Luebke v. Automobile Club of Southern California* (2020) 59 Cal.App.5th 694. No one wants to have to appeal a case that was tossed on MSJ by a judge who just straight-out gets the law wrong. But that was exactly what happened. Not only was our client severely injured, in part because of the negligence of the Automobile Club of Southern California (AAA), he came very close to never getting his day in court because of the trial court's initial ruling. But thanks to the appellate court, we live to fight another day for our deserving client on this matter.

The facts of the crash

In the early evening of June 4, 2015, Tong Yin lost control of his vehicle and ran onto the shoulder of northbound Interstate 405 near Skirball Center Drive, where his vehicle struck the rear of our client's car. Our client, Mr. Luebke, had coasted to the shoulder of the freeway after his engine died and had been waiting inside his car for more than two hours after contacting AAA roadside assistance for help.

The complaint against AAA alleged that "Defendants negligently, carelessly and recklessly failed to respond to a roadside assistance call." After Mr. Luebke put in the call, the AAA tow-truck driver did not respond to the call in a timely fashion. In fact, AAA caused Mr. Luebke to sit on the freeway shoulder for more than two hours without AAA help arriving. Foreseeably, after this lengthy time, his vehicle was struck by another vehicle as he sat waiting for assistance on the freeway shoulder.

The summary judgment motion and opposition

The Auto Club moved for summary judgment. In our opposition, we explained that our client called the Auto Club at approximately 5:30 p.m. as he sat parked in his car on the shoulder of the freeway and he was told a tow truck would be there within 30 to 45 minutes. A short while later, an employee from the California Department of Transportation stopped at his car and asked if he needed a ride to get gas. Mr. Luebke responded that he was waiting for a AAA tow truck. By 7:00 p.m., when no tow truck had arrived to help him, Mr. Luebke again called the Auto Club. He was told the tow truck had canceled and a different one would need to be contacted.

At approximately 7:30 p.m. Mr. Yin's vehicle struck Luebke's vehicle. We asserted that the Auto Club owed a duty to exercise due care in providing reasonably safe roadside assistance and that they had breached that duty by placing our client in a situation in which he was exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of third-party drivers, such as Mr. Yin.

We relied on *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703 (*Lugtu*), which held a California Highway Patrol (CHP) officer, in directing a traffic violator to stop in a particular location, had a legal duty to use reasonable care for the safety of those in the vehicle and to exercise his authority in a manner that did not expose them to an unreasonable risk of harm. The Supreme Court also held the negligence of the other driver, who struck the stopped vehicle, did not constitute a superseding cause as a matter of law. (*Id.* at pp. 725-726.)

We argued our client's injuries, like those at issue in *Lugtu*, were caused by the combined negligence of Mr. Yin and the Auto Club: Each was a substantial factor in causing the injuries. In the *Lugtu* case, the Court explained, the CHP officer had directed a driver stopped for speeding to the center median area of the highway rather than the right shoulder. The Court held that the theory of liability was not that the officer was liable because he failed to come to the driver's aid (nonfeasance), but that the officer's alleged misconduct amounted to malfeasance, creating a serious risk of harm to the plaintiffs to which they would not otherwise have been exposed. (*Id.* at pp. 716-717.)

In our opposition papers we alleged that nonfeasance was at issue in this case. Auto Club argued that nonfeasance is limited to cases in which a special relationship can be established. I know AAA doesn't think my $56.00 a year AAA roadside assistance membership is special, but I do.

The trial court's ruling

The trial court ruled, "Based on the facts set forth in the amended discovery response, Plaintiff cannot establish Auto Club's liability as a matter of law." The court explained that Mr. Luebke's theory of liability was predicated on the Auto Club's nonfeasance, unlike the situation in *Lugtu*, *supra*, 26 Cal.4th 703. Citing *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, which held that the plaintiff, who was struck by a hit-and-run driver while working on a car on the side of the road, did not have a viable

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negligence claim against law enforcement officers who had failed to place flares on the road for his protection, the trial court stated, "The court in *Mikialian* held such an omission is nonfeasance, and a defendant "can be held liable for these negligent omissions only if a special relationship then obtained between him and plaintiff."

The trial court wrote in its tentative ruling that a special relationship is not created simply because a person or company like AAA responds to a call for assistance. We argued at the hearing that a special relationship had been created by our client's roadside assistance contract with the Auto Club. AAA does not service calls for the public at large; they only service persons with a valid AAA membership. A membership costs money and has to be renewed annually. I've had a lot of relationships not nearly as special.

The court, quite fortuitously for Mr. Luebke, commented on the record at the MSJ hearing that the contract was not in the record, but, in any event, Mr. Luebke "did not have any legal authority supporting the argument that a contract creates a special relationship such that the breach of a contract can lead to tort remedies. The law is actually to the contrary." The court went on to say that "Absent intentional conduct intended to harm plaintiff, the alleged contractual relationship between the Auto Club and plaintiff did not give rise to a special relationship or tort remedies under California law." WOW!

Judgment was entered in favor of the Auto Club. Obviously, we had to appeal.

The appeal

The trial court at least correctly recognized for purposes of a negligence cause of action based on nonfeasance, we had to establish that a special relationship existed between our client and the Auto Club, creating a duty to act, which the Auto Club breached. "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." (*Regents of University of California v. Superior Court*, *supra*, 4 Cal.5th at p. 619; see Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (a) ["an actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."].)

The appellate court correctly ruled that the "trial court misunderstood the law" as well as its obligations in ruling on a motion for summary judgment. They correctly held that a special relationship may, in fact, arise out of a contractual duty. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1177; *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1203.) "The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Jackson, at* p. 1177.)

Commonly referred to as the negligent-undertaking doctrine, this aspect of the law of duty has traditionally been discussed in the context of a volunteer (a "Good Samaritan") who, having no initial duty to do so, undertakes to provide protective services to another. In those circumstances the volunteer will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: (a) the volunteer's failure to exercise such care increases the risk of harm to the other person; (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249.) But, as explained in *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 289-290, the doctrine may apply whether the actor undertook to provide the services "gratuitously or for consideration."

As now set forth in Restatement Third of Torts, section 42, Duty Based on Undertaking, "An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking."

It was obvious to the appellate court, as well as to anyone who keeps a AAA card in their wallet or purse, that a special relationship existed between Mr. Luebke and the Auto Club. The issues in this case are full of factual questions for a jury to decide: (1) Whether the Auto Club breached its duty in providing its services based on the terms of the contract between our client and the Auto Club; (2) Whether there was evidence Mr. Luebke reasonably relied on the Auto Club to fulfill its contractual obligations under the roadside assistance contract; (3) Whether the Auto Club failed to do so in a way that increased Mr. Luebke's risk of harm.

The case was sent back to the trial court and we will now have a jury answer these questions. I'll keep you posted on what happens on the CAALA list serve.

It is no fun to appeal bad trial court rulings. It is expensive, time consuming and nerve-racking. But when the result is published guidance on an important public-policy issue like contractual tort duties, it is all worth it.

Mauro Fiore, Jr., is a Los Angeles native who graduated from law school in 1998.