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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

BETTY RUTH WOOD et al.,

Plaintiffs and Appellants,

v.

HAROLD WILLIAMS,

Defendant and Respondent.

C065332

(Super. Ct. No.
145421)

John Wood (Wood) suffered a heart attack and died during an encounter with defendant Harold William's dog, after the dog approached Wood but never made physical contact with him.

Wood's family members, plaintiffs Betty Ruth Wood, Kim A. Wood, Todd B. Wood, and John L. Wood III (collectively, plaintiffs) filed a wrongful death complaint against defendant alleging negligence, violation of Butte County Ordinances (negligence per se), and bystander liability on behalf of Wood's wife. Plaintiffs appeal from a summary judgment entered in

favor of defendant on their wrongful death claims. We affirm the judgment.

FACTS AND PROCEEDINGS

Defendant owned a 50-pound Shar Pei named Too who had no prior history of viciousness. Defendant was aware of the requirement that dogs be kept on a leash, and it was his practice to keep Too under control and not allow her to run loose.

On January 15, 2007, as defendant opened his door to let the housekeeper in, Too darted through his legs and escaped. With choke chain in hand, defendant got in his car and followed the dog, calling her name as he drove.

Wood was in the front yard of his home with his two small Chihuahuas. Too approached Wood and his dogs in a threatening manner, pacing back and forth approximately two to three feet in front of them. Wood threw pebbles at Too in a futile attempt to scare her away.

Wood and his wife were eventually able to get both of their dogs safely into the house. Too continued to pace several feet from Wood, and as Wood gathered more pebbles to throw at Too, Wood collapsed and died. An autopsy was never performed on Wood to determine the cause of death, but plaintiffs' expert, Peter Magnusson, M.D., opined that it was "more likely than not" the confrontation with Too caused Wood to have a heart attack, resulting in his death.

As to the complaint, defendant denied the allegations and filed a motion for summary judgment, arguing plaintiffs could not establish defendant owed them a duty of care under the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*). More particularly, he claimed it was not reasonably foreseeable that allowing Too to run free would scare someone to death in the absence of any physical contact.

Plaintiffs opposed the motion, arguing defendant's violation of county ordinances amounted to negligence per se. They also asserted it was unreasonable for defendant not to train Too, thus rendering the dog "incapable of responding to commands," or for him not to utilize the leash and collar to restrain Too when he opened the door for the housekeeper given Too's propensity to escape. They further argued defendant was negligent in failing to stop the confrontation when he arrived on the scene.

Applying the factors set forth in *Rowland*, the trial court found that although defendant had a duty to keep Too from running at large and harming other people, he had no duty to prevent Wood's death which, while tragic and "perhaps indirectly caused by the dog, was not the kind of harm which could reasonably have been foreseen by [defendant], either at the time he inadvertently allowed the dog to escape, or when he allegedly negligently failed to gain control of the dog in the decedent's yard." The court further found that moral blame on defendant's part was minimal, the connection between defendant's conduct and Wood's death was "difficult to establish, as a person generally

does not have a heart attack from the stress of what is . . . more or less [an] every day occurrence," and the burden on the community to insure against similar circumstances would be great "and would create something like strict liability."

DISCUSSION

I

Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "'First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.'" (*Waschek v. Dept. of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

In determining the merits of a summary judgment motion, we scrutinize strictly the moving party's papers and construe

liberally those of the party opposing the motion to determine the existence of triable issues of fact. Any doubts are to be resolved in favor of the opposing party. (*Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 362; *Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 649.)

Although our review is de novo, the appellant has the responsibility to demonstrate error affirmatively and identify triable issues with proper citation to the record. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.)

II

Summary Judgment Was Proper

Civil Code section 1714 subdivision (a) provides in pertinent part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person"

In *Rowland*, the Supreme Court held that there were several considerations that, when balanced together, might justify an exception to the statutory duty to use ordinary care. Those considerations include: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between 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 to the defendant and consequences to the community of imposing a duty

to exercise care with resulting liability for breach; and, (7) the availability, cost, and prevalence of insurance for the risk involved. (*Rowland, supra*, 69 Cal.2d at p. 113; see, e.g., *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472-473.)

More recently, our high court, in discussing the concept of duty in a negligence action, said: "Under general negligence principles, . . . a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.)

"Duty is a question of law for the court, to be reviewed de novo on appeal. [Citations.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771.)

Applying these principles to the matter now before us, we conclude defendant did not breach a duty of care to plaintiffs.

The most significant of the *Rowland* factors to be applied in this case is the reasonable foreseeability in these circumstances of the tragic death of plaintiffs' decedent.

Under these circumstances we cannot find that it was reasonably foreseeable that defendant's conduct in allowing his nonvicious dog to get out of the house, negligent or not, would reasonably lead to a man's death brought about, apparently, by fright or stress. Speaking particularly, when defendant's dog escaped from the house it could not then have been reasonably

anticipated that Wood would be walking his two dogs as defendant's dog roamed the neighborhood and that Wood would happen to have a serious heart condition that would be aggravated to the point that he suffered a fatal heart attack brought on by defendant's barking dog and Wood's effort to scare it away. This result depends on a sequence of events that, though tragic, were coincidental and not reasonably foreseeable. (See *Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1133 ["[T]he creation of a legal duty requires more than a mere possibility of occurrence since, through hindsight, everything is foreseeable".])

While a lack of reasonable foreseeability determines this matter, we note that the other *Rowland* factors also weigh in favor of finding that defendant did not owe Wood a duty of care under the circumstances. While plaintiffs obviously suffered injury arising from Wood's death, the coincidental connection between defendant's conduct and Wood's death, the relatively small moral blame of defendant in allowing his dog to get loose, and the small likelihood that liability in this matter would prevent future similar harm all argue in favor of a finding that defendant cannot be held liable for Wood's death.

Plaintiffs contend the trial court failed to weigh the evidence properly for purposes of a summary judgment motion. But, as noted above, we decide this matter de novo and any infirmities in the trial court's consideration of the motion are of no consequence here.

Plaintiffs argue there is no statute creating an exception to, nor a public policy clearly supporting departure from, the fundamental principle of Civil Code section 1714 that one must "exercise reasonable care in owning, controlling and restraining one's dog," and thus duty is established. But again, as noted above, while Civil Code section 1714 may impose a general duty of care, the question remains to whom the duty is owed, a question we have answered adversely to plaintiffs here.

Plaintiffs also argue that Butte County Ordinances relating to the control of dogs conclusively establish both a duty and a standard of conduct, and thus consideration of the *Rowland* factors is unnecessary. "Negligence per se" is an evidentiary doctrine codified at Evidence Code section 669. The doctrine creates a rebuttable presumption of negligence if four elements are established. (Evid. Code, § 669, subd. (a).) "'The presumption of negligence created by Evidence Code section 669 concerns the *standard of care*, rather than the *duty of care*.'" [Citation.] In order for the presumption to be available, 'either the courts or the Legislature must have created a duty of care.' [Citation.] '[A]n underlying claim of ordinary negligence must be viable before the presumption of negligence of Evidence Code section 669 can be employed. . . . ". . . [I]t is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages.'" [Citation.]" (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353 (italics added); see also *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285 [in order

for the presumption of negligence under Evidence Code section 669 to be employed, an underlying claim of negligence must be viable].) Thus, while the standard of care set forth in the relevant Butte County Ordinances may well have required defendant to keep Too from running free, his failure to do so would only result in liability to plaintiffs if he owed Wood a duty of care.

We likewise reject plaintiffs' contention, raised for the first time in their reply brief, that *Rowland* is not applicable because it is limited to cases involving "immunities which may be conferred upon possessors of land." "A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. [Citations.] The *Rowland* factors determine the scope of a duty of care whether the risk of harm is situated on site or off site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479.)

On a final note, plaintiffs make a passing claim in their reply brief that, irrespective of foreseeability, defendant owed Wood a duty under the "direct causation rule" (otherwise known as the "natural and proximate consequence rule") which states that in cases of direct causation without an intervening force, foreseeability is immaterial. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1192, p. 567.) The claim fails for

several reasons. First, while plaintiffs conclude "there is obvious 'direct causation' in the instant case," they provide no factual or legal analysis to support their claim. Next, as previously discussed, plaintiffs failed to demonstrate that defendant owed Wood a duty. "While causation is an indispensable element of negligence liability, it is neither the only element, nor a substitute for 'duty.'" (*Hegyesh v. Unjian Enterprises, Inc.*, *supra*, 234 Cal.App.3d at p. 1134.) Finally, the "direct causation" rule resulted from the court's holding in *Polemis v. Furness, Withy & Co.* (1921) 3 K.B. 560, a King's Bench case from England and a case we are not bound to follow and which, in any event, is no longer regarded as good law. (See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* (1961) App.Cas. 388 (P.C.) (appeal taken from Austl.); *Miller S.S. Co. v. Overseas Tankship (U.K.) Ltd., The Wagon Mound No. 2* (1963) 1 Lloyd's Law List Rep. 402 (Sup.Ct.N.S.W.); *Petition of Kinsman Transit Co.* (2d Cir. 1964) 338 F.2d 708, 726, cert. den. (1965) 380 U.S. 944 [liability may be limited by lack of foreseeability of the exact harm suffered where the damages do not result from "the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable"].)

DISPOSITION

The judgment is affirmed. Defendant shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

_____ HULL _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ BUTZ _____, J.