S235412

SUPREME COURT
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IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al.,

Plaintiffs and Appellants,

vs.

GRACE FAMILY CHURCH,

Defendant and Respondent.

REPLY BRIEF ON THE MERITS

AFTER A DECISION
BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
[3d Civil No. C074801]

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I.

INTRODUCTION

The determination of the existence of a duty, in short, comes down to whether Defendant and Respondent Grace Family Church ("GFC") created an unreasonable risk of harm by directing Plaintiff and Appellant Aleksandr Vasilenko to park in the overflow parking available at the Debbie Myer Swim School ("swim school lot"). GFC did not. Under the factors set forth in *Rowland*, as well as under settled principles of premises liability, no duty should be imposed. Merely directing someone to park at a lot that is located across a public street which is adjacent to a landowner's[1] premises, without more, does not and should not, create a duty on that landowner to provide safe passage across the public street.

Plaintiffs and Appellants Aleksandr Vasilenko and Larisa Vasilenko (collectively "Vasilenko") present numerous facts which are not germane to the determination of the existence of a duty and the conduct of GFC on the evening the accident occurred. Vasilenko also raises new theories of duty and arguments which are not contained in the pleadings and should not be considered. In this case, an exception to *Civil Code* section 1714, based upon, and in continuation of, the longstanding principles of premises liability is justified.

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[1] All future references to "landowner" encompass one who owns, possesses or controls the premises.

II.

ARGUMENT

A. The Salient Facts to Determine the Existence of a Duty Under *Rowland* and General Principles of Premises Liability Are Not Disputed

The pertinent facts to determine the existence of a duty in this case are not in dispute, including the layout of Marconi Avenue ("Marconi"), the church, the swim school lot, the map provided by GFC to Mr. Vasilenko, and the circumstances of the accident that occurred on the evening of November 19, 2010. (I CT 65, 67-68, 184, 186-187, 189, 200, 248-254, 260-264; II CT 445, 447-448, 594.) Aleksander Ivantsov was a volunteer parking attendant at the church's parking lot on evening of November 19, 2010. (I CT 260-261, 263-265; II CT 594.) The church's parking lot was full, and Mr. Vasilenko was directed to park in the swim school lot. (I CT 262-264; II CT 592-594.) Vasilenko emphasizes words "you need to" from Mr. Ivantsov's testimony regarding Mr. Ivantsov's communication with Mr. Vasilenko, and attributes the failure to quote Mr. Ivantsov's testimony verbatim as a misapplication of the standard of review. (Answer Brief on the Merits ("ABOM") 10, fn. 1.) However, the specific word or words that Mr. Ivantsov used are not pertinent to the determination of the existence of

a duty. It is undisputed that Mr. Ivantsov told Mr. Vasilenko to park at the swim school lot. (I CT 262, 264; II CT 447, 592-595.)

B. Vasilenko Presents New Theories of a Duty Which Are Not Contained in the Pleadings and Should Be Disregarded

Vasilenko appears to confuse the issue, or seeks to change the issue by raising new or additional arguments as to the duty owed by GFC. Vasilenko raises new theories of duty such as a duty not to direct invitees to use the swim school lot when GFC could have directed invitees to a "safer" lot at the business plaza, and a duty to cease the use of the swim school lot permanently or to use it only during the daytime and in good weather. (ABOM 3.) However, these new duty arguments that Vasilenko now seeks to impose cannot be considered as they are not alleged in the First Amended Complaint ("FAC"). By raising new theories, Vasilenko also strays from the issue presented and attempts to impermissibly expand the scope of the duty.

Under summary judgment standards, a court is limited to assessing those theories alleged in the plaintiff's pleadings. (*Conroy v. Regents of University of Calif.* (2009) 45 Cal.4th 1244, 1250, 1254; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the

boundaries of the issues to be resolved at summary judgment.' " (*Id.* at p. 1250 quoting *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) As a result, a " 'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]' " (*Oakland Raiders, supra,* 131 Cal.App.4th at p. 648, citations omitted.) Additionally, the " ' " ' . . . [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not substitute for an amendment to the pleadings.' " ' " (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332-333, citation omitted.) If a response to a motion for summary judgment at the trial court level cannot create issues outside the complaint, a brief at the appellate level, before this Court, is much too late for Vasilenko to attempt to present new theories upon which they seek a duty to be imposed on GFC.

The duty issue at hand is bound by the pleadings. The FAC contains specific allegations regarding GFC's duty: the duty to assist or instruct Mr. Vasilenko in crossing Marconi. The Third Cause of Action for negligence alleges that GFC knew or should have known the following:

> [U]sing, controlling, maintaining and operating a certain parking lot [the swim school lot] as an overflow parking lot across the street from said church, . . . , would and did create a foreseeable risk of harm for persons invited lawfully to attend said church . . . , and foreseeably would thereby induce and/or require visitors, invitees and attendees, from time to time, to park at said church overflow parking area and as pedestrians to cross Marconi Avenue to said church without

> assistance or instruction from church personnel or its parking lot attendants regarding safe access to said church from said overflow parking area.

(I CT 67, 186.)

The Third Cause of Action also alleges that GFC knew or should have known that invitees "would require assistance and safety instruction from [GFC], through their agents and employees who served as parking lot attendants for [GFC] . . . and [GFC] negligently failed and refused to offer plaintiff any such assistance or instruction." (*Ibid.*) The Third Cause of Action further alleges that as a result of the "negligent failure of . . . [GFC] . . . to offer or provide reasonable assistance and safety instruction to persons utilizing said overflow parking lot . . . [Mr. Vasilenko] utilized and parked his vehicle within said overflow parking lot and attempted to cross Marconi Avenue from said parking lot to said church without assistance or instruction from [GFC] and, in so doing, was struck by that certain automobile . . . ." (*Ibid.*)

Vasilenko's Fourth Cause of Action for GFC's failure to train or supervise is premised upon the existence of the duty alleged in the Third Cause of Action, and alleges solely that GFC failed to adequately train or supervise its volunteer parking attendants because it did not train them to provide safe passage across Marconi. The FAC alleges that GFC knew or should have known the following:

> [The] parking lot attendants . . . were neither qualified nor adequately trained and/or supervised to enable them to perform their duties . . . in a reasonably safe manner and, as a result thereof, presented an unreasonable and foreseeable risk of harm to plaintiff ALEKSANDR VASILENKO and others who relied upon said agents and employees to direct them to a safe area to park and otherwise to assist them in safely crossing the street.

(I CT 68, 187.)

The FAC also alleges that as a direct and proximate result of GFC's failure to adequately train or supervise the parking attendants, Mr. Vasilenko "was not assisted by such agents or supervisors in any manner while attempting to cross Marconi Avenue . . . thereby causing him to be struck by an automobile traveling upon said roadway . . . ." (*Ibid.*)

Based on the pleadings, the duty issue is not whether there was a duty to direct invitees to use a "safer" parking lot, or to not use the swim school lot the night of the accident considering the weather, visibility issues, and time of day. Therefore, all purported facts relating to these two theories, including but not limited to, the fact that GFC used the parking lot at the business plaza for overflow parking, and the sheer existence of that lot, are not material or relevant to determining the duty issue at bar.

C. Vasilenko Presents Numerous Extraneous Facts Which Are Not Pertinent To Determining A Duty Under *Rowland*

As a threshold matter, the ABOM includes numerous facts which have no bearing on the actual duty alleged in the pleadings and at issue due to a fundamental misunderstanding in the analysis of the *Rowland* factors. (*See*, ABOM 5-14.) Vasilenko focuses on the particular details of the conduct by GFC, and not a "broad level of factual generality" under which the *Rowland* factors are to be evaluated. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772 ("*Cabral*").) This Court has explained, "as to foreseeability, . . . 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 . . . .' " (*Ibid.*, citations omitted, italics in original.) This Court also noted, "In applying the other *Rowland* factors, as well, we have asked not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us . . ." (*Ibid.*) This Court further noted, "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.*, citations omitted, italics in original.) "[T]he legal decision that an exception to Civil Code section 1714 is warranted, so that the defendant *owed no duty* to the plaintiff, or owed only a limited duty, is to be made on a more general basis suitable to the formulation of a legal rule . . . ." (*Id.* at p. 773, italics in original.) Accordingly, "the factual details of the accident are not of central importance," and ". . . on duty California law looks to the entire 'category of negligent conduct,' not to particular parties in a narrowly defined set of circumstances." (*Id.* at p. 774.)

Despite these guidelines, Vasilenko raises numerous facts and inferences which stray from the issue and are not germane to a determination of duty, confusing, at times, the existence of a duty of ordinary care with a breach of the duty of ordinary care. The background regarding how the swim school lot became an overflow lot (ABOM 5), GFC's communications with any public entity regarding a marked crosswalk or traffic light at the intersection of Marconi and Root (ABOM 6), GFC's communications with its church members on prior occasions

regarding crossing Marconi (ABOM 6), what volunteer parking attendants did generally on other occasions and how they were selected (ABOM 7-8, 14), how people usually crossed Marconi (ABOM 7, 9), facts and contentions regarding the parking lot at the business plaza (ABOM 8-9, 12-13), and specific details about the night of the accident (ABOM 9-11) have no bearing on the duty issue at hand.

D. A Duty Analysis Under Section 1714(a) and the *Rowland* Factors Support an Exception to the Duty of Ordinary Care and the Conclusion that GFC Owed Vasilenko No Duty

Though the general principles of premises liability are clear and applicable here, there is no case that is on all fours with the facts of this case. Thus, application of the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 ("*Rowland*") assist to determine the existence of a duty. Vasilenko's discussion of misfeasance and nonfeasance based on *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48-49 and *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, do not assist in determining the duty issue here because the designation of conduct as misfeasance or nonfeasance is not coterminous with duty. Vasilenko seeks to categorize the conduct here as misfeasance; however, this is unsupported by both the allegations in the FAC and the record. The FAC provides, ". . .

said defendants [GFC] negligently **failed** and refused to offer plaintiff any such assistance or instruction [in safely crossing Marconi to get to the church from the swim school lot]", and that "[a]s a direct and proximate result of the negligent **failure** of [GFC] to offer or provide reasonable assistance and safety instruction to persons utilizing said overflow parking lot . . ." Vasilenko was injured. (I CT 67, 186, emphasis added.) Thus, this case involves a **failure** by GFC to take affirmative action [assist or provide safety instruction] to protect persons from dangerous conditions [crossing Marconi] on adjacent property [public street]. Vasilenko cannot escape the allegations made in their own pleadings, and certainly cannot seek to now modify their pleadings in their brief before this Court.

Notably, a duty is not imposed merely because of a creation of a risk, but an **unreasonable** risk of harm. (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 47 ("Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable. . . . [Citation.]"); *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716 ("Under general negligence principles, . . . , a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an **unreasonable** risk of injury to others . . .").) Accordingly, the question is whether directing Mr. Vasilenko to the swim school lot which required him to cross Marconi

to get to the church created an unreasonable risk of harm. Under an analysis of the *Rowland* factors, the answer to this question is no.

1. Foreseeability and Related Factors

Based upon *Rowland*, the first category of considerations looks at the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, and the closeness of the connection between the defendant's conduct and the injury suffered. (*Cabral, supra,* 51 Cal.4th at p. 774.)

"When ruling upon duty as a question of law, the court considers in making its determination of foreseeability such factors as the extent of the burden in prevent future harm, and the 'totality of the circumstances' including the nature, condition and location of the defendant's premises." (*Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 82, citations omitted ("*Gray*").) In *Gray*, the court acknowledged that it is "well known that travelers in an airport carry boxes and luggage and that some percentage of them can be expected to handle their belongings negligently," but the court found that the airline's extent of control over the concourse where plaintiff tripped over a bag did not justify the imposition of a duty based on the foreseeability of this type of accident, and found that foreseeability under the totality of the circumstances was lacking. (*Id.* at pp. 84-85.)

In this case, like *Gray*, while is generally foreseeable that a pedestrian crossing a public street may be hit by a vehicle, under the totality of the circumstances, foreseeability is lacking. GFC did not own, operate, or control Marconi. GFC could not and did not control traffic on Marconi, or otherwise control Marconi, as it is within the control of the state or local authorities. (*Vehicle Code* §§ 21100, 21102, 21352-21353, 21465; *City of El Segundo v. Bright* (1990) 219 Cal.App.3d 1372, 1377 ("*City of El Segundo*"); *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 492 ("For, just as a property owner has no duty to erect signs for the purpose of controlling or regulating traffic on adjacent public roads and may in fact be prohibited by law from doing so, similarly a landowner cannot be responsible for such signage controlling or regulating pedestrian traffic across public highways. [Citations.]") ("*Seaber*"); II CT 507-508.) Moreover, GFC did not control Mr. Vasilenko's movements once he parked his car in the swim school lot.

The third consideration weighs heavily against the imposition of a duty. "[T]he question of 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation] is strongly related to the question of foreseeability itself. . . . , where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the

risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable." (*Cabral, supra,* 51 Cal.4th at p. 779.)

Although Mr. Vasilenko undeniably was injured, the connection between GFC's conduct and the injury suffered by Mr. Vasilenko is attenuated. Providing alternative parking and directing someone to the alternative parking that is available across a public street does not equate to an unreasonable risk of harm. GFC did not tell or require that Mr. Vasilenko cross Marconi when he did. Nor GFC did not tell or instruct Mr. Vasilenko to follow Sergey Skachokov in crossing Marconi. After parking in the swim school lot, Mr. Vasilenko was in a commonplace situation facing every adult pedestrian—the necessity of crossing a public street. Being mindful of the pleadings, the negligent conduct alleged is GFC's failure to assist or instruct Mr. Vasilenko in safely crossing Marconi on foot after having directed him to park his car there. (I CT 67, 186.) Although GFC directed Mr. Vasilenko to park in the swim school lot, **GFC did not direct or control Vasilenko's movements once he exited his car and as he crossed the street**.

Again, GFC did not own or control Marconi and GFC is precluded from controlling traffic on Marconi. As the court reasoned in *Seaber*, "it is doubtful there exists any close connection between its omissions, given the limited availability of alternatives for action and their effectiveness under

the circumstances, and the injuries suffered." (*Seaber, supra,* 1 Cal.App.4th at p. 493.) The *Seaber* court further reasoned, "Implicit in the absence of control is that the Hotel cannot be reasonably expected to take action where it is, in fact, powerless to do so. [Citation.] Further, the record is devoid of any indication the Hotel gratuitously assumed the safety of persons crossing the public street and failed to discharge that duty with due care." (*Ibid.*)[2]

Furthermore, GFC did nothing to increase or enhance the danger of crossing Marconi. GFC's alleged failure to instruct or assist an adult in crossing a public street would not result in greater likelihood of that adult being hit by a vehicle. Crossing a public street is an obvious, everyday risk of harm that exists for all pedestrians. A pedestrian generally uses his or her own common sense to determine when, where, and how to cross a street in compliance with the law. The risk of being hit by a car is inherent in the act of crossing a street and the dangers of crossing Marconi are obvious to

[2] In the ABOM, Vasilenko asserts that GFC voluntarily assumed a duty to protect Mr. Vasilenko from the danger inherent in an unassisted crossing of Marconi. (ABOM 51-55.) The voluntary assumption of a duty is not at issue here and should be disregarded as discussed in Part K. Nevertheless, in merely providing parking at the swim school lot across the street, and directing Mr. Vasilenko to park there, GFC did not assume a duty to provide safe passage across Marconi. Not only can GFC not reasonably ensure safe passage across Marconi as it cannot control, and is, in fact, prohibited from controlling the street or the traffic on the street, but this also requires a leap in logic that by directing someone to park across the street, a person now owes a duty to assist that person in crossing the street.

anyone driving on the street as well as crossing that street. Importantly, it has been held that one is under no duty to warn another of a danger equally obvious to both. (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 90; *Gray, supra,* 209 Cal.App.3d at p. 85.) In consideration of the foregoing, Mr. Vasilenko's injuries were not closely connected to parking at the swim school lot. Therefore, under *Cabral*, since the injury suffered is attenuated from GFC's failure to provide assistance or instruction in crossing Marconi to get to the church, the risk of being injured from a car while crossing a public street is unforeseeable.

Vasilenko focuses on the testimony given by Mr. Ivantsov, and the interpretation of the use of the word "need" by Mr. Ivantsov in attempts to create a triable issue of fact. (ABOM 25.) Vasilenko asserts that reasonable minds could differ on whether "directed" means that Mr. Vasilenko was "required" to park in the swim school lot. (ABOM 25, fn. 6.) The interpretation of the word "need" is not material. The duty issue does not turn on whether Mr. Vasilenko, or a reasonable person in the same or similar circumstances, would have understood Mr. Ivantsov's statements as being "directed" or "required" to park in the swim school lot. Whether or not Mr. Vasilenko was "directed" or "required" to park at the swim school, after parking there, the risk of harm was the same—crossing

Marconi on foot, and GFC did not control Mr. Vasilenko after he parked his car in the swim school lot, and did not control Marconi.

Under this category of *Rowland* factors, Vasilenko asserts that the location of the swim school lot would "induce him [a person parking at said lot] to cross at the most dangerous possible location, at night, during a rain storm." (ABOM 24.) Not only is this unsupported by the record, but this amalgamation of particular facts regarding the night of the accident are not relevant in applying the *Rowland* factors, as they involve the facts particular to only this case. (*Cabral, supra,* 21 Cal.4th at p. 772.)

Despite the foregoing, even assuming the harm was foreseeable because it is foreseeable that a person may be struck by a car while crossing a street midblock, this conclusion unto itself is not determinative. " '[F]oreseeability is not synonymous with duty; nor is it a substitute.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) While foreseeability may be a primary consideration, it is not determinative, and the existence of a duty " 'depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability. [Citation.]' " (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072, citations omitted.) For that reason, " 'A court may find that no duty exists, despite foreseeability of harm, because of other factors and considerations of public policy.' " (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th

377, 405, citation omitted.) Other factors and considerations of public policy support no duty here.

2. 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. To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability. [Citation.]" (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.) Courts require a higher degree of moral culpability. (*Ibid.*)

Under these legal parameters, there is nothing morally blameworthy about GFC's decision to provide parking at the swim school lot and directing people to park there, without providing assistance or instruction in crossing Marconi. There is no evidence that GFC intended or planned for people to cross Marconi midblock and get injured by a car while crossing the street.

Additionally, assisting or instructing Mr. Vasilenko would not have provided safe passage across Marconi. If by assisting Mr. Vasilenko, GFC is charged with directing traffic, it can have no such duty because GFC cannot regulate or direct traffic. There is no evidence of "sloth or timidity,"

sufficient to establish moral blame. Moral blame cannot attach to acts that GFC could not have engaged in.

3. Policy of Preventing Future Harm, Extent of Burden to GFC, Consequences to the Community, and Insurance

In addition to moral blame, the public policy factors include " 'the policy of preventing future harm, and the extent of the burden to the defendant and the 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.' " (*Cabral, supra,* 51 Cal.4th at p. 781, quoting *Rowland, supra,* 69 Cal.2d at p. 113.) A duty exception is supported by public policy considerations.

Vasilenko now raises, in passing and without persuasive legal authority, that there was an affirmative duty based on a special relationship between GFC and Mr. Vasilenko. Notably, this too is a new argument, like the theory of a duty to direct invitees to the business plaza parking lot, which is not contained in the pleadings. (I CT 67, 186.) A special relationship is never alleged, and so, this argument must be disregarded. Nonetheless, there is no evidence that Mr. Vasilenko was a business invitee, and the relationship in *Delgado v. Trax Bar & Grill* (2005) 36

Cal.4th 224, 244, is the relationship between a bar proprietor and its patron and invitee, which is not implicated here.

Imposing a duty on a landowner under the circumstances of this case will not prevent future harm because the harm in crossing a public street is a "traffic hazard" that still exists and will continue to exist. Directing someone to a place where he or she is then required to cross a street to get to a particular location does not make the act of crossing the street more dangerous than it already is. The quandary here is where to draw the line of a landowner's liability under the facts of a case like this. If a duty is imposed on a landowner under the facts of this case, no landowner should or would provide any directions for parking lest the landowner risk liability of someone being hit by a car while crossing a public street that may bisect the parking area and the landowner's premises. People are then left to their own devices for parking, which will likely involve the same risk of harm of having to cross a street to the get to the landowner's premises.

Vasilenko asserts that recognizing a duty on landowners for injuries occurring on adjacent public streets would motivate them to avoid creating a greater risk of harm from the traffic hazard of crossing a street and preventing future harm. This presumes a fact that Vasilenko fails to establish—that GFC created a greater risk of harm in crossing Marconi by directing people to park in the swim school lot. Nothing is alleged in the

pleadings and nothing in the record shows that GFC created a greater risk of harm in the actual act of crossing Marconi, for example, by controlling Mr. Vasilenko's movements in crossing the street. As the presumption upon which Vasilenko's proposition fails, Vasilenko's proposition also fails.

Vasilenko's approach to analyzing the public policy considerations, again, suffers from the defect which appears periodically throughout the ABOM. Vasilenko's assertions rely upon new theories of duty which are not contained in the pleadings, and Vasilenko does not review the *Rowland* factors under the requisite broad level of factual generality. The assertion that "GFC's duty arises from the accumulation of the large number of unique facts existing in this case," is contrary to the analysis set forth in *Rowland.* (ABOM 28.)

Notably, Vasilenko concedes that a landowner should not be liable for operating an overflow lot across a street, or informing invitees about parking available across a street as these actions do not create a greater risk of harm. (ABOM 28.) Thus, by implication, it is one fact—directing a person to park in an overflow lot across a street—that results in the imposition of a duty for a landowner to assist or instruct someone in crossing that street. The conclusion that the addition of this one fact, without more, creates an **unreasonable** risk of harm, is untenable. Indeed,

had GFC engaged in the conduct that Vasilenko alleges it should have but failed to engage in, had GFC directed Mr. Vasilenko where, when, and how to cross Marconi, GFC may have then owed a duty to Mr. Vasilenko. That is the conduct which may create a duty on a landowner to provide safe passage across a public street because the landowner is purporting to control a pedestrian's movements across the street. However, these are not the circumstances of this case.

The burden on a landowner to provide safe passage across public streets located adjacent to it just because the landowner provides instructions to park at a location across the street is onerous. In California, landowners are not permitted to regulate or control public streets or traffic on public streets. (*City of El Segundo, supra,* 219 Cal.App.3d at p. 1377.) Thus, *Seaber* concluded, "[a]lthough expanding potential liability inevitably promotes the policy of preventing future harm, the extent of the burden on the Hotel and like commercial establishments to police and regulate public crosswalks adjacent to the property is onerous." (*Seaber, supra,* 1 Cal.App.4th at p. 493.) Compounded by the fact that all landowners would have to employ people to direct invitees on a matter of common knowledge, a heavy burden would be imposed on landowners. The burden does not consider just what occurred under the particular facts of this case, but in creating an exception to the ordinary duty of care,

“ ‘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.) Failing to assist or instruct a person in crossing a public street, is not likely to result in greater harm of being hit by a car.

Vasilenko cites to attempted legislation after the decision in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 (“*Bonanno*”), but the aftermath of *Bonanno* does not assist Vasilenko as *Bonanno* itself is not applicable. First, *Bonanno* concerned potential public entity liability under the Government Tort Claims Act, not the potential liability of private, adjacent landowners. (*Id.* at pp. 146-148.) Second, *Bonanno* also involved affirmative action by the defendant in creating the danger by intentionally placing a bus stop in a dangerous location such that bus patrons were in danger of being hit by traffic on a busy public street. (*Id.* at p. 148.)

As to the issue of insurance, Vasilenko misses the mark. Vasilenko does not establish the applicability of the insurance forms they cite, to the facts of this case. Even if insurance is available, the potential cost of insurance covering injuries on public property and land off-site, the calculation for the parameters of which is impossible to delineate, is uncertain and may be prohibitive. For example, in this case, for how much

of public property would GFC be required to obtain insurance? Further, imposing a duty in this case may result in a massive increase in litigation against landowners by persons who are injured on adjacent public streets.

The totality of the circumstances, the analysis of the *Rowland* factors and the guiding principles in *Cabral* justify an exception to the general duty of ordinary care.

E. The Restatement Third of Torts Supports the Finding of No Duty

Vasilenko asserts that section 54 of the *Restatement Third of Torts* supports them because GFC engaged in conduct on the land that posed a risk of physical harm to persons not on the land. However, Vasilenko fails to establish that GFC's conduct on the swim school lot posed an unreasonable risk of physical harm, especially as Vasilenko has acknowledged that operating an overflow lot located across a street or informing invitees about parking across the street does not impose a duty on GFC. (ABOM 28.) Vasilenko, thus, fails to articulate what unreasonable risk GFC created by providing overflow parking at the swim school lot and concomitantly, directing someone to park there when there was no more parking available in the main lot.

Vasilenko's analysis under the *Restatement Third of Torts* is also unsound because it presupposes, without establishing, that GFC created a

risk, considering GFC did not control Marconi and did not control Mr. Vasilenko's movements after he parked his car in the swim school lot.

F. Vasilenko's Reliance on *Barnes* and *Bonanno* Is Misplaced As These Cases Are Factually Distinguishable

As argued at length in the Opening Brief on the Merits, *Barnes v. Black* (1999) 71 Cal.App.4th 1473 ("*Barnes*") and *Bonanno* are neither instructive, nor applicable here. (OBM 23-28.)

Vasilenko attempts to argue that GFC affirmatively caused Mr. Vasilenko to enter Marconi and notes the distinction made in *Barnes* between "cases involving the failure to take affirmative action to protect persons from dangerous conditions on adjacent property," and an injury that "was a result of [a] child being ejected from [defendant's] premises by its dangerous configuration at a point where resident young children were known to ride wheeled toys." (*Barnes, supra,* 71 Cal.App.4th at pp. 1479-1480; ABOM 33.) However, here, based on the allegations in the pleadings that the duty owed was assistance or instruction in crossing Marconi, and that GFC failed to assist or instruct in crossing Marconi, this case is precisely in line with those category of cases described in *Barnes* as involving the "failure to take affirmative action to protect persons [Mr. Vasilenko] from dangerous conditions on adjacent property [Marconi]." (*Ibid.*)

Vasilenko also misinterprets *Barnes*, *Annocki*, and *Bonanno*'s application to the instant case. Unlike Vasilenko's assertion, *Barnes* did not impose a duty just because the child was ejected into the street, but because of the "configuration of the defendant's property" that "ejected the child into the street against his will." (*Barnes, supra,* 71 Cal.App.4th at p. 1479.) Thus, the configuration of the defendant's land created an unreasonable risk of harm. (*Ibid.*) As such, the duty of care encompassed "a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Id.* at p. 1478.) No fact is alleged, and nothing in the record shows that GFC maintained the swim school lot in a way, or did something on the swim school lot, that exposed persons to an unreasonable risk of injury on Marconi.

In *Annocki*, the "parking lot and driveway [of defendant's property] were designed and in such condition as to create a danger of decreased visibility of the adjacent highway." (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 34-35 ("*Annocki*".) Vasilenko ignores the fact that in both *Barnes* and *Annocki*, the allegations involved the configuration or design of the defendant's property which limited the plaintiff's ability to act. In *Barnes* and *Annocki*, there was a hazard on defendant's actual property which caused the harm. This is the not the case here. There was

no hazard on the church property or on the swim school lot. The pleadings do not assert that the church property or swim school lot was designed or configured in such a way that forced Mr. Vasilenko to cross Marconi in a particular way or restricted his ability to see whether there were cars on the street, nor do they assert that GFC affirmatively caused Mr. Vasilenko to cross Marconi at the place, time, and manner that he did.[3]

In *Bonanno*, the defendant owned and controlled its own bus stop and the physical location of that bus stop, which was placed there in the first instance by the defendant, caused bus stop patrons to be at risk from the immediate adjacent property. (*Bonanno, supra,* 30 Cal.4th at pp. 151-152.) Vasilenko contends that GFC "controlled" where it would have an overflow parking lot; however, it did not actually control the location of an overflow parking lot because each lot, whether it was the swim school lot or the business plaza lot, was at a pre-existing, fixed location. Conversely, in *Bonanno*, the bus stop was not at a fixed location and the CCCTA controlled where the bus stop would be located. (*Id.* at p. 152.) In this

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[3] This Court has recently stated that it has "never held that the physical or spatial boundaries of a property define the scope of a landowner's liability." (*Kesner v. Superior Court of Alameda County* (December 1, 2016, S219534) __ Cal.5th __ [2016 WL 7010174].) And indeed, GFC makes no such argument here. The holding in *Barnes* is in line with the general principles of premises liability. The fact that Mr. Vasilenko was not injured on the church premises or swim school lot, in and of itself, is not determinative of a duty, although it is a fact that contributes to an analysis of control. The facts in *Barnes* and *Annocki*, however, are readily distinguishable from our case.

way, Vasilenko's interpretation of the term "control" differs from the interpretation of the term in *Bonanno*. Consequently, the argument that flows from this incorrect interpretation is misguided and unavailing. Ultimately, the crucial difference between *Barnes*, *Annocki*, and *Bonanno*, and the facts here is that GFC did not control the public highway or the configuration or design of where the swim school lot would be constructed, and the configuration or design of the premises it did control did not create an unreasonable risk.

Moreover, despite Vasilenko's contention that *Bonanno* is authoritative, Vasilenko provides no authority wherein a determination of a duty for a private landowner applied the Government Tort Claims Act and principles involving liability of public entities for dangerous conditions of public property. *Bonanno* is not instructive because it involved the liability of a public entity and looked to general principles of premises liability involving private landowners for that purpose.

Reliance on *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49 likewise does not aid Vasilenko. The defendants in *Bigbee* controlled the location, installation, and maintenance of telephone booths, and on that basis, they owed a duty to exercise due care. (*Id.* at pp. 52-53, 55-56.) Here, GFC did not control the physical placement or installation of the swim school lot, and did not maintain the swim school lot.

Vasilenko asserts that GFC could have moved, removed, or eliminated the "dangerous location" of the swim school lot by using the business plaza lot[4] or not utilizing the swim school lot based on the time of day and weather.[5] Neither of these arguments assists in determining whether GFC had a duty to provide safe passage across a public street adjacent to it by assisting or instructing persons how to cross the street, let alone answers the question as to whether GFC had a duty to provide safe passage across Marconi. **The question is not what GFC could have done in hindsight, but whether or not it owed a duty to provide safe passage across Marconi after having directed persons to park there, and in turn, whether the general principles of premises liability should apply or whether a landowner owes a duty to persons who are injured in a public street adjacent to the landowner's premises after having been directed to park there by the landowner**. As seen in *Adams*, in certain circumstances "almost any result [is] foreseeable with the benefit of hindsight," and that where "the bar of foreseeability is set so low,

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[4] The assertion that parking at the business plaza lot was "safer" does not answer the duty question here. That lot would have required invitees to cross a public street, Root Avenue, and the duty question as to whether a landowner owes a duty to assist or instruct invitees in crossing a public street adjacent to the land remains. (II CT 350-351, 366, 433, 510, 530, 599.)

[5] By implication, Vasilenko suggests that using the swim school lot during the day and in good weather would not violate a duty of reasonable care. However, this too, does not resolve the duty question at issue.

foreseeability alone is insufficient to create a legal duty to prevent harm. [Citations.]" (*Adams, supra,* 68 Cal.App.4th at p. 269.)

G. *Rowland* Rejected Common Law Distinctions, Such As That of an Invitee, in Imposing Liability Upon a Landowner

Rowland v. Christian did away with common law distinctions based upon the status of the injured party as a trespasser, licensee, or invitee. (*Rowland, supra,* 69 Cal.2d at pp. 118-119.) To the extent that Vasilenko seeks to impose a duty on GFC strictly due Mr. Vasilenko's status based on *Schwartz v. Helms Bakery* (1967) 67 Cal.2d 232 ("*Schwartz*"), which was decided prior to *Rowland*, that contention is without merit. (*Id.* at p. 119 ["although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative"].)

In addition, Vasilenko's reliance on *Schwartz* and citations to *Bonanno*, *Alcarez*, and *Lugtu* are misplaced as Vasilenko misapprehends the distinction between defendants at fixed locations and mobile defendants. (*Bonanno, supra,* 30 Cal.4th at p. 152 [defendant controlled the location of the bus stop and could have moved it]; *Alcarez v. Vece* (1997) 14 Cal.4th 1149 at p. 1158 [the presence of a meter box created a dangerous condition on land that was in defendants' possession or control];

Lugtu, supra, 26 Cal.4th at p. 716 [defendant directed the driver of the vehicle to stop the vehicle in a dangerous position].) Vasilenko remarks that GFC cannot support the claim that it did not direct egress from the swim school lot. However, Vasilenko can point to nothing in the record to controvert this claim. In fact, Vasilenko's theory of duty is based upon this very premise—that GFC should be liable because it did not assist or instruct Mr. Vasilenko in crossing Marconi from the swim school lot, *i.e.,* direct egress from the swim school lot. (I CT 67, 186.) Vasilenko provides no evidence disputing that GFC did not direct Mr. Vasilenko's movements after he parked the car, or showing that GFC required Mr. Vasilenko to cross mid-block.

Vasilenko misunderstands the distinction in *Johnston v. De La Guerra Properties* (1946) 28 Cal.2d 394 ("*Johnston*"). *Johnston* involved control and different theories of duty. (*Id.* at pp. 397-400.) The "patrons of . . . the building used the adjoining property as a parking lot, which had been graded by [the landlord] so that it sloped down to the private walk," an oil company acquired the adjoining property and constructed a concrete wall running the length of the walkway, and the landlord "encouraged patrons . . . to park their cars on the adjoining property and approach the building by the way of the private walk" where the injury occurred. (*Ibid.*) The landlord controlled plaintiff's movements in getting to the premises

after plaintiff's husband parked the car, and controlled the private walk. Thus, a duty was based on "failing to light the premises, or provide guard rails, or otherwise to protect or warm [sic] business invitees against the danger inherent in this **particular approach**." (*Id.* at pp. 400-401, emphasis added.) Such facts are not present here. GFC did not design, create, or control Marconi or the swim school lot. Most importantly, it did not design, create, or control a particular approach to the church from the swim school lot. Finally, reliance on *Johnston* to support liability based on common law distinctions rejected by *Rowland* is meritless.

H. The General Principles of Premises Liability Are Applicable Despite Factual Distinctions

Though generally factually distinguishable, these distinctions do not effect the applicability of the guiding principles set forth in *Seaber* and *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142 ("*Steinmetz*"). Vasilenko otherwise fails to dispute the applicability of the general principles of premises liability.

Vasilenko attempts to distinguish *Steinmetz*, *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715 and *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799 on the basis that these cases involved nonfeasance. However, here, the FAC involves nonfeasance. Also, contrary to Vasilenko's contentions, by directing Mr. Vasilenko to

the swim school lot, GFC did not restrict or control where he would park, and it did not require him to cross Marconi by any particular, specified approach. As to *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, Vasilenko's sole argument against the duty analysis is that it was erroneously decided. (ABOM 47-48.) This argument is unpersuasive.

I. Vasilenko's Out-of-State Decisions Are Unpersuasive

Vasilenko cites to two out-of-state cases as persuasive authority. However, *Warrington v. Bird* (1985) 204 N.J.Super. 611 involved a different theory of duty, namely a duty to provide lighting, and the duty in *Donavan v. Jones* (La. Ct. App. 1995) 658 So.2d 755 was premised upon precedent involving the duty of an employer. Neither case is persuasive.

J. Vasilenko Misapprehends the Standard to Impose a Duty

The fact that Mr. Vasilenko was placed in a position where he needed to cross a public street to get to the church after having parked in the swim school lot is pertinent to show that Mr. Vasilenko, and anyone who parked in the swim school lot, was not confronted with an **unreasonable** risk of harm for having to cross a public street, whether big or small, because that act is a matter of common knowledge.

K. Vasilenko Illegally Crossed Marconi Avenue in Violation of Sacramento County Code Section 10.20.040

Vasilenko asserts that it was legal to cross midblock citing to Sacramento County Code, Title 10, Chapter 10.20, Section 10.20.040. (ABOM 7, 11, 50-51.) The FAC does assert that the accident took place in an unincorporated area of the County of Sacramento. As such, the Sacramento County Code would apply. (I CT 65, 184.)

Significantly, however, Vasilenko's assertion that it was legal for Mr. Vasilenko to cross midblock, or jaywalk across, Marconi under Section 10.20.040 is incorrect. Plaintiffs misinterpret and disregard crucial language from this section which provides, "No pedestrian shall cross a roadway at any place other than by a route at a right angle to the curb or by the shortest route to the opposite curb **except in a marked crosswalk.** (Ord. 703 § 56, 1960.)" (Sacramento County Code Section 10.20.040, emphasis added.) Vasilenko's application of this code ignores the last clause of the sentence. It is undisputed that Mr. Vasilenko crossed Marconi, midblock, and not in a marked crosswalk. *Vehicle Code* section 21961 provides that local authorities can adopt ordinances prohibiting pedestrians from crossing roadways at other than crosswalks. Section 10.20.040 does just that. It prohibits pedestrians from crossing at other

than a marked crosswalk. Accordingly, Mr. Vasilenko impermissibly and illegally crossed Marconi in violation of Section 10.20.040.

L. The Voluntary Assumption of A Duty Is Not At Issue

Whether or not GFC voluntarily assumed a duty is not an issue that is properly before this Court. This argument was never made in the moving or opposing papers for the motion for summary judgment before the trial court, nor is it one of the issues presented before this Court. (I CT 278-284; II CT 312-331; II CT 478-483.) There is no judgment on this issue from the trial court, and thus, no judgment to be affirmed. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [" 'If right upon any theory of law applicable to the case, [a trial court's ruling] must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]") The judgment to be affirmed is the grant of summary judgment based on a finding that GFC owed no duty.

M. Summary Judgment Was Properly Granted as GFC Did Not Owe Vasilenko a Duty of Care Under the Fourth Cause of Action

Despite Vasilenko's assertion, GFC has asserted that it owed no legal duty upon which it can be liable for the Forth Cause of Action. This claim is another theory of negligence, which as alleged, is premised upon the same duty asserted in the Third Cause of Action, and requires, at the

outset, the determination that GFC owed a duty to assist or instruct people who parked in the swim school lot, in crossing Marconi. (I CT 38, 187.) A finding of no duty for the Third Cause of Action applies equally to the Fourth Cause of Action.

N. GFC's Conduct Was Not a Substantial Factor in Bringing About Vasilenko's Injuries

Vasilenko asserts that they can show that GFC's conduct was a substantial factor in bringing about Vasilenko's injuries because GFC directed Mr. Vasilenko to park in the swim school lot and then failed to assist Mr. Vasilenko in making safe passage across Marconi. (ABOM 57-58.) These facts do not constitute a "substantial link or nexus between the omission [failure to assist] and the injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.) A reasonable juror could not infer that but for GFC's failure to assist Mr. Vasilenko in crossing Marconi, Mr. Vasilenko would not have been struck by a car. GFC's conduct in operating the swim school lot and directing Mr. Vasilenko to park there was a remote factor, not a substantial factor of Mr. Vasilenko's harm.

III.

CONCLUSION

While Vasilenko's accident is tragic, neither the settled principles of premises liability nor the application of the *Rowland* factors supports the imposition of a duty to provide safe passage across a public street adjacent to a landowner's premises. The Third Appellate District misapplied the principles of premises liability under the facts of this case in reversing the grant of summary judgment. Accordingly, the order granting GFC's summary judgment motion should be affirmed and the judgment reinstated.

Dated: December 7, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c) and 8.204 of the California Rules of Court, the enclosed Reply Brief on the Merits has been produced using 13-point type including footnotes and contains 8,382 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 8, 2016

Respectfully Submitted,

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PROOF OF SERVICE BY MAIL

In Re: REPLY BRIEF ON THE MERITS; No. S235412
Caption: ALEKSANDR VASILENKO, et al. v. GRACE FAMILY CHURCH
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 Del Mar Blvd., Suite 216, Pasadena, California 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2016, at Pasadena, California.

E. Gonzales