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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

STEPHEN CLARO et al., Plaintiffs and Appellants, v. TARGET CORPORATION et al., Defendants and Respondents.	B226644 (Los Angeles County Super. Ct. No. GC041068)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan A. Pluim, Judge. Reversed in part and affirmed in part.

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The Homampour Law Firm and Arash Homampour; Law Offices of Richard M. Falk and Richard Falk for Plaintiffs and Appellants.

Trachtman & Trachtman, Benjamin R. Trachtman and Ryan M. Craig for Defendants and Respondents.

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Plaintiffs Stephen Claro and Southland Display Co., Inc. filed suit against defendants Target Corporation (Target), Sunbelt Stores, Inc. (Sunbelt), and the Betty R. Hollingsworth Trust (Trust) for damages resulting from a fire caused by the use of fireworks on defendants' property. The trial court granted summary judgment in favor of defendants, and plaintiffs appealed. We reverse in part and affirm in part.

BACKGROUND

The Trust owns certain real property in Alhambra, California. Plaintiffs own and occupy real property adjacent to the Trust's property. The Trust leased its property to Sunbelt, which subleased the property to Target, which opened a Target store on the property in 1983.

Plaintiffs allege that in the evening of July 4, 2006, fireworks ignited in the Target parking lot caused a fire on plaintiffs' property. As a result, "the structure located on plaintiffs' property was destroyed, along with its contents."

Target admits that it was aware of the previous use of fireworks in its parking lot, both because of "expended firework remnants that need[ed] to be picked up and discarded the following day" and because several Target employees stated that they had observed the use of fireworks in the parking lot on July 4 in the two to four years before the 2006 fire. Plaintiffs also introduced evidence that Alhambra Fire Department personnel have observed the use of fireworks in the Target parking lot on July 4 "roughly every year" since 1988 and have issued citations or seized illegal fireworks there on July 4 approximately every year for the five years preceding the fire.

Plaintiffs filed suit against the Trust and Target and later amended their pleadings to add Sunbelt as a defendant. The operative first amended complaint alleges causes of action for negligence, premises liability, ultrahazardous activity, and trespass. Target's demurrer to the ultrahazardous activity claim was sustained without leave to amend, and that claim is not at issue on this appeal.

Defendants moved for summary judgment or, in the alternative, summary adjudication. They argued that they were entitled to judgment in their favor on the negligence and premises liability claims because the undisputed facts showed that they owed no duty to plaintiffs. They further argued that they were entitled to judgment in their favor on the trespass claim because there was no evidence that they intended "to commit the act constituting trespass" and no evidence of "a causal nexus" between any intent on their part and the conduct of the individuals who ignited the fireworks. In opposition, plaintiffs argued that defendants did owe them a duty of ordinary care and that defendants' conduct did "satisfy the elements of trespass."

The trial court granted defendants' motion in its entirety and entered judgment against plaintiffs. Plaintiffs timely appealed.

STANDARD OF REVIEW

We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.)

DISCUSSION

I. Negligence and Premises Liability Claims Against Target

Plaintiffs argue that the undisputed facts do not establish that Target owed plaintiffs no duty of ordinary care. We agree.

"The general rule in California is that '[e]veryone 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 or person . . . .' (Civ. Code, § 1714, subd. (a).) In other words, 'each person has a duty to use ordinary care and "is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . ."' [Citation.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 (*Cabral*).) In *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*), the Supreme Court "identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: '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.' [Citations.]" (*Cabral*, *supra*, 51 Cal.4th at p. 771.) As the Court has also explained, however, "in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' [Citations.]" (*Cabral*, *supra*, 51 Cal.4th at p. 771.)

The Court also provided the following guidance for determining whether an exception to the general duty of ordinary care should be recognized in a particular case under *Rowland*: "[T]he *Rowland* factors are evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, we have explained that the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to 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 . . . .' [Citations.]" (*Cabral*, *supra*, 51 Cal.4th at p. 772.) Likewise, regarding the other *Rowland* factors, the relevant question is "not whether they support an exception to the general duty of reasonable care on the facts of the particular case . . . , but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Ibid.*) "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Ibid.*)

Cabral illustrates the application of these principles. In that case, a truck driver had parked his tractor-trailer on the shoulder of the freeway so that he could eat a snack. (*Cabral*, *supra*, 51 Cal.4th at p. 769.) A pickup truck rear-ended the parked tractor-trailer, killing the pickup truck's driver. (*Ibid.*) A toxicology report on the decedent driver was negative, and expert witnesses opined that he had probably fallen asleep while driving or suffered from an unknown medical condition. (*Id.* at pp. 769-770.) After the widow of the decedent driver obtained a jury verdict against the employer of the tractor-trailer's driver, the employer appealed and obtained a reversal in the Court of Appeal on the ground that the tractor-trailer driver owed the decedent driver no duty of care. (*Id.* at p. 770.)

The Supreme Court reversed the Court of Appeal. (*Cabral*, *supra*, 51 Cal.4th at p. 787.) Addressing the duty question, the Court observed that "the factual details of the accident are not of central importance. That [the tractor-trailer driver] parked 16 feet from the outermost traffic lane, rather than six feet or 26 feet; that parking for emergencies was permitted in the dirt area he chose; that [the decedent driver] likely left the highway because he fell asleep or because of some unknown adverse health event, rather than from distraction or even intoxication—none of these are critical to whether [the tractor-trailer driver] owed [the decedent driver] a duty of ordinary care. These facts may have been important to the jury's determinations of negligence, causation and comparative fault, but on duty California law looks to the entire 'category of negligent conduct,' not to particular parties in a narrowly defined set of circumstances. [Citations.] To base a duty ruling on the detailed facts of a case risks usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances." (*Id.* at p. 774.)

Accordingly, the Court framed the pertinent inquiry as follows: "We take the issue between the parties to be whether a freeway driver owes other drivers a duty of ordinary care in choosing whether, where and how to stop on the side of the road. Because the general duty to take ordinary care in the conduct of one's activities (Civ. Code, § 1714, subd. (a)) indisputably applies to the operation of a motor vehicle,

the issue is also properly stated as whether a categorical exception to that general rule should be made exempting drivers from potential liability to other freeway users for stopping alongside a freeway." (*Cabral*, *supra*, 51 Cal.4th at p. 774.)

Following *Cabral*, and therefore undertaking the duty inquiry at a broad level of factual generality, we take the issue between plaintiffs and Target to be whether an owner or possessor of land owes the owner or possessor of adjacent land a duty of ordinary care in choosing whether and how to try to limit or control the use of fireworks on their own property, which is known to recur on a specific date.

Again following *Cabral*, we first address foreseeability and the closeness of the connection between the defendant's conduct and the plaintiff's injury. (*Cabral*, *supra*, 51 Cal.4th at pp. 774-781.) "In the generalized sense of foreseeability pertinent to the duty question" (*id.* at p. 775), it is clearly foreseeable that the use of fireworks may start a fire that will damage neighboring property, and Target's knowledge that fireworks had been used in the Target parking lot on July 4 for several years made it clearly foreseeable that fireworks would again be used in that parking lot on July 4, 2006. The connection between the defendant's conduct and the plaintiff's injury is likewise close—plaintiffs were injured when their property was destroyed by a fire started by fireworks that were ignited in Target's parking lot. The "general foreseeability" of property damage from a fire caused by fireworks, and the "relatively direct and close connection" between the failure to limit or control the known use of fireworks and such a fire, "weigh against creating a categorical exception to the duty of ordinary care." (*Id.* at p. 781.)

Next we consider "whether the public policy factors identified in *Rowland* . . . justify creating a duty exception" immunizing owners or possessors of land from potential liability for negligently failing to limit or control the known use of fireworks on their land. (*Cabral*, *supra*, 51 Cal.4th at p. 781.) We conclude that such an exception is not "clearly supported by public policy." (*Rowland*, *supra*, 69 Cal.2d at p. 112; see also *Cabral*, *supra*, 51 Cal.4th at p. 781.)

"The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. The policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Cabral*, *supra*, 51 Cal.4th at pp. 781-782.) We perceive no "state policy [that] would clearly justify an exception to the general duty of ordinary care, *promoting or protecting*" decisions by owners or possessors of real property to do nothing about the known use of fireworks on their property. (*Id.* at p. 782.) Nor would the existence of potential liability for negligence impose heavy burdens on potential defendants or the community. (*Ibid.*) The duty of ordinary care requires only the taking of steps that are reasonable under the circumstances; a land possessor or owner who would have to go to great lengths or incur great expense in order to mitigate a slight risk of harm "is less likely to be found negligent." (*Id.* at p. 783.) And nothing in the record indicates that potential liability for negligent failure to limit or control the known use of fireworks on one's property will significantly affect the cost or availability of insurance. (See *id.* at p. 784, fn. 12.)

Respondents' brief does not mention *Cabral*, although appellants' opening brief cites and discusses it, but respondents' brief does contain arguments that relate to various aspects of the *Cabral* analysis. Respondents contend that the undisputed facts establish both that the fire was caused by illegal fireworks rather than legal, "'safe and sane'" fireworks and that respondents did not know that illegal fireworks had been or were going to be used in the Target parking lot on July 4—Target has admitted knowing only about the use of *legal* fireworks in its parking lot on July 4 in previous years. Accordingly, respondents frame the issue as whether they have "a legal duty to protect [plaintiffs'] property from the unforeseeable use of illegal dangerous fireworks and subsequent fire." (Bold and capitalization omitted.) We must reject respondents' framing of the issue, however, because it is inconsistent with *Cabral*'s command that the duty analysis be conducted "at a relatively broad level of factual generality." (*Cabral*, *supra*, 51 Cal.4th at p. 772.) For purposes of answering the duty question, the distinction

between legal and illegal fireworks is irrelevant in the same way as the factual details mentioned but then dismissed by the Supreme Court—it did not matter that the tractor-trailer driver "parked 16 feet from the outermost traffic lane, rather than six feet or 26 feet," and so forth. (*Id.* at p. 774.) Such details might be relevant to determining whether Target breached its duty, because they might show that, given what Target knew or had reason to believe about the kinds of fireworks being used in its parking lot, Target's conduct was reasonable under the circumstances. The factual details might also be relevant to causation, because even if Target's conduct was not reasonable, the reasonable steps that Target failed to take but should have taken might not have prevented the fireworks usage and consequent fire that actually occurred. But under *Cabral* these factual details do not enter the calculus of determining whether Target owed its neighbors a duty of ordinary care.

In addition, if we were to frame the duty question in terms of the distinction between legal and illegal fireworks, the putative unforeseeabiliy of the use of illegal fireworks in the Target parking lot still would not be dispositive of the duty question in this case. Even if the use of illegal fireworks was unforeseeable, the use of legal fireworks was clearly foreseeable, for the reasons we have already explained. Target has never argued that it owed plaintiffs no duty of ordinary care in choosing whether and how to try to limit or control the use of *legal* fireworks on Target's property, which Target knew was likely to recur on a specific date. Moreover, our previous analysis shows that on this record such an argument would be unsuccessful.[1] If Target breached its duty of ordinary care with respect to the *legal* fireworks it knew about, and if that breach was a substantial factor in causing the use of *illegal* fireworks that resulted in the 2006 fire, then Target could still be liable. The alleged unforeseeability of the use of illegal fireworks consequently does not show that Target owed plaintiffs no relevant duty of care.

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[1] It is undisputed on the record before us that even legal fireworks pose some risk of harm—plaintiffs have introduced uncontroverted evidence that even legal fireworks could cause a fire.

Respondents also rely on an analytical framework based on various cases involving the distinction between misfeasance and nonfeasance, the duty (or lack thereof) to protect another from the wrongful conduct of a third person, or the duty (or lack thereof) of a landowner "to take measures to prevent unexpected and random crimes." *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, for example, dealt with the liability of a bar for an attack on a bar patron by other bar patrons in the bar's parking lot. (*Id.* at pp. 230-231.) Drawing on such cases, respondents argue that in general a party is not liable "for the criminal or tortious conduct of another with only two exceptions: (1) a party may be liable when the party has benefited [from], created or enhanced the risk of injury; or (2) a party may be liable where there is a special relationship between that party and either the harmed party or the perpetrator of the act causing the injury." Respondents then argue that they did not benefit from, create, or enhance the risk of injury and that there is no special relationship between them and either plaintiffs or the individuals who ignited the fireworks that caused the fire.

We decline to adopt respondents' analytical framework for two reasons. First, none of the cases on which respondents rely is analogous to this case, because none of them addresses the duty of an owner or possessor of real property to limit or curtail the use of the property for dangerous activities (such as the use of fireworks) *that are known to recur on a specific date*. As respondents acknowledge, foreseeability is central to duty questions. Target's knowledge that fireworks had been used in its parking lot on July 4 every year for several years made it clearly foreseeable that they would be used there again on July 4, 2006. None of the cases cited by respondents involves a remotely similar degree of knowledge and foreseeability.

Second, our analysis closely tracks the analysis in *Cabral*, which is the Supreme Court's most recent explication of the proper approach to duty questions in cases alleging negligent management of one's own property or person.[2] According to the Court, "[t]he

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[2] A more recent case, *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, contains some discussion of duty issues but concerns only the question of a product manufacturer's duty (or lack thereof) to prevent injuries that were concededly caused by another

general rule in California is that '[e]veryone 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 or person . . . .' (Civ. Code, § 1714, subd. (a).)" (*Cabral*, *supra*, 51 Cal.4th at p. 771.) Thus, as a general rule, Target is responsible for injuries occasioned by Target's want of ordinary care in the management of its parking lot. According to the Court, exceptions to that general rule should be created "only where 'clearly supported by public policy.' [Citations.]" (*Ibid.*) No public policy clearly supports an exception here. Thus, *if Target failed to exercise ordinary care in the management of its parking lot*, then Target is responsible for injuries proximately caused by that failure.

We do *not* hold that Target was negligent. We hold only that defendants have failed to show that Target owed plaintiffs no duty of care; we do not hold that Target breached its duty. Thus, our holding leaves open the possibility that Target could prevail at trial or even on a new summary judgment motion. As the Supreme Court acknowledged, "[o]n the facts of a particular case, a trial or appellate court may hold that no reasonable jury could find the defendant failed to act with reasonable prudence under the circumstances. Such a holding is simply to say that as a matter of law the defendant *did not breach* his or her duty of care, i.e., was not negligent toward the plaintiff under the circumstances shown by the evidence." (*Cabral*, *supra*, 51 Cal.4th at p. 773.) Defendants did not base their motion for summary judgment on such an argument, so the trial court did not address the issue, and we express no opinion on it.

For all of the foregoing reasons, we agree with plaintiffs that the undisputed facts do not show that Target owed plaintiffs no duty of ordinary care, and we accordingly reverse the judgment in favor of Target on the negligence and premises liability claims.

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manufacturer's products. (*Id.* at pp. 342, 363-366.) The case cites *Cabral* with approval (*O'Neil v. Crane Co.*, *supra*, 53 Cal.4th at p. 365, fn. 12) and casts no doubt on *Cabral*'s treatment of cases, like this one, involving a defendant's duty to exercise ordinary care in the management of the defendant's own property.

II. Negligence and Premises Liability Claims Against the Trust and Sunbelt

Plaintiffs likewise argue that we should reverse the judgment in favor of the Trust and Sunbelt on the negligence and premises liability claims. We disagree.

Nothing in the record indicates that the Trust or Sunbelt knew or had reason to know of the use of fireworks in the Target parking lot on July 4, 2006, or on July 4 in previous years. Accordingly, the duty inquiry with respect to the Trust and Sunbelt is materially different from the duty inquiry with respect to Target. Again following *Cabral*, we take the issue concerning the Trust and Sunbelt to be whether a lessor or sublessor of land owes the owner or possessor of adjacent land a duty of ordinary care in choosing whether and how to try to limit or control the use of fireworks on their own property, in the absence of any information that such use has occurred in the past or is likely to occur in the future.

Turning to the first part of the analysis under *Cabral*, we conclude that the lack of foreseeability as to the Trust and Sunbelt is dispositive. No evidence in the record indicates that for the Trust or Sunbelt it was foreseeable that fireworks would be used in the Target parking lot on July 4, 2006, or at any other time.

Plaintiffs present no arguments to the contrary. Rather, plaintiffs phrase most of their arguments in terms of "defendants" generally, but their only specific showing as to knowledge and foreseeability relates to Target (e.g., "Defendant Target admitted that it had actual notice of" the use of fireworks in its parking lot on July 4 in previous years; "Defendant Target had video surveillance cameras which were capable of monitoring" the relevant part of the parking lot.). Plaintiffs consequently have not shown that the trial court erred by concluding that the Trust and Sunbelt owed plaintiffs no duty of ordinary care.

For the foregoing reasons, we affirm the judgment in favor of the Trust and Sunbelt on the negligence and premises liability claims.

III. Trespass Claim

With respect to the trespass claim, plaintiffs argue only that intent to harm is not an element of such a claim. Defendants' summary judgment motion, however, did not argue that intent to harm was an element of trespass, and the trial court likewise did not grant the motion on that basis. Because plaintiffs have not shown that the argument actually advanced by defendants and relied on by the trial court was erroneous, we must affirm the judgment in favor of defendants on the trespass claim.[3]

DISPOSITION

The judgment is reversed as to the negligence and premises liability claims against Target, and the costs award in favor of Target is vacated. In all other respects, the judgment is affirmed. The parties shall bear their own costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

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[3] In their reply brief, plaintiffs argue that "the spread of a negligently set fire to the land of another constitutes a trespass." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 460.) Arguments not raised until the reply brief, however, are forfeited absent a showing of good cause for failing to raise them earlier. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Plaintiffs have made no such showing of good cause, so we deem the point forfeited.