Court of Appeal, Fourth District, Division 1, California.
Todd BONILLA et al., Plaintiffs and Appellants,
v.
TRANSAMERICAN AUTO PARTS, INC., et al., Defendants and Respondents.

No. D041258.
(Super.Ct.No. GIN009384).
Oct. 25, 2004.

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.
George C. Heppner, San Diego, CA, Mary A. Lehman, Coronado, CA, for Plaintiff and Appellant.

Jefferi J. Hamilton, Law Offices Of William I. Chopak, Richard J. Ritchie, Jon Evan Taylor, Callahan, McCune & Willis, San Diego, CA, for Defendant and Respondent.

NARES, J.

***1** This action arises out of an automobile accident that occurred when, according to witnesses, plaintiff Julie Bonilla (Julie) [FN1] ran a red light and was struck by a 1997 Dodge Ram truck (the truck) that had been modified by placing larger tires on it and lifting its frame. The truck was driven by Alfred Wise (Wise), a defendant in the underlying action.[FN2] Julie suffered severe brain injuries as a result of the crash.

FN1. The use of Julie Bonilla's first name is solely for the sake of convenience and clarity. We intend no disrespect.

FN2. Wise is not a party to this appeal.

Julie's husband Todd Bonilla filed suit, individually and as guardian ad litem for Julie (together, the Bonillas) against, among others not parties to this appeal, Wise and defendants Transamerican Auto Parts, Inc., doing business under the name of 4 Wheel Auto Parts Wholesaler (Transamerican) and Kearny Mesa Dodge (KMD) on a general negligence theory. The Bonillas alleged that Transamerican was liable because it had modified the truck in a manner that made it unreasonably dangerous in a foreseeable accident scenario. The Bonillas alleged that KMD was negligent for selling the vehicle in an unreasonably dangerous condition.

Transamerican and KMD moved for summary judgment on the grounds that (1) the truck was not unreasonably dangerous, and (2) neither owed a duty of care to Julie. The court granted both motions for summary judgment, finding as a matter of law that Transamerican and KMD owed no duty of care to Julie. The Bonillas appealed from the judgment entered in favor of Transamerican and KMD.

On appeal the Bonillas asserts that the court erred in granting summary judgment in favor of Transamerican and KMD because (1) Transamerican owed a duty not to make

the truck unreasonably dangerous for a foreseeable accident; (2) KMD had a duty not to sell a modified truck that was unreasonably dangerous for a foreseeable collision; (3) the court should have considered the supplemental declaration filed by plaintiff's expert; and (4) the court defined the duty of Transamerican and KMD to Julie in an overly narrow manner. We affirm.

FACTUAL BACKGROUND

A. *Modification to Truck*

The truck was leased by William Butson from KMD. Butson brought the vehicle to Transamerican for installation of larger tires and a lift to accommodate the larger tires. Transamerican installed the tires and lift in accordance with factory specifications. The lift was approximately two to four inches higher than when originally manufactured, making the frame height of the truck approximately 22 inches. The applicable Vehicle Code [FN3] section, section 24008.5, allowed for a frame height of up to 30 inches for the truck.[FN4]

FN3. All further statutory references are to the Vehicle Code unless otherwise specified.

FN4. Section 24008.5 provides in part: "a) No person shall operate any motor vehicle with a frame height or body floor height greater than specified in subdivisions (b) and (c). [¶] (b) The maximum frame height is as follows:

"Vehicle Type	Frame Height
"(1) Passenger vehicles, except housecars	23 inches
"(2) All other motor vehicles, including housecars, as follows:	
"Up to 4,500 pounds GVWR	27 inches
"4,501 to 7,500 pounds GVWR	30 inches
"7,501 to 10,000 pounds GVWR	31 inches

"(c) The lowest portion of the body floor shall not be more than five inches above the top of the frame."

B. *Sale of Truck to Wise*

In March 1998 Butson wanted to pay off the lease on the truck in order to sell it to Wise. In April 1998 Butson went to KMD to facilitate the sale to Wise. Butson wrote a check to KMD to pay the lease buyout amount. Wise then wrote a check to Butson for the purchase of the truck.

C. *The Accident*

At approximately 5:30 a.m. on December 1, 1999, Wise was driving the truck at approximately 35 miles per hour westbound on Valley Parkway in Escondido, California. He had a green light as he approached the intersection of Broadway and Valley Parkway. His headlights were on as it was still dark.

***2** Julie was traveling southbound on Broadway in a Mercedes Benz. A witness traveling immediately behind Julie observed that they faced a red light as they approached the intersection with Valley Parkway. According to this witness, Julie continued through the intersection against the red light and collided with Wise's truck.[FN5] The front of the truck struck the driver's side door of Julie's vehicle, pushing in the door and entering her window. As a result of the accident, Julie suffered severe brain damage and was in a coma for almost five months.

FN5. Bonilla disputes whether it was Julie or Wise who ran a red light. However, it is only the negligence of Transamerican and KMD that are at issue. Moreover, as will be discussed below, the court sustained the defendants' objections to Bonilla's expert testimony claiming Wise ran the red light.

PROCEDURAL BACKGROUND

A. *The Bonillas' Complaint*

The Bonillas filed an action for negligence against, among others, Transamerican and KMD. They alleged that Transamerican was negligent in "lifting" the truck and that KMD was negligent in selling the truck in its lifted condition, as the truck was unreasonably dangerous to others in a foreseeable accident scenario.

B. *Transamerican's Motion for Summary Judgment*

Transamerican brought a motion for summary judgment on the grounds that it owed no legal duty of care to Julie, that it was not negligent, and that it did not cause her injuries. The Bonillas opposed Transamerican's motion, asserting that triable issues of fact existed as to whether (1) Transamerican owed a duty to Julie; (2) Julie's injuries were enhanced or made more serious by Transamerican's actions; (3) Julie or Wise caused the collision; and (4) section 24008.5 (see fn. 3, *ante*) was applicable to the case.

In support of their opposition to Transamerican's motion the Bonillas submitted a declaration from their expert, Anil V. Khadilkar, Ph.D. He stated that automobile manufacturers, retailers and modifiers/installers had known safety concerns about raised vehicles since at least the 1980's. He further stated that the dangers of lifted vehicles had been well documented in the media. He opined that had the truck not been lifted, Julie's injuries, if any, would have been minimal. He also opined that when the truck was lifted Transamerican should have also installed a lower bumper that would have impacted lower on Julie's vehicle. Khadilkar stated that to "raise a bumper which is already high to start out with, to a completely unreasonable height that would permit it to come in a passenger car vehicle window and also completely miss the bumpers of virtually all passenger cars is unreasonable." Khadilkar also analyzed and cited to several exhibits in support of his opinion. Khadilkar opined that lift kits "are unnecessary, unreasonably dangerous and foreseeably unsafe for use on public streets, particularly when installed for cosmetic reasons only...." However, Khadilkar failed to sign the declaration under oath, simply signing it, "Respectfully submitted."

The court granted Transamerican's motion for summary judgment, finding as a matter of law that it owed no duty to Julie "to refrain from installing the subject lift kit on [Wise's] vehicle or to install a lift kit in a manner which insured that, in case of a collision, the bumper of the lifted vehicle would collide with the door, but not the window, of [Julie's] vehicle." In doing so, the court addressed the factors laid out in the seminal case of *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*).

***3** The court found that the factor of foreseeability weighed in favor of Transamerican because "it is not clear that a reasonable lift-installer would have known that lifting a vehicle three inches would cause an impact with the window only of any vehicle and that 'protective devices' in any passenger car would not deploy." In addressing Dr. Khadilkar's declaration on the foreseeability issue, the court found that it was inadmissible because it was not signed under penalty of perjury. The court also found that Dr. Khadilkar's conclusion that this type of accident was foreseeable as a result of the lifted truck lacked foundation.

The court also concluded that the "connection between the lift-installer's conduct and plaintiff's injury is attenuated. The collision itself had nothing to do with the height of the truck's bumper." The court also found that "[t]here is little, if any, 'moral blame' which can be attached to the act of raising a truck by a few inches." Transamerican's "moral blame" was no more than "that of manufacturers of buses, tractor-trailer trucks, motor homes, larger SUVs, and any other vehicle with a frame or bumper height above 22 inches." The court again addressed Dr. Khadilkar's declaration, which opined that the fact that there were less expensive and safer alternatives to the lift kit placed moral blame on Transamerican's sale of the lift kit to Butson. The court found his declaration to be inadmissible, and, even if not, concluded that it lacked foundation for this conclusion.

As to the policy of preventing future harm, the court found that requiring lift-installers to match the door and window height of a particular vehicle such as Julie's Mercedes would not prevent future harm because it would likely be mismatched to other vehicles. The court again rejected the declaration of Dr. Khadilkar on this issue as inadmissible.

The court found the burden on Transamerican and consequences to the community of imposing a duty in this case to be significant. Installers would have to conduct significant research to determine if particular lifts would impact the windows of particular cars and would be prevented from lifting trucks even though the lift was permitted by law. Last, the court found that the availability, cost and prevalence of insurance factor weighed in the Bonillas' favor because insurance would likely be available to cover the negligence of lift installers. In sum, the court found that the *Rowland* factors weighed in favor of Transamerican, and thus no duty was owed as a matter of law.

In reaching its decision, the court found that Dr. Khadilkar's declaration, which addressed the *Rowland* factors, was inadmissible because it was not signed under penalty of perjury. The court also found that many of Dr. Khadilkar's conclusions lacked foundation. The court also sustained Transamerican's hearsay and foundational objections to the Bonillas' exhibits 1 through 14 and 17.

C. *KMD's Motion for Summary Judgment*

***4** KMD moved for summary judgment on the grounds that (1) it did not modify the truck; (2) it did not sell or lease the truck with a lift kit; (3) the truck was not exceptionally dangerous; (4) the truck was not defective; (5) it owed no duty to Julie; and (6) Julie caused her own injuries by running a red light.

The Bonillas opposed KMD's motion on the grounds that triable issues of material fact existed as to whether (1) KMD sold the truck to Wise; (2) KMD made a reasonable

inspection of the vehicle before it sold it; (3) KMD violated provisions of the Vehicle Code by selling an unsafe automobile; (4) KMD assumed a duty to make a reasonable inspection of the truck when they took possession of it during the transfer to Wise; and (5) the bumper height of the truck made it more likely to cause serious injuries in foreseeable collisions.

The court granted KMD's motion for summary judgment, finding as a matter of law that KMD owed no duty not to sell a truck that had a lift kit such as the one placed on the truck involved in the accident with Julie. The court again addressed the *Rowland* factors, and its decision was similar to that reached as to Transamerican, with slight differences in analyzing the duty of the seller of a truck, as opposed to an installer of lift kits.[FN6] On the foreseeability factor, the court found that while "accidents may generally be foreseeable, it is not clear that a reasonable dealer would have known that lifting a vehicle to a height permitted under the Vehicle Code would cause an impact with certain windows and that the airbags or other 'protective devices' in any passenger car would not deploy." The court also rejected plaintiff's expert's reliance upon an episode of the television show Dateline that asserted certain lifted trucks caused enhanced injuries in accidents as there was "no indication ... that trucks lifted to a height permitted by the California Vehicle Code caused such enhanced injuries." The court also addressed the testimony of an employee from the truck's manufacturer that it would be "inadvisable" to put a lift kit or large tires on such a vehicle. However, the court noted that this testimony only indicated that it was inadvisable because such modifications could affect the truck's safety and handling, not because it might result in enhanced injuries during a collision.

FN6. For purposes of its decision, the court assumed that the Bonillas had created a triable issue of fact that KMD was a "seller" of the truck when it passed from Butson to Wise.

The court, as with Transamerican, found that the connection between KMD's conduct and Julie's injury was extremely attenuated because the sale of the lifted truck did not cause the collision and the collision itself had nothing to do with the height of the truck's bumper. The court also found that moral blame could not be attached to the act of selling a truck that had been raised within Vehicle Code limits. The court found that as there was no moral blame attached to sellers of large vehicles such as buses, tractor-trailer trucks, motor homes and larger sport utility vehicles, there was no moral blame involved in KMD's alleged sale. The court also found that no moral blame attached to KMD as the alleged seller of the truck because there was no evidence that KMD, even if it could be proven that it was the seller, received any compensation for the transfer from Butson to Wise.

***5** The court also found that imposing liability upon KMD as the seller of the truck would not serve the policy of preventing future harm. The court noted again that even if it were ensured that if a truck were lifted it would hit the door but not the window of a Mercedes, there would still be a mismatch between the truck and other vehicles. The court also found that the burden imposed upon KMD if a duty were found would be a significant one. As with Transamerican, KMD would be forced to research whether modified vehicles it was selling were a safe height with regard to all other vehicles and might be forced to refuse to sell such vehicles because of the possibility that a bumper might someday collide with the window of another car. Finally, the court found that the availability, cost, and prevalence of insurance factor weighed in the Bonillas' favor because it appeared that liability insurance would be available to KMD.

The court concluded that the factors to be considered favored KMD and that KMD owed no duty not to sell lifted vehicles that were within the height limit of the Vehicle Code.

DISCUSSION

The Bonillas assert that the court erred in granting summary judgment in favor of Transamerican and KMD because (1) the court should have considered Dr. Khadilkar's declaration even though it was not signed under penalty of perjury; (2) Transamerican owed a duty not to make the truck unreasonably dangerous for a foreseeable accident; (3) KMD had a duty not to sell a modified truck that was unreasonably dangerous for a foreseeable collision; and (4) the court defined the duty of Transamerican and KMD to Julie in an overly narrow manner. We reject these contentions.

I. *Standard of Review*

"The summary judgment procedure aims to discover whether there is evidence requiring the fact-weighing procedures of trial. [Citation.] '[T]he trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves.' [Citation.] The trial judge determines whether triable issues of fact exist by reviewing the affidavits and evidence before him or her and the reasonable inferences which may be drawn from those facts." (*Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 131.) To prevail on a motion for summary judgment, a defendant must show one or more elements of the plaintiff's cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) The evidence of the moving party is strictly construed and that of the opponent liberally construed, and any doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.)

Consequently, summary judgment should be granted only when a moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Because a motion for summary judgment raises only questions of law, we independently review the parties' supporting and opposing papers and apply the same standard as the trial court to determine whether there exists a triable issue of material fact. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 723.) In practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court's determination of a motion for summary judgment. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1121-1122.)

II. *Analysis*

A. *Admissibility of Dr. Khadilkar's Declaration*

***6** The Bonillas assert that Dr. Khadilkar's declaration was in "substantial compliance" with the requirements of the law, and therefore should have been considered by the court. We reject this contention.

Code of Civil Procedure section 437c, subdivision (b), provides that a motion or opposition to a motion for summary judgment shall be supported by "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." In the absence of statutory authorization for its form and use, however, a declaration is inadmissible hearsay. (*Estate of Horman* (1968) 265 Cal.App.2d 796, 805.) In this regard, Code of Civil Procedure section 2015.5 provides in part:

Whenever under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be suppo

statement, declaration, verification, or certificate, in writing of such person *which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California.* The certification or declaration may be in substantially the following form: [¶] (a) If executed within this state: [¶] " *I certify (or declare) under penalty of perjury that the foregoing is true and correct* '...." (Italics added.)

Where the formalities required of a declaration pursuant to Code of Civil Procedure section 2015.5 are lacking, the declaration is inadmissible as evidence. (*Baron v. Mare* (1975) 47 Cal.App.3d 304, 308; *Witchell v. De Korne* (1986) 179 Cal.App.3d 965, 975.)

Cases have held that in some instances substantial compliance with Code of Civil Procedure section 2015.5 is sufficient. However, " '[s]ubstantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.] Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. [Citation.]" (*Southern Pac. Transportation Co. v. State Bd. of Equalization* (1985) 175 Cal.App.3d 438, 442.)

Here, we do not have a mere technical deviance that can constitute substantial compliance. The failure to verify the declaration under penalty of perjury made it no declaration at all. The objective of Code of Civil Procedure section 2015.5 is to ensure truthful representations by requiring a form of declaration that subjects the declarant to criminal penalties for knowingly false statements. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223; *Pacific Air Lines, Inc. v. Superior Court* (1965) 231 Cal.App.2d 587, 589 ["test of sufficiency of an affidavit is whether an indictment for perjury will lie if it is false"].) Thus, the requirement that a declaration be made under penalty of perjury is a substantive requirement that cannot be ignored. Indeed, it would have been manifest error for the court to consider Dr. Khadilkar's declaration.

***7** The Bonillas cite several cases holding that technical deficiencies in declarations should be ignored. However, none of those cases involved a situation where the declarant failed to state facts under penalty of perjury. (See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21, fn. 11; *Mission House Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 68-69; *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 870; *McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 564.) The Bonillas further assert that the declaration should have been admissible as it was merely "supplemental" to an earlier declaration filed Dr. Khadilkar. However, the fact remains that the subject declaration does not declare that the facts stated *therein* were made under penalty of perjury, making it inadmissible. The court did not err in ruling that Dr. Khadilkar's declaration was inadmissible.

B. *The Legal Issue of Duty*

The Bonillas assert that Transamerican was negligent by installing a lift kit on the truck that caused it to strike her driver's side window when the crash occurred and that KMD was negligent in selling the truck with such a lift kit. Transamerican and KMD prevailed on summary judgment by convincing the court that, as a matter of law under the facts of this case, neither owed Julie a duty that was breached. We review the record de novo to determine whether Transamerican and KMD conclusively negated this necessary element of the Bonillas' case. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.)

The elements of negligence are: (1) defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2)

failure to conform to that standard (breach of the duty); (3) a reasonably close connection between the defendant's conduct and resulting injuries (proximate cause); and (4) actual loss (damages). (Prosser & Keeton, Torts (5th ed.1984) § 30, pp. 164-165.) The first element-existence of a duty to be decided by the court rather than the jury-"is not an immutable fact, but rather an expression of policy considerations leading to the legal conclusion that a plaintiff is entitled to a defendant's protection." (*Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1110.) To determine the standard of conduct required by the first element of negligence, we generally undertake a risk-benefit analysis "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest ... the actor is seeking to protect, and the expedience of the course pursued. For this reason, it is usually ... difficult, and often simply not possible, to reduce negligence to any definite rules; it is 'relative to the need and the occasion,' and conduct ... proper under some circumstances becomes negligence under others." (Prosser & Keeton, supra, § 31, p. 173, fns. omitted.) Stated differently, " 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same-to conform to the legal standard of reasonable conduct in the light of the apparent risk." (*Id.,* § 53, p. 356.) Thus, although the articulated standard is the same, the question of what is reasonable will depend in each case on the particular circumstances facing that defendant considering the foreseeability of the risk of harm balanced against the extent of the burden of eliminating or mitigating that risk.

***8** To determine the existence and scope of a duty of care owed by a defendant to a plaintiff in a given case, we apply a test balancing the major factors set forth in *Rowland, supra,* 69 Cal.2d at page 113: "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" We address these factors in order.

1. *Foreseeability of Harm*

In assessing this factor, we do not decide whether Julie's *particular* injuries were reasonably foreseeable as a result of the *particular* actions of a defendant; rather, we "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 on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) Foreseeability is determined in light of the totality of the circumstances and balanced against the burden to be imposed. (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at pp. 677-678; *White v. Southern Cal. EdisonCo.* (1994) 25 Cal.App.4th 442, 447.)

Further, to support a duty of care, the foreseeability must be reasonable. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 402; *Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306.) Courts have articulated the standard as follows: "The reasonableness standard is a test which determines if, in the opinion of a court, the degree of foreseeability is high enough to charge the defendant with the duty to act on it. If injury to another ' "is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct" ' [citation], we must label the injury 'reasonably foreseeable' and go on to balance the other *Rowland* considerations." (*Sturgeon v. Curnutt,* 29 Cal.App.4th at p. 307 .) With respect to holding a defendant liable for the behavior of a third party, the same reasonableness standard applies. "In other words, 'a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably

anticipated. [Citations.]' [Citation.]" (*Juarez v. Boy Scouts of America, Inc., supra,* 81 Cal.App.4th at p. 402; see also *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1189, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19.)

However, "foreseeability alone is not sufficient to create an independent tort duty. ' "Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." [Citation.]' [Citation.] Because the consequences of a negligent act must be limited to avoid an intolerable burden on society [citation], the determination of duty 'recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.' [Citation.] '[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.' [Citation.] In short, foreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.)

***9** Here, the foreseeability factor favors Transamerican and KMD. It is not reasonable to require a lift installer or seller of a vehicle to foresee that the height at which the truck was lifted, which complied with California law, would be unreasonably dangerous to other vehicles with differing heights. If such were the case, any vehicles with differing heights would be subject to liability. Indeed, sellers of cars with *lower* bumpers would have to foresee all possible conflicts with the heights of higher vehicles and change their configurations to avoid liability. With so many vehicles of differing heights on our roads today, from low, small compact and sports cars to higher trucks, SUV's and motorhomes, it is not *reasonable* that a lift installer or seller of vehicles should anticipate all variations to avoid injury to other drivers. This is particularly so when the actions of third parties are the actual cause of the potential injury.

Further, even if it could be said that the type of injury suffered by Julie was reasonably foreseeable, that fact does not equate with duty, as the remaining factors support a finding that no liability should be imposed in this case.

2. *Degree of Certainty Plaintiff Suffered Injury*

Here there is no dispute that Julie suffered severe injuries. Therefore, we need not address this factor further.

3. *Connection Between Defendants' Conduct and the Injury Suffered*

This factor weighs heavily in Transamerican and KMD's favor. The collision itself, caused either by Julie running a red light or, as the Bonillas claim, by Wise's negligence, had nothing to do with the fact that the truck was lifted. (See *Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1353-1354 [no connection between defendant's conduct and crash because it was caused by others who were negligent].) The injury was caused by a collision between third parties, not by the direct actions of Transamerican and KMD. Further, because the frame height of the truck met Vehicle Code requirements and was not otherwise illegal, the connection between the defendants' conduct and the injury suffered is remote, as it would be as to any collision between vehicles that happen to have differing bumper and frame heights.

The Bonillas assert that the National Highway Traffic & Safety Administration (NHTSA) has federal standards for bumper heights of no less than 13 and no more than 21 inches in height. However, in support of this contention they cites to the supplemental declaration of Dr. Khadilkar, which we have already concluded was properly excluded as inadmissible by the trial court.

At oral argument counsel for the Bonillas argued that this fact was demonstrated not only by Dr. Khadilkar's supplemental declaration, but also in the deposition of Thomas Brunner, a representative of Mercedes Benz. However, in the Bonillas' supplemental opposition and separate statement filed with the trial court at the same time as Dr. Khadilkar's supplemental declaration, this deposition is not cited for such a claim. The only citations on this issue were to Dr. Khadilkar's inadmissible declaration. Further, Brunner did not testify that NHTSA has national standards for bumper heights. Rather, he only testified about a side impact test performed on a Mercedes Benz of the same model Julie was driving at the time of the accident and that the simulated bumper on the testing mechanism that struck the Mercedes Benz had a lower edge of 13 inches and a higher edge of 21 inches. Similarly, the actual NHTSA documents lodged with the trial court set forth test parameters for side impact protection testing, not standards for bumper heights. Finally, in a previous declaration Dr. Khadilkar admitted that the NHTSA has not addressed after-market lifting of vehicles and in fact "is not permitted to regulate after market modifications to vehicles." In sum, the Bonillas have not shown that there are any national standards for bumper heights that would reflect a duty on Transamerican and KMD to refrain from their challenged actions in this case.

***10** The Bonillas also contended at oral argument that the allowable frame heights for vehicles in California specified by section 24008.5 (see fn. 3, *ante*) is irrelevant as the important issue is a vehicle's *bumper* height. However, as California has elected to regulate the lifting of vehicles based upon frame as opposed to bumper heights, and there are no contrary state or national standards for bumper height, the height of the frame *is* the important issue. Further, the definition of "frame" in section 24008.5 is the "main longitudinal structural members of the chassis," to which bumpers are attached. (§ 24008.5, subd. (d)(1.)

4. *Moral Blame*

"Moral blame has been applied to describe a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts.... [C]ourts have required a higher degree of moral culpability such as where the defendant (1) intended or planned the harmful result [citation]; (2) had actual or constructive knowledge of the harmful consequences of their behavior [citation]; (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citation]." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.)

This factor similarly weighs heavily in Transamerican and KMD's favor for the same reason as the preceding factor. Moreover, to say that everyone whose vehicle has a bumper higher than another vehicle's side impact protection is morally blameworthy in a side impact collision would create a duty on behalf of anyone who drives a vehicle that is higher than vehicles such as Julie's. It also runs contrary to section 24008.5, which specifically allows for a vehicle frame the height of the truck at issue here.

Sakiyama v. AMF Bowling Centers, Inc. (2003) 110 Cal.App.4th 398 is instructive. There, the court found that the owner of a facility which was rented out for a "rave" party had no legal duty to attendees who stayed up all night and consumed drugs and/or alcohol, and later were involved in a collision that resulted in their deaths. The Court of Appeal found that the moral blame factor weighed in the defendant's favor: "[T]here is nothing morally blameworthy about AMF's decision to rent its roller skating rink for a rave party, particularly under the facts presented in this case. There is no evidence that AMF intended or planned for teenagers to drive while impaired, had actual or constructive notice that the rave would result in the subject vehicle collision, or acted with bad faith or a reckless indifference to the consequences of allowing its roller skating rink to be used for a rave." (*Id.* at p. 410.)

In this case, there is no evidence that either Transamerican or KMD intended that the accident occur or had actual knowledge that the lift kit employed would cause the injuries suffered. Further, because the lift employed was within the height limits of section 24008.5, and therefore legal, there is no expression of moral blame for Transamerican or KMD's conduct in California law.

***11** The Bonillas assert that moral blame attaches here because Transamerican and KMD put their own profits over safety. KMD points to Dr. Khadilkar's declaration and supporting documents that allege that there was an alternative to the lift kit utilized. However, there was no evidence offered that Transamerican profited by recommending lift kits. As for KMD, there is no assertion that it made any money over the transfer of the truck from Butson to Wise.

5. *Prevention of Future Harm*

The Bonillas asserts that they submitted "undisputed evidence" to the trial court that vehicles with higher bumpers cause more injuries. However, the evidence cited by Bonilla consists of Dr. Khadilkar's inadmissible declaration and exhibits referred to therein.

Further, we agree with the trial court's conclusion that requiring lift installers to match the door and window height of a particular vehicle such as Julie's Mercedes would not prevent future harm because it would likely be mismatched to other vehicles. Additionally, imposing a duty here would run contrary to the Legislature's expression that cars with different frame heights, within limits, are acceptable and lawful. It is undisputed that the frame height of the truck met legal requirements.

6. *Burden on Defendants and Consequences to Community*

The Bonillas assert that the burden on defendants here would not be onerous because automobile manufacturers and special equipment part sellers are aware of standards set by the NHTSA. However, Bonilla again cites to Dr. Khadilkar's inadmissible declaration to support this contention.

As the court found, the burden on defendants and consequences to the community of imposing a duty in this case would be significant. Installers would have to conduct significant research to determine if particular lifts would impact the windows of particular cars and would be prevented from lifting trucks even though the lift was permitted by law. This factor also weighs in defendants' favor.

7. *Availability, Cost and Prevalence of Insurance*

Undoubtedly insurance is available to businesses such as Transamerican and KMD to cover negligent acts arising out of modification of vehicles. However, it is also true that insurance is available for the drivers of modified vehicles, who could bear more of the cost through increased premiums because of any potential increase in risk of harm caused by driving a lifted vehicle. Ultimately, we conclude, as did the trial court, that this factor probably favors the Bonillas, but not heavily, due to the availability of insurance to drivers such as Wise to cover losses arising from accidents.

In sum, because the factors to be addressed overwhelmingly support Transamerican and KMD's position, the court did not err in determining as a matter of law that they owed no duty to Julie.

C. *Duty Issue As Framed by Court*

The Bonillas assert that the court framed the issue of duty in an inordinately narrow fashion. The Bonillas contend the issue should not be whether defendants had a duty not to provide a lifted truck that was higher than other cars' doors, but rather more generally whether they had a duty to not to modify a truck in an unsafe or dangerous manner or to sell a truck in such condition. This contention is unavailing.

***12** It is true that in assessing duty courts do not look to whether a particular defendant has a duty to a particular plaintiff under the peculiar facts of a particular case. "[A] 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 be appropriately imposed on the negligent party." (*Ballard v. Uribe, supra,* 41 Cal.3d at p. 572, fn. 6, italics omitted.)

However, we cannot assess the issue of duty in a vacuum. Duty is " 'only an expression of the sum total of those considerations of policy which lead the law to say that the *particular* plaintiff is entitled to protection.' " (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734, italics added.) While we frame the *issue* of duty more generally, our analysis of the factors determining whether a duty exists in a particular case focuses upon the particular conduct of a defendant and the injury suffered by the particular plaintiff. In conducting this analysis we address "this specific event's reasonable foreseeability, or likelihood of occurrence under the circumstances, with applicable policy considerations in resolving whether liability should be restricted." (*Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 504.) All the factors we have analyzed-foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendants' conduct and the injury suffered, the moral blame attached to the defendants' conduct, the policy of preventing future harm, the extent of the burden to the defendants 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-involve assessment of the circumstances of this case, together with more general policy considerations.

Lopez v. McDonalds Corp., supra, 193 Cal.App.3d 495, illustrates this point. There, survivors and family members of those killed in a mass murder shooting at a fast food restaurant brought a negligence action seeking to impose liability against the restaurant for their injuries. In concluding that no duty existed as a matter of law, we held that in addressing the foreseeability of the incident, the issue "is not whether a fast-food proprietor has a duty to protect plaintiffs from the potential criminal attacks perpetrated by unknown third parties, but rather to determine whether the boundaries of McDonald's general 'duty' encompasses the burden to protect against once-in-a-lifetime massacres." (*Id.* at p. 504.)

While it is true as a general statement that everyone owes a duty not to injure another through his or her negligence, when we are determining the outer reaches of duty, and whether public policy supports imposing a duty upon a particular defendant, we must look to the facts of the particular case and the policy considerations that support or do not support a finding of duty: "Where the court endeavors to determine the boundaries of 'duty', the pertinent inquiry is whether public policy justifies departing from the general rule that persons will be held liable for failing to act reasonably. 'The issue is one of legal remedy, not "duty." In cases where liability is restricted, society is not intending to foster unreasonable conduct; rather, other policy interests are seen as being adversely affected if defendants' conduct and decisions are subject to judicial scrutiny and sanctions.' [Citation.]" (*Lopez v. McDonald's Corp., supra,* 193 Cal.App.3d at p. 505; see also *Hucko v. City of San Diego* (1986) 179 Cal.App.3d 520, 523.)

***13** Thus, the court did not err in looking at the facts of this case, both the conduct of the defendants and the injury to Julie, in addressing whether a duty should be imposed.

DISPOSITION

The judgment is affirmed.

WE CONCUR: BENKE, Acting P.J., and McINTYRE, J.

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