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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WESLEY YU et al., Cross-complainants and Appellants, v. GEICO GENERAL INSURANCE COMPANY et al., Cross-defendants and Respondents.	B270303 (Los Angeles County Super. Ct. No. BC555022)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Law Offices of Roger C. Hsu, Roger C. Hsu, and Joseph M. Liu for Cross-complainants and Appellants.

Gilbert, Kelly, Crowley & Jennett, Freeman Mathis & Gary, Timothy W. Kenna, Rebecca J. Smith, and Kristin A. Ingulsrud for Cross-defendant and Respondent Venkat Iyer.

Tharpe & Howell, Charles D. May, and Eric B. Kunkel for Cross-defendant and Respondent GEICO Insurance Company.

Wesley and Julia Yu appeal from a judgment of dismissal in favor of Venkat Iyer and GEICO General Insurance Company.

In 2014, Iyer drove his car into the Yus' parked car. His insurer, GEICO, agreed to adjust the Yus' claim and pay for repairs. The Yus took their car to Final Touch Collision Center, which performed some work but then demanded more for the repairs than GEICO would pay. GEICO refused to pay, and Final Touch sued the Yus to foreclose on a garageman's lien. The Yus incurred attorney fees to resist foreclosure.

The Yus cross-complained against Iyer and GEICO for negligence, seeking to recover the attorney fees they incurred defending against the Final Touch lawsuit. They alleged Iyer and GEICO were liable for the fees pursuant to the "tort of another" doctrine, which holds that when a tortfeasor's negligence causes the victim to become involved in litigation with a third party, the victim may recover from the tortfeasor attorney fees incurred in that litigation.

After the Yus' opening statement at trial but before any evidence was presented, the trial court granted Iyer's and GEICO's motions for nonsuit on the grounds that Iyer's negligent driving did not proximately cause the Final Touch lawsuit, and assuming GEICO was negligent, it owed no duty to the Yus because it was not their insurer.

We conclude nonsuit was properly granted, as neither Iyer nor GEICO owed the Yus any tort duty in connection with the Final Touch lien. Accordingly, we affirm the judgment.

BACKGROUND

Because the trial court granted nonsuit upon the Yus' opening statement, before any evidence was presented, we assume for purpose of appeal the truth of facts adduced in that statement, viewing them in a light most favorable to the Yus. (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347; see *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

On April 15, 2014, Iyer negligently drove his car into a parked 2013 Hyundai Tucson leased by the Yus. The Yus were not present, and no one was injured. Iyer left a note acknowledging fault and indicating he was insured by GEICO. Wesley Yu (sometimes hereafter simply Wesley or Yu) notified GEICO of the accident and obtained a claim number. GEICO promised Yu it would "handle the claim and pay for all the damages that Wesley sustained." Yu then had the vehicle towed to Final Touch's facility.

Yu and Final Touch entered into an agreement in which Final Touch promised to inspect Yu's vehicle for an estimated $5,391, comprising $3,500 for "tear down," $466 for "tow," $250 for "load & unload," $200 for "debris clean up," $200 for "non-driveable/moveable," $150 for "wrap and store components," $175 for "dolly fee," and $450 for "transfer to & from offsite storage." Yu authorized the work and acknowledged Final Touch would place a lien on the car to secure the cost of inspection and repairs.

Yu also agreed that should he "not pick up [the] vehicle within 48 [hours] of notice of completion or stoppage of work, additional storage charges [would] accrue at $125.00 per day. Should no repairs be performed . . . for whatever reason," Yu agreed "storage charges [would] accrue at $125.00 a day for each day [the] vehicle [was] in the shop."

Three days after the accident, on April 18, 2014, GEICO inspected the car and approved and paid $7,575.31 for the pre-repair inspection. (It is unclear why GEICO paid approximately $2,000 more than Final Touch estimated such an inspection would cost.)

Nineteen days later, on May 7, 2014, Final Touch requested that GEICO reinspect the car. GEICO did so, and deemed it to be a total loss. Final Touch then submitted an itemized list of charges to GEICO totaling $5,470. GEICO disputed some of the charges as being for unnecessary or unperformed services. It authorized only $2,422.29 and requested a refund from the $7,575.31 it had already paid. (Further details of the dispute between GEICO and Final Touch are not germane to this appeal.)

Final Touch refused to refund any money to GEICO, and instead demanded an additional payment to cover storage costs that had been accruing at a rate of $125 per day. Final Touch also claimed a garageman's lien on the vehicle, refused to release the car until storage charges were paid (Civ. Code, § 3068), and sued the Yus and Hyundai Lease Titling Trust (Hyundai) to enforce its lien.

The Yus resisted enforcement of the lien and cross-complained against Final Touch for breach of contract and conversion, alleging Final Touch overcharged for repairs and deliberately delayed repairs to drive up storage charges. They cross-complained against their own insurer, State Farm Insurance Company, for breach of contract, alleging State Farm owed a duty to pay for repairs after GEICO abandoned their claim. Finally, the Yus cross-complained against Iyer and GEICO, alleging their negligence caused the Yus to incur attorney fees prosecuting their cross-complaint and defending

against the Final Touch lien foreclosure complaint. (It is not clear from the record why the Yus personally resisted the Final Touch foreclosure action, as it was undisputed they were fully insured by State Farm, the car was a total loss, and if recovered, the car would belong to whatever insurer recovered it, not to the Yus.) State Farm subsequently paid off all claims against the Yus, including all amounts claimed by Hyundai, and State Farm and Hyundai were dismissed from the lawsuit.

Although in their cross-complaint the Yus nominally sought reimbursement from Iyer and GEICO for legal fees they incurred defending against Final Touch's lien enforcement action, they failed to allege any facts to support such a claim. For example, they alleged Iyer drove negligently and damaged their car, but failed to allege how his negligent driving caused the Final Touch lawsuit.

As against GEICO, the Yus alleged under a cause of action captioned "Negligence" that GEICO promised "it would pay for the repair of the damages," and Yu, relying on the promise, transported the vehicle to Final Touch. Despite the caption, the Yus never actually asserted in their cross-complaint that GEICO was negligent. They alleged only that it "abandoned the[ir] claim leaving a $7,197.70 unpaid balance," then Final Touch sued to enforce a garageman's lien, which damaged the Yus in the form of defense legal fees. The Yus alleged no facts establishing that GEICO owed them any tort duty, nor any facts indicating the insurer's dealings with Final Touch fell below a standard of care.

The parties agreed to proceed to trial on the cross-complaint as written, and to try the Yus' negligence cause of action to the court based on trial briefs and opening statements.

In their trial brief the Yus argued GEICO gratuitously promised it "would handle the claim and pay for all the damages" but then disputed the cost of repairs and refused to pay for them. The Yus again failed to explain why GEICO owed them a duty sounding in tort or how its conduct fell below a standard of care.

The Yus first attempted to articulate a tort theory during their opening statement at trial, where their attorney explained that GEICO assumed a duty of care by voluntarily undertaking to handle their claim. "GEICO not only made a promise to fix this problem to repair the vehicle," the Yus argued, it "made at least five payments to pay for all property damages until the very last one. Then they said, 'Okay. We're going to withhold some money because Final Touch owes us a refund of $5,000, but we're not going to get that." The Yus further asserted, also for the first time, that this constituted a "mishandling" of their claim, although they failed to explain exactly how the claim was mishandled.

As to Iyer, the Yus repeated their contention that his negligent driving caused the Final Touch lawsuit, and expressly disavowed any contention that he was negligent in any other respect.

Immediately upon the close of the Yus' opening statement, the trial court stated that it accepted for purposes of the nonsuit motion that Iyer drove negligently and GEICO mishandled the Yus' claim. However, the court found Iyer's driving was not the proximate cause of the Final Touch lawsuit, and GEICO owed no duty to the Yus because it was not their insurer.

The court granted nonsuit in favor of Iyer and GEICO, after which all remaining causes of action involving these and

other parties settled. The Yus timely appealed from the judgment of dismissal.

DISCUSSION

The Yus contend nonsuit was improper because Iyer's and GEICO's negligence proximately caused them to incur attorney fees defending against the Final Touch lawsuit, fees for which Iyer and GEICO were liable pursuant to the tort of another doctrine.

I. Grounds for Nonsuit

A motion for nonsuit tests the legal sufficiency of a plaintiff's evidence, operating, in effect, as a demurrer to the evidence. The motion lies when the plaintiff's evidence, taken as true and construed most strongly in favor of the plaintiff, entitles the plaintiff to no relief under any theory. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215.) In a proper case the court has the duty to forestall the cost and delay of a meritless lawsuit by granting nonsuit. (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 746.)

A nonsuit motion may be made "[o]nly after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury." (Code Civ. Proc., § 581c, subd. (a).)

The motion may be granted as to "some but not all of the issues involved in the action." (Code Civ. Proc., § 581c, subd. (b).) In a negligence action, nonsuit is proper where the plaintiff cannot prove causation or breach of a duty of care. (*Rufo v. N. B. C. Nat'l Broadcasting Co.* (1959) 166 Cal.App.2d 714, 719.)

Because a nonsuit deprives the plaintiff of the right to have a claim determined by a jury, California courts take a restrictive view of the circumstances under which it may be granted.

(*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) Nonsuit upon an opening statement is a particularly dangerous and unfavored practice, "akin to sustaining a demurrer without leave to amend." (*Weyburn v. California Kamloops, Inc.* (1962) 200 Cal.App.2d 239, 241.) In considering an opening statement nonsuit, " '[e]very fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried.' " (*Moffitt v. Ford Motor Co.* (1931) 117 Cal.App. 247, 251.) Such a nonsuit should be granted " 'only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be. . . . [citation] . . . . "[I]t would be much better not to nonsuit on an opening statement unless it is clearly made, and it is evident therefrom that no case can be made out." Where, however, these conditions are complied with, the court is authorized to accept the statements and admissions of counsel and to direct a verdict required by such statements or admissions.' " (*Bias v. Reed* (1914) 169 Cal. 33, 37; accord *Paul v. Layne & Bowler Corp.* (1937) 9 Cal.2d 561, 564; *Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 640.)

In reviewing a judgment of nonsuit, we are "guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. 'The judgment of the trial court cannot be sustained unless interpreting the [proposed] evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required

as a matter of law.' " (*Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.)

II. Tort Of Another

A party to litigation must ordinarily pay its own attorney fees, unless a contract or statute provides that such fees may be recovered from an opponent. (*Prentice v. North American Title Guaranty Corp*. (1963) 59 Cal.2d 618, 620 (*Prentice*).) The tort of another doctrine justifies departure from this rule when fees constitute a "measure of tort damages." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310.) The doctrine holds that "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice*, *supra*, at p. 620.) For example, if A knowingly sells stolen goods to B, who believes A to be the owner, and C, the true owner, sues B for conversion, B can recover from A the amounts he reasonably expends in defense of C's tort suit and in satisfaction of any judgment against him. (Rest.2d Torts, § 914(2), illus. 1.)

The measure of tort damages "is the amount which will compensate for all the detriment proximately caused" by breach of a duty sounding in tort, "whether it could have been anticipated or not." (Civ. Code, § 3333.)

III. Neither Iyer nor GEICO owed a Tort Duty in Connection with the Final Touch Lien

At the outset we must clarify the alleged torts at issue and the recovery sought. The Yus alleged Iyer negligently damaged their car and GEICO promised to pay for repairs but then negligently failed to do so. They sought only the attorney fees

they incurred defending against Final Touch's lawsuit to foreclose on its garageman's lien. The Yus did not allege breach of contract or bad faith against GEICO and did not seek reimbursement for damages to their car or indemnification for amounts owed by them to Final Touch or Hyundai. In short, all other claims having settled, attorney fees are the only issue.

To prevail on a cause of action for negligence, a plaintiff must prove the defendant breached a duty of care, resulting in damages. " 'Duty . . . is a legal issue and must be determined by the court. [Citation.] A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties.' [Citation.] '[E]ntities generally have no *duty* to prevent purely economic loss to a potential plaintiff. [Citation.] Under the common law, it is only where a "special relationship" exists, giving rise to such a duty [citation], that a plaintiff may recover purely economic loss.' [Citation.] 'Courts are reluctant to impose duties to prevent economic harm to third parties because "[a]s a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence and contracting power, as well as other informational tools." ' " (*Mega RV Corp. v. HWH Corp*. (2014) 225 Cal.App.4th 1318, 1339.) " ' "Whether a defendant owes a duty of care . . . depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." ' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.)

The Yus' negligence claims against Iyer and GEICO both fail as a matter of law because Iyer owed no tort duty in connection with the Final Touch lien, and GEICO owed no tort duty at all.

A. Iyer Owed no Duty in Relation to the Final Touch Lien

The Yus argue Iyer is liable under the tort of another doctrine for their attorney fees spent defending against the Final Touch lawsuit because the repairman's lien was a natural and proximate consequence of Iyer's negligent driving. We disagree.

"The tort of another doctrine is not particularly relevant in cases involving physical injury or property damage." (*Mega RV Corp. v. HWH Corp.*, *supra*, 225 Cal.App.4th at p. 1340, fn. 17.) A tortfeasor who causes damage to property is subject to a negligence lawsuit by the property owner and would be liable for all direct and proximately consequential damages, including, in theory, any amounts a third party overcharges the victim for repairs (subject to defenses involving causation and failure to mitigate). But the tortfeasor would not be liable for the plaintiff's "attorney's fees *qua* attorney's fees" incurred in establishing liability for those damages, "such as those attributable to the bringing of the . . . action itself." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817.) Nor could another alleged tortfeasor sued unsuccessfully by the victim recover his or her defense attorney fees from the original tortfeasor. (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 894 ["The extension of the *Prentice* rule to the commonplace case of an exonerated alleged tortfeasor would go a long way toward abrogation of the American rule"].)

Here, Iyer's negligent driving subjected him to liability for damage to the Yus' car, but not for attorney fees they might incur in a lawsuit to recover those damages. Final Touch is even further removed, as its transaction involved not damage to the car but failure to repair the damage. The tort of another doctrine

does not extend to the "litigation expenses incurred by all persons, however connected to any tortious event, whom the injured plaintiff elects to sue who succeed in establishing lack of liability." (*Watson v. Department of Transportation*, *supra*, 68 Cal.App.4th at p. 894.) If the Yus under the American rule could not recover their attorney fees from Iyer directly in a negligence action, they cannot recover a subset of them in an action arising from a secondary transaction.

Even if the tort of another doctrine could reach a secondary transaction in a property damage case, it would not reach the Final Touch lien.

Attorney fees incurred in litigation caused by the tort of another may be recovered only when the litigation is the "natural and proximate consequence" of the tort. (*Prentice*, *supra*, 59 Cal.2d at p. 621.) But the only natural and proximate consequence of Iyer's negligent driving was damage to the Yus' vehicle. He could not foresee, and it was thus not a "natural" consequence, that the Yus would thereafter abandon their vehicle at a mechanic's shop and refuse to pay for repair and storage. (E.g., *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1156-1157 [separate transactions causally unrelated].)

Iyer was not obligated, for example, to repair the vehicle himself, nor to prevent future disputes between the Yus and whatever entity they involved in the repairs. He was not even obligated to pay Final Touch directly, but only to reimburse the Yus for payments *they* made. To hold otherwise would require him to follow the Yus' car through the repair process, force all involved parties to fulfill all of their duties—which he could not conceivably do—and guarantee performance on all sides. But

under the Yus theory Iyer would be liable not only for their attorney fees spent resisting the lien foreclosure, but also Final Touch's fees spent prosecuting it.

Final Touch sued the Yus because they abandoned their car in its yard and refused to pay service and storage fees. This disagreement between the Yus and Final Touch was not a natural and probable consequence of Iyer's negligent driving.

B. GEICO Owed no Tort Duty

The Yus asserted a cause of action for negligence against GEICO based on a duty of care arising from its promise—directly to the Yus—to pay for repairs to their car. They alleged they relied on the promise and were injured when GEICO's refusal to pay Final Touch's last invoice caused Final Touch to sue them to enforce its lien.

"Contract law exists to enforce the intentions of the parties to an agreement while tort law is designed to vindicate social policy." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774.) Negligent performance of a contractual obligation may constitute a tort. (*Id*. at p. 774.) But "where the 'negligent' performance of a contract amounts to nothing more than a *failure* to perform the express terms of the contract, the claim is one for contract breach, not negligence." (*Ibid*.)

The Yus alleged GEICO owed them an obligation to pay for repairs to their car. This obligation sounded only in contract. Although the Yus attempted to phrase GEICO's obligation as something other than to pay money, for example an obligation to shepherd their vehicle through the repair process, GEICO's only alleged nonperformance was failure to pay Final Touch.

The tort of another doctrine does not apply because the Yus alleged no facts giving rise to a tort duty. Therefore, nonsuit was properly granted as to GEICO.

The Yus argue a duty of care arose when GEICO voluntarily undertook to pay for repairs. We disagree.

A duty of care "may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty." (*Merrill v. Buck* (1962) 58 Cal.2d 552, 561-562.) "A person may not be required to perform a service for another but he may undertake to do so—called a voluntary undertaking. In such a case the person undertaking to perform the service is under a duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence." (*Valdez v. Taylor Auto. Co*. (1954) 129 Cal.App.2d 810, 817; see Rest.2d Torts, § 323 ["One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if . . . the harm is suffered because of the other's reliance upon the undertaking"].)

For example, " '[i]f [a] defendant . . . undertakes, without consideration, to obtain insurance [for a plaintiff], . . . he assumes a duty to use proper care in the performance of the task. . . . [W]here the defendant has reason to expect such reliance to the plaintiff's detriment, even a mere gratuitous promise will be enough to create a duty, for the breach of which a tort action will lie.' " (*Valdez v. Taylor Auto. Co.*, *supra*, 129 Cal.App.2d at pp. 817-818 [car dealer who volunteered to procure insurance for purchaser liable in negligence for failing to do so]; see *id*. at p.

818 (collecting cases); *Aim Ins. Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 216 [defendant negligently handled voluntary undertaking to procure health insurance]; see also *Bloomberg v. Interinsurance Exchange* (1984) 162 Cal.App.3d 571, 575-576 [auto club's undertaking to send a tow truck, upon which victim relied, resulted in a duty to act with care].)

Here, the Yus offered to prove that GEICO promised *as Iyer's insurer* to pay for repairs to their car, a promise upon which they reasonably relied. These facts, if proven, would establish only that GEICO's promise was preemptive, not that it was voluntary. Whether the Yus paid for repairs initially or State Farm or even Iyer did, at some point GEICO would be liable for the Yus' damages as the insurer of the at-fault party. That GEICO agreed to step in early did not render its contractual undertaking voluntary.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.