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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARIANA BERNICE CABRERA-MEDRANO, a Minor, etc., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B240990 (Los Angeles County Super. Ct. No. BC445382)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Flanagan, Unger, Grover & McCool, Clinton T. McCool; Law Offices of Bruce Wernik and Bruce A. Wernik for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Amy Jo Field, Supervising City Attorney, and Blithe Smith Bock, Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

When the decedent, Flor Medrano, was threatened by her ex-boyfriend, Los Angeles police officers undertook an investigation to find him that included inspecting the outside of Medrano's apartment. The investigation, however, failed to reveal that Medrano's ex-boyfriend had secretly gained access to her apartment. When Medrano returned home, he killed her.

Medrano's minor daughter, plaintiff and appellant Mariana Bernice Cabrera-Medrano, by and through her guardian ad litem, sued the City of Los Angeles (City) for negligence. The trial court granted the City's motion for summary judgment on the ground it owed no duty of care to plaintiff because a special relationship had not been formed between Medrano and the police. Plaintiff appeals from the judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.[1]

On the evening of November 11, 2009, Los Angeles Police Officers Hugo Fuentes, Jr. and Tony Im were patrolling in the Wilshire area when they were called back to the station to investigate criminal threats made against Medrano by her ex-boyfriend, Daniel Carlon. Since they broke up after dating for three months, Carlon had been continuously threatening Medrano. The day before, November 10, Carlon tried to break into Medrano's apartment. Medrano let him in because her young daughter wanted to see him. He raped Medrano, who thought he was hiding a gun beneath a pillow. Medrano told Im she was also scared because Carlon was wanted for murder in Mexico.

[1] Following the usual standard of a review from the entry of a summary judgment, we construe the facts in the light most favorable to plaintiff, the party who opposed the motion for summary judgment. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 3, fn. 1; *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768.)

While Medrano was at the police station on November 11, 2009, Carlon sent text messages to Medrano. One claimed he was in her apartment and was going to burn " 'the house down' "or words to that effect.[2] In response, Officers Fuentes and Im and Detective Edward Ruffalo went to Medrano's apartment in an unmarked police car. Medrano's building had six apartments, three on the first floor and three on the second. Medrano's apartment was the middle apartment on the second floor. Her front door faced north, and there was no door on the south/rear side of her apartment. Her windows were approximately 30 feet from the floor. The pitched roof was approximately 35 feet from the ground. Ruffalo saw no "viable ways" to access the rear side of Medrano's apartment from the ground floor.

Because he was in "detective plainclothes,"[3] Ruffalo approached the apartment alone so as to not alert Carlon, if he was in the area, to police presence. The lights were off in Medrano's apartment. The front window had security bars, and the front door had an outer metal security door. Ruffalo saw no signs of forced entry at the front door, and he turned the security door knob to ensure the dead bolt was engaged.[4] Through a space between the window blinds, Ruffalo used his flashlight to look inside the apartment. He did not go inside, as Medrano had the only key to the apartment. There being no evidence of a crime, Ruffalo and the officers returned to the police station. Ruffalo reported what he found to Medrano, namely, the front door was locked, the security bars were secure, there was no fire damage, and it didn't appear that anybody had been there or tried to force entry.

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[2] The text was " 'I am inside your house and I am going to burn all of your stuff.' "

[3] Ruffalo wore a black polo shirt with a police department badge and "Los Angeles Police Department" embroidered on it.

[4] The front door, however, was ajar 4 to 5 inches.

While the officers were gone, Carlon called Medrano about 25 to 30 times over a 40-minute period. He told her he was at her mother's home or buying drugs and that if Medrano called the cops he would get a knife and stab her and shoot it out with the cops, who he would kill. Officers Im and Fuentes told Medrano to get Carlon to meet her at a laundromat so they could arrest him, but Carlon, who Medrano thought was suspicious she had contacted police, refused. Inglewood police officers went to Carlon's home, but did not find him. Officers Im and Fuentes advised Medrano not to answer Carlon's calls and to get a restraining order.

After spending approximately three and one-half hours at the police station, Medrano wanted to go home. Although the officers suggested she instead stay at a shelter, with family or a friend or even in the police lobby, Medrano refused. She did, however, agree to leave her daughter at her mother's house. Because she was afraid Carlon would be mad if he saw her with the police, Medrano also refused Im's offer to follow her home in a marked police car. She felt she would be safe at home because she had security bars on her front window, a front security door, and she had the only key.

According to a pre-arranged plan, Officers Im and Fuentes followed Medrano home in an unmarked police vehicle.[5] Medrano went through a McDonald's drive-thru, because the officers wanted Carlon, if he were watching, to think Medrano was behaving normally and that the police were not around. The officers also did not want to reveal themselves, because Medrano said that if Carlon found out she had called the police he would kill her. From their car, the officers watched Medrano park her car and enter her second floor apartment. They saw the lights come on. For about 72 minutes, the officers watched Medrano's front door, but they did not see or hear anything unusual and they did not hear any radio calls relating to Medrano.

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[5] The watch commander, Lieutenant Nicholas Barbara, advised Detective Ruffalo, who did not accompany Officers Im and Fuentes in following Medrano to her apartment, to "secure" the apartment and to make sure it was "swept."

At approximately 11:20 p.m., Officer Fuentes called Medrano to see how she was doing. Over the next 10 minutes Fuentes made four calls to her cell phone, but each call was disconnected before any conversation occurred. At about 11:35 p.m., Fuentes received a call from Medrano's cell phone, but it was disconnected. Fuentes's call back to her was also disconnected. At 11:36 p.m., Fuentes made a sixth call to Medrano, and this time a connection was made and he heard a woman screaming. Fuentes called for backup, and he and Im ran to the apartment.

Looking through an opening in the blinds, Im did not see or hear anything unusual, so he told Fuentes to cancel the back-up request. But when they heard screams coming from the apartment, they made another back-up request at 11:38 p.m. Im saw Medrano come into the living room with blood oozing from her shirt. Carlon followed her with a knife. Pointing his gun through the opening in the blinds, Im repeatedly told Carlon to drop the knife. Carlon stabbed Medrano, who fell and crawled towards the front door. When Carlon continued to move towards Medrano with the knife raised, Im shot Carlon once.

As Fuentes monitored Carlon, Im tried to forcibly enter the apartment, but he had to use a crowbar to force open the security door. Medrano and Carlon died. Carlon apparently had climbed onto the roof and entered the apartment through a bathroom window.

II. Procedural background.

In September 2010, plaintiff filed a complaint alleging a cause of action for negligence against the City.[6] The City filed a motion for summary judgment supported by the declarations of Officers Fuentes and Im and Detective Ruffalo. The City argued it owed no duty to plaintiff, because it created no special relationship with her mother, Medrano. Plaintiff opposed the motion for summary judgment on the ground that the officers created a special relationship with Medrano.

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[6] The complaint also alleged a cause of action for premises liability against the owners of the property where Medrano lived, but plaintiff dismissed the complaint against them with prejudice and they are not a party to this appeal.

On March 15, 2012, the trial court entered judgment in favor of the City based on its conclusion that plaintiff could not establish an element of the cause of action, duty, because a special relationship was not created between the City and Medrano. Plaintiff appealed.

DISCUSSION

I. Summary judgment was properly granted in the City's favor.

A. *Standard of review of summary judgment.*

"A defendant moving for summary judgment bears the burden of showing that a cause of action has no merit because plaintiff cannot establish an element of the claim or because defendant has a complete defense. If the defendant makes this showing, the burden then shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; Code Civ. Proc., § 437c, subds. (a), (p)(2).)" (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741.) Summary judgment therefore is " 'properly granted where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision granting a summary judgment de novo. In doing so, we liberally construe all conflicting facts in the light most favorable to the party opposing the motion. [Citations.]' [Citation.]" (*Baudino v. SCI California Funeral Services, Inc.* (2008) 169 Cal.App.4th 773, 781.)

B. *A special relationship was not created between Medrano and the City.*

Although law enforcement officers owe duties to the public at large, they generally take on no greater obligation to individuals. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23-24 & fn. 3; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1129; *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 704; *Von Batsch v. American Dist. Telegraph Co.* (1985) 175 Cal.App.3d 1111, 1121-1122 (*Von Batsch*).) In most instances, this general rule bars recovery when plaintiffs who have been injured by the criminal act of a third party claim that timely assistance from law enforcement officers would have prevented their injuries. (*Zelig*, at p. 1129.)

A duty of protection or assistance may arise, however, from a special relationship created by an officer's words or conduct. (*M.B. v. City of San Diego*, *supra*, 233 Cal.App.3d at pp. 704-705; *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1129.) A special relationship between the police and an individual may be found in a "few narrow circumstances": (1) Where the police made specific promises to undertake a particular action and failed to do so; (2) where the police created or increased a peril by affirmative acts; or (3) where the police voluntarily took affirmative steps to aid the individual and by the acts lulled the individual into a false sense of security. (*M.B.*, at pp. 704-705; *Von Batsch*, *supra*, 175 Cal.App.3d at p. 1122 ["absent a special relationship creating a special duty, the victim of a crime that the police might have prevented cannot recover"].)

Plaintiff contends that there was a triable issue of material fact that a special relationship between the officers and her mother was created based on all three circumstances.

1. Specific promises.

A special relationship may be created where the police make specific promises or assurances, express or implied, that turn out to be false and endanger the plaintiff. (*Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938; *Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6, 10.) In *Morgan*, for example, the police promised to warn the decedent if the man who had threatened her was released from prison. When the man was released, the police failed to warn the decedent, and he killed her. (*Morgan*, at p. 941.) These facts were sufficient to show that a special relationship was created between the decedent and the police.

But where the police make no promise to warn or to protect the victim, a special relationship is not created, even if the victim asked the police for help. (See, e.g., *Hartzler v. City of San Jose*, *supra*, 46 Cal.App.3d 6 [victim who reported her husband was coming to kill her was told to call back when he arrived; he did kill her, but the police owed no duty to the victim because there was no indication the police promised to protect her]). Recovery has thus been denied for injuries caused by the failure of police

personnel to respond to requests for assistance, the failure to investigate properly or to investigate at all, "where the police had not induced reliance on a promise, express or implied, that they would provide protection." (*Williams v. State of California*, *supra,* 34 Cal.3d at p. 25; see also *M.B. v. City of San Diego, supra,* 233 Cal.App.3d at pp. 705-706 & fns. 1-4 [listing case examples].)

Absent in this case was a promise made by the officers to protect Medrano. Unlike the specific promise the officer in *Morgan* made to warn the victim, neither Officers Fuentes and Im nor Detective Ruffalo promised, for example, they could protect Medrano from Carlon. Plaintiff concedes that, at most, any "promise" was implied by the officers' "continual series of advice," including indications the apartment was secure and Carlon was not in the area. But advice is not a promise. All the officers did was advise Medrano that her apartment, when Ruffalo checked it, appeared secure because there were no signs of forced entry or of Carlon. They did not promise it was secure or guarantee her safety.

Von Batsch found that a special relationship was not created between the victim and officers based on similar facts. In *Von Batsch*, a burglar alarm service received an alert for the victim's business property. (*Von Batsch*, *supra*, 175 Cal.App.3d at p. 1116.) Deputies investigated the premises and reported no intruders. After alarm service employees inspected the outer premises, including the doors and windows, they too reported no break-in at the premises. Neither the deputies nor the alarm service employees inspected the roof, through which burglars had gained access to the premises. When the victim later entered the business, the intruders killed him. (*Id.* at p. 1117.)

The court found that the officers' investigation did not create a special relationship. (*Von Batsch, supra,* 175 Cal.App.3d at p. 1122.) "The officers did not promise that they would or had checked the roof. Nor did the officers, by reporting that they had investigated the premises and there were no intruders, undertake to guarantee the safety of or offer future protection to decedent or any other employee who might arrive for work three hours later." (*Id.* at p. 1124.)

By reporting that they had investigated the premises and seen no sign of Carlon, the officers here did not similarly guarantee or promise Medrano she was safe. In fact, their actions belied any such promise. They advised Medrano not to answer Carlon's calls, to get a restraining order, and not to go home but to stay at a shelter, with family or at the police station. They escorted Medrano to her apartment in an unmarked car and did not walk Medrano to her apartment because Medrano did not want Carlon to see her with police. Outside, Officers Fuentes and Im watched the apartment for over an hour before calling Medrano to check on her. There was no reason for the officers to engage in these actions unless they and Medrano thought that Carlon might be in the area.

We therefore see no triable issue of material fact as to the existence of a special relationship based on any promise to Medrano that she was safe from Carlon.

2. Affirmative acts that increased the peril.

Where an officer's conduct placed the victim in a dangerous position and created a serious risk of harm to which the victim would not otherwise have been exposed, the officer owes the victim a duty of care. (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 717.) In *Lugtu*, a speeding driver complied with an officer's order to stop in the center median area of the highway. (*Id.* at p. 708.) While the driver's car was parked in the median area, another car struck it, injuring the occupants of the car stopped by the officer. (*Id.* at p. 709.) *Lugtu* concluded that the officer owed an obligation to the driver not to expose him to an unreasonable risk of injury by a third party.

The failure to investigate a crime or a potential crime that eventually occurs, however, is not conduct that contributes to the peril to the victim. *Von Batsch*, for example, found that officers, by failing to inspect the roof or otherwise investigate premises for intruders, did not create the peril to the decedent or take any affirmative action which contributed to, increased, or changed the risk which would have otherwise existed. "At most they merely failed to eliminate the danger of unknown intruders." (*Von Batsch, supra*, 175 Cal.App.3d at p. 1124; see also *Davidson v. City of Westminster* (1982) 32 Cal.3d 197; *M.B. v. City of San Diego, supra,* 233 Cal.App.3d 699.)

Similarly, in *M.B.*, the victim told the police she suspected "Johnson" of burglarizing her home. (*M.B. v. City of San Diego*, *supra*, 233 Cal.App.3d at p. 702.) The police advised her to get mace or a stun gun. When Johnson then made obscene calls to the victim and threatened to return to her house, the police advised her, " 'they never do.' " (*Id.* at pp. 702-703.) Two days later, Johnson returned to the victim's home and raped her. *M.B.* rejected the victim's claim that a special relationship existed between herself and the officers: "The police did not do anything which increased her peril. Nothing that they did made it more likely Johnson would return or harm her, e.g., they did not increase Johnson's ability or encourage him to return or harm her nor did they increase her vulnerability. Rather, the essence of M.B.'s complaint is that the police failed to take affirmative acts—failed to adequately investigate, to uncover Johnson's prior record, to warn her Johnson might return. These failures by the police did not *increase* the risk Johnson would decide to return to her house and harm her; they merely failed to *decrease* the risk. The police actions resulted in maintaining the status quo." (*Id.* at p. 706.)

Similarly, in *Davidson*, officers had a laundromat under surveillance because someone had been stabbed there the night before, and there had been three other stabbings at the same or nearby laundromats. (*Davidson v. City of Westminster*, *supra*, 32 Cal.3d at p. 201.) While the laundromat was under surveillance, the victim was stabbed. Although the police were watching the suspect, they did not warn the victim. Still, the court found that the officers did not create the peril to the victim because "[t]heir conduct did not change the risk which would have existed in their absence[.]" (*Id.* at p. 208.)

This case is like *Von Batsch*, *M.B.*, and *Davidson* and not like *Lugtu*. In *Lugtu*, the officer, by directing the driver to stop in the center median area, placed the driver in a dangerous position, potentially exposing him to an unreasonable risk of danger from passersby. Although plaintiff here contends that the officers took similar "affirmative steps" placing Medrano in a dangerous position, the officers merely investigated the premises for an intruder and reported finding none. They continued their investigation by

following Medrano to her apartment and watching it after she went in. This investigation, even if faulty, did not create or increase the peril to Medrano. The peril to Medrano was from Carlon. The officers' failure to eliminate the peril of Carlon did not create a duty of care to Medrano. (*Von Batsch, supra*, 175 Cal.App.3d at p. 1124; *M.B. v. City of San Diego, supra,* 233 Cal.App.3d at p. 706.)

3. Creation of a false sense of security.

Plaintiff's last argument is the officers, by their actions, vested such a sense of security in Medrano that she returned to her apartment where, unbeknownst to her, Carlon waited. That Medrano felt she could return to her apartment does not, however, establish that the officers gave her a false sense of security. Rather, there must be evidence she detrimentally relied on the officers' conduct or statements made by them "which induced a false sense of security and thereby worsened her position." (*Williams v. State of California, supra,* 34 Cal.3d at p. 28.)

Von Batsch again is instructive. As did the officers in *Von Batsch*, Detective Ruffalo here examined Medrano's premises and looked into the apartment, but he did not inspect the roof or go inside. As did the officers in *Von Batsch,* Ruffalo reported finding no signs of Carlon or of forced entry. Unfortunately, Carlon, like the intruders in *Von Batsch*, at some unknown time (perhaps after the inspection but before Medrano came home) gained access to the apartment, it is believed by climbing onto the roof and going in through a bathroom window.

Undoubtedly, the officers' investigation comforted Medrano to some degree, and she, like the unsuspecting victim in *Von Batsch*, entered her apartment thinking it was secure. Plaintiff thus focuses on the fact that the apartment was not secure. But even if the officers should have rechecked the apartment before Medrano entered it, the crucial point is the officers made no statement or action that could have led Medrano to reasonably believe Carlon was not a danger to her. There is no evidence that an officer promised to go into Medrano's apartment and check it. In fact, Medrano knew that the officers did not check the interior of her apartment before she entered it, as she refused to

be escorted home with a marked police car, fearing that Carlon would be watching her. She entered her apartment alone, as Officers Im and Fuentes waited outside.

That the officers were unable to protect Medrano is a tragedy, but their inability to do so does not give rise to any liability under a negligence cause of action.

II. Negligent misrepresentation.

As an alternative to her negligence cause of action, plaintiff seeks leave to amend her complaint to allege negligent misrepresentation.

We need not decide whether plaintiff has stated facts sufficient to constitute the cause of action because she did not seek leave to amend the pleadings before the hearing on the summary judgment motion to include such a claim. "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.) *Distefano* thus rejected the plaintiff's implied contention he could seek leave to amend his pleading for the first time on appeal after the grant of a summary judgment.

Although plaintiff's claim here is procedurally barred, the undisputed facts would, in any event, preclude it. To establish a cause of action for negligent misrepresentation involving a risk of physical harm, the plaintiff must show "(1) the police had a duty to exercise reasonable care in giving . . . information . . . ; (2) the police gave . . . false information with a degree of culpability at least equal to negligence; (3) [the victim] actually and reasonably relied on the alleged misrepresentations; and (4) [the victim's] reliance proximately caused the harm." (*M.B. v. City of San Diego, supra,* 233 Cal.App.3d at p. 708.)

In *Garcia v. Superior Court* (1990) 50 Cal.3d 728, for example, the plaintiff, after her demurrer was sustained, was granted leave to amend to state the cause of action on appeal based on these facts: Johnson was released from prison after serving time for murdering his wife. He began a relationship with Morales, against whom he began a

" 'campaign of violence' " after they broke up. (*Id.* at p. 732.) Johnson's parole officer initially placed Johnson in custody for psychiatric observation but later tried to reconcile the relationship between Johnson and Morales. In response to Morales's fear that Johnson wanted to harm her, the parole officer assured Morales of her safety. Johnson later killed Morales. (*Id.* at p. 733.)

M.B. distinguished *Garcia*. In *M.B.*, the victim reported that a man burglarized her home and made obscene calls to her threatening to return. Although a police officer advised M.B. that " 'they never do,' " the man returned and raped her. (*M.B. v. City of San Diego*, *supra*, 233 Cal.App.3d at pp. 702-703.) Because the officers gave only generalized assurances and were not making representations about what the man would do based on special knowledge they had about him, a cause of action for negligent misrepresentation could not be stated.

Plaintiff would amend the complaint here to allege that the officers "communicated messages" to Medrano that Carlon was not in her apartment. She would not have entered her apartment had they indicated it was unsafe to do so. But the officers gave, at most, "generalized assurances" about Medrano's safety; namely, Detective Ruffalo saw no sign of forced entry or of Carlon at her apartment. They did not tell her, for example, that Carlon was not in the area or that she was safe from him or that he was not in her apartment. Because Medrano had the only key to her apartment and because she did not give that key to Ruffalo, she must have known that the officers did not enter her apartment.[7] The officers' investigation may have led Medrano to believe she could go home, but officers simply did not represent that she would be safe if she did so.

[7] Even if Ruffalo had searched the interior of Medrano's apartment, it is unknown at what time Carlon gained access to the apartment. He could have entered the apartment after Ruffalo conducted his search.

Also, given the undisputed facts, Medrano could not have reasonably relied on any representation she was safe from Carlon. The officers had tried, but failed, to locate him and to lure him out. They advised Medrano to stay somewhere other than her apartment, managing to convince her at least to leave her daughter with her mother. Medrano herself told the officers she didn't want them to follow her home in a marked car because she didn't want Carlon to know she had reported him to the police. Medrano agreed to have Officers Fuentes and Im keep watch outside her apartment.

Given these undisputed facts, the complaint cannot be amended to state a cause of action for negligent misrepresentation.

DISPOSITION

The judgment is affirmed. The City is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.