CASENOTE: COMPANY OWED INJURED MOTORISTS NO DUTY IN LOADING TRUCK OF DRIVER WHO WAS INTOXICATED AT THEIR LOADING DOCK AND ALLOWING HIM TO GET BACK ON ROAD

LAWATYOURFINGERTIPS ®
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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EFREN SANTOS et al., Plaintiffs and Appellants, v. TELESIS ONION COMPANY, INC., Defendant and Respondent.	F072346 (Super. Ct. No. 14CECG02637) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Yarra, Kharazi & Clason, H. Ty Kharazi; and George J. Vasquez for Plaintiffs and Appellants. Jacobson, Hansen & McQuillan, Steven M. McQuillen and Jason A. Decker for Defendant and Respondent.

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Plaintiff Efren Santos and his daughter were injured, and his wife and son were killed, in an accident near Fowler caused by a drunken truck driver after the truck driver loaded his truck at defendant Telesis Onion Company's loading dock in Five Points. Santos and his daughter sued Telesis Onion Company (Telesis) for negligence, claiming the driver worked for Telesis and it entrusted the truck to him.

On a defense motion for summary judgment, plaintiffs conceded the driver was not defendants' agent and they did not entrust the truck to him. On this basis, the trial court ruled that

Telesis had no duty to plaintiffs and their decedents. Further, on grounds of futility, the court denied plaintiffs' request for leave to amend their complaint to allege that, even if the truck driver was not an agent of Telesis and it did not entrust him with the truck, Telesis committed misfeasance (not mere nonfeasance) by not refusing to load the truck when the driver appeared to be drunk. In the court's view, Telesis had no duty to refuse to load the truck.

On appeal, plaintiffs argue that the trial court's ruling on duty was erroneous and they should have been allowed to amend their complaint. We disagree and will affirm.

FACTS AND PROCEDURAL HISTORY

The complaint was filed on September 9, 2014, on behalf of Efren Santos and his children Reynalda, Cesar, Eduardo, Maria E., Jose A., Efren J., and Juan M. Santos. Efren Santos sued on his own behalf and as successor to his deceased wife and son, Leticia Santos and Ricardo Santos. Named as defendants were Telesis, A2A Transportation, Inc., and Alonso Hernandez, the truck driver. Telesis is the only defendant that is a party to this appeal.

The complaint alleged that Reynalda was driving a car near Fowler on July 31, 2014, with Efren, Leticia and Ricardo as passengers. While the car was stopped at a stop sign, a tractor-trailer truck driven by Hernandez hit it from behind. Leticia and Ricardo were killed and Reynalda and Efren were injured. Hernandez had a blood alcohol concentration of 0.08 percent or more and was charged with vehicular manslaughter. The complaint further alleged that Hernandez was employed by defendants and defendants entrusted Hernandez with the truck.

The complaint alleged four causes of action: (1) motor vehicle negligence; (2) general negligence; (3) negligence per se; and (4) loss of consortium. The substance of each cause of action was that defendants were liable for the consequences of Hernandez's drunk driving because they entrusted the truck to him and were his principals. The complaint prayed for compensatory and punitive damages according to proof.

Telesis answered the complaint and filed a motion for summary judgment. With the motion, Telesis submitted evidence that it was not Hernandez's employer and the truck he drove did not belong to it. Instead, he worked for A2A Transportation, which was transporting onions for Telesis's buyer, Champion Produce Sales, Inc. The contract between Telesis and Champion required Champion to provide the transportation. Telesis had no role in choosing A2A Transportation to transport the onions. Telesis also submitted evidence that its employees did not notice anything about Hernandez that would have indicated his intoxication.

In their opposition to the motion, plaintiffs conceded it was undisputed that Telesis did not own the truck and Hernandez was not its agent. The opposition focused instead on attempting to show there were triable issues regarding whether or not Hernandez was drunk yet at the time he picked up the onions at Telesis's loading dock and whether or not his drunkenness was so apparent that Telesis's employees must or should have noticed it. Plaintiffs argued that even if Hernandez was not Telesis's employee and Telesis did not own the truck, Telesis was negligent in failing to recognize Hernandez's obvious drunkenness and failing to refuse to load his truck.

In support of their contention that Hernandez was obviously drunk when he appeared at the loading dock, plaintiffs submitted portions of the transcript of a deposition of Sergeant Scot Esmay. In the deposition, Esmay testified that on the day of the collision, he met another officer who had Hernandez in the back of his patrol car. When Hernandez got out of the car, he smelled of alcohol, looked drunk, and performed poorly on field sobriety tests; Esmay considered his drunkenness to be obvious. Hernandez told Esmay he had been drinking heavily at a barbecue the night before the collision and his last drink before the collision was at about 2:00 a.m. the

previous morning. Hernandez's blood was drawn and Esmay recalled being informed of test results showing his blood alcohol concentration to be 0.14 percent.

Plaintiffs also submitted an expert declaration by Stanley Dorrance, a criminalist. Dorrance relied on Esmay's testimony and on a police report. The police report stated that Hernandez had eight beers the night before and no alcohol after 2:00 a.m., and that he arrived at Telesis Onion at 10:30 a.m., caused the accident at 12:20 p.m., and had his blood drawn at 2:23 p.m. Dorrance provided two different calculations of Hernandez's likely blood alcohol concentration at the time when he was at the loading dock.

First, assuming a concentration of 0.04 percent at 2:23 p.m., Hernandez's blood alcohol concentration at the loading dock would have been between 0.10 percent and 0.12 percent. It is unclear where Dorrance got the 0.04 percent figure. Next, assuming a test result of 0.14 percent, as testified to by Esmay, Hernandez's blood alcohol concentration at the loading dock would have been between 0.20 percent and 0.22 percent. At the lower figure, an observer would probably think Hernandez was intoxicated, and at the higher figure Hernandez's intoxication would be clear.

To rebut Telesis's assertion that its employees found nothing unusual about Hernandez, plaintiffs submitted transcripts from depositions of two Telesis employees who said they were on duty on the day in question on the loading dock or in the office where drivers check in, but did not remember Hernandez at all.

Telesis filed written objections to plaintiffs' evidence. These included objections to hearsay statements in Dorrance's declaration and Esmay's deposition testimony. In its reply brief, Telesis argued that without this evidence, there was no basis for plaintiffs' claim that Hernandez became intoxicated before, rather than after, he picked up the onions at the loading dock. Further, Telesis argued that there was no authority for plaintiffs' contention that they owed a duty to plaintiffs even if Hernandez was not their agent and they did not entrust the truck to him.

Before the hearing, the trial court issued a tentative opinion. The court first indicated it would sustain Telesis's objections to the Dorrance declaration and the Esmay deposition on hearsay grounds. Dorrance, as an expert, could base his opinion in part on hearsay if the hearsay was reliable, but the court found it was not. Dorrance relied on statements by Esmay, which in turn were based on statements by Hernandez to the effect that he had stopped drinking the night before the day of the crash. The trial court pointed out that these were the self-serving claims of an arrestee with a motive to minimize his culpability.

Next, the court stated that because plaintiffs conceded Hernandez was not Telesis's agent and Telesis did not entrust the truck to Hernandez, plaintiffs had failed to demonstrate the existence of triable issues of material fact sufficient to support any of their causes of action. Each cause of action in the complaint required plaintiffs to prove that Telesis owned the truck, or employed Hernandez, or directed the transportation of the onions. Plaintiffs admitted they could not prove any of these points.

Finally, the court acknowledged plaintiffs' argument that Telesis was liable for loading Hernandez's truck when Hernandez was obviously drunk, even though he was not working for Telesis or driving its truck. The court indicated it would find this theory not to be encompassed within the complaint and therefore not a basis for denying summary judgment. Further, even if the court were to deem the theory to be within the complaint, it would hold that there was no authority to support it. The court stated that failing to stop Hernandez from driving drunk would be an instance of nonfeasance, not misfeasance, and there is no negligence liability for nonfeasance absent a special relationship between the defendant and the victim.

At the hearing on the motion, plaintiffs' counsel addressed the remark in the tentative that the complaint failed to state the claim that Telesis was liable for negligence even if Hernandez

was not its agent and it did not entrust the truck to him. Counsel argued that he should be allowed to amend the complaint to add this. The court took the matter under submission.

The court issued its ruling on June 25, 2015, adopting its tentative order as a final order. It added that plaintiffs were denied leave to amend their complaint as requested at the hearing. The amendment would be futile. Since Telesis did not employ Hernandez or entrust him with the truck, it had no duty to try to stop him from driving by refusing to load his truck even if he appeared intoxicated.

The court issued another order stating its ruling on July 10, 2015. The appellate record contains no indication that a judgment was ever filed, however.

DISCUSSION

I. Appealability

As far as we can tell, the trial court never actually entered judgment upon its order granting Telesis's motion, which itself is nonappealable. We have discretion to construe the order as a judgment for the defense, however, and will do so in the interests of justice and to avoid delay. (*Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 445.) No party suggests we should dismiss the appeal and no purpose would be served by dismissing it.

II. Standard of review

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arces* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 850-851, fn. omitted.) We view the facts in the light most favorable to the nonmoving party and assume that, for purposes of our analysis, his version of all disputed facts is correct. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159.) A moving defendant can establish its entitlement to summary judgment by either (1) demonstrating that an essential element of the plaintiff's case cannot be established, or (2) establishing a complete defense. (Code Civ. Proc., § 437c, subd. (o).)

III. Duty

The trial court ruled, and plaintiffs on appeal do not deny, that all the causes of action pleaded in their complaint are defeated by the undisputed facts that Hernandez was not driving the truck as Telesis's agent and Telesis did not own the truck or entrust it to Hernandez. This leaves only the theory plaintiffs sought leave to add by amendment: that Telesis had a duty to observe Hernandez's obvious drunkenness and refuse to load his truck, and Telesis is liable for negligence because it breached this duty.

In effect, the trial court found it would be futile to amend the complaint to state this theory for two reasons: (1) In light of the court's rulings on Telesis's evidentiary objections, there was no triable issue regarding whether Hernandez appeared drunk at the loading dock; and (2) Telesis's failure to try to stop Hernandez from driving by refusing to load his truck was a case of nonfeasance, and this means that in the absence of a special relationship (never alleged) between Telesis and plaintiffs or plaintiffs' decedents, or between Telesis and Hernandez, Telesis had no duty to plaintiffs or their decedents.

We agree with the second point. We need not rule on the first, or on the associated evidentiary objections.

Basic principles regarding misfeasance and nonfeasance in negligence cases are discussed in *Weirum v. RKO General, Inc*. (1975) 15 Cal.3d 40 (*Weirum*). In that case, a radio station conducted a promotion in which members of a largely teenage audience were encouraged to drive around the Los Angeles area and receive prizes by being the first to meet a disc jockey in various locations.

A motorist was killed when two minor listeners raced against each other to reach a freeway exit first, forcing the victim off the road. The victim's family sued the radio station for negligence and a jury awarded damages. (*Id.* at pp. 43-45.)

The California Supreme Court considered whether a defense judgment should have been entered on the ground that the plaintiffs' claim was based on mere nonfeasance in failing to control the behavior of negligent third parties (i.e., the minor drivers). (*Weirum, supra*, 15 Cal.3d at pp. 48-49.) The court stated that the relevant principles are laid out in sections 314 and 315 of the Restatement Second of Torts. These sections provide:

> "§ 314. Duty to Act for Protection of Others
>
> "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose on him a duty to take such action."
>
> "§315. General Principle
>
> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> "(b) a special relation exists between the actor and the other which gives the other a right to protection." (Rest.2d Torts, §§ 314, 315.)

The *Weirum* court pointed out that the rule in section 315 is "merely a refinement" of the principle in section 314. If there is no duty in general to take affirmative action to aid or protect another, then there also is no duty to take action to control a third party in order to aid or protect another. (*Weirum, supra*, 15 Cal.3d at p. 49.)

The court further explained its understanding of the meaning of these sections in the following way:

> "This doctrine is rooted in the common law distinction between action and inaction, or misfeasance and nonfeasance. Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. As section 315 illustrates, liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. If, on the other hand, the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care . …" (*Weirum, supra*, 15 Cal.3d at p. 49.)

Applying this doctrine, the Supreme Court held that the radio station had a duty to the victim. "Here, there can be little doubt that we review an act of misfeasance to which section 315 is inapplicable. Liability is not predicated upon [the] defendant's failure to intervene for the benefit of decedent but rather upon its creation of an unreasonable risk of harm to him." (*Weirum, supra*, 15 Cal.3d at p. 49.)

The same principles were applied with the opposite result in *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275 (*Baldwin*).

There, the plaintiff was one of a group of underage college students who had been drinking in their dormitory when they decided to get in three cars and have a race. A collision resulted and the plaintiff was paralyzed. She sued the trustees of the university and the dormitory advisors for negligence. (*Id.* at pp. 278-279.) The dormitory advisors allegedly knew of the drinking and failed to stop it, and the trustees allegedly failed to enforce dormitory contract provisions prohibiting drinking on campus. (*Id.* at pp. 279-280.) The trial court sustained the defendants' demurrer. (*Id.* at p. 278.)

This court affirmed. Citing *Weirum*, the court stated that the plaintiff's claims averred nonfeasance—the defendants did not stop the drinking—rather than misfeasance. It followed that liability could attach only if there was a special relationship between the plaintiff and the defendants or between the defendants and the drivers. (*Baldwin, supra*, 123 Cal.App.2d at p. 281, citing *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435, the court observed that when a claim of negligence involves a contention that a defendant should have controlled the behavior of a third party, that claim also can succeed only if there was a special relationship. (*Baldwin, supra*, at pp. 282-283.) After analyzing the dormitory contract, contemporary standards regarding the personal independence of college students, and other matters, the court concluded there was no special relationship. (*Id.* at pp. 283-291.)

In this case, we agree with the trial court's conclusion that the facts alleged by plaintiffs would, if proved, be a case of nonfeasance, not misfeasance. The claim is that Telesis failed to observe Hernandez's intoxication and take appropriate steps to stop him from driving while in that condition. This failure is an omission, not an action. By failing to stop or discourage Hernandez from driving away, Telesis may have failed to protect the public from a danger, but it did not create the danger. Instead, it only failed to undertake a beneficial intervention. Since no special relationship has been alleged, it follows that Telesis is not subject to negligence liability for the consequences of its omission.

Plaintiffs argue there was action, not inaction, because Telesis loaded Hernandez's truck. This is not persuasive. Plaintiffs do not claim there was anything negligent about the manner in which the truck was loaded. Plaintiffs say that if Telesis had refused to load the truck, Hernandez would either have had to wait until he was sober to drive or would have had to call his dispatcher to say Telesis was refusing to load his truck because he was drunk. This argument only shows, however, that the essence of plaintiff's claim is that Telesis failed to take steps that could have stopped Hernandez from driving drunk. The argument also is illogical, because there is no reason to believe Hernandez would have remained parked at the loading dock or would have called his employer to report himself if Telesis had refused to load the truck. Plaintiffs have not claimed that by loading the onions, Telesis actively *encouraged* Hernandez to drive drunk.

Some of the discussion in a comment to section 314 in the Restatement Second of Torts helps to show that the rule of nonliability for nonfeasance applies in this case. The comment explains that this rule only applies if the danger to which the plaintiff is exposed "is not due to any active force which is under the [defendant's] control," and if it is due to such a force, then the

defendant's failure to stop the force is treated as action by the defendant, not inaction. (Rest.2d Torts, § 314, com. d, p. 117.) By way of illustration, the comment poses the case of a trespasser in a freight yard who falls in the path of a slow-moving train. A bystander who sees this and could signal the engineer in time to save the trespasser, but who fails to do so, would not be liable, because the train is not a force under the bystander's control.

On the other hand, if a railroad employee also saw in time and could have signaled the engineer, but did not, the railroad would be subject to liability for negligently failing to protect the victim from a force under its control. (*Id.*, illus. 3, pp. 117-118.) In the case before us, Hernandez's drunk driving, which was initiated by him before he stopped at the loading dock and continued after he left, was not a force under Telesis's control, so Telesis is not liable for failing to stop the force even if it could have done so. Telesis's situation is comparable to that of the bystander, not the railroad.

Plaintiffs rely on *Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359 (*Pedeferri*). In *Pedeferri*, a motorist and a police officer were at the side of a highway when an intoxicated driver struck them with a pickup truck, killing the motorist and injuring the officer. The intoxicated driver had become distracted and steered off the highway when two motorcycles, which had been loaded into the bed of the truck by employees of a store, shifted. The Court of Appeal reversed a plaintiffs' verdict for another reason, but held that the store owner did have a duty to the victims. In the court's view, "a commercial vendor owes a duty of care to persons on or near the roadways who are injured as a result of the vendor's negligence in loading and securing cargo in a way that distracts the vehicle's driver irrespective of whether the cargo remains in the vehicle." (*Id.* at p. 366.) On this basis, plaintiffs maintain that loading a vehicle is action rather than inaction and therefore supports a duty of care to people injured by the vehicle after it is loaded.

Pedeferri is inapplicable because, as we have already mentioned, there is no claim here that there was any negligence in the manner in which Telesis loaded Hernandez's truck. There was never any claim that Hernandez caused the accident partly because anything related to the loading of the truck caused him to be distracted. *Pedeferri* stands for the proposition that loading a truck negligently can give rise to liability for injuries resulting from the negligently-loaded cargo. It does not address the question of whether failing to refuse to load a truck in the hope of discouraging its drunken operator from continuing to drive it constitutes misfeasance or nonfeasance for purposes of the duty analysis.

Plaintiffs' briefs on appeal include a discussion of the factors our Supreme Court listed in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) for determining when conduct gives rise

to a duty of care. There is no need to address these factors in this case, however, because they do not apply when there is no conduct to which liability could attach, i.e., in cases of nonfeasance where no special relationship is alleged. To put the point another way, there is no need for consideration of the *Rowland* duty factors when it is clear for a reason independent of those factors that no duty exists.

We are aware that the no-duty rule at issue in this case has sometimes been criticized as harsh to plaintiffs. The Restatement authors put it this way:

> "The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law." (Rest.2d Torts, § 314, com. c., p. 117.)

The authors express the further view that extreme and outrageous instances will in the long run produce case law making inroads on the rule. (Rest.2d Torts, § 314, com. c., p. 117.) So far as the present case is concerned, however, we believe the rule conforms to common expectations, and it is not the role of the courts to change such settled principles. We do not expect, for instance, that a store owner observing a customer entering the store drunk must on pain of liability try to stop the customer from getting back in his car and leaving when he is through shopping, even though the dangerousness of his leaving by car may be clear. In light of this, we do not see what purpose would be served by imposing a requirement that the store owner refuse to sell goods to the customer or refuse his request to carry his purchases to his car. Such a refusal might reflect well on the store owner, but it would not reduce the likelihood of the customer continuing on his way by car. The present case is similar.

On April 13, 2016, plaintiffs filed a request for judicial notice of court documents indicating that Hernandez has pleaded no contest to criminal charges arising from the collision, and, in doing so, has waived his privilege against self-incrimination. Plaintiffs argue that this waiver removes the only obstacle to Hernandez being compelled to testify regarding his degree of intoxication at the loading dock. Plaintiffs contend that the availability of this testimony shows their request for leave to amend their complaint is not futile.

We have held that amending the complaint would be futile because Telesis had no duty to try to stop Hernandez from driving even if his intoxication was apparent. The documents submitted by plaintiffs are judicially noticeable (Evid. Code, § 452, subd. (d)), but they do not affect this analysis.

The factors are: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability, cost, and prevalence of insurance for the risk involved. (*Rowland, supra*, 69 Cal.2d at p. 113.)

DISPOSITION

The judgment is affirmed. The request for judicial notice filed on April 13, 2016, is granted. Respondents are awarded costs on appeal.

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SMITH, J

WE CONCUR:

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GOMES, ACTING P.J.

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KANE, J.