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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAMES C. KEITH, Plaintiff and Appellant, v. CITY OF PLEASANT HILL et al., Defendants and Respondents.	A137044 (Contra Costa County Super. Ct. No. MSC10-02737)

Plaintiff James C. Keith filed an action against the City of Pleasant Hill (the City) and Kelli M. Geis, a police officer employed by the City, seeking damages for injuries he suffered at his job when he was struck by a water pump attached to a hose that became entangled with the underside of Geis's vehicle. The complaint alleges Geis caused the accident by negligently driving at an excessive speed through a construction zone.[1] Plaintiff appeals a summary judgment in favor of defendants, contending the court erred in concluding Geis did not owe him a duty of care. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 27, 2010, plaintiff was working for the Contra Costa Water District (District), performing repairs in the street on Golf Club Road in Pleasant Hill. The construction area was set up with orange traffic cones directing eastbound traffic on Golf Club Road into the right hand, or "number two" lane. Plaintiff was working in the number one lane, where a hole had been dug to fix a leaking pipe. As part of the

[1] The City was sued in its capacity as Geis's employer only.

construction work, the District workers placed a flexible hose attached to a water pump across the active lane of traffic, the number two lane.

At about 1:44 p.m., Geis, a Pleasant Hill police officer, was driving a patrol car eastbound on Golf Club Road on a nonemergency assignment to back up a fellow officer. The weather was clear and sunny, and the roadway was dry. The posted speed limit for this portion of Golf Club Road was 25 miles per hour. Geis slowed as she entered the construction area, and passed over the hose at under 25 miles per hour. Traffic had been passing over this hose for several hours earlier that day, with some vehicles traveling faster than Geis and some traveling slower. When Geis passed over the hose, it became entangled in the undercarriage of her vehicle. As she continued driving, the hose pulled the water pump out of the excavation hole. The pump struck plaintiff's leg, causing multiple serious fractures. The force of the impact also sent him into the air, causing him to fall on and injure his head and shoulder. Geis was not aware of the accident at the time it occurred. As she traveled further down the road, another driver indicated to her that some material was trailing from her patrol vehicle. She stopped the car and retrieved a section of yellow hose.

On January 13, 2011, plaintiff filed his first amended complaint against defendants. Plaintiff alleged that Geis negligently "drove past a work site at an unsafe speed" and failed to "adhere to traffic warning signage."

On May 10, 2012, defendants filed a motion for summary judgment. Defendants argued that Geis did not breach any duty to plaintiff based upon the speed at which she was driving: "Because it was not reasonably foreseeable that this accident would be caused by a vehicle passing over the hose at a speed at or below the posted speed limit, there is no duty which was breached." Additionally, they contended plaintiff had offered no evidence that Geis's speed caused the accident.

On August 14, 2012, plaintiff filed his opposition to defendants' motion. In support of his opposition, he included a declaration prepared by Dean B. Tuft, reportedly an expert in accident reconstruction and analysis. He concluded that Geis's speed had "caused the pressurized hose to 'jump' higher than other motorists who had traveled at

slower speeds over the hose, which allowed the hose to catch or entangle on the undercarriage of [her] vehicle."

On September 11, 2012, the trial court filed its order after hearing, granting the motion for summary judgment. The court sustained all but one of defendants' evidentiary objections to Tuft's declaration, which were based on lack of foundation, lack of authentication of records, and/or hearsay.

On September 25, 2012, the trial court filed its order entering judgment for defendants. This appeal followed.

DISCUSSION

I. *Standard of Review*

Summary judgment or summary adjudication of issues is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f).) "On appeal after a motion for summary judgment has been granted, we review the record de novo . . . ." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "[W]e determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Ibid.*) We draw all reasonable inferences from the evidence in the light most favorable to the opposing party. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470.)

II. *Summary Judgment Was Properly Granted*

A. *Elements of Negligence and Duty of Care*

Here, plaintiff alleges that Geis was negligently travelling through the construction site when the accident occurred. A cause of action for negligence requires a plaintiff to establish a duty on the part of a defendant (in addition to the defendant's breach of that duty that was both the actual and proximate cause of the plaintiff's damages). (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1160.) The existence of a "duty," which is a question of law (*Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, 993),

represents the result of an aggregation of policy factors weighing in favor of the imposition of liability in the abstract in a particular set of circumstances. The existence of a duty "is not an immutable fact, but rather an expression of policy considerations leading to the legal conclusion that a plaintiff is entitled to a defendant's protection." (*Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1110 (*Ludwig*).) "Duty, being a question of law, is particularly amenable to resolution by summary judgment." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465 (*Parsons*).)

To determine the standard of conduct required by this first element of negligence, we generally undertake a risk-benefit analysis "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest . . . the actor is seeking to protect, and the expedience of the course pursued. For this reason, it is usually . . . difficult, and often simply not possible, to reduce negligence to any definite rules; it is 'relative to the need and the occasion,' and conduct . . . proper under some circumstances becomes negligence under others." (Prosser & Keeton, Torts (5th ed. 1984) § 31, p. 173, fns. omitted.) Stated differently, " 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." (*Id*., § 53, p. 356.) Thus, although the articulated standard is always the same, the question of what is reasonable will depend in each case on the particular circumstances facing that defendant considering the foreseeability of the risk of harm balanced against the extent of the burden of eliminating or mitigating that risk.

B. *Duty of Care Factors*

The factors to considered in the analysis of duty include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden on the defendant; and (7) the

consequences to the community of imposing a duty to exercise care with resulting potential liability. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112–113.)

1. *Foreseeability of Harm*

In assessing the foreseeability factor, we do not decide whether plaintiff's particular injuries were reasonably foreseeable as a result of the particular actions of a defendant; rather, we "evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572–873, fn. 6 (*Ballard*).) Foreseeability is determined in light of the totality of the circumstances and balanced against the burden to be imposed. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 677–678 (*Ann M.*); *White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442, 447.)

Further, to support a duty of care, the foreseeability must be reasonable. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 402; *Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306.) The reasonableness standard is intended to limit "the otherwise potentially infinite liability which would follow every negligent act." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739.) Courts have articulated the standard as follows: "The reasonableness standard is a test which determines if, in the opinion of a court, the degree of foreseeability is high enough to charge the defendant with the duty to act on it. If injury to another ' "is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct" ' [citations], we must label the injury 'reasonably foreseeable' and go on to balance the other *Rowland* considerations." (*Sturgeon, supra,* at p. 307.)

However, foreseeability alone is not sufficient to create an independent tort duty. "Because the consequences of a negligent act must be limited to avoid an intolerable burden on society [citation], the determination of duty 'recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.' [Citation.] '[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone

provides a socially and judicially acceptable limit on recovery of damages for [an] injury.' [Citation.] In short, foreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.)[2]

Here, the foreseeability factor favors defendants. It is not reasonable to require a driver of a vehicle to foresee that driving at or below the posted speed limit over a hose that has been deliberately extended over the road, and which the driver has no choice but to drive over, will become entangled in the undercarriage of his or her vehicle. If such were the case, any vehicle driven over such a hose would potentially subject its driver to liability. Indeed, it is difficult to perceive how a driver could avoid potential liability in this case, given that hundreds of vehicles of all sizes had driven over the hose prior to Geis, some at different speeds and all without incident. " ' "[W]ithout evidence that a defendant knew or reasonably should have known there was any danger or potential danger associated with that defendant's act or failure to act, any imposition of liability would in essence be the imposition of liability without fault." ' [Citation.]" (*N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1376, quoting *Ludwig, supra*, 65 Cal.App.4th at p. 1111, quoting *Butcher v. Gay* (1994) 29 Cal.App.4th 388, 403.)

Plaintiff faults the trial court for focusing on the circumstance of the hose itself, instead of the more general level of care that one must exercise when driving through a roadway construction site. However, the obvious danger presented by a moving vehicle is to persons who are ahead of the vehicle in the direction in which it is moving, and thus a driver has the duty proceed carefully in that direction. (*Gray v. Brinkerhoff* (1953) 41 Cal.2d 180, 184; *Weis v. Davis* (1938) 28 Cal.App.2d 240, 242–243.) Logically, this duty of attention also extends to persons who could potentially be struck by objects that an errantly driven vehicle might collide with. In another scenario, if on a public street a person drives or parks a vehicle that is likely to attract the attention of children, such as an ice cream truck, the driver may be required to anticipate that children will act

[2] "More than a mere possibility of occurrence is required since, with hindsight, everything is foreseeable." (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465–466.)

carelessly in responding to the attraction. (*Schwartz v. Helms Bakery Ltd.* (1967) 67 Cal.2d 232, 241; *Brousseau v. Carnation Co.* (1955) 137 Cal.App.2d 570, 573.) In general, however, danger does not usually arise behind a vehicle, unless it is being moved in reverse. Nor does danger arise from underneath a vehicle, unless a part of the vehicle itself becomes loose and falls off, striking someone behind the driver. In ruling on the motion for summary judgment, the trial court noted, as we have, that in driving over the hose there was no indication that the hose could become attached to a vehicle's undercarriage, and it was not reasonably foreseeable that the hose would do so. Plaintiff asserts that this finding usurps the role of the jury. We disagree.

A jury is required to consider and assess the foreseeability of risk in determining whether the defendant was negligent and, if so, whether the defendant's conduct was a proximate cause of the plaintiff's injury. (*Ballard, supra,* 41 Cal.3d at pp. 572–573, fn. 6.) However, before a matter is submitted to a jury, the court must consider foreseeability of risk in resolving the legal question whether the defendant owed a duty to the plaintiff. (*Ibid.*) The court considers foreseeability of risk in a more general manner than does the jury. (*Ibid.*; see *Parsons, supra*, 15 Cal.4th at p. 476.) But foreseeability of the risk nonetheless remains an essential component of the duty issue. (*Ludwig, supra,* 65 Cal.App.4th at p. 1111.) Any suggestion that foreseeability in the context of determining duty is a question of fact for the jury is erroneous. (*Ann M., supra*, 6 Cal.4th at p. 678.) "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ibid.*)[3] It was, therefore, appropriate for

[3] "This doctrine was fully expounded in the landmark case of *Palsgraf* v. *Long Island R. Co.* (1928) 248 N.Y. 339 [162 N.E. 99, 59 A.L.R. 1253]. In *Palsgraf,* a man carrying a package of fireworks attempted to board a moving train, assisted by defendant's employee. The package was dislodged, fell, and exploded, causing a platform to fall down and strike plaintiff, who was standing several feet away. The court found that negligence in the abstract is not a tort and that there *must* be a violation of a duty toward the *plaintiff,* who cannot recover merely for negligence towards someone else. [Citation.] Therefore, Helen Palsgraf, as the unforeseeable plaintiff, could not recover from defendant for its employee's negligence. [¶] . . . [¶] Thus, the important practical effect of the *Palsgraf* rule is that liability for unforeseeable consequences is avoided by limiting the scope of *duty,* rather than by application of rules of proximate causation. In fact, the *Palsgraf* court specifically stated that the question of proximate cause is not involved where

the trial court, and it is appropriate for this court, to consider foreseeability of the risk in assessing defendants' duty to plaintiff. Further, even if it could be said that the risk of injury of the type suffered by plaintiff was reasonably foreseeable, that fact does not equate with duty, as the remaining factors support a finding that no liability should be imposed in this case.

2. *Degree of Certainty Plaintiff Suffered Injury*

Here there is no dispute that plaintiff suffered severe injuries. Therefore, we need not address this factor further.

3. *Connection Between Defendants' Conduct and the Injury Suffered*

This factor weighs in defendants' favor. In particular, neither the City nor Geis was responsible for the hose having been placed across the road. Instead, responsibility for the placement of the hose, and for the decision to allow traffic to pass directly over the hose, lies with plaintiff's employer. Geis was compelled to drive over the hose, and she and every other person who drove over the hose that day would have been entirely reasonable in failing to perceive any risk that the hose would become entangled in the undercarriage of his or her vehicle. There is no allegation that her driving was otherwise unsafe, though plaintiff stated at his deposition that he gestured to her to indicate that she should slow down. He also stated that other cars had driven through the site faster than she did. Presumably, in asking her to slow down he was not acting out of a concern that the hose would become attached to the underside of her vehicle.

4. *Moral Blame*

"Moral blame has been applied to describe a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts . . . . [C]ourts have required a higher degree of moral culpability such as where the defendant (1) intended or planned the harmful result [citation]; (2) had actual or

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there is no negligence as to the particular plaintiff. Hence, the admonition of writers to ' "look for the duty before you talk causation," ' because ' "there is no duty to an unforeseeable plaintiff." ' [Citations.]" (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1131.)

constructive knowledge of the harmful consequences of their behavior [citation]; (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citation]." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.)

This factor weighs heavily in defendants' favor for the same reason as the preceding factor. The accident that occurred here is simply not a foreseeable consequence of driving over a hose that another party has voluntarily placed across the road, thereby compelling all drivers to run over it. Here, there is a complete lack of moral blame as to Geis.

5. *Prevention of Future Harm*

Attaching liability to Geis's conduct would not prevent future harm. Geis had no control over the placement of the hose and, like the hundreds of drivers who had passed over the hose during the day of the incident, would have had no idea that driving within the posted speed limit could lead to the unfortunate chain of events that transpired here.

6. *Burden on Defendants and Consequences to Community*

In our view, the burden on defendants and consequences to the community of imposing a duty in this case would be significant. Drivers passing over hoses set out on the roadway by construction crews would be forced to incur liability in the unexpected event that the hose became entangled with the undercarriage of their cars. This factor also weighs in defendants' favor.

7. Availability, Cost and Prevalence of Insurance

Obviously, insurance is available to cover negligent acts arising out of the operation of vehicles. However, it is also true that insurance is available for construction companies, who could bear more of the cost through increased premiums because of any potential increase in risk of harm caused by laying hoses across roadways. Ultimately, we conclude this factor weighs against plaintiff, due to the availability of insurance for construction companies to cover injuries to their employees.

In sum, because the factors to be addressed overwhelmingly support defendants' position, the court did not err in determining as a matter of law that they owed no duty to plaintiff.[4]

DISPOSITION

The judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P.J.

_____
Banke, J.

[4] In light of our conclusion, we need not consider the parties' remaining arguments.