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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARCUS GARLAND, Plaintiff and Appellant, v. TITUS YOUNG et al., Defendants and Respondents.	B292533 (Los Angeles County Super. Ct. No. BC691260)

APPEAL from an order of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed, with instructions.

Mastroianni Law Firm, A. Douglas Mastroianni, for Plaintiff and Appellant.

Demler, Armstrong & Rowland, Robert W. Armstrong, David A. Ring, for Defendants and Respondents Richard Young and Teresa Young.

Plaintiff and appellant Marcus Garland appeals the trial court's order sustaining the demurrer of defendants and respondents Richard and Teresa Young without leave to amend the first amended complaint in this action for negligence. Garland is the Youngs' neighbor, and was brutally attacked by their adult son, Titus Young, after Titus visited their home in violation of the terms of his probation, which required him to stay at a medical facility in San Diego. Garland sued the Youngs for sheltering Titus and failing to report him to authorities although they knew that Titus had a history of violence and illegal drug use and was violating his probation by returning to the family's neighborhood.

On appeal, Garland argues that the trial court's order must be reversed because the Youngs "sheltered" Titus and failed to report his whereabouts to authorities despite their knowledge of his violent nature and history, which increased the risk of danger to their neighbors. We conclude that the Youngs did not owe Garland a duty of care under the facts alleged in the first amended complaint, and therefore hold that the trial court did not err in sustaining the demurrer. Garland has also failed to establish that his proposed amendment to the first amended complaint—that the Youngs are aware Titus has suffered a traumatic brain injury that increases his propensity for violence and undermines his ability to control his own violent

tendencies—will change the legal effect of Garland's pleading. We therefore conclude that the trial court did not abuse its discretion in denying leave to amend.

FACTS[1]

Titus is a former NFL professional football player with a history of violent assaults, drug use, and other criminal conduct. The Youngs are Titus's parents.

In May 2015, Titus pleaded guilty and was sentenced to 12 months' probation for assault, and he was ordered to receive counseling and treatment at a medical facility near San Diego for one year. The terms of Titus's probation required that he stay at the medical facility.

On the morning of January 30, 2016, Titus left the medical facility and "appeared" at the Youngs' home in Los Angeles. The Youngs knew their son was in violation of the terms of his probation, and they knew that he had extremely violent tendencies and a history of illegal drug use. Despite this knowledge, the Youngs "provided shelter" to Titus and did not call the Los Angeles Police Department, probation department, District Attorneys' Office, or the medical facility to report that Titus was in the Los Angeles area.

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[1] In accordance with the standard of review on appeal, we state the material facts properly pleaded in the first amended complaint as true. (*McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1206–1207.)

Also on January 30, 2016, before the subject assault took place, Titus rode a bicycle through the streets of his parents' neighborhood, and threatened to assault the Youngs' neighbors. Titus had previously threatened his parents' neighbors, who were granted a restraining order by the Los Angeles County Superior Court as a result.[2]

On the evening of January 30, 2016, Titus ambushed and brutally attacked Garland, who was a neighbor of the Youngs, and severely injured him. Garland suffered deep wounds to his head and eyes and may suffer severe vision impairment or blindness as a result of the attack. He was transported to the hospital for treatment.

Titus was arrested for battery and faces criminal charges and revocation of his probation.

PROCEDURAL HISTORY

First Amended Complaint

On May 2, 2018, Garland filed the operative first amended complaint. As relevant here, Garland alleged a cause of action for negligence against the Youngs.[3] Garland alleged that the Youngs knew or should have known that by

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[2] The threatened neighbors are not named, but do not include Garland.

[3] Garland also alleged a cause of action for battery against Titus, which is not at issue in the current appeal.

sheltering Titus in their home and failing to alert law enforcement or the treatment center of Titus's whereabouts they created a significant risk of danger to their neighbors. Garland alleged that the Youngs breached their duty of care to him, and that as a proximate and legal result of their breach, Garland suffered bodily and emotional injuries, and incurred medical expenses.

Demurrer

On May 31, 2018, the Youngs demurred to Garland's negligence cause of action against them. The Youngs argued that Garland failed to state a cause of action for negligence because the factual allegations did not demonstrate that they owed a legal duty to Garland. In general, a defendant has no duty to control the conduct of a third person absent a special relationship with either that third person or the plaintiff. Liability may be imposed only when someone has worsened the plaintiff's position by creating a foreseeable risk of harm from the third person. The first amended complaint did not state any facts indicating that the Youngs took any action that increased the risk of harm to Garland, and thus failed to allege facts sufficient to demonstrate that the Youngs owed Garland a duty of care. The Youngs further argued that Garland should be denied leave to amend the first amended complaint because Garland had not demonstrated how an amendment would change the legal effect of the pleading.

Tentative Ruling

The trial court issued its tentative ruling sustaining the demurrer without leave to amend on the basis that Garland failed to allege that the Youngs owed him a duty of care. The law does not usually require a defendant to control, or warn others regarding, the conduct of a third party in the absence of a special relationship unless the defendant has committed misfeasance—i.e., taken an action that makes the plaintiff's position worse. A defendant cannot be held liable for failure to assist the plaintiff absent a duty to take affirmative action.

In this case, no duty was alleged. There was no causal connection between the conclusory allegations that the Youngs "'provided shelter'" to Titus and Titus's criminal attack against Garland. The allegations did not support the inference that the Youngs either created or enhanced Garland's risk of harm. Nor were there allegations of a special relationship between the Youngs and Garland sufficient to support a duty for liability based on the Youngs' nonfeasance.

Trial Court's Ruling

The case was called for a hearing on the demurrer on July 11, 2018. Garland did not oppose the Youngs' demurrer and did not appear at the hearing or otherwise contact the court. The Youngs submitted to the trial court's tentative

ruling via e-mail. The trial court adopted its tentative ruling and ordered the demurrer sustained without leave to amend.

DISCUSSION

Appealability

Judgment of Dismissal Not Entered

On September 7, 2018, Garland purported to appeal the judgment of dismissal following the order sustaining the demurrer. Garland did not attach the order of dismissal or notice of entry of dismissal.

On September 17, 2018, and September 18, 2018, this court advised Garland of the deficiency and informed him that he must provide the court with filed, stamped copies of the order of dismissal and notice of entry of dismissal within 15 days or face dismissal of the appeal as taken from a non-appealable order.

On October 3, 2018, Garland filed a motion asking this court to exercise its discretion to deem the order sustaining the demurrer without leave to amend an appealable order in the absence of a judgment of dismissal, which was deferred to the panel. In the motion, Garland explained his concern that if he were to submit the proposed judgment himself he may be precluded from appealing the judgment, and argued that even if this was not the case, doing so would further

delay the appeal to no purpose. We agree, and grant the motion.

"An order sustaining a demurrer is interlocutory and thus not appealable. Any appeal must be taken from the subsequently entered judgment of dismissal." (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780.) "'The existence of an appealable judgment is a jurisdictional prerequisite to an appeal.' . . . (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)" (*Ibid.*)

It does not appear that a judgment or order of dismissal has been entered. "To promote the orderly administration of justice, and to avoid the useless waste of judicial and litigant time that would result from dismissing the appeal merely to have a judgment formally entered in the trial court and a new appeal filed, we order the trial court to enter a judgment of dismissal nunc pro tunc as of the date of the order sustaining the demurrer without leave to amend, and we will construe the notice of appeal to refer to that judgment." (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204; see also *Munoz v. Davis* (1983) 141 Cal.App.3d 420, 431 [directing amendment of order sustaining demurrer to include "The cross-complaint is dismissed"]; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 527, fn. 13 [directing amendment of order granting motion to strike to include "The complaint is dismissed"].)

Forfeiture for Failure to Oppose Demurrer or the Denial of Leave to Amend

The Youngs argue that Garland forfeited his claims on appeal when he failed to object to the demurrer below. We disagree.

In general, a party who fails to oppose a motion in the trial court effectively waives appellate review. (See *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.) Nonetheless, "'[a] trial court's order sustaining a demurrer without leave to amend is reviewable for abuse of discretion "even though no request to amend [the] pleading was made." (Code Civ. Proc. § 472c, subd. (a).)'" (*Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1072, quoting *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 667–668.) Further, "'[w]hile it is the plaintiff's burden to show "that the trial court abused its discretion" and "show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading" [citation], a plaintiff can make "such a showing . . . for the first time to the reviewing court" [citation].'" (*Ibid.*) The fact that Garland failed to oppose the demurrer is therefore not dispositive of the appeal, as he may still make a showing of how amendments would cure defects in the complaint. We will therefore review the appeal on the merits.

Judgment Sustaining Demurrer

Standard of Review

"'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citation.]" (*McAllister v. Los Angeles Unified School Dist.*, *supra*, 216 Cal.App.4th at p. 1206.)

Legal Principles

"An essential element of an action for negligence is the existence of a duty of care to the plaintiff. [Citation.] The existence and scope of a defendant's duty is an issue of law

to be decided by the court." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 838.)

"In general, each person has a duty to act with reasonable care under the circumstances. [Citations.] However, 'one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.' [Citation.]" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents of University of California*).) There are exceptions, however, to the general rule that there is no duty control the conduct of the wrongdoer or to warn those in danger. "A duty to control, warn, or protect may be based on the defendant's relationship with 'either the person whose conduct needs to be controlled or [with] . . . the foreseeable victim of that conduct.' [Citations.] Specifically, a duty to control may arise if the defendant has a special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct. [Citation.] . . . Similarly, a duty to warn or protect may be found if the defendant has a special relationship with the potential victim that gives the victim a right to expect protection." (*Ibid.*)

Even in the absence of a special relationship arising from a duty to control the wrongdoer or a duty to protect the victim, the general rule that a defendant has no duty for the conduct of a third party "does not apply if the claim 'is grounded upon an affirmative act of [the] defendant which created an undue risk of harm.' [Citation.] 'The question . . . is . . . whether appellant created a "peril," that is, an

unreasonable risk of harm to others.' [Citation.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 533 (*Boustred*).) "A legal duty may arise from affirmative acts 'where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person. In such cases the question of duty is governed by the standards of ordinary care.' [Citations.]" (*Id.* at p. 531.)[4]

Courts may depart from the rule that there is no duty to aid "upon the 'balancing of a number of [public policy] considerations' . . . ." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434.) "In determining whether policy considerations weigh in favor of such an exception, we have looked to [the *Rowland* factors, including] '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

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[4] "By contrast, nonfeasance generally does not give rise to a legal duty. The underlying premise is that 'a person should not be liable for "nonfeasance" in failing to act as a "good Samaritan."' [Citation.] In other words, 'one "who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another" from the acts of a third party.' [Citations.] Thus, absent misfeasance, 'as a general matter, there is no duty to act to protect others from the conduct of third parties.' [Citations.]" (*Boustred*, *supra*, 183 Cal.App.4th at p. 531.) Nonfeasance may give rise to a duty where there is a special relationship. (*Ibid.*; *Regents of University of California*, *supra*, 4 Cal.5th at p. 619.)

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* [*v. Christian* (1968)] 69 Cal.2d [108,] 113.)" (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*).)

"We do not ask whether these factors (the *Rowland* factors) 'support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.' (*Cabral* [*v. Ralph's Grocery Co.* (2011)] 51 Cal.4th [764,] 772; see Rest.3d Torts, Liability for Physical and Emotional Harm, § 7, com. a, p. 78 ['No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.'].)" (*Vasilenko*, *supra*, 3 Cal.5th p. 1083.)

There are "many public policy reasons for limiting liability. 'Chief among these is our belief that the responsibility for tortious acts should lie with the individual who commits those acts; absent facts which clearly give rise to a legal duty, that responsibility should not be shifted to a third party.' . . . ([*Wise v. Superior Court* (1990)] 222 Cal.App.3d [1008,] 1015–1016.)" (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 259–260.) "'[I]n the case of *criminal*

conduct by a third party, an extraordinary degree of foreseeability is required . . . .'" (*Boustred*, *supra*, 183 Cal.App.4th at p. 536, citation omitted.) "When the court engages 'in any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware.' (*Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950, 957.)" (*Ibid.*)

Analysis

Although the first amended complaint emphasizes that the Youngs are the parents of Titus and that Garland is their neighbor, Garland concedes that the Youngs lack any special relationship either to Titus[5] or to Garland[6] himself

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[5] While the parent-child relationship can give rise to a duty to control, the relationship must entail an "ability to control." (*Regents of the University of California*, *supra*, 4 Cal.5th at p. 619; see also Rest.3d Torts, § 41, com. d, p. 66 [recognizing a duty arising from the relationship of parents and *dependent* children and stating, "[w]hen children reach majority or are no longer dependent, parents no longer have control, and the duty no longer exists"].) Garland makes no argument that the Youngs, as parents, had any ability to control their son; indeed, the theory of the first amended complaint is that Titus's violent tendencies are uncontrollable.

[6] The relationship between the Youngs and Garland as neighbors has none of the common features of special relationships that support a duty to protect: there is no

that would create a duty of care. He argues instead that the Youngs' failure to alert authorities of Titus's whereabouts and their provision of shelter to Titus increased the risk that Titus would harm Garland by creating a "home base" from which Titus would commit violent acts. Garland asserts that the Youngs' misfeasance created a duty of care even in the absence of a special relationship between the Youngs and either Titus or Garland.

We find that Garland's allegations are based on either nonfeasance, or misfeasance that did not create peril or increase risk to him. Even assuming, however, that he has alleged the Youngs increased the risk, public policy considerations weigh heavily against imposing a duty in this context. We explain below that a person who is aware that another (1) is a convicted felon, (2) has violent tendencies, and (3) is violating a term of his probation by leaving a proscribed area, does not owe a duty of care to prevent injury to a third person based solely upon (1) the failure to notify the authorities of the probationer's violation and (2) the provision of shelter to the probationer for a short time period.

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aspect of dependency in which Garland relies on the Youngs for protection; Garland is not particularly vulnerable; and the Youngs do not have control over Garland's welfare. (See *Regents of the University of California*, *supra*, 4 Cal.5th at p. 620–621.)

Failure to Report Titus to Authorities

Nothing in the first amended complaint indicates that the Youngs either encouraged Titus to leave the medical facility, aided him in departing, or brought him to their neighborhood. Titus "appeared" at his parents' home on the day of the attack. Under the facts alleged, the Youngs' failure to report Titus's whereabouts to authorities is nonfeasance, not misfeasance, and therefore is not actionable in the absence of a special relationship. (*Regents of University of California*, *supra*, 4 Cal.5th at p. 619, quoting *Williams v. State of California* (1983) 34 Cal.3d 18, 23 ["'[a] person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another'"].)

Providing Shelter to Titus

Garland's argument for misfeasance is that by providing shelter to Titus, the Youngs increased the risk of harm to Garland such that they may be held liable. This argument is also without merit.

First, we do not assume the truth of the assertion in the first amended complaint that "by sheltering Titus . . . in their home . . . [the Youngs] created a significant risk of harm to their neighbors"—a conclusory statement that is unsupported by facts. (*People v. Superior Court* (*J.C. Penney Corp., Inc.*) (2019) 34 Cal.App.5th 376, 386 [when reviewing

a demurrer on appeal the court disregards unsupported legal and factual conclusions].)

Moreover, there is no close connection here between the Youngs giving Titus shelter at their home (for less than a day) and an increased risk of an assault being committed against Garland at a different location in the neighborhood. The Youngs took no action to bring Garland within harm's reach. The assault was not alleged to have taken place on the Youngs' property or in their home. To the contrary, had Titus remained sheltered in the Youngs' home that day, it is unlikely that the assault would have occurred; and had the Youngs turned Titus away when he appeared at their home, there is no reason to expect Titus was any less likely to pose a risk to Garland or other persons elsewhere in the neighborhood.

The absence of a close connection between the alleged misfeasance and the increased risk to the victim here stands in stark contrast to the facts at issue in *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206 (*Pamela L.*), the case upon which Garland principally relies. In *Pamela L.*, the court of appeal found the trial court erred in sustaining defendant wife's demurrer to a complaint alleging that she "negligently, carelessly, recklessly and wantonly encouraged and invited" several minor children (plaintiffs) to come to defendants' home, where her husband sexually molested them. (*Id*. at pp. 208–209.) The wife encouraged the minors to visit the defendants' home, enticing them with use of the pool and with snacks, and assured plaintiffs' parents they would be

safe, all the while knowing the minors would be left alone with her husband, who she also knew presented a danger of sexual predation. (*Id.* at p. 210.) The *Pamela L.* court noted the close connection between defendant wife's invitation and the molestation that occurred at their home, as well as the "more stringent precautions" required for dealing with children, in finding a duty. (*Id.* at p. 211.) As one of our sister courts has observed, "[i]t is obvious that the wife in *Pamela L.* was seen by the court as functioning as a *procurer* of victims for her husband." (*Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 729.)

At oral argument, Garland argued for the first time that the Youngs' conduct amounted to misfeasance increasing the risk to Garland because the Youngs violated Penal Code section 32, the accessory statute, by providing shelter to Titus.[7] Because Garland failed to raise it in the opening brief, the issue has been waived, and we need not consider it. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9 ["[w]e do not consider arguments that are raised for the first time at oral argument"].) Regardless, the argument is

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[7] Penal Code section 32 provides, "Every person who, *after a felony has been committed*, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, *is an accessory to such felony*." (Italics added.)

without merit, and Garland's reliance on Penal Code section 32 only serves to illustrate a fundamental flaw in his theory of misfeasance. Assuming the Youngs violated Penal Code section 32 by "sheltering" Titus in violation of his terms of probation, that would make the Youngs accessories to Titus's prior, May 2015 conviction for assault; the alleged violation in no way makes the Youngs responsible for Titus's subsequent attack of Garland.[8] "For purposes of [Penal Code] section 32, the relevant felony here is [the felon's] conviction for [the original crime], not any conduct in violating his [probation]." (*People v.Nuckles*, (2013) 56 Cal.4th 601, 607.) Thus, even assuming misfeasance based on a violation of Penal Code section 32 by the Youngs, Garland still fails to show a close connection between that misfeasance and Titus's assault on him.

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[8] Garland's use of the word "sheltering" is by definition linked to Titus's past crime, not the assault at issue in this case. "Sheltering" means "to protect," or "to place under shelter or protection." (Webster's 10th Collegiate Dict. (1995) p. 1080.) In context, the first amended complaint can only be read to allege the Youngs were protecting Titus from the punishment previously imposed on him. Further, the sole protection that they allegedly offered was giving him a place to stay for a short time; at oral argument, Garland's counsel admitted that there are no allegations that the Youngs actively hid Titus, or harbored him from law enforcement. Most significantly, there are no facts pleaded that even suggest the Youngs affirmatively assisted, aided, or abetted the assault on Garland.

The Rowland Factors

Even assuming the Youngs' conduct foreseeably increased the likelihood that Garland would encounter Titus and suffer harm, imposition of a legal duty is not automatic; rather, we must analyze duty not on the facts of this case, but ask at a "higher level of generality" "'whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.' [Citations.]" (*Vasilenko*, *supra*, 3 Cal.5th at pp. 1083–1084.) Here, we conclude that policy considerations weigh against imposing a duty on persons who fail to report, and provide short term shelter to, a known violent probationer who has absconded from his required conditions of confinement and who assaults a victim.

"'The *Rowland* factors fall into two categories. Three factors—foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevan[t] injury, while the other four—moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.' (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145.)" (*Vasilenko*, *supra*, 3 Cal.5th at p. 1085.) "'"[The] existence [of a duty] depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." [Citation.]' [Citation.]" (*Erlich v. Menezes* (1999) 21 Cal.4th

543, 552.) These policy considerations include "'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" [citation].' (*Cabral*, *supra*, 51 Cal.4th at p. 781.) 'A duty of care will not be held to exist even as to foreseeable injuries . . . where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.' (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 502.)" (*Vasilenko*, *supra*, at pp. 1086–1087.)

With respect to the three foreseeability factors, it was foreseeable that a probationer in violation of the terms of his probation who had a record of violence like Titus, might harm a person who came into contact with him. There is also no question that the injuries resulting from such an attack are certain: Garland suffered physical injuries that are of the general type foreseeable as a result of an assault. Therefore, the first two foreseeability factors favor imposing a duty. However, as we have discussed, there is no close connection between the Youngs' conduct and Garland's injuries. Without the ability to control Titus or foresee the identity of a particular victim, the Youngs were not in a position to prevent the harm. Titus' actions were "independent" of the Youngs' alleged misfeasance, Titus's

actions were not "derivative" of the alleged misfeasance, and the Youngs' conduct "bears only an attenuated relationship to the [victim's injuries], [therefore] we conclude that the closeness factor tips against finding a duty." (*Vasilenko*, *supra*, at p. 1086.)

With respect to the public policy factors, moral blame is difficult to assess in the absence of a complete factual record, but "if there were reasonable ameliorative steps the defendant could have taken, there can be moral blame 'attached to the defendants' failure to take steps to avert the foreseeable harm.' [Citation.]" (*Vasilenko*, *supra*, 3 Cal.5th at p. 1091.) In this case, the Youngs could have alerted authorities to Titus's whereabouts, and arguably should have, but it is unclear whether reporting Titus would have had an ameliorative effect. Likewise, refusing Titus shelter may or may not have improved the situation, as refusing him shelter would have released him back into same neighborhood where the assault occurred. It is impossible to know what Titus's reaction would have been, or if authorities would have apprehended him before he harmed Garland or someone else. It is also possible that by refraining from calling authorities and instead allowing Titus into their home the Youngs could have diffused his tendency to act violently to some degree. Because determining whether moral blame should attach to the Youngs' decisions requires a degree of speculation, we cannot conclude that this factor carries much weight either in support of or against imposition of a duty.

Preventing future harm is equally murky—in some instances reporting a probationer's whereabouts or refusing him shelter could avert potential harm, in other instances it might increase the risk of violence, and still in others it may have no effect. A probationer with a violent past who has broken the terms of his probation is outside the control of others, and whether future harm can be prevented is speculative.

The final two public policy factors—the burden on society and the availability of insurance—both weigh heavily on the side of not imposing a duty. In many instances it could be extremely onerous and potentially dangerous to require a defendant to report a probation violation or to refuse a probationer short term "shelter" or risk civil liability. It may be difficult to predict the reaction of a felon who has broken the terms of his or her probation, and in some situations imposing a duty would force the defendant into a situation where they had to choose between their own immediate safety and the potential safety of others. In other situations, providing shelter might keep a felon from committing acts of violence in the community. Where, as here, there is no evidence that a defendant took any action to bring the felon and victim together, we conclude the burden is too great. Additionally, there is no insurance available in such situations. The connection between the defendants who "sheltered" or failed to report the probationer and the harm he causes is simply too attenuated. It is the probationer who is responsible for and determines his own actions.

Examining all of the *Rowland* factors, we do not believe that imposition of a duty of care is appropriate under these circumstances. Courts have routinely rejected imposing a duty to be a "Good Samaritan" in instances where a third person has committed a crime and the defendant has no control over the criminal, no knowledge that the victim is any more likely to be targeted than any other member of the general populace, and has done nothing to increase the likelihood of harm. We hold that a person's conduct that includes only providing a place to shelter to a probationer for a short time, coupled with the person's decision not to report the probationer's whereabouts to law enforcement despite knowledge of the probationer's violent tendencies and probation violation, does not impose on that person a duty toward third-parties assaulted elsewhere by the probationer.

Because the facts alleged do not demonstrate that the Youngs owed Garland a duty of care, the trial court did not err in sustaining the demurrer as to Garland's negligence claim.

Proposed Amendment to the First Amended Complaint

Finally, Garland proposes to amend the first amended complaint to allege that the Youngs are aware that Titus has suffered a traumatic brain injury that increases his propensity for violence and undermines his ability to control his own violent tendencies. The proposed amendment is not

a sufficient basis for imposing a duty upon the Youngs, and it will not change the legal effect of Garland's pleading. Our analysis already accepts Garland's allegation that the Youngs were fully aware of Titus' uncontrollable violent tendencies when they did not call law enforcement and allowed him shelter in their home; why he developed those violent tendencies adds nothing to that analysis. We therefore conclude that the trial court did not abuse its discretion in denying leave to amend the first amended complaint.

DISPOSITION

We order the trial court to enter a judgment of dismissal nunc pro tunc as of the date of the order sustaining the demurrer without leave to amend. We affirm the trial court's order sustaining the demurrer without leave to amend and its judgment of dismissal. The Youngs are awarded their costs on appeal.

MOOR, J.

We concur:

RUBIN, P. J.

BAKER, J.