Filed 7/25/18 Carter v. NBC Universal, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LILLIAN CARTER et al., Plaintiffs and Appellants, v. NBC UNIVERSAL, LLC et al., Defendants and Respondents.	B278890 (Los Angeles County Super. Ct. No. BC583946)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian S. Currey, Judge. Affirmed.

Carpenter, Zuckerman & Rowley, Paul S. Zuckerman, Nicholas C. Rowley, Keith Bruno; Rafii & Associates, Daniel J. Rafii and Joseph Nazarian, for Plaintiffs and Appellants.

Scheper Kim & Harris, Marc S. Harris, David L. Burg and Alexander H. Cote, for Defendants and Respondents NBC Universal LLC, Andre Young and O'Shea Jackson, Sr.

Venable, Celeste M. Brecht, Eric J. Bakewell, Sean P. Hanle; DLA Piper, Douglas C. Emhoff; Leopold, Petrich & Smith, Vincent Cox, for Defendant and Respondent Pretty Bird Pictures, Inc.

Marion "Suge" Knight (Knight) killed Terry Carter (Carter), the late husband and father of plaintiffs Lillian Carter, Nekaya Carter, and Crystal Carter (plaintiffs). Knight fatally hit Carter while driving a truck after arguing with Cle "Bone" Sloan (Sloan), who worked for the producers of the film *Straight Outta Compton*. Plaintiffs sued individuals and entities involved in the film's production, including defendants Andre "Dr. Dre" Young (Young), O'Shea "Ice Cube" Jackson (Jackson), NBC Universal LLC (NBC Universal), and Pretty Bird Pictures, Inc. (Prettybird) for wrongful death/negligence and negligently hiring Sloan.[1] The trial court sustained three sets of demurrers by defendants, the last without leave to amend. We consider whether the resulting dismissal entered against defendants must be reversed.

I. BACKGROUND

A. The Initial Complaint's Allegations and the Successful Demurrers

As alleged in plaintiffs' initial complaint, *Straight Outta Compton* "revolves around the rise and fall of the seminal Compton rap group N.W.A., of which Defendants [Young] and [Jackson] were founding members." The film also addresses Young and Knight's founding of the record label Death Row Records. Young and Jackson were involved in the film's production, but Knight was not. The initial complaint alleged

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[1] Plaintiffs named NBC Universal as a defendant pursuant to an amendment. We have no occasion to discuss plaintiffs' claims against the other named defendants: Knight, Sloan, Toi Lin Kelly (the registered owner of the truck driven by Knight), and Tam's Burgers (the establishment on whose property Carter was killed).

defendants knew or should have known of longstanding tensions between Young and Knight, Knight's objections "to his violent depiction in the movie," and Knight's concerns that he would not share in the film's profits. Defendants were also aware, according to the complaint, of Knight's propensity for violence, which had in the past prompted Young to obtain a restraining order against Knight. Indeed, Young "made it known on several occasions to each of [the other defendants] that he did not want [Knight] near any movie set connected with the filming."

The film was shot at various locations in and around Compton, and the cast and crew maintained a base camp at the Compton City Yard. Sloan was hired as a "Technical Advisor, location assistant, and . . . part of the film's security team." Sloan's duties included "using funds provided by [defendants] to recruit known gang members to serve as cast members and extras for the filming, as well as to provide security for on-location shooting in gang controlled neighborhoods."

Prior to the fatal encounter between Knight, Sloan, and Carter, the cast and crew returned from a set location to base camp for lunch. The next scene was to be filmed "while traveling in a car along Parmalee Street between 133rd and 139th Streets." Before the cast and crew left for Parmalee Street, Knight "pulled up into the camp" driving a truck. Plaintiffs alleged that "in response to a specific request from [defendants], [Sloan] confronted [Knight] while he was still seated in his truck, directing that he leave the base camp immediately. After a verbal altercation between the two men, [Knight] drove his truck off the camp property."

Sometime after Knight left the base camp, he and Carter "arranged to meet at the parking lot of [Tam's Burgers] in an

effort to reduce the tensions between [Knight] and defendants." Plaintiffs did not allege Carter was directly affiliated with the film production; rather, he was "a successful businessman, and a respected member of the Compton business community" who had "developed a reputation as a unifier."

During the meeting between Knight and Carter, "[Sloan] suddenly appeared . . . and began continuing the fight with [Knight] . . . that had started back at the base camp." When Carter attempted to intervene, Knight ran him over in the truck Knight was driving.

Predicated on these allegations, plaintiffs asserted two causes of action against the defendants in this appeal: wrongful death/negligence (the first cause of action) and negligent hiring, retention, and supervision (the fifth cause of action).[2] Defendants demurred to the complaint, and the trial court sustained the demurrers with leave to amend. The court reasoned the complaint was defective because the facts alleged constituted a "pretty long [chain] of causation, particularly in light of the fact that it's . . . allegedly a criminal act of Mr. Knight . . . at an off-site location where at least, as alleged, there's no knowledge or direction by Pretty Bird or Universal entities to [Sloan] to tell him to go do something right there."

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[2] The heading for the fifth cause of action in both the initial complaint and the subsequent first amended complaint does not name Young, Jackson or NBC Universal. These defendants, plus Prettybird, are named in the heading for the negligent hiring, retention, and supervision cause of action in the operative complaint at issue in this appeal.

B. The First Amended Complaint and the Successful Demurrers

Plaintiffs filed a first amended complaint that again asserted causes of action for wrongful death/negligence and negligent hiring, this time including various new allegations. The first amended complaint alleged there was animosity between Young and Knight, in part because Knight "felt he was entitled to a share in some of the profits [Young] enjoyed following the sale of his Beats enterprise to Apple." Plaintiffs also added details regarding (a) the identities of three men hired to assist Sloan in his various duties and (b) the nature of defendants' instructions to Sloan. For instance, plaintiffs alleged defendants "anticipated the possibility that [Knight] might come in and around the headquarters, sets, and/or general locations where filming for the movie and related commercial productions were to be taking place." Plaintiffs further alleged that "among [Sloan's] duties was to intervene and prevent [Knight from] coming in and around the sets, thereby preventing him from interacting with any of the Defendants."

The first amended complaint also altered factual details regarding what transpired on the day of Carter's death. The scene to be filmed after lunch was no longer a driving scene "along Parmalee Street between 133rd and 139th Streets," but rather a scene "in and around Tam's Burgers." In addition, Sloan no longer "suddenly appeared" at a meeting scheduled between Carter and Knight at Tam's Burgers. Instead, defendants directed Sloan and his assistants to arrange a meeting with Carter "to continue their ongoing business related to paying community members to work on the filming projects." Furthermore, according to the first amended complaint, Knight

and Carter had not independently arranged to meet. Instead, Sloan and his associates contacted Knight, "inviting him to travel to Tam[']s to participate in the meeting with [Carter], in an effort to resolve the ongoing tensions that were existing between [Knight] and [defendants]."

Defendants again demurred. Although the trial court identified several inconsistencies between the initial complaint and the first amended complaint, it ruled these inconsistencies were sufficiently explained in a declaration from plaintiffs' counsel Carl Douglas, which stated he learned new information from privileged conversations with his clients and a review of the preliminary hearing transcript from Knight's criminal case. Nonetheless, the court sustained the demurrers because plaintiffs had not alleged facts sufficient to establish that defendants owed a duty of care to Carter or that ejecting Knight from the base camp proximately caused Carter's death. The court emphasized plaintiffs did not allege defendants instructed Sloan to arrange the meeting with Knight at Tam's Burgers.

C. The Differing Allegations in the "Third Amended Complaint," and the Demurrers Sustained Without Leave to Amend

Plaintiffs erroneously labeled their second amended complaint as the "third amended complaint." We shall hereafter refer to the erroneously labeled third amended complaint as the operative complaint.

Plaintiffs engaged new counsel, Daniel Rafii, to draft the operative complaint. In addition to refining the allegations relating to the financial interests underlying Knight's hostility toward defendants, the operative complaint included new

allegations regarding Sloan. Plaintiffs alleged defendants decided to "fight fire with fire" by hiring Sloan, "a known gangster and criminal with a more than ten-year history of ill-will with [Knight]." Sloan had allegedly "guaranteed" during his interview with defendants that he would "resolve the 'Suge Knight problem' and that [Knight] would present no problems for [defendants]."

The operative complaint also included revised allegations concerning Carter's connection to defendants and Knight: "[Jackson] and [Carter] were partners in the record label, Heavyweight Records, founded in 1998. Defendants [Jackson] and [Young] were aware that [Carter] was well-respected in the Compton community, including by [Knight], and that [Jackson] and [Young] could utilize [Carter] to mediate their ongoing issues with [Knight]." The operative complaint further alleged that just over a week before Carter's death, Jackson and Young "contacted [Carter] to discuss the 'Suge Knight [ ]problem' and how to resolve [Knight's] potential financial compensation."

Allegations regarding what happened on the day of Carter's death also changed. According to the operative complaint, Knight exited his truck and "had a brief exchange with [Young]" at base camp. Before Knight returned to his vehicle, defendants allegedly directed Sloan to "confront [Knight] immediately" to "ensure that [Knight would] no longer be an issue and to resolve [Knight's] financial demands." Still at base camp, Sloan "immediately . . . followed [Knight] to his car and a verbal altercation ensued." Sloan then told Knight "to meet him at Tam's Burgers, the site of the next set, to resolve the matter . . . ." Plaintiffs further alleged defendants directed Sloan and his

associates to contact Carter and ask that he be present for Sloan's meeting with Knight.

Defendants filed two demurrers: one by Prettybird and another by NBC Universal, Young, and Jackson. The trial court sustained defendants' demurrers and denied plaintiffs leave to amend. The court found the new and changed allegations in the operative complaint were governed by the sham pleading doctrine because the operative complaint "changed nearly all aspects of [defendants'] employment relationship with [Sloan] and their involvement in the meeting at Tam's Burgers." The court additionally ruled that, regardless, the new allegations failed to establish Knight's actions were sufficiently foreseeable such that a duty of care could be imposed on defendants. The trial court reasoned: "[T]he alleged fact that [d]efendants ordered [Sloan] to 'take control of the situation' and arrange a meeting with Carter does not make it highly foreseeable that [Sloan] would 'flank' and 'ambush' Knight by continuing a personal fight with Knight in the presence of [Sloan's] associates [citation], or that Knight would attempt to recklessly and criminally attack [Sloan] with his vehicle, or that Carter would be in any probable danger."

II. DISCUSSION

We need not resolve whether plaintiffs have adequately explained the variations (putting it charitably) in their pleadings because, even assuming the truth of all properly pled facts alleged in the operative complaint, plaintiffs have not stated a cause of action against defendants. Plaintiffs' wrongful death cause of action fails because the factors courts consider under *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) when confronted by tort duty issues counsel against recognizing a duty

to protect someone invited to mediate a dispute (Carter) from violent acts by a third party (Knight). Plaintiffs also have not validly alleged defendants voluntarily assumed a duty to Carter, nor that defendants are vicariously liable for Sloan's actions. Plaintiffs' operative complaint similarly fails to allege facts sufficient to state a cause of action for negligent hiring because the harm to Carter was not foreseeable. There being no cognizable argument for how plaintiffs could further amend the complaint to state a valid claim, we shall affirm the judgment.

A. Standard of Review

We review de novo an order sustaining a demurrer without leave to amend. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. . . . To determine whether the trial court should, in sustaining the demurrer, have granted [the] plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. [Citation.]" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the [trial] court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2

[validity of the trial court's action, not the reason for its action, is reviewable].)

B. Wrongful Death

Plaintiffs' opening and reply briefs assert, in general terms, that defendants had a duty to "protect" Carter from Knight. Focusing on the actual allegations of the operative complaint, the duty that plaintiffs allege defendants have is a duty to protect someone invited to mediate a dispute between defendants and a third party from violent acts by the third party.

"Duty 'is an essential element' of the tort of negligence." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 529 (*Melton*). "'California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. [Citation.]'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142 (*Kesner*).) Specifically, Civil Code section 1714, subdivision (a) provides in pertinent part that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ."

Courts "'"invoke[ ] the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act . . . .'" [Citation.]" (*Kesner*, *supra*, 1 Cal.5th at p. 1143.) "The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Ibid.*)

In determining whether public policy considerations support an exception to Civil Code section 1714's general duty of care, courts consider "'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.' [Citation.]" (*Kesner*, *supra*, 1 Cal.5th at p. 1143.) The first three of these factors generally address the foreseeability of the relevant injury, while the other four "take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Id.* at p. 1145.) All of the factors, originally identified in *Rowland*, *supra*, 69 Cal.2d 108 remain "'the gold standard against which the imposition of common law tort liability in California is weighed by the courts in this state.' [Citation.]" (*Melton*, *supra*, 183 Cal.App.4th at p. 530.) "Foreseeability and the burden to the defendant 'have evolved to become the primary factors considered in every case . . . .'" (*Id.* at p. 541; see also *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 ["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'"] (*Vasilenko*).)

1. Negating the "No-Duty-to-Protect Rule" does not suffice to establish the existence of a duty

One "well established" carve-out to Civil Code section 1714's general duty of care is the rule that, "as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 (*Delgado*).) But there are also exceptions to the exception. Plaintiffs argue two apply here, i.e., that the no-duty-to-protect-from-third-parties rule does not apply (1) because defendants' actions left Carter in a position worse than the one he would have otherwise been in, and, in the alternative, (2) because defendants and Carter had a "special relationship."

The implicit foundation of plaintiffs' argument is the notion that the existence of a duty of care flows automatically from a demonstration that the no-duty-to-protect rule does not apply. That, however, is not quite right. Finding the no-duty-to-protect-from-third-parties rule inapplicable does not necessarily mean that the *Rowland* factors support the existence of a duty. (*Melton*, *supra*, 138 Cal.App.4th at p. 532 ["Where there is a legal basis for imposing a duty—as in cases of misfeasance or when a special relationship exists—the court considers the foreseeability of risk from the third party conduct"]; *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 ["In cases involving nonfeasance and a special relationship between a plaintiff and a defendant, courts have balanced the policy factors set forth in *Rowland* [citation] to assist in their determination of the existence and scope of a defendant's duty in a particular case"]; see also *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 285-286 ["Our conclusion that the question of duty must not ignore matters of policy regardless of whether the duty

purportedly arises under the special relationship doctrine is supported by the commentators"]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 411 ["[W]e are reluctant to rely on the special relationship doctrine per se as the analytical underpinning for our conclusion that a duty of care was owed"].)[3] Because the *Rowland* factors preclude a duty of

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[3] Some cases do appear to view the special relationship and misfeasance exceptions to the no-duty-to-protect-from-third-parties rule as a shorthand proxy of sorts for the *Rowland* analysis. (See, e.g., *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 646 ["The existence of a 'special relationship' does not create the duty. 'Special relationship,' rather, is simply a label expressing the conclusion that the facts, considered in light of the pertinent legal considerations, support the existence of a duty of care"]; *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1203 ["Because the traditional weighing process using the seven factors set forth in *Rowland* . . . 'has already been done by courts over the centuries in formulating the "no duty to aid" rule' in the context of liability for nonfeasance, it is not necessary to engage in the weighing process in a particular case"].) Although we opt to undertake a first principles analysis under *Rowland*, the result would be the same under the mode of analysis suggested by these other cases. Plaintiffs' reliance on authority regarding the special relationship between a business and its customers is not persuasive (*Marois v. Royal Investigation & Patrol, Inc.* (1984) 162 Cal.App.3d 193, 199), and defendants' conduct did not amount to misfeasance for the reasons discussed *post* (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1079 ["'no duty to aid' rule . . . has no application 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"]). To the extent plaintiffs suggest defendants owed Carter a duty stemming from the special

care in the type of scenario alleged here even if the no-duty-to-protect-from-third-parties rule is inapplicable, we dispense with a discussion of the rule's applicability and focus on the factors themselves.

2. The Rowland factors

a. forseeability

"The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by [Civil Code] section 1714 is whether the injury in question was foreseeable." (*Kesner*, *supra*, 1 Cal.5th at p. 1145.) "An injury is reasonably foreseeable only if its occurrence is likely enough in modern daily life that reasonable people would guard against it."[4] (*Melton*, *supra*, 183 Cal.App.4th at p. 538.) In determining whether someone in defendants' position should reasonably foresee that a third party such as Knight would escalate a non-violent dispute to a deadly attack against a mediator, our analysis must focus "'on the specific, rather than more general, facts of which [they] should have been aware.' [Citation.]" (*Id.* at p. 536.) Plaintiffs argue it was

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relationship between defendants and Sloan, we address their negligent hiring, retention, and supervision theory *post*.

[4] Because we conclude plaintiffs have not sufficiently alleged facts establishing it was reasonably foreseeable to defendants that Knight would harm Carter during the meeting with Sloan, we need not decide whether the "'extraordinarily high degree of foreseeability'" necessary to establish a landlord's duty to protect against criminal acts by third parties applies in cases that do not allege premises liability. (See generally *Melton*, *supra*, 183 Cal.App.4th at p. 536.)

foreseeable that Knight would harm Carter because "Respondents knew Defendants Sloan and Knight had violent tendencies toward each other," "Respondents knew Defendants Sloan and Knight had a confrontation that same day," "Respondents directed [Sloan] to 'confront' Defendant Knight 'immediately' at Tam's," and "Respondents directed Carter to attend the [Sloan] and Knight meeting."

In contrast to the license they take in describing these ostensible facts in their briefing, plaintiffs' operative complaint only vaguely alleges that "ill will" existed between Sloan and Knight and that both men had violent pasts—it does not allege any history of violence between those two. Even assuming this sort of contention-phrased allegation in a complaint is cognizable (contra *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100 [a "reviewing court 'does not . . . assume the truth of contentions, deductions or conclusions of law'"]), it still is not enough to permit a judgment that it would be foreseeable that a third party like Knight would harm a mediator at a meeting—particularly one who was, as plaintiffs allege, "well-respected" by the third party.

As to plaintiffs' argument that "Respondents directed [Sloan] to 'confront' Defendant Knight 'immediately' at Tam's," that too is not what the operative complaint alleges. The only instance in which the complaint avers Sloan was directed to confront Knight was prior to their interaction at base camp. There is no allegation that defendants directed a confrontation to occur later at Tam's Burgers during the meeting where Carter would be present, and it is the interaction at that location that is critical for purposes of foreseeability analysis.

Moreover, even if the operative complaint did allege defendants intended or merely suspected Sloan would confront

Knight at Tam's Burgers, the complaint's use of the word "confront" does not bear the heavy weight plaintiffs place upon it in arguing their position on appeal. Plaintiffs treat the word as if it must carry a violent denotation, but that is not so.[5] (Oxford English Dict. Online (2018) <http://www.oed.com/view/Entry/38989?rskey=IjVmHp&result=2&isAdvanced=false#eid [as of July 20, 2018] [defining "confront" variously as "2.a. *trans*. To stand or come in front of (any one); to stand or meet facing, to face. (Often with a shade of sense 3.) [¶] . . . [¶] b. To front or face in situation. 3.a. esp. To face in hostility or defiance; to present a bold front to, stand against, oppose. [¶] . . . [¶] 4.a. *trans*. To bring together face to face; to bring (a person) face to face *with* (a person or thing); *esp*. an accused and his accusers, or the different witnesses in a trial, for examination"].)

Indeed, on the facts alleged in the operative complaint, there is good reason to conclude any alleged confrontation between Sloan and Knight at Tam's Burgers with Carter present would be *non*-violent. The earlier interaction between Sloan and Knight at base camp was, by plaintiffs' own admission, non-violent, and plaintiffs make no allegation that Knight or Sloan made any threats of future harm or violence during their base camp exchange of words—nor that defendants ever directed Sloan to confront Knight in a violent manner. The facts alleged concerning the encounter at base camp thus suggest, if anything, that Sloan and Knight were capable of resolving any

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[5] Consider a concrete example. When we said at the outset of our discussion, *ante*, that courts "confront" the *Rowland* factors when analyzing tort duty questions, we obviously did not imply that such courts perpetrate any violence.

disagreement peacefully, particularly with Carter present.[6] There is no logical basis for plaintiffs' suggestion that the exchange between Knight and Sloan at base camp made violence at a subsequent meeting foreseeable.

The other *Rowland* factors related to foreseeability—the degree of certainty that the plaintiff suffered injury and the closeness of the connection between the defendant's conduct and the injury suffered—do not support the existence of a duty. The degree of certainty that the plaintiff suffered injury is not relevant here. (*Kesner*, *supra*, 1 Cal.5th at p. 1148 [noting that this factor is discussed "'primarily, if not exclusively, when the only claimed injury is an intangible harm such as emotional distress'"].) The closeness of the connection between defendants' conduct and Carter's death "is 'strongly related to the question of foreseeability itself' [citation], but it also accounts for third party or other intervening conduct." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1086.) A third party's "intervening conduct [that] is foreseeable or derivative of the defendant's . . . does not '"diminish the closeness of the connection between defendant['s] conduct and plaintiff's injury . . . ."' [Citations.]" (*Ibid.*) In the absence of any allegation that a party calling a meeting (here, defendants) influenced the conduct of a third party (Knight) toward a mediator (Carter), however, the third party's independent role in the mediator's death weighs against imposing a duty. (*Ibid.* [holding that unless landowner impaired driver's ability to see

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[6] The operative complaint continued to allege, as had the earlier iterations of the complaint, that Carter was "well-respected" by Knight and a "unifier[ ] who would often bring different community interests together for the greater good."

and react to crossing pedestrians, driver's conduct in hitting pedestrian was independent of landowner].)

b. burden

Even if there were a basis to conclude it was in some weak sense foreseeable that Knight would harm Carter during the meeting with Sloan, the burden of preventing Knight's violent conduct well outweighs whatever risk was foreseeable. Courts use a "sliding-scale balancing formula" under which "imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability." (*Delgado*, *supra*, 36 Cal.4th at p. 243.) Here, plaintiffs suggest "that the stationing of security guards at and around the parking lot of [Tam's Burgers] would deter any criminal activity from occurring . . . ." To the extent that hiring security guards to be present at Tam's Burgers *might* have prevented Knight's violent acts—which, given the nature of the attack, is highly uncertain[7]—"[t]he California Supreme Court has repeatedly found 'the burden of hiring security guards' to be 'extremely high, so high in fact, that the requisite foreseeability to trigger the burden could rarely, if ever, be proven without prior similar incidents.' [Citations.]" (*Melton*, *supra*, 183 Cal.App.4th at p. 539.)

Largely unspecified allusions to Knight's history of violence notwithstanding, there were no prior similar incidents to warrant

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[7] Because Knight was allegedly invited to the meeting at Tam's Burgers, there is no question that additional hypothetical security measures would still have permitted him entry into the parking lot. Once there, it is unclear how additional security would have deterred him from using his truck as a weapon.

additional security for the meeting between Sloan and Knight. In fact, the confrontation at base camp earlier in the day was non-violent. Because a third party's sudden escalation of a verbal dispute to a deadly assault against a mutually respected mediator is not foreseeable and the burden of preventing such violence is quite high in any event, the *Rowland* factors preclude finding defendants had a duty to protect Carter from Knight.[8]

3. Voluntary assumption of duty

Plaintiffs argue that even if the *Rowland* factors do not support the existence of a duty, defendants voluntarily assumed a duty to protect Carter by hiring Sloan as a security guard. Plaintiffs cite *Lopez v. Baca* (2002) 98 Cal.App.4th 1008 (*Lopez*) and *Trujillo v. G.A. Enterprises, Inc.* (1995) 36 Cal.App.4th 1105 (*Trujillo*) for the proposition that a business that hires a security guard to protect customers may be held liable if, by virtue of the guard's unreasonable conduct, the guard fails to protect a customer from injury.

Plaintiffs do not reckon, however, with an important qualification to the holding in *Lopez*: providing security in one instance or context does not expose one to liability for the absence of security in another. (*Lopez*, *supra*, 98 Cal.App.4th at p. 1018

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[8] The remaining *Rowland* factors—the moral blame attached to defendants' conduct, the policy of preventing future harm, the consequences to the community of imposing a duty, and the availability, cost, and prevalence of insurance—are consistent with the conclusion we reach. Defendants' conduct was morally neutral, and policy concerns militate against any holding that would discourage alleged efforts to defuse tensions in meetings mediated by community leaders.

[concluding that because the defendant did not employ a security guard on the night of a shooting at her club, there was no voluntary assumption of a duty to customers that night]). Here, although providing security was allegedly one of Sloan's various roles in the production, this was not his alleged assignment with respect to the meeting at Tam's Burgers. The operative complaint avers Sloan arranged the meeting to "resolve" Knight's grievances with Carter's help. His role was that of a negotiator, not a security guard. Plaintiffs' voluntary assumption theory of liability depends on the premise that Sloan's task at Tam's Burgers was to keep Knight away from Carter, but the operative complaint alleges precisely the opposite.

4. Vicarious liability

Plaintiffs also contend defendants are vicariously liable for Sloan's conduct even accepting they had no duty to protect Carter from Knight. "[T]he venerable respondeat superior rule provides that 'an *employer* may be held vicariously liable for torts committed by an employee within the scope of employment.' [Citation.]" (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 491.) ""[T]he modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to

absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large." [Citation.]' [Citation.] 'The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business. [Citations.]' [Citation.] Under respondeat superior, an employer is liable for the "'risks that may fairly be regarded as typical of or broadly incidental to the enterprise [the employer] has undertaken,'" that is, 'the risks inherent in or created by the enterprise.' [Citation.]" (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94 (*Halliburton*).)

"The most common, obvious cases in which respondeat superior liability arises are those 'in which the employee commits a tortious act while performing his or her ordinary duties for the employer at the employer's place of business. In such circumstances, the employer is ordinarily liable for the employee's tortious act, even if wholly unauthorized and without benefit to the employer.' [Citation.]" (*Halliburton*, *supra*, 220 Cal.App.4th at p. 95.) However, "[a]n exception is made when the employee has substantially deviated from his duties for personal purposes at the time of the tortious act." (*Ibid.*) An employee's deviation from his or her duties precludes vicarious liability only if it is ""'so material or substantial as to amount to an entire departure'" from those duties . . . ." (*Ibid.*) The employer remains liable if the employee's conduct is either "required by or incidental to the employee's duties" or "reasonably foreseeable in light of the employer's business." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521.)

The trial court did not directly address vicarious liability in its order sustaining defendants' demurrers. Nonetheless, we may affirm if the trial court's decision was correct on any theory (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 374), and there is no proper alleged basis for vicarious liability here.

According to the operative complaint, Sloan and his associates arrived at Tam's Burgers and "began continuing the fight with [Knight] . . . that had started back at the base camp." Plaintiffs' opening brief states that because "Sloan was only following [defendants'] instructions . . . [,] the incident was in the course and scope of his employment." The operative complaint, however, alleges defendants directed Sloan to intercede with Knight as he approached at base camp, not at Tam's Burgers. Moreover, as discussed *ante*, "confront" is susceptible to varying meanings, and the allegation that defendants instructed Sloan to "confront" Knight is not an allegation that defendants intended or expected the confrontation to be violent; indeed, the alleged fact that defendants directed Sloan to invite Carter to the meeting at Tam's Burgers underscores that the meeting was intended to be peaceful.

Even if the operative complaint could instead be read to imply Sloan initiated the violence at Tam's Burgers,[9] there are still no facts alleged that explain how that conduct was connected to or a foreseeable result of his assignment to resolve the

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[9] Although the operative complaint alleges that Sloan "continu[ed] the fight . . . that had started back at the base camp," that Sloan and his associates "flanked" Knight's truck, and that Sloan and his associates "ambush[ed]" Knight, it conspicuously avoids alleging Sloan physically attacked Knight.

situation with Knight. Rather, the personal purpose motivating this alleged deviation by Sloan is readily supplied by the operative complaint: There was existing unspecified "ill will" between Sloan and Knight and he was "embarrassed" by Knight's intrusion at base camp that suggested "he could not control the set and deliver as promised as head of street security."

C. Negligent Hiring, Retention, and Supervision

"Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815.) The elements are the same as those for any negligence cause of action: duty, breach, causation, and injury. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.) The injury must be foreseeable: "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' [Citation.]" (*Ibid.*)

Plaintiffs contend defendants "failed to hire a competent security guard." Plaintiffs take the position that defendants knew or should have known both that Sloan would fail to protect Carter from Knight and that Sloan's affirmative conduct would provoke Knight to violence. (See *Trujillo*, *supra*, 36 Cal.App.4th at pp. 1108-1109 [observing that a "business which hires [a] security guard may be liable for its failure to hire a competent security guard"]; *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 943 ["The employer of a security guard may be liable for the guard's assaults if the employer negligently hired the guard or

negligently placed him in a position to commit foreseeable harmful acts"].)

Both theories fail on the facts alleged. First, the theory that Sloan was an incompetent security guard because he failed to protect Carter from Knight at Tam's Burgers fails for the reason discussed *ante* with respect to the theory that defendants voluntarily assumed a duty to protect Carter from Knight—i.e., Sloan did not meet with Knight and Carter in his capacity as a security guard. Second, even if plaintiffs' operative complaint can be taken to argue that defendants were negligent in dispatching Sloan to Tam's Burgers as a negotiator, the harm to Carter was not foreseeable for the reasons already discussed.

D. Leave to Amend

In determining whether the trial court abused its discretion by sustaining defendants' demurrers without leave to amend, we assess whether "there is a reasonable probability that the complaint could have been amended to cure its defects. [Citation.] '[T]he burden is on the plaintiff to show in what manner the complaint can be amended and how such an amendment would cure the defect.' [Citation.]" (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 826.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action. [Citations.] Absent such a showing, the appellate court cannot assess whether or not the trial court abused its discretion by denying leave to amend." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner

he can amend his complaint and how that amendment will change the legal effect of his pleading"].)

Here, all plaintiffs offer is a non-specific assertion that "any defect in the [operative complaint] may be amended, especially any allegation or characterization set forth in this brief that the court finds not to be sufficiently clear or included in the [operative complaint]." This reference to inconsistencies between unidentified facts alleged in the operative complaint and those recited in plaintiffs' appellate briefing is inadequate to demonstrate the trial court abused its discretion in denying further leave to amend. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 799, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P.J.

We concur:

MOOR, J.

KIN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.