

Unpublished Opinion  
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California courts.

Court of Appeal, Second District, Division 4, California.  
Rigoberto HERNANDEZ, Plaintiff and Appellant,  
v.  
SATURN OF MONROVIA, Defendant and Respondent.

No. B166036.  
(Los Angeles County Super. Ct. No. KC036147).  
Oct. 26, 2004.

APPEAL from a judgment of the Superior Court of Los Angeles County, Karl Jaeger,  
Judge. Affirmed.  
Kaplan, Kenegos & Kadin, [Jerry Kaplan](#) and [Joan Kenegos](#) for Plaintiff and Appellant.

Law Offices of John Gardner Hayes and [John Gardner Hayes](#); Law Office of Barry M. Wolf  
and [Barry M. Wolf](#) for Defendant and Respondent.

GRIMES, J. <sup>FN\*</sup>

<sup>FN\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to  
[article VI, section 6 of the California Constitution](#).

#### **BACKGROUND**

**\*1** This appeal presents the questions whether the trial court correctly determined as  
a matter of law that an automobile dealership owed no duty to inspect and repair the  
brakes on a vehicle brought in for a cruise control repair, and the dealership did not  
cause a fatal collision that the surviving driver attributed to brake failure. Plaintiff  
Rigoberto Hernandez <sup>FN1</sup> appeals a summary judgment granted in favor of defendant  
Saturn of Monrovia in this wrongful death case that arose when his decedent was killed  
while a passenger in an automobile serviced by Saturn the day before the accident.

<sup>FN1</sup>. Mr. Hernandez appears as a plaintiff individually and as a guardian ad litem for his  
three children Digna, Eric, and Samuel Hernandez and decedent's estate. We refer to all  
of them collectively as "Hernandez."

Saturn moved for summary judgment on the grounds that duty and causation were  
lacking. Joseph Guercio, the owner of the Saturn sedan involved in the accident, asked  
Saturn to repair the cruise control switch on June 12, 2000. When Guercio brought the  
car into the dealership, the mechanic noticed a dashboard light was on, so the dealership  
performed an engine diagnostic and determined that the CCP solenoid switch needed  
repairs. The CCP solenoid is a switch on the engine for emission control purposes. The  
dealership also discovered that a worn top engine mount and a decorative pillar molding  
located along the interior of the vehicle needed to be replaced. Guercio authorized these  
additional repairs. Guercio did not complain about the brakes and did not request a  
complete vehicle inspection.

Saturn's shop foreman appeared at deposition to testify as the person most  
knowledgeable of the repairs performed on Guercio's vehicle on June 12 and 13, 2000.  
He testified that, "It would be customary for [Saturn] to make a visual inspection of the  
brakes. Even if we didn't pull the wheels off, we would take a look-you're able to see the  
pads just by looking-without taking anything apart, and we would look to see if the pads  
were low or if there's any fluid leaking or any damaged parts there." <sup>FN2</sup> Saturn did not

detect any problem with the brakes and did not perform any brake repairs. None of the repairs that Saturn performed had any effect on the brakes.<sup>FN3</sup>

[FN2](#). He explained that whenever Saturn puts a car up on the rack, the mechanic performs a "visual external inspection of the calipers, the brake pads, the brake lines, brake rotors for any damage, any leaks, excessive wear," and he had no reason to believe such an inspection was not performed on Guercio's car. He added that Saturn also checks the tires and the exhaust for excessive wear or damage; the transmission, engine and power steering for leaks; "torn CV boots, axle boots"; and looks for "any loose, damaged, missing components, things of that nature." On Guercio's repair order, he noted "cradle bent, the leaking trans case, the oil pressure sensor being broken off and the intake manifold bracket being missing, that would indicate that I looked at this car pretty carefully."

[FN3](#). Hernandez claims that this is disputed, but he did not cite any evidence in his separate statement of disputed and undisputed facts to support his assertion of a factual dispute. There is no evidence supporting his contention of a factual dispute in the record.

Guercio picked up his car on June 14, 2000. His wife drove it later that day and "rear-ended" a truck, killing Hernandez's decedent. In response to her claim of brake failure, two California Highway Patrol (CHP) officers inspected the Guercios' entire vehicle. One officer was certified as a mechanic, had repaired cars as a hobby for years, and was a trained accident investigator. While no complete forensic analysis was done, they did remove the wheels and check for fluid leakage, inspect the rotors, and check the hydraulic system, brake lines, and master [cylinder](#). They found no pre-existing [mechanical abnormalities](#) or deficiencies that would have impaired the "normal operation" of the vehicle.

About two months after the accident, Hernandez's attorney learned that the CHP no longer had possession of the vehicle. He conducted a search and located the car at a salvage yard and bought it. Since then, Hernandez has had the car stored in a secure facility.

**\*2** In opposing summary judgment, Hernandez claimed there were material issues of fact that brake failure caused the accident. Mrs. Guercio, who was driving and survived the accident, did not provide any testimony, either by declaration or deposition. Hernandez relied on Mrs. Guercio's interrogatory responses, in which she attributed the accident to brake failure, and the CHP traffic collision report in which Mrs. Guercio is reported to have said that the pedal went down to the floor and did not push back up against her foot.

Hernandez also relied on circumstantial evidence of brake failure. There were no roadway skid marks. The CHP found an imprint of the brake pedal on the bottom of Mrs. Guercio's sandal. Mrs. Guercio broke her right ankle in the accident.

Hernandez did not offer any evidence that the vehicle had been inspected and found to have a defect in the brakes, although Hernandez's attorneys had been in possession of the vehicle at all times since two months after the accident.

The trial court found that Saturn made a "cursory" inspection by "looking for oil leakage, period." It ruled the CHP officer qualified as an expert, and that Hernandez failed to present necessary expert evidence in rebuttal. After finding no triable issue of material fact regarding duty or causation, the court granted Saturn's motion.

Judgment was entered accordingly and Hernandez timely appealed. He contends on appeal that there are triable issues of material fact concerning duty and causation. We affirm.

## DISCUSSION

### I

#### *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" ([Guz v. Bechtel National, Inc. \(2000\) 24 Cal.4th 317, 334.](#)) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." ([Aguilar v. Atlantic Richfield Co. \(2001\) 25 Cal.4th 826, 843.](#))

### II

#### *Duty*

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of" the plaintiff's injuries. ([Ann M. v. Pacific Plaza Shopping Center \(1993\) 6 Cal.4th 666, 673.](#)) "[A]ll persons have a duty 'to use ordinary care to prevent others [from] being injured as the result of their conduct....'" [Citation.]" ([Ballard v. Uribe \(1986\) 41 Cal.3d 564, 572, fn. 6.](#)) Whether a defendant owes a duty is a question of law. (*Ibid.*) The court must determine if a relationship between the parties exists such that society should impose on the defendant an obligation to protect the plaintiff from certain risks. As our Supreme Court explained, "'duty' is not an immutable fact of nature 'but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" [Citations.]" (*Ibid.*)

\*3 Courts distinguish negligence claims based on "misfeasance" from those based on "nonfeasance." ([Seo v. All-Makes Overhead Doors \(2002\) 97 Cal.App.4th 1193.](#)) Misfeasance exists when a defendant creates a risk or worsens a plaintiff's position. ([Id. at p. 1202.](#)) On the other hand, nonfeasance is where a defendant fails to intervene and assist a plaintiff. (*Ibid.*) "Liability for misfeasance is based on the general duty of ordinary care.... Liability for nonfeasance is limited to situations in which there is a special relationship that creates a duty to act. [Citations.]" (*Ibid.*)

A special relationship supporting liability for nonfeasance may arise when the defendant voluntarily assumes a duty upon which a person reasonably relies. ([Seo v. All-Makes Overhead Doors, supra, 97 Cal.App.4th at p. 1203.](#)) "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. [Citation.] However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. [Citation.]" ([Paz v. State of California \(2000\) 22 Cal.4th 550, 558-559.](#))

Here, although the owner did not ask for a brake inspection or complain about the brakes, Saturn undertook to perform a visual inspection of the brakes. The record is undisputed that Saturn did not volunteer to do a complete vehicle inspection. There is no evidence that Guercio relied on Saturn to inspect his brakes. He made no complaint about his brakes and did not ask Saturn to inspect his brakes. There is no evidence from which it may be inferred that Guercio was aware that Saturn had visually inspected his brakes

until the shop foreman testified in this lawsuit that it was customary for his Saturn dealership to do so.

As a matter of public policy, it would be undesirable to impose on Saturn the duty to disassemble the wheels and brakes to look for a possible latent defect when the car owner did not report any brake failure and the shop foreman's visual inspection did not detect any problem. Doing so would be akin to concluding that Saturn owed a duty to inspect and repair the brakes by virtue of its status as a car dealership with a service department. In *Seo v. All-Makes Overhead Doors*, *supra*, the court rejected plaintiff's argument that the defendant had a duty to warn the owner about the design defects of an automatic garage gate repaired by defendant where the defect was unrelated to the repairs.

The *Seo* court declined to recognize a new type of special relationship between those who perform repairs and their customers. It explained that to find such a duty "would impose a substantial additional burden on repairers and those who hire them. No repairer could be hired simply to repair a single defect in a mechanical device without the repairer potentially incurring liability to anyone who might use the device. The cost of simple repairs would increase significantly, as every repairer would factor into the charge for a service call the additional cost of inspection, advisement, insurance and liability. An automobile mechanic could not perform a simple oil change without a complete inspection for any design defect of the automobile and the preparation of a complete advisement of defects to the owner.... Thus, the creation of a new category of special relationship for repairers and third parties injured by the equipment in order to create a duty for nonfeasance does not appear to be based on sound public policy." ([Seo v. All-Makes Overhead Doors, supra, 97 Cal.App.4th at pp. 1205-1206.](#))

**\*4** Imposing a duty upon Saturn to perform a complete brake inspection would be burdensome and costly and would not necessarily improve safety. Fearing potential liability, mechanics would avoid making any voluntary inspections. Thus, even obvious defects would go undetected and unrepaired. Public policy supports the conclusion that when Saturn voluntarily undertook to visually inspect the brakes, it did not also assume the significantly greater duty to perform a thorough inspection of the brakes for any defect that might not be visible without disassembly. We therefore conclude that the trial court correctly granted Saturn's summary judgment motion based on a lack of duty.

### III Causation

To establish causation, a plaintiff must demonstrate that the defendant's negligence was a substantial factor in bringing about the plaintiff's injuries. ([Leslie G. v. Perry & Associates \(1996\) 43 Cal.App.4th 472, 481.](#)) If there is no evidence supporting Hernandez's claim that Saturn negligently caused his injuries, then summary judgment must be affirmed as a matter of law. (*Ibid.*) In order to demonstrate a triable issue of material fact, a plaintiff opposing a summary judgment motion must produce substantial responsive evidence. ([Sangster v. Paetkau \(1998\) 68 Cal.App.4th 151, 162-163](#); see [Code Civ. Proc., § 437c](#), subd. (p)(2).)

The appellate court in *Leslie G.*, *supra*, affirmed a summary judgment in favor of the defendant apartment owner on the ground that his failure to repair a parking garage gate did not cause the plaintiff's rape. Regarding the plaintiff's burden of demonstrating a triable issue of material fact, the court explained, "In deciding whether a plaintiff has met her burden of proof, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence.... [¶] We will not, however, draw inferences from thin air. Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her

theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her.” ([43 Cal.App.4th at p. 483.](#))

Saturn produced a CHP post-accident mechanical inspection report stating that the vehicle had no mechanical defects that would have impaired its normal operation. Relying on circumstantial evidence, Hernandez contends there is a triable issue of material fact regarding causation. His evidence demonstrates it is possible that brake failure may have caused the accident, but it is also consistent with the CHP finding that no mechanical failure caused the accident. Mrs. Guercio could have been driving too fast and could have failed to brake in time to create any skid marks on the road. An imprint of the brake pedal on her sandal does not demonstrate when Mrs. Guercio stepped on the brake pedal. She could have braked too late or the imprint could have been made before the accident. Her broken ankle could have resulted from the impact of the accident. Because Hernandez failed to demonstrate that the inferences favorable to him are more reasonable or probable than those against him, this evidence fails to raise a triable issue of material fact. ([Leslie G. v. Perry & Associates, supra, 43 Cal.App.4th at p. 483.](#))

**\*5** Mrs. Guercio's interrogatory responses and statements attributed to her in the CHP report that brake failure caused the accident are insufficient to create a triable issue of material fact. The value of opinion evidence depends on the factors considered and the reasons employed. ([Bay Area Rapid Transit Dist. v. Superior Court \(1996\) 46 Cal.App.4th 476, 482.](#)) Even construing Mrs. Guercio's statements liberally, we conclude that they fail to raise a triable issue of material fact. Hernandez's attorney admitted at the hearing of the summary judgment motion that Hernandez had no way of determining how the brakes had failed. Only after a brake defect is identified can it be determined if the defect caused the accident and should have been discovered during a proper visual inspection.

We agree with the trial court's conclusion that expert testimony was required to show a triable issue that there was brake failure and Saturn's failure to detect and repair the brakes caused the accident. “If the matter in issue is one within the knowledge of experts *only* and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case. [Citations.]” ([Miller v. Los Angeles County Flood Control Dist. \(1973\) 8 Cal.3d 689, 702](#) (*Miller* ).)

In *Miller*, the plaintiffs sued a homebuilder after their home was swept down a hillside during a rainstorm. The *Miller* court affirmed a judgment of nonsuit in favor of the builder on the ground that the plaintiffs failed to present expert testimony regarding building practices in order to establish the proper standard of care. The court concluded that “it was not for nonexpert minds to determine whether Noble Manors failed to exercise due care in the construction of the home,” since the average layperson is untrained and cannot determine if a building has been built with requisite skill and in accordance with the proper standards. ([Miller, supra, 8 Cal.3d at pp. 702-703.](#))

Similarly, at bench, the average layperson is not trained and cannot determine whether a vehicle was properly inspected and repaired, cannot identify a precise brake defect, and cannot determine whether an accident was the result of a mechanic's negligence.<sup>FN4</sup> Because there was competent opinion evidence by the CHP officer, an expert in car repair and accident reconstruction,<sup>FN5</sup> that no mechanical defect caused the accident, and no competent testimony to demonstrate a triable issue that brake failure which Saturn neglected to repair caused the accident, the trial court appropriately granted Saturn's motion for summary judgment.

**FN4.** Hernandez erroneously contends that expert testimony is unnecessary to determine whether brake failure caused the accident because this case does not involve professional negligence. The *Miller* court, however, rejected a similar argument. ([Miller, supra, 8](#)

[Cal.3d at pp. 701-702.](#))

[FN5](#). Hernandez argues that the testimony of the two CHP officers was contradictory and attacks their qualifications to serve as experts. Because he failed to object to this evidence below, his objections are deemed waived. ([Code Civ. Proc., § 437c](#), subs. (b)(5) & (d).)

**DISPOSITION**

The judgment is affirmed.

We concur: [HASTINGS](#), Acting P.J., and [CURRY](#), J.