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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
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DEPUTY

DEBORAH GONZALEZ et al., Plaintiffs and Respondents, v. SOUTHERN CALIFORNIA GAS COMPANY, Defendant and Appellant.	D054677 (Super. Ct. No. L-01518)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Reversed and remanded with directions.

Defendant Southern California Gas Company (SCG) appeals a judgment following a jury verdict finding SCG liable to plaintiffs Peter and Deborah Gonzalez (Plaintiffs) for the wrongful death of their daughter, Tiffany. She died after driving her car off a street and striking an SCG gas meter assembly located 11 feet, 4 inches from the curb. On appeal, SCG contends the trial court erred by denying its motions for judgment notwithstanding the verdict (JNOV) and for new trial because: (1) it did not owe Tiffany

a legal duty of care in the circumstances of this case; (2) its conduct was not the proximate cause of her injuries; (3) the court erred in instructing the jury; and (4) the court erred by excluding certain evidence showing Plaintiffs negligently entrusted Tiffany with a vehicle.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, SCG, a natural gas distributor, installed a new gas main and service line to provide gas service to the portion of Gio's Mobile Home Estates (Gio's) located south of Lincoln Avenue in El Centro.[1] Gio's and its engineers proposed plans for the location of SCG's new meter assembly that were reviewed and approved by SCG. The meter assembly was installed 11 feet, 4 inches from the southern curb of Lincoln Avenue, near the outside of Gio's perimeter wall, and 13 feet from the driveway entrance to the southern portion of Gio's. A riser gas line was connected to the above-ground meter assembly that had a regulator reducing the pressure from 40 pounds per square inch to five pounds per square inch. Individual customer lines were connected to the meter assembly and installed underground to individual regulators at each of the approximately 50 mobile homes.

In 1989, SCG installed three concrete-filled, steel posts around the meter assembly. Two were set in the concrete sidewalk and the third was set in dirt with a 12-inch deep concrete footing. Each of the three posts was four-and-one-half inches in diameter and rose three feet above the ground. SCG intended the posts to protect the

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1 Another portion of Gio's is located north of Lincoln Avenue.

meter assembly from damage from being hit by vehicles traveling at less than 10 miles per hour. SCG engineers were capable of designing other barriers that would provide a higher level of protection.

At about 5:00 p.m. on August 3, 2002, 17-year-old Tiffany was driving home from work in her Ford Escort. She was traveling westbound on Lincoln Avenue at a speed of about 25 miles per hour (the speed limit) when another vehicle apparently attempted to pass her vehicle on its right side. Tiffany's vehicle drifted to the left into the eastbound lane and jumped the southern curb without any apparent braking. Continuing at a speed of about 25 miles per hour, her vehicle apparently rotated counter-clockwise and struck and bounced off of Gio's perimeter block wall. With her vehicle continuing to rotate, its passenger door then struck the eastern steel post of SCG's gas meter assembly, which was set in dirt and guarded the meter assembly. The force of the collision knocked that post onto the meter assembly, breaking the gas line on the high-pressure side of the assembly. A spark ignited gas that escaped from the ruptured gas line, causing a fire that engulfed Tiffany's vehicle. After a minute or two, Tiffany was able to escape the burning vehicle.

Tiffany's father, Peter, arrived while paramedics were assisting her. Tiffany told him she had swerved to miss a gray car. She was transported by ambulance to a hospital for emergency treatment of her severe burn injuries. In the hospital emergency room, she told a police officer that she had turned to avoid a silver car. Two days later, Tiffany died from burn injuries to 80 percent of her body's surface.

In July 2003, Plaintiffs filed the instant action against SCG and Gio's, alleging wrongful death claims based on theories of general negligence, negligence per se, and

premises liability.[2] The complaint alleged SCG created a dangerous condition by placing the gas meter assembly near a roadway without adequate protection. SCG filed a motion for summary judgment, apparently arguing that it did not owe Tiffany any legal duty of care.[3] The trial court denied that motion.

In October 2005, the first trial in this matter was held, resulting in a mistrial after the jury could not reach a verdict. In October 2008, the second trial in this matter was held. Eleven of 12 jurors found SCG was negligent and that its negligence was a substantial factor in causing Plaintiffs' damages. The jury found Plaintiffs' past and future damages were $2 million. The jury apportioned 40 percent of the fault for the accident to SCG, 50 percent to Tiffany, and 10 percent to Gio's. The trial court ordered judgment entered against SCG in the amount of $800,000, plus costs.

SCG filed motions for JNOV and for new trial based on the absence of a legal duty, instructional and evidentiary error, and excessive damages. The trial court denied both motions. SCG timely filed a notice of appeal.

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2 Gio's agreed to a settlement with Plaintiffs before trial.

3 The record on appeal does not contain a copy of SCG's motion for summary judgment.

DISCUSSION

I

Negligence and the Legal Duty of Care Generally

"The elements of a cause of action for negligence are: the 'defendant had a duty to use due care, that he [or she] breached that duty, and that the breach was the proximate or legal cause of the resulting injury. [Citation.]' " (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278 (*Vasquez*).) "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.) Civil Code section 1714, subdivision (a), provides: "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property . . . , except so far as the latter has, . . . by want of ordinary care, brought the injury upon himself or herself."

In *Vasquez*, we noted: "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." (*Vasquez, supra*, 118 Cal.App.4th at p. 278.) An appellate court determines de novo the existence and scope of a legal duty in a particular case. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, disapproved on another ground in *Reid v. Google, Inc.* (2005) 50 Cal.4th 512, 527, fn. 5.)

The element of a legal duty of care generally acts to limit otherwise potentially infinite liability that would follow from every negligent act. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) "A public utility [like other persons or entities] has a general duty to exercise reasonable care in the management of its personal and real property." (*White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442, 447.) For example, "[a] public utility, which negligently places a power pole too close to the road, may be liable to the occupants of a motor vehicle injured when their vehicle collides with the pole." (*Id.* at pp. 447-448.) A property owner may owe vehicle occupants a legal duty of care if it places a fixed object in a location where it is reasonably foreseeable that a vehicle driven with reasonable care would deviate or veer from a roadway in the ordinary course of travel. (*Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 517, fn. 3 (*Scott*).) In an analogous situation involving premises liability, the Restatement Second of Torts commented: "Distance from the highway is frequently decisive [whether an unreasonable risk of harm to others exists], since those who deviate in any normal manner in the ordinary course of travel cannot reasonably be expected to stray very far."[4] (Rest.2d Torts, § 368, com. h, p. 271.)

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4 Section 368 of the Restatement Second of Torts states at page 268: "A possessor of land who creates or permits to remain thereon an . . . artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who [¶] (a) are traveling on the highway, or [¶] (b) foreseeably deviate from it in the ordinary course of travel." Comment h to that section notes: "In determining whether the condition is one which creates an unreasonable risk of harm to persons lawfully travelling on the highway and deviating from it, the essential question is whether

A determination that a legal duty of care exists is a "shorthand expression of the sum total of public policy considerations which lead the law to protect a particular plaintiff from harm." (*Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 504.) No exception to the general rule of Civil Code section 1714 liability for negligence "should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*).) *Rowland* stated:

> "A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, 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 the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, at pp. 112-113.)

"The foreseeability of the harm, though not determinative, has become the chief factor in duty analysis." (*Scott, supra*, 5 Cal.App.4th at p. 515.) In considering the foreseeability of harm in a particular case for purposes of determining whether a legal duty of care existed, "[t]he proper focus is on the foreseeability of a harmful event of the general type that occurred. The relevant foreseeability is not the foreseeability of the particular and possibly unique details of how and why a particular harmful event came to pass." (*Robison v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1297 (*Robison*).)

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it is so placed that travelers may be expected to come in contact with it in the course of a deviation reasonably to be anticipated in the ordinary course of travel. *Distance from the highway is frequently decisive, since those who deviate in any normal manner in the ordinary course of travel cannot reasonably be expected to stray very far. . . .*" (Rest.2d Torts, § 368, com. h, p. 271, italics added.)

As we noted in *Vasquez*, "foreseeability depends not on whether a particular plaintiff's injury was foreseeable as a result of a particular defendant's conduct, but instead on whether the conduct at issue created a foreseeable risk of a ' "particular kind of harm." ' [Citations.]" (*Vasquez, supra*, 118 Cal.App.4th at p. 286.) Alternatively stated, it is the general character of the event or harm, not its specific nature or manner of occurrence, that must be reasonably foreseeable for a legal duty to exist. (*Robison*, at pp. 1298-1299; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58 (*Bigbee*).) In determining the question of reasonable foreseeability, *Bigbee* stated:

> "[I]t is well to remember that 'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' [Citation.] One may be held accountable for creating even ' "the risk of a slight possibility of injury if a reasonably prudent [person] would not do so." ' [Citations.]" (*Bigbee*, at p. 57.)

"An act must be *sufficiently likely* before it may be foreseeable in the legal sense. That does not mean simply imaginable or conceivable. Given enough imagination, *everything* is foreseeable. To paraphrase Justice Eagleson, with apologies to Bernard Witkin, on a clear judicial day, you can foresee forever. [Citation.] If the law imposed a duty to protect against every *conceivable* harm, nothing could function." (*Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, 996.) Foreseeability and the extent of burden to the defendant have become the primary *Rowland* factors to be considered on the question of legal duty. (*Vasquez, supra*, 118 Cal.App.4th at p. 280, fn. 5.)

II

Motion for JNOV

SCG contends the trial court erred by denying its motion for JNOV because it did not owe Tiffany a legal duty of care in the circumstances of this case.

A

At the second trial the jury found SCG was negligent and that its negligence was a substantial factor in causing Plaintiffs' damages. The jury found Plaintiffs' past and future damages were $2 million. The jury apportioned 40 percent of the fault for the accident to SCG, 50 percent to Tiffany, and 10 percent to Gio's. The trial court entered judgment against SCG in the amount of $800,000, plus costs. SCG filed a motion for JNOV based on the absence of a legal duty. The trial court denied the motion.

B

In determining independently, or de novo, the question of law whether SCG owed Tiffany a legal duty of care in the circumstances of this case, we consider primarily whether it was reasonably foreseeable that the general event or conduct in this case would cause the general type of harm in this case. (*Vasquez, supra*, 118 Cal.App.4th at p. 286; *Robison, supra*, 64 Cal.App.4th at p. 1297.) We also consider the extent of the burden on SCG were a legal duty of care imposed on it, as well as the other *Rowland* factors discussed above. (*Rowland, supra*, 69 Cal.2d at p. 113.)

In the general circumstances of this case, we conclude, as a matter of law, it was not reasonably foreseeable that SCG's installation of the gas meter assembly 11 feet, 4 inches from a street with a 25-mile-per-hour speed limit would cause the general type of

harm in this case (i.e., severe or fatal burn injuries from the conflagration caused by natural gas escaping from a ruptured gas line damaged by an errantly driven vehicle). It was not reasonably foreseeable that a vehicle driven with reasonable care would deviate or veer from a street with a 25-mile-per-hour speed limit in the ordinary course of travel and strike a gas meter assembly located over 11 feet from the curb. (*Scott*, *supra*, 5 Cal.App.4th at p. 517, fn. 3.) The Restatement Second of Torts commented: "Distance from the highway is frequently decisive [whether an unreasonable risk of harm to others exists], since those who deviate in any normal manner in the ordinary course of travel cannot reasonably be expected to stray very far." (Rest.2d Torts, § 368, com. h, p. 271.) In the general circumstances of this case, a vehicle driven with reasonable care on an ordinary street with no apparent dangerous conditions (e.g., sharp curves, dips, descents, or ascents) and a relatively low speed limit of 25 miles per hour could not reasonably be expected to deviate from, or veer off, the street the substantial distance involved in this case (i.e., 11 feet, 4 inches beyond the street's curb).[5] Furthermore, it is not reasonably foreseeable that a vehicle driven with reasonable care would deviate from, or veer off, the type of street in this case in the ordinary course of travel more than 11 feet and strike a gas meter assembly (much less any other fixed object), causing severe burn or other

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5 The fact there had not been any previous collision with the gas meter assembly during the 14-year period since its installation supports, rather than detracts from, our conclusion regarding the absence of reasonable foreseeability. (Cf. *Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 895 [the "requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents"]; *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1306-1307.)

injuries to an occupant of that vehicle. Applying the appropriate standard in determining reasonable foreseeability, we conclude the general event in this case was *not* sufficiently likely to occur in the setting of modern life that a reasonably thoughtful or prudent person would take account of it in deciding where and how to install and maintain a gas meter assembly. (*Bigbee, supra,* 34 Cal.3d at p. 57.) "[T]he mere placing of a fixed object next to a highway does not necessarily create an unreasonable risk of harm."[6] (*Scott, supra,* 5 Cal.App.4th at p. 516.) We conclude it was not reasonably foreseeable that SCG's installation of the gas meter assembly 11 feet, 4 inches away from a street with a 25-mile-per-hour speed limit would cause the general type of harm in this case.[7]

Furthermore, there presumably would be a significant burden imposed on SCG were a legal duty of care imposed on it with resulting liability for breach in the general circumstances of this case. (*Rowland, supra,* 69 Cal.2d at p. 113.) Although the record does not contain any definitive evidence regarding the specific number of SCG gas meter assemblies located a similar (or lesser) distance from streets or other roadways in

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6 Based on our review of cases cited in one annotation, it appears an overwhelming majority of cases in California and other states have not imposed negligence liability on public utilities for placement of utility poles within three feet (much less 11 feet) of a roadway when those poles are struck by vehicles. (Annotation, Placement, Maintenance, or Design of Standing Utility Pole as Affecting Private Utility's Liability for Personal Injury Resulting from Vehicle's Collision with Pole Within or Beside Highway (1987) 51 A.L.R.4th 602.) Nevertheless, we do not rely on that annotation, or its cited cases, in reaching our conclusion regarding reasonable foreseeability in this case.

7 Although we do not rely on this testimony in determining the reasonable foreseeability factor, Plaintiffs' own expert witness (Harry Krueper) testified at trial that he "can't say it's reasonably foreseeable" that vehicles "would leave the roadway [i.e., Lincoln Avenue], travel off 11 feet or more, and do some damage."

California, a survey of all SCG gas meter assemblies would be required to determine which ones are located within 11 feet, 4 inches of a street or other roadway, which presumably would require substantial time and effort of SCG employees. Furthermore, if a duty were imposed on SCG, it would then have to incur substantial design and construction costs to provide sufficient protection against vehicles that deviate from, or veer off, streets and other roadways. As SCG notes, that design and construction may require additional effort and costs to protect against atypical vehicles (e.g., motorcycles, large trucks, etc.) that may deviate from, or veer off, streets and other roadways. The burden on SCG would be substantial if a legal duty of care were imposed on it in this case, thereby weighing against the imposition of a legal duty on SCG. (*Ibid.*)

Likewise, none of the other *Rowland* factors weigh strongly, if at all, in favor of imposing a legal duty of care on SCG in this case. Although it was certain Tiffany and Plaintiffs suffered injuries or damages from the incident in this case, that factor alone does not weigh strongly in favor of imposing a legal duty on SCG. (*Rowland*, *supra*, 69 Cal.2d at p. 113.) Similarly, although there is a causal connection between SCG's conduct (i.e., installation and maintenance of the gas meter assembly with three posts) in this case and Tiffany's injuries and Plaintiffs' damages, that connection in the circumstances of this case is not sufficiently close to weigh strongly in favor of imposing a legal duty on SCG. The factual series of events leading to Tiffany's injuries and Plaintiffs' damages involved an extended sequence of multiple occurrences not reasonably foreseeable generally and, even less so, in the particular circumstances of this case. Apparently in response to a vehicle passing on her right side, Tiffany drove her

westbound vehicle into the eastbound lane and over the southern curb without any apparent braking. Her vehicle continued at a speed of about 25 miles per hour off the roadway, apparently rotated counter-clockwise, and struck and bounced off of Gio's perimeter block wall. With her vehicle continuing to rotate, its passenger door then struck the eastern steel post guarding SCG's gas meter assembly. The force of the collision knocked that post onto the gas meter assembly, breaking the gas line on the high-pressure side of the assembly. A spark ignited gas that escaped from the ruptured gas line, causing a fire that engulfed Tiffany's vehicle, burning her severely. We conclude there was not a "close" connection between SCG's conduct, and Tiffany's injuries and Plaintiffs' damages. (*Ibid.*)

Furthermore, we conclude there was no "moral blame" associated with SCG's conduct than would otherwise be found in an ordinary negligence case. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270 ["the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability"].) Although we presume, as Plaintiffs' assert, that had SCG taken additional measures to protect the gas meter assembly (e.g., stronger posts, different location), Tiffany's injuries and their damages could have been avoided, it was not SCG's moral responsibility to undertake all possible measures to protect Tiffany from injury when her injuries were not reasonably foreseeable in the circumstances of this case.[8] (Cf. *Scott*,

8 Contrary to Plaintiffs' apparent assertion, the record does not show SCG had a policy against protection of gas meter assemblies located more than three feet from a

supra, 5 Cal.App.4th at p. 517 ["[n]o moral blame can be attached to [defendant's] conduct, as there is nothing inherently wrong with placing a fixed object on one's property"].)

The policy of preventing future harm also does not strongly weigh in favor of imposing a legal duty on SCG. Although SCG presumably could take additional preventive measures that would avoid or diminish future injuries like those suffered by Tiffany in this case, the policy of preventing future harm should not be extended so far as to unduly burden defendants by requiring them to take such preventive measures when the general type of event, as in this case, is not reasonably foreseeable. Like *Scott*, we "doubt that society is willing to so restrict property rights. Imposing liability in these circumstances would effectively require" SCG and other real or personal property owners to forego or limit certain property rights or incur substantial burdens. (*Scott*, *supra*, 5 Cal.App.4th at p. 517.) We believe the imposition of that burden in these circumstances should be a legislative, not judicial, decision. (*Ibid.*)

The consequences to the community of imposing a duty of care in these circumstances include the likelihood that there would be uncertainty regarding whether, and in what circumstances, a duty would be imposed on all owners of real or personal property within 11 feet, 4 inches of any street or roadway to protect the occupants of all errantly driven vehicles from striking any fixed objects. Were a broad duty to be imposed, the burden on owners of real and personal property adjacent to streets and other

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roadway. Rather, its planners were allowed to require specially designed protection if they believed vehicle impact was reasonably foreseeable.

roadways presumably would require them to incur substantial demolition, design and/or construction costs to prevent errantly driven vehicles from colliding with fixed objects even though it is not reasonably foreseeable an errantly driven vehicle would do so. The benefit, if any, to the community of imposing such a legal duty is uncertain. Weighing the benefit to the community of imposing a legal duty against its substantial burden, we conclude this factor does not support the imposition of a legal duty in this case. (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

To the extent insurance (e.g., whether from an insurance company or through self-insurance) would be available were a duty of care to be imposed in these circumstances, that cost presumably would effectively be borne by the customers of SCG, a public utility, in the form of higher rates for natural gas. Although there is no information in the record regarding what that cost might be, the availability of insurance does not weigh heavily in favor of imposing a legal duty of care in the circumstances of this case. (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

Balancing all of the *Rowland* factors discussed above, we conclude a legal duty of care should not be imposed on SCG in the circumstances of this case. The most important factor is that it was not reasonably foreseeable SCG's installation of the gas meter assembly 11 feet, 4 inches away from a street with a 25-mile-per-hour speed limit would cause the general type of harm in this case. Furthermore, we believe the imposition of a legal duty of care on SCG in the circumstances of this case would be an unreasonable burden. (*Jefferson v. Qwik Korner Market, Inc.*, *supra*, 28 Cal.App.4th at p. 996.) The trial court erred by denying SCG's motion for JNOV based on the absence

of a legal duty of care. (Code Civ. Proc., § 629 ["[t]he court . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made"]; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [A motion for JNOV "may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support" of the verdict].)[9]

C

None of the cases cited by Plaintiffs persuade us to reach a contrary conclusion. *Bigbee* was a summary judgment case involving a vehicle that veered off a six-lane major thoroughfare (with a posted speed limit of 35 to 40 miles per hour) and struck an occupied telephone booth, located 15 feet from that street in a parking lot and near a driveway, which booth had been the site of a previous accident and was difficult for its user to exit. (*Bigbee*, *supra*, 34 Cal.3d at pp. 52-55, 58.) The trial court granted the defendants' motion for summary judgment and dismissed the negligence action by the injured telephone booth user. (*Id.* at p. 55.) On appeal, the California Supreme Court addressed the question of "whether foreseeability remains a triable issue in this case" that would preclude summary judgment. (*Id.* at p. 56.) Alternatively, it phrased the question:

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9 Code of Civil Procedure section 629 further provides that "[i]f the motion for [JNOV] be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for [JNOV] should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for [JNOV]." (See also *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044.)

"Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances [in this case]?" (*Id.* at p. 57.) *Bigbee* answered that question as follows:

> "Under these circumstances, this court cannot conclude as a matter of law that it was unforeseeable that the booth might be struck by a car and cause serious injury to a person trapped within. A jury could reasonably conclude that this risk was foreseeable. [Citation.] This is particularly true where, as here, there is evidence that a booth at this same location had previously been struck." (*Bigbee*, at p. 58.)

The court concluded: "Since the foreseeability of harm to plaintiff remains a triable issue of fact, the judgment is reversed and the case is remanded to the trial court for further proceedings consistent with the views expressed in this opinion." (*Bigbee*, *supra*, 34 Cal.3d at p. 60.) Some courts have interpreted *Bigbee* as addressing the issue of foreseeability in terms of whether it is a triable issue for the jury (i.e., whether defendants breached a duty of care) and not in the context of whether a legal duty of care exists. (See, e.g., *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 157, fn. 19; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 780.) Based on our reading of the somewhat brief opinion in *Bigbee*, those courts appear to be correct. In any event, *Bigbee* did not substantively address the issue of the existence of a legal duty of care by expressly discussing the *Rowland* factors or otherwise. Accordingly, its reasoning is not sufficiently persuasive to compel us to reach a contrary result in this case (i.e., that SCG

owed Tiffany a legal duty of care), especially because the facts in this case are inapposite to those in *Bigbee*.[10]

Robison does not persuade us to reach a contrary conclusion. In *Robison*, the defendant installed a picnic table in a grassy area directly in line with the parking lot's flow of traffic without any protective measures. (*Robison, supra,* 64 Cal.App.4th at p. 1299, fn. 1.) The court stated: "[F]or a car to crash into a picnic table, the picnic table must first be placed in harm's way. If traffic and picnic tables are placed in a configuration in which the cars can hit the tables, the resulting danger can be identified by simple observation." (*Id.* at p. 1301.) Because of that observable danger, *Robison* concluded a legal duty of care existed even though there had not been a previous accident involving the picnic table. (*Id.* at pp. 1301, 1305.) The court reversed the summary judgment for the defendant and remanded for further factual development and analysis regarding the extent of the defendant's duty of care. (*Id.* at p. 1305.) Because SCG did not install the gas meter assembly in the direct line of traffic on Lincoln Avenue, *Robison* is factually different from this case and does not support Plaintiffs' assertion that SCG owed Tiffany a legal duty of care.

Likewise, *Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260 (*Laabs*) does not persuade us to reach a contrary conclusion. In *Laabs*, the plaintiff was a

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10 For instance, in *Bigbee*, unlike in this case, there had been a previous collision with the telephone booth 20 months before the instant collision and the major thoroughfare had a posted speed limit of 35 to 40 miles per hour. (*Bigbee*, *supra*, at pp. 54-55.)

passenger in a car that collided with another car and struck defendant's light pole, located 18 inches from the curb of a street where vehicle speeds commonly reached 62 miles per hour. (*Id.* at pp. 1263-1264, 1273.) *Laabs* cited a general rule that a public utility could be found liable in negligence for injuries sustained from a collision with a pole located too close to a highway. (*Id.* at pp. 1269-1270.) In the circumstances of that case, *Laabs* concluded "it is reasonably foreseeable (for purposes of the analysis of duty) that a vehicle involved in a collision with another car would 'deviate from the highway' and collide with a light pole placed 18 inches from the curb." (*Id.* at p. 1276.) After weighing all of the *Rowland* factors, *Laabs* reversed the summary judgment for the defendant, holding the evidence submitted in support of and in opposition to the motion for summary judgment did not establish the absence of a legal duty of care.[11] (*Laabs, supra,* 175 Cal.App.4th at p. 1279.) Nevertheless, *Laabs* did not conclude defendant owed plaintiff a duty of care as a matter of law. (*Ibid.*) Rather, it concluded additional evidence on the issue of duty may be presented at trial, effectively allowing the trial court to consider that issue anew at trial. (*Ibid.*) Because *Laabs* addressed the question of whether a duty of care existed regarding location of a pole situated 18 inches from a curb of a street involving vehicle speeds of more than 60 miles per hour, we conclude it is factually different from the instant case that involves a gas meter assembly located 11 feet, 4 inches from a curb of a street with a 25-mile-per-hour speed limit. Furthermore,

11 In discussing the moral blame factor under *Rowland*, *Laabs* noted the defendant could have placed the light pole up to 12 feet away from the roadway. (*Laabs*, *supra*, 175 Cal.App.4th at p. 1278.)

Laabs did not conclude the defendant owed the plaintiff a legal duty of care in those circumstances. *Laabs* does not persuade us to reach a contrary conclusion.

D

Although Plaintiffs argue a legal duty of care is imposed on SCG by a federal regulation (i.e., 49 C.F.R. § 192.353(a)) requiring gas meters and service regulators to be protected from damage, they do not cite any case holding that regulation independently establishes a negligence duty of care or supplants the common law *Rowland* factor test in determining whether a defendant owes a plaintiff a legal duty of care in the circumstances of a particular case.[12] To the contrary, as SCG notes, "a negligence duty cannot be derived from an administrative regulation." (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 793; see also *California Service Station etc. Assn. v. American Home Assurance Co.*, *supra*, 62 Cal.App.4th at p. 1175.) We conclude the regulation cited by Plaintiffs does not impose a legal duty of care on SCG in the

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12 Plaintiffs do not cite any specific *statutory* language that purportedly would impose a legal duty of care on SCG in the circumstances of this case. Their reference to general federal statutes regarding the regulation of natural gas pipelines (i.e., 49 U.S.C. § 60101 et seq.) is insufficient to show a legislative intent by the United States Congress to impose a legal duty of care for purposes of negligence causes of action. Although we presume a legislative body may create a negligence duty of care, a regulatory or administrative agency cannot impose a duty of care absent delegation to it of that authority by the Legislature. (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175-1176.) Plaintiffs do not cite any language in any federal statute (or otherwise) showing any such legislative intent regarding the federal regulation on which they base their argument (i.e., 49 C.F.R. § 192.353(a)).

circumstances of this case.[13] At most, that regulation would be relevant in determining the *standard* of care were a legal duty of care first determined to exist.[14] (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430 ["[t]he presumption of negligence created by Evidence Code section 669 concerns the *standard* of care, rather than the *duty* of care"].) Furthermore, Plaintiffs do not, and presumably could not, assert a private right of action (independent of their negligence claim) exists based on their cited federal regulation. (*California Service Station etc. Assn. v. American Home Assurance Co.*, *supra*, 62 Cal.App.4th at pp. 1178-1179.) Regardless of any federal (or state) regulations, the question of whether SCG owed Tiffany a legal duty of care in the circumstances of this case remained a question of law for determination, by the trial court initially and on appeal by this court de novo, by application of the *Rowland* factors. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)

III

Remaining Contentions

Because we dispose of this appeal based on the absence of a legal duty of care owed by SCG to Tiffany and resultant trial court error in denying SCG's motion for JNOV, we need not address the other contentions made by SCG on appeal.

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13 SCG has *not* conceded federal statutes and regulations impose a legal duty of care on it in the circumstances of this case.

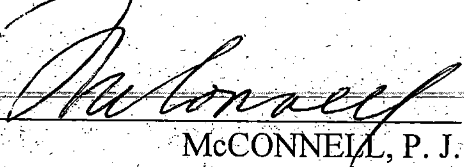
14 Similarly, the actions taken by SCG to comply with federal and state regulations did not create a legal duty of care if one did not exist as a matter of law by application of the *Rowland* factors. (Cf. *Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 958-959; *Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 907-908.)

DISPOSITION

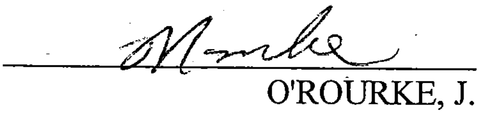
The judgment against SCG is reversed and the matter is remanded with directions that the trial court vacate its order denying SCG's motion for JNOV, issue a new order granting that motion, and enter judgment for SCG. SCG shall be awarded its costs on appeal.

McDONALD, J.

WE CONCUR:



McCONNELL, P. J.



O'ROURKE, J.