

Applicant Number

MPT-2

219

THE MPT[®]

MULTISTATE PERFORMANCE TEST

In re Remick

**Read the directions on the back cover.
Do not break the seal until you are told to do so.**



NATIONAL CONFERENCE OF BAR EXAMINERS
302 S. BEDFORD ST., MADISON, WI 53703
608-280-8550
WWW.NCBEX.ORG

© 2019 by the National Conference of Bar Examiners.
All rights reserved.

In re Remick

FILE

Memorandum to Examinee1
Transcript of client interview2
Memorandum to file5

LIBRARY

Excerpts from the Restatement (Third) of Torts (2012)7
Weiss v. McCann, Franklin Court of Appeal (2015)9
Thomas v. Baytown Golf Course, Franklin Court of Appeal (2016).....11
Boxer v. Shaw, Franklin Court of Appeal (2017).....14

FILE

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM

TO: Examinee
FROM: Susan Daniels
DATE: February 26, 2019
RE: Andrew Remick matter

Our client, Andrew Remick, was injured when his car stalled on a roadway and was struck by another vehicle. At the time of the accident, Remick was in the backseat of his car with a twisted ankle while a motorist, Larry Dunbar, attempted to jump-start the car with his truck's battery. Another motorist, Marsha Gibson, drove around a bend in the road, was unable to stop in time, and struck Remick's stalled car from behind. As a result of the collision, Remick was seriously injured and his car sustained significant damage.

Remick wants to know if he has any legal recourse. We talked about suing Marsha Gibson, and I suggested that there may also be a claim against Larry Dunbar. Remick told me that he thought the collision could have been avoided if Dunbar had either moved Remick's stalled car to the side of the road, set out emergency flares, or turned on the hazard lights on his truck.

Please draft a memorandum to me analyzing and evaluating whether Remick has a viable negligence claim against Dunbar. In addressing the element of duty, discuss the legal theories under sections 42 and 44 of the Restatement (Third) of Torts. Do not address either Gibson's liability or any defenses based on Remick's conduct.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. I will ask another associate to assess the claim against Gibson.

**Transcript of Interview of Andrew Remick
February 19, 2019**

Attorney: Andrew, it's good to meet you. How are you doing?

Remick: I'm feeling better than I was a month ago, but I'm still on the mend.

Attorney: Why don't you tell me what happened.

Remick: Well, on January 20, I was driving my car on Highway 290 down by the coast. It's a two-lane road with small towns scattered here and there.

Attorney: Yes, I've been down that way before, and I recall that it's a pretty isolated stretch. How did the accident occur?

Remick: I was on my way back to Franklin City from a weekend trip. It was about 4:30 p.m., and all of a sudden my car stopped working. It just powered off and the dashboard display stopped working. I tried to start the car, but the engine wouldn't even turn over. I tried to turn on the hazard lights, but they didn't work either.

Attorney: Were you able to pull over to the side of the road?

Remick: No, the engine died while I was driving; I didn't have time to pull off the road.

Attorney: What did you do next?

Remick: First, I tried to use my cell phone to call for help, but I couldn't get a signal. I tried to push the car to the shoulder of the road. Since it's a stick shift, it can be moved, but when I tried to move it, I slipped and fell, badly twisting my right ankle. I was in excruciating pain and I could barely put any weight on it. I decided to get into the backseat to keep my ankle elevated and wait for somebody to drive by.

Attorney: And did that happen?

Remick: Yes, about 45 minutes later, a man named Larry Dunbar pulled up on the shoulder of the road next to my car, got out of his truck, and asked me if I needed help. I explained what had happened. Larry said that he was a mechanic and offered to help me.

Attorney: What did he do?

Remick: He went back to his truck, grabbed a toolbox, and began poking around under the hood of my car. I'm not very knowledgeable about cars, but I remember him

mentioning that he thought my car might have a bad alternator, which is part of the car's electrical system, so he was going to try to jump-start the car to see if the alternator was working.

Attorney: Where were you when all this was happening?

Remick: I was still sitting in the back of my car with my right foot elevated on the backseat. By this time, it was starting to get dark. My ankle had swelled up, and I was in a lot of pain. I told Larry I was worried about the fact that it was getting dark and my car was still parked on the road. I asked him if he could push the car off the road. He told me not to worry because he thought he could get the car started pretty quickly. I told him that I had emergency flares in the trunk; he said not to worry.

Attorney: Was he able to jump-start your car?

Remick: I never found out. Right after he attached the jumper cables, I heard another car coming around the bend behind my car and then I heard the screech of tires as the driver hit the brakes, but she couldn't stop in time. She hit my car, with me still in the backseat! The impact was so hard that it slammed me into the back of the driver's seat. I blacked out, and when I woke up, I was in the hospital.

Attorney: I can see a brace on your left shoulder, and your left arm is in a cast and a sling. Is that from the accident?

Remick: Yes, the impact of the collision dislocated my shoulder, broke my arm, and gave me a minor concussion. The ankle I initially twisted when I fell is nearly healed, and my doctor doesn't anticipate any long-term complications from the concussion. But the orthopedist thinks I will probably need surgery to repair the damage to my shoulder, and my broken arm will need to heal for at least another three to four weeks before the cast can be removed. I've been told that I'll have to undergo physical therapy for several months to regain full function in my left arm and shoulder. I'm really worried about my shoulder and my arm. I own a small landscaping business, and most of my work is very physical. Without full use of my shoulder and arm, I can't work.

Attorney: What about Larry Dunbar and the other driver, Marsha Gibson?

Remick: I don't know. I've never met or spoken to the other driver, Marsha Gibson, and I haven't seen or spoken to Larry Dunbar since the accident.

Attorney: What about your car? How badly was it damaged?

Remick: It turns out that my car stalled because of a bad alternator, which would have cost a few hundred dollars to fix. But now it's going to cost at least \$4,500 to repair the damage caused by the collision.

Attorney: Was a police report generated for the accident?

Remick: I don't know. In the month since the accident, I've been focused on my recovery and trying to keep my landscaping business afloat. I think that the accident could have been avoided if Larry had taken the time to move my car to the side of the road or if he had at least turned on the hazard lights on his truck—you know, the "flashers"—or used my emergency flares. If he had done any of those things, I doubt that the other driver would have hit my car, and I would be nursing a sore ankle instead of facing shoulder surgery and months of rehabilitation.

Attorney: You may have a case against Larry Dunbar as well as against the driver who hit you. I'll get back to you as soon as we have completed our initial assessment of your case.

Remick: Thanks. I really appreciate your assistance.

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM TO FILE

FROM: Peter Nelson, Private Investigator
DATE: February 22, 2019
RE: Andrew Remick matter

As requested, I have obtained a copy of the police report for the car accident that occurred on January 20, 2019. I also interviewed Marsha Gibson, the driver of the SUV that rear-ended Remick's stalled car, and gathered some initial background information about Larry Dunbar. Below is a summary of my findings.

Police Report:

- A two-car collision involving Remick's four-door passenger car and Gibson's SUV occurred at approximately 6:00 p.m. on January 20, 2019, on a relatively remote, two-lane stretch of Highway 290 between the towns of Castlerock and Highwater.
- At the time of the collision, Remick's car was stalled on the northbound lane of the highway, approximately 75 feet beyond a bend in the road.
- Remick was sitting in the backseat of his car at the time of impact.
- Dunbar's truck was parked on the shoulder of the northbound lane next to Remick's car.
- The hoods of Remick's car and Dunbar's truck were up, and Dunbar was in the process of jump-starting Remick's car battery.
- Gibson was driving northbound on Highway 290 at approximately 50 mph (the speed limit is 55 mph).
- Skid marks measured at the scene of the accident indicate that Gibson immediately applied the brakes on her vehicle but was unable to avoid hitting Remick's car. Her estimated speed at impact was 25 mph.
- The force of the collision caused Remick to slam into the driver's seat in front of him, as a result of which he suffered a concussion, a dislocated shoulder, and a broken arm. He was transported by ambulance to Castlerock Hospital for medical treatment.

- Neither Gibson nor Dunbar was injured by the collision.
- No persons were cited or ticketed for the accident, although the responding police officer noted that the accident occurred at dusk and that neither Remick's car nor Dunbar's truck had its hazard lights turned on.

Marsha Gibson's Statement to Police:

- Gibson claims that she was driving under the speed limit at the time of the collision.
- Gibson did not see Remick's unlit car until she was about 40 feet away from it because it was getting dark outside and Remick's car was parked just beyond a bend in the road.
- Gibson estimates that she was driving at about 25 to 30 mph when she collided with Remick's car.
- Gibson was not injured in the accident.

Larry Dunbar Background Information:

- Dunbar is 35 years old and currently works in cable TV sales.
- Dunbar is a former automotive mechanic, having spent three years working for Franklin City Automotive from 2012 to 2015.

LIBRARY

Excerpts from Restatement (Third) of Torts (2012)

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking.

Comment:

* * *

c. . . . [A]ffirmative duty based on undertaking . . . The duty provided in this Section is one of reasonable care. It may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance).

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering a service . . . on behalf of another The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section.

* * *

§ 44 Duty to Another Based on Taking Charge of the Other

An actor who, despite no duty to do so, takes charge of another who reasonably appears to be:

- (1) imperiled; and
- (2) helpless or unable to protect himself or herself

has a duty to exercise reasonable care while the other is within the actor's charge.

Comment:

* * *

c. Distinctive feature of rescuer affirmative duty. This Section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable

adequately to protect himself or herself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other.

* * *

g. Taking charge of one who is helpless. The rule stated in this Section is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct, including intoxication; by the tortious or innocent conduct of others; or by a force of nature. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril.

Weiss v. McCann
Franklin Court of Appeal (2015)

Plaintiff David Weiss, individually and in his capacity as guardian for Janet Weiss, appeals the dismissal of his personal injury action against Sue McCann for serious injuries his wife sustained at a party hosted by McCann. The issue on appeal is whether the Restatement (Third) of Torts §§ 42 and 44, collectively referred to as the “affirmative duty” or “Good Samaritan” doctrine, should apply to a homeowner. We find that under the specific facts of this case the Good Samaritan doctrine does apply. Accordingly, we reverse the order of the trial court dismissing the action.

The relevant facts and procedural history are as follows: On December 29, 2013, McCann hosted a party at her home in her basement recreation room. Janet Weiss, a neighbor, was among the attendees. Both McCann and Weiss had been drinking alcoholic beverages that evening. When the party ended and everyone had left except Weiss and McCann, Weiss fell, struck her head on the concrete floor, and lost consciousness. McCann revived Weiss and placed her on a couch. The next morning Weiss awoke and walked home, without informing McCann that she was leaving. At 9:30 a.m., McCann called Weiss’s home to see whether Weiss had arrived home safely. McCann spoke to Weiss’s husband, David, who said that Weiss was home and asleep. During the call, McCann did not mention that Weiss had fallen and hit her head. McCann called again at 11:30 a.m. to check on Weiss and for the first time informed David of his wife’s fall and injury. David checked on Weiss and was unable to wake her, so he immediately called 911. An ambulance took Weiss to the hospital, where she had emergency brain surgery for a subdural hematoma. As a result of the injury, she suffered permanent brain damage. David Weiss brought this personal injury action against McCann, alleging that McCann was negligent in caring for Weiss after her fall and injury. McCann moved to dismiss the complaint for failure to state a cause of action, and the trial court granted the motion.

On appeal, the plaintiff claims that his complaint properly stated a cause of action in negligence based on the common law “affirmative duty” or “Good Samaritan” doctrine set forth in Restatement (Third) of Torts §§ 42 and 44, which has been adopted by the Franklin courts. To determine whether the trial court properly granted McCann’s motion to dismiss, this court must consider as true all of the well-pleaded material facts set forth in the complaint and all reasonable inferences that may be drawn from those facts. *Davis v. Humphries* (Franklin Sup. Ct. 1996).

As a preliminary matter, we note that to establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Fisher v. Brawn* (Franklin Sup. Ct. 1998).

On appeal, the plaintiff first claims that he presented facts establishing a duty under the Restatement (Third) of Torts § 42, which provides, "[a]n actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise [reasonable] care increases the risk of harm beyond that which existed without the undertaking or (b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking."

We conclude that the language of § 42 envisions the assistance of a private person, such as McCann, to a person in need of aid. Based on the plain language of the Restatement, we will not, as a matter of law, preclude the application of § 42 to a homeowner such as McCann.

We now consider whether § 44 of the Restatement (Third) of Torts should apply as well. Section 44 provides that "[a]n actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care," including "one who is rendered helpless by his or her own conduct, including intoxication." § 44, comment g. Based on this language, it is clear that § 44 may apply to the homeowner McCann in this case.

The plaintiff's complaint alleges that McCann did not contact Weiss's family or seek medical assistance for Weiss after she fell and then failed to inform the plaintiff of Weiss's fall and injury until nearly noon the next day, at which point the plaintiff was unable to revive his wife. Based on our review of the language of the Restatement and the applicable case law, we cannot, as a matter of law, preclude the application of § 44 to McCann.

Reversed and remanded with instructions to the trial court to reinstate the complaint.

Thomas v. Baytown Golf Course
Franklin Court of Appeal (2016)

This interlocutory appeal stems from a wrongful death action brought by the surviving family members of Seth Thomas, who was killed in an automobile accident. Defendant Baytown Golf Course (Baytown) petitions for review of the trial court's order striking Baytown's notice that another individual, Glenn Parker, who was not named in this lawsuit, was a participating cause of the fatality and hence liable for comparative apportionment of damages under Franklin law. We conclude that Parker could be liable as a nonparty for the fatal accident after Parker assumed the duty of a "Good Samaritan" to use reasonable care for Thomas, but in fact placed Thomas in a worse position by giving his keys back to him and allowing him to drive away.

FACTS

On June 3, 2012, Thomas and Parker played golf and consumed alcoholic beverages at Baytown. Because Thomas appeared intoxicated, a Baytown employee took possession of Thomas's car keys. Parker then stepped forward and offered to drive Thomas home. With that assurance, and observing Parker's apparent lack of impairment, the employee gave Thomas's keys to Parker. Once in the parking lot, Parker returned the keys to Thomas. Thomas left the golf course in his own car and crashed into a tree. He died from his injuries.

The plaintiffs brought a wrongful death action against Baytown alleging that Baytown's sale of alcohol to Thomas was the cause of the accident. Baytown filed a notice of nonparty at fault, alleging that Parker was at least partially at fault because he volunteered to drive Thomas home and then gave the car keys back to Thomas. The plaintiffs filed a motion seeking to strike Baytown's notice of nonparty at fault. The trial court granted the motion, and this interlocutory appeal followed. For the reasons set forth below, we agree with Baytown that the trial court erred, and so reverse and remand.

DISCUSSION

Rule 28 of the Franklin Rules of Civil Procedure provides that a defendant can give notice that a person or entity not a party to the action is allegedly wholly or partially at fault for the purpose of determining the respective liability of all actors under Franklin's comparative negligence laws. The jury is required to consider the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been, named as a party to the

suit. Once a defendant designates a person as a nonparty at fault by filing the appropriate notice with the trial court, the defendant can offer evidence of the nonparty's negligence and argue that the jury should attribute some or all fault to the nonparty, thereby reducing the defendant's percentage of fault and consequent liability.

The issue, then, is whether Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault. To find a person at fault in a negligence action, four elements must be shown: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *See Fisher v. Brawn* (Franklin Sup. Ct. 1998). A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.*

Baytown argues that Parker had a duty to Thomas under the Good Samaritan doctrine set forth in the Restatement (Third) of Torts §§ 42 and 44. In its docket entry striking Baytown's notice of nonparty at fault, the trial court stated, "Mr. Thomas was not . . . 'helpless' as that term is used in § 44. He was simply too drunk to drive." We disagree. The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case. A person who is drunk and slumped in a chair at home in front of the television may not be considered imperiled and helpless. However, we reach the opposite conclusion if the same person is put behind the wheel of an automobile and sent down the road. Moreover, comment g to § 44 specifically provides that § 44 applies where a person "is rendered helpless by his or her own conduct, including intoxication."

Although the trial court's order focused on § 44, we find that both sections of the Restatement are applicable to the facts of this case. The major difference between the sections is the requirement of § 44 that the person be in an imperiled, helpless position. Section 42 has no such requirement, but does require either that the actor's actions increased the risk of harm or that the victim relied on the actor. In either event, we believe that the Good Samaritan doctrine applies when an actor, otherwise without any duty to do so, voluntarily takes charge of an intoxicated person who is attempting to drive a vehicle and, because of the actor's failure to exercise reasonable care, changes the other person's position for the worse. The rule applies here because if Parker had not said that he would see that Thomas got home safely, Baytown might have taken steps that would have avoided the accident.

The plaintiffs argue that Parker did not have a duty to Thomas because it was Baytown

that first provided Thomas with the alcohol that rendered him too drunk to drive. The plaintiffs contend that the duty of care that Baytown owed to Thomas as a patron in its bar is not one that can be delegated. We agree that Baytown's duty cannot be delegated. Baytown, however, is not trying to delegate its responsibilities to Parker. Rather, Baytown argues, and we agree, that the duties owed by Baytown and Parker are independent of each other.

When Parker took charge of Thomas for reasons of safety, he thereby assumed a duty to use reasonable care. Thomas was too drunk to drive. Baytown's employees had taken charge of Thomas and effectively stopped him from driving. Parker's offer deterred the employees from their efforts to keep Thomas out of his automobile. Rather than use reasonable care to drive Thomas home or make other arrangements, Parker discontinued his assistance and put Thomas in a worse position than he had been in when Baytown's employees had possession of his keys. A reasonable fact-finder could conclude that Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault.

We conclude that the trial court erred in striking Parker as a nonparty at fault and therefore reverse and remand for further proceedings.

Boxer v. Shaw
Franklin Court of Appeal (2017)

Plaintiff Karen Boxer, as personal representative of the estate of Tim Boxer, appeals the dismissal of her wrongful death action against defendant Harry Shaw. Tim Boxer was struck and killed by a truck after exiting Shaw's car on the side of a highway. The trial court granted Shaw's motion for a directed verdict. We affirm.

At trial, Shaw testified that he and Boxer were coworkers who often socialized together. On the day of the accident, he and Boxer finished work early, around 3 p.m., and decided to go fishing. Shaw offered to drive because Boxer's car was in the shop. The two men fished for about three hours. They then went to a marina, watched the boats, and played pool until about 10 p.m., at which time they decided to go to a nightclub. They were driving on Highway 101 to the club when they got into a heated argument. Boxer started cursing and demanded that Shaw stop the car. Shaw pulled onto the shoulder of the road, and Boxer exited the car and lit a cigarette. Shaw has stated that he thought Boxer would get back in the car after smoking his cigarette, but Boxer refused to do so. Shaw decided to briefly drive away to allow Boxer to "cool off." Shaw drove one mile down the road and then returned. In the meantime, Boxer attempted to cross the highway and was struck by a truck.

Shaw testified that, although the two men had consumed a few beers while playing pool, Boxer did not appear to have had too much to drink. The toxicology and autopsy reports confirmed that Boxer's blood alcohol level was under the legal limit. It is undisputed that the accident occurred around 10:30 p.m., it was dark with misting rain, there were no lights on the highway, and Boxer was wearing dark clothing. The investigating police officer testified that the shoulder of the highway was "extremely wide" and agreed that there was ample room for a pedestrian to walk there.

On appeal, the plaintiff argues that the trial court erred by directing a verdict for Shaw on the issue of duty. The plaintiff contends that she presented evidence that Boxer was "helpless" and that Shaw had "taken charge of" Boxer after the two men left work to go fishing and thereby had assumed a duty to leave Boxer in no worse a position than when he took charge of him. We must determine whether the trial court erred in finding that Shaw owed no duty of care to Boxer because Boxer was not "helpless" and Shaw did not "take charge of" him.

In reviewing a ruling granting a directed verdict, the evidence and all reasonable

inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. *Ellis v. Dowd* (Franklin Sup. Ct. 1995). In a negligence action, if there is no duty, then the defendant is entitled to a directed verdict. *Id.*

An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. The common law ordinarily imposes no duty on a person to act; however, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. *Id.*

The Restatement (Third) of Torts § 44 provides that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge.

Under the Restatement, an intoxicated person is considered helpless. § 44 comment g. However, the undisputed evidence in this case indicates that Boxer was not "helpless." The mere fact that Boxer's car was being repaired did not render him helpless, and his blood alcohol level was below the legal limit. There was testimony from a family member that Boxer was in the midst of a nasty divorce and that he was very upset about the breakup of his marriage. However, the fact that a person may be distraught about a situation does not render that person "helpless" without additional evidence of actual impairment.

Even if we assume that Boxer was "helpless" under the circumstances, to show that Shaw "took charge" of Boxer, the plaintiff would have to show that Shaw through affirmative action assumed an obligation or intended to render services for Boxer's benefit. *See, e.g., Thomas v. Baytown Golf Course* (Franklin Ct. App. 2016) (golfer assumed duty by telling golf course employee who had taken car keys from an intoxicated man that the golfer would drive the man home); *Sargent v. Howard* (Franklin Ct. App. 2013) (driver could be held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night while driver used a convenience store restroom).

Viewing the evidence in the light most favorable to the plaintiff, the facts do not indicate that Shaw, through affirmative action, assumed an obligation or intended to render services for Boxer's benefit. We disagree with the plaintiff's claim that Shaw "took charge of" Boxer when the two men left work to socialize on the day of the accident, nor did he do so at any point throughout the remainder of the day. Boxer was not legally intoxicated and he was not helpless.

Accordingly, Shaw could not have assumed an obligation to render services for Boxer's benefit. Granted, on the day of the accident, Shaw drove. However, Shaw's driving is not evidence of the assumption of an affirmative obligation by Shaw to take care of Boxer. It is undisputed that both men mutually agreed to go fishing, visit the marina, and head to the nightclub. There is no suggestion that Shaw directed when and where he and Boxer would go, or that he intended to "take charge of" Boxer.

Because the plaintiff presented no evidence from which a jury could find that Boxer was "helpless" or that Shaw "took charge of" him, the trial court correctly concluded that Shaw had no duty to Boxer and properly directed the verdict for Shaw.

Affirmed.

NOTES

2) MPT2 - Please type your answer to MPT 2 below

MEMORANDUM

Re: Evaluation of negligence claim against Dunbar

I. Law and Analysis

The elements required to establish a viable cause of action in negligence are: 1) Duty, 2) Breach of Duty, 3) Causation, and 4) Damages. *Fisher v. Brawn*.

A. Duty

A duty must be recognized by law and is defined as a legal obligation requiring the actor to conform to a certain standard of conduct. *Fisher*. An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.

1) Section 42 of Restatement (Third) of Torts

Section 42 of the Restatement (Third) of Torts states that an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or (b) the person to whom the services are rendered . . . relies

on the actor's exercising reasonable care in the undertaking. The Comments to Section 42 provide that an undertaking entails an actor voluntarily rendering a service on behalf of another. The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section. Section 42 requires that the actor's actions either increased the risk of harm or that the victim relied on the actor. *Thomas v. Baytown Golf Course*.

Here, Dunbar's actions constituted an undertaking. He saw Remick on the side of the road, and offered voluntarily to help Remick fix the issues with his vehicle, which is the rendering of a service on behalf of another. Dunbar knew, or should have known, that by voluntarily offering to help Remick fix the issues with his vehicle, it would reduce the risk of harm to Remick, because Remick would no longer be stalled in a dangerous position the middle of the road in his vehicle with no help available to him. So, Dunbar's action constituted an undertaking. Additionally, Dunbar's actions must have either increased the risk of harm to Remick *or* Remick must have relied on the actor to exercise reasonable care in the undertaking. In this case, it does not seem plausible that Dunbar's actions increased the risk of harm to Remick. Before Dunbar appeared and worked on fixing the car, Remick was in the exact same position. Dunbar did not move the car, did not move Remick, and did not block traffic with his own car or by standing in front of Remick's vehicle. Therefore, Dunbar's actions

did not increase the risk of harm to Remick. However, there is evidence to suggest that Remick relied on Dunbar to exercise reasonable care in the undertaking. Remick questioned the fact that Dunbar had not attempted to move his car and wondered whether they should send up emergency flares. Dunbar told Remick not to worry about either of those things, and Remick, knowing that Dunbar was a mechanic with some experience, relied on Dunbar's assurances that they did not need flares and that the car did not need to be moved. Therefore, because Dunbar's actions constituted an undertaking and because Remick relied on Dunbar to exercise reasonable care in the undertaking, Dunbar has a duty under Section 42 to Remick.

2) Section 44 of Restatement (Third) of Torts

Section 44 of the Restatement (Third) of Torts states that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; **and** (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge. The Comments to Section 44 state that the Section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable to adequately protect himself or herself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other. The Comments also state that this rule is applicable whenever a

rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct, including intoxication; by the tortious or innocent conduct of others, or by a force of nature. The rule does, however, require that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril. A determination of whether an individual is "imperiled" or "helpless" must be made within the context of each case. *Thomas v. Baytown Golf Course*. To take charge of another, the actor is required, through affirmative action, to assume an obligation or intend to render services for the other's benefit. *Thomas*.

Here, Remick was helpless and unable to take care of himself because he was unable to walk with his twisted ankle, was unable to call anyone for help because there was no cell service, and was unable to push his car off the road and out of danger. He was rendered helpless by his car breaking down and his inability to get any help, which was a force of nature and no fault of anyone else or even himself. Even if it was found to be Remick's fault, Section 44 would still apply because it is applicable even when someone is rendered helpless by his own conduct. Remick was also imperiled, because he was in danger sitting in his car in the middle of the road where anyone could drive into him. So, Remick was imperiled and helpless. Dunbar, although he had no duty to do so, did take charge of Remick because he intended to render services for his benefit by fixing Remick's car and did so through his affirmative action of offering to help

and then physically helping Remick with the problems with his car. Remick was still exposed to peril while Dunbar took charge of him because he was still sitting in his car in the middle of the road, and therefore the scope of Section 44 was applicable during the entire time that Dunbar was helping Remick. Therefore, because Dunbar took charge of Remick, and because Remick was imperiled and helpless, Dunbar had a duty to exercise reasonable care while Remick was in his charge under Section 44.

B. Breach of Duty

Breach of duty is defined as unreasonable conduct in light of foreseeable risks of harm. *Fisher*.

1) Section 42 of Restatement (Third) of Torts

A duty under Section 42 of Restatement (Third) of Torts may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance), according to the comments. Here, while Dunbar did not commit any acts of commission, he did commit an act of omission by failing to move the car off the road before he started working on it and by failing to put up any emergency flares or other signals that would alert oncoming drivers of the danger ahead. The harm of someone running into the car was foreseeable because the car was sitting in the middle of the road in a parked position, and Dunbar's conduct in allowing the car to continue to sit in the middle of the road with no precautions

was unreasonable. Therefore, Dunbar breached his duty to Remick under Section 42.

2) Section 44 of Restatement (Third) of Torts

A duty under Section 44 is breached if the actor does not exercise reasonable care while the other party is in the actor's charge. Dunbar did not exercise reasonable care when he continued working on the car with it still in the middle of the road and with Dunbar in it, without putting up any emergency flares or any other signals that would alert oncoming drivers of the danger ahead. The risk of someone running into Remick's car parked in the road was foreseeable, and Dunbar taking no precautions and not moving the car off the road was unreasonable in light of the foreseeable risk. Therefore, Dunbar breached his duty to Remick under Section 44.

C. Causation

Causation is defined as a reasonably close causal connection between the actor's conduct and the resulting harm. *Fisher*. Here, Dunbar's conduct was working on Remick's car in the middle of the road to get it to start working again. He did not place the car in the road, and he did not create or cause any more danger to Remick or to his car than Remick had already caused himself. However, Dunbar did commit acts of omission or nonconduct by not moving the car off the road and by not putting up any emergency flares, signals, or other precautions that

would alter oncoming drivers of the danger ahead. If he had done either of these things, there is an extremely strong chance that the collision would not have occurred. Therefore, due to Dunbar's acts of omission, there was a reasonably close causal connection between the actor's conduct and the resulting harm.

D. Damages

Damages must include at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Fisher*. The element of damages is easily satisfied by Remick, as he suffered major injuries from the collision, including a dislocated shoulder, broken arm, and minor concussion. He was also taken to the hospital for these injuries, and will require further treatment. Additionally, his injuries have caused him to be unable to work and his car was badly damaged in the collision. Therefore, Remick's damages include lost wages, pain and suffering, medical expenses, and property loss, which all fit under the definition of damages. Remick's claim would meet the element of damages.

II. Conclusion

The elements of duty, breach of duty, causation and damages under both Section 42 and Section 44 of the Restatement (Third) of Torts are met in Remick's case against Dunbar. Therefore, Remick likely has a viable negligence claim against Dunbar under Section 42 and Section 44 of the Restatement (Third) of Torts

END OF EXAM