Circuit Court for Montgomery County
Case No. 410941-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1010

September Term, 2016

EMERSON SUMO, *et al.*

v.

GARDA WORLD, *et al.*

Graeff,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 12, 2017

A group of robbers stole a bag of money from a security guard working for Garda World. After a firefight between a security guard and the robbers, the security guard shot at the robbers' getaway car, damaging it, as the robbers sped away. A couple of minutes later, and about a mile and half down the road, the robbers carjacked Emerson Sumo and shot him in the head. Sumo and his wife sued Garda World for damages—for the actions of its employee—under a negligence theory. The Circuit Court for Montgomery County granted Garda World's motion to dismiss, finding that Garda World owed no duty to Sumo for harm caused by the robbers.

On appeal, Sumo presents a single issue for our review. Sumo argues that the circuit court erred when it found that the Garda World security guard shooting at the robbers' vehicle did not create a duty on Garda World to Sumo. We affirm the judgment of the circuit court.

BACKGROUND

On October 26, 2012, an employee of Garda World, a security company, pulled up to a Cricket Wireless store in Takoma Park in an armored car to pick up money. The security guard entered the store, and then exited a short while later carrying a bag containing $3,911 in cash. Suddenly, a man wearing a ski mask pointed a gun at the security guard and demanded the money bag. The security guard attempted to retreat into the Cricket Wireless store, but was cut off by another masked man holding a gun. The security guard then dropped the money bag and pulled out his own gun. The robbers and the security

guard both exchanged fire from a close distance. Miraculously, neither was injured. The robbers grabbed the money bag and ran to their getaway car.

The security guard then shot at the robbers' vehicle as it sped away. One bullet hit the vehicle's rear tire, and another bullet tore through the back window, striking one of the robbers in the shoulder. After travelling for a few minutes—about a mile and half down the road—the robbers spotted Sumo getting into his parked car. The robbers jumped out of their vehicle, shot Sumo twice in the head, and stole his car. The robbers then used Sumo's car to flee into Washington, D.C., where they were eventually apprehended.

Sumo sued Garda World. Sumo alleged that Garda World owed him a duty of care for the actions of the robbers because the affirmative conduct by Garda World's employee—shooting at the robbers' vehicle—created a previously non-existent risk of harm to Sumo. The circuit court granted Garda World's motion to dismiss with prejudice. Sumo noted a timely appeal to this Court.

STANDARD OF REVIEW

The standard of review of a grant of a motion to dismiss is "whether the trial court was legally correct." *Litz v. Maryland Dep't of Env't*, 446 Md. 254, 264 (2016). We "must determine whether the [c]omplaint, on its face, discloses a legally sufficient cause of action." *Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009). In reviewing the complaint, we "accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Litz*, 446 Md. at 264 (citation

omitted). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 447 Md. 394, 403-04 (2016) (citations omitted).

ANALYSIS

Sumo focuses on one central argument that he asserts is sufficient to survive Garda World's motion to dismiss. According to Sumo, a defendant owes a duty of care to one harmed by a third party if the defendant's affirmative conduct creates a previously non-existent risk of third party harm to the plaintiff. Under these facts, Sumo contends that Garda World owes a duty of care to Sumo because the shots fired at the robbers' getaway car by Garda World's employee created a previously non-existent risk of third party harm—the robbers were forced to search for another getaway car a couple of minutes later, and, as a result, shot Sumo in the head. Sumo postulates that had Garda World's employee not shot at the getaway car, the robbers would have driven past Sumo without harming him. Sumo argues, therefore, that Garda World owes him a duty of reasonable care—under the tort rules related to third party harm and under the 7-factor test to establish a duty, both of which we will explain below—and should be liable for the robbers shooting him. The circuit court found that Garda World owed no duty to Sumo and granted Garda World's motion to dismiss. We agree.

I. Third party harm

We begin by restating basic tort law. Negligence requires the following elements:

> (1) that the defendant was under a duty to protect the plaintiff from injury,
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> (2) that the defendant breached that duty,
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> (3) that the plaintiff suffered actual injury or loss, and
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> (4) that the loss or injury proximately resulted from the defendant's breach of the duty.

Warr v. JMGM Group, LLC, 433 Md. 170, 181 (2013) (citation omitted). The first element, duty, is defined as a legal obligation "to conform to a particular standard of conduct toward another." *Id.* "[T]he existence of a legal duty is a question of law to be decided by the court." *Remsburg v. Montgomery*, 376 Md. 568, 581 (2003).

The general rule is that "a private person is under no special duty to protect another from the criminal acts by a third person." *Valentine v. On Target, Inc.*, 353 Md. 544, 551-52 (1999) (citation omitted). The policy behind this rule is the overarching principal that "[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties … ." *Id.* at 553. There are three exceptions, however, to this "no duty" rule:

> (1) If the defendant has *control* over the conduct of the third party;
>
> (2) If there is a *special relationship* between the defendant and the third person or between the defendant and the plaintiff; or
>
> (3) If there is a *statute* or *ordinance* that is designed to protect a specific class of people.

Warr, 433 Md. at 189 (control); *Barclay v. Briscoe*, 427 Md. 270, 294 (2012) (special relationship); *Kiriakos v. Phillips*, 448 Md. 440, 457 (2016) (statute or ordinance). If a

particular case does not fit into one of these exceptions, then the defendant does not owe a duty to the plaintiff for the criminal acts of a third party.[1] *Warr*, 433 Md. at 184.

[1] Sumo posits that three Maryland cases—*Kiriakos*, *Boyer*, and *Keesling*—support his view that there is another exception to the "no duty" rule besides the previously enumerated three categories. The three cases that he cites, however, do not create a fourth category. The Court of Appeals in all three cases, as discussed below, relied on specific statutes to create a duty, rather than on Sumo's suggested method—that a defendant owes a duty of care to one harmed by a third party if the defendant's affirmative conduct creates a previously non-existent risk of third party harm to the plaintiff.

First, in *Kiriakos*, the Court of Appeals framed the question presented as "address[ing] to what extent adults who allow underage persons to drink alcohol on their property—in violation of [Section 10-117(b) of the Criminal Law Article]—are liable for injuries arising from the youth's intoxication." 448 Md. at 448. The Court went on to address the duty created by the statute under the Statute or Ordinance Rule. *Id.* at 457-65. The Court also based its decision on the strong policy underlying the statute. *Id.* at 477 ("We certainly do not overlook or discount our recent decision in *Warr*. What critically distinguishes Kiriakos's claim from the plaintiffs' in *Warr*, however, is Robinson's age and the venue of his intoxication, both reflected in the strong public policy underlying [Section 10-117(b)].); *see also id.* at 495 ("Although the reasoning differs in the two cases, the public policy underlying [Section 10-117(b)] applies to both cases."). Thus, in our view, *Kiriakos* is firmly in the category of statutory cases.

Second, in *Keesling v. State*, a motorist sued the State for damages sustained when police officers allegedly commandeered his vehicle and forced him to participate in a roadblock. 288 Md. 579, 267 (1980). Relying entirely on the provisions of what is now Section 19-102 of the Transportation Article, the Court of Appeals reversed the grant of summary judgment in favor of the State. *Id.* at 583-89; *see also id.* at 591 ("If the jury were to believe that the officers set in motion a chain of events which they knew or should have known would lead to the commandeering of the Keesling vehicle and would likely lead to Keesling's injury by the criminals or by the police effort to stop the vehicle, *then there would be a violation of the statute* in two respects.") (Emphasis added). Thus, *Keesling* does not create a new category, but is rather a standard statutory case.

Third, *Boyer v. State* "involve[d] the possible liability of law enforcement officers, the State of Maryland, and Charles County for injuries sustained by motorists struck by a suspected drunk driver who was being pursued by the officers in a high-speed chase." 323 Md. 558, 562 (1991). The Court of Appeals, citing to Section 21-106(d) of the

None of the three enumerated exceptions apply in this case. Sumo does not argue that Garda World had *control* over the robbers, that Garda World had a *special relationship* with either Sumo or with the robbers, or that a specific *statute* or *ordinance* governed Garda World's conduct. Rather, Sumo relies exclusively on the theory that Garda World owed him a duty because its affirmative conduct created a previously non-existent risk of third party harm. This is not one of the limited exceptions to the general "no duty" rule for third party harms.[2] Therefore, even if we assume all facts and inferences in a light most favorable

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Transportation Article, stated that "it is clear under Maryland *statutory* and common law that a police officer, in connection with his operation of a police car, owes others on the roadway a duty of due care." *Id.* at 584 (emphasis added). Here, Sumo relies particularly on this statement from *Boyer*:

> Moreover, under Maryland law police officers owe a duty of care to a plaintiff injured by suspected criminals fleeing the officers if the officers set in motion a chain of events which they knew or should have known would lead to ... [the plaintiff's] injury by the criminals or by the police effort to stop the vehicle.

Id. at 585 (quoting *Keesling*, 288 Md. at 591) This quote, however, is unconvincing—*Boyer* merely quotes *Keesling*, but then leaves out the last phrase from *Keesling*. As mentioned above, the quote from *Keesling* ends: "*then there would be a violation of the statute* [Section 19-102 of the Transportation Article] in two respects." 288 Md. at 591. This means that the line from *Boyer* that Sumo wants to use to provide a non-statutory duty when a defendant's affirmative conduct creates a previously non-existent risk of third party harm, is actually referring to a duty created by a statute. *Boyer*, therefore, does not advance the analysis.

Thus, these cases do not create a new fourth category, but are, in fact, properly categorized as statutory cases.

[2] Sumo also tries to divine a fourth exception—that a defendant owes a duty of care to one harmed by a third party if the defendant's affirmative conduct creates a previously

to Sumo, he has not stated a legally cognizable cause of action in negligence. As a result, the circuit court was legally correct in dismissing Sumo's amended complaint.

II. 7-factor test

Sumo also urges us to hold that Garda World owes a duty of care to Sumo for another reason. At times, Maryland courts have looked to a 7-factor test to determine whether a duty exists in a particular case. *Kiriakos*, 448 Md. at 486. Although the exact relationship between the three exceptions to the "no duty" rule that we discussed above, and this 7-factor test, is unclear (when to use one or the other, or where the 7-factor test

non-existent risk of third party harm to the plaintiff—from *Kiriakos* in yet another way. He points to the statement by the Court of Appeals in that case that "special relationships are not the exclusive means to justify imposition of a duty to a third person." *Kiriakos*, 448 Md. at 482. He also places emphasis on the Court's mention of two provisions of the Restatement (Third) of Torts—Section 19 comment e, and Section 37 comment c, that seem to allow his third party harm theory. *Id.* at 483-84 & n.51. We do not agree.

Both the statement of the *Kiriakos* Court cited above, and the two Restatement provisions, arose in the context of the Court of Appeals' discussion of negligent entrustment and the public policy behind Section 10-117(b) of the Criminal Law Article. The Court held that the common law tort principle of negligent entrustment could provide the basis for imposing a duty on an adult who allows underage persons to drink alcohol on his or her property. *Id.* at 480-86. But the Court based its holding exclusively on the presence of the recognized common law tort principle of negligent entrustment and the public policy evident in Section 10-117(b). *Id.* at 486 ("[W]e conclude that Kiriakos can maintain a limited social host cause of action against Phillips through common law tort principles, like negligent entrustment, based on the strong public policy evident in [Section 10-117(b)]."). Additionally, the Court expressly did not adopt these Restatement provisions as Maryland law. *Id.* at 483 ("Although we need not adopt Section 19 [of the Restatement], we find it helpful to illustrate how the theory of negligent entrustment provides a foundation for recognizing the tort of social host liability in the present case."). Our case presents neither a deep-rooted common law principle like negligent entrustment, nor a strong public policy evident in a statute. Thus, we decline to hold that *Kiriakos* permits Sumo's proposed fourth exception.

fits in relation to the 3 exceptions), the Court of Appeals has described the 7-factor test as "consonant" with the 3 exceptions. *Id.* ("Our decision is *consonant* with the classic factors we use to decide questions of duty under the common law.") (Emphasis added). Therefore, we will also examine the 7-factor test to determine whether it creates a duty here.[3] It does not.

The 7-factor test to establish a duty considers:

> (1) the foreseeability of harm to the plaintiff,
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> (2) the degree of certainty that the plaintiff suffered the 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 reasonable care with resulting liability for breach,
>
> (7) and the availability, cost and prevalence of insurance for the risk involved.

Kiriakos, 448 Md. at 486 (quoting *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 627 (1986)). "Although foreseeability is perhaps most important among these factors, it alone does not justify the imposition of a duty." *Id.* at 486 (citation omitted). Because we do not

[3] "[T]he existence of a legal duty is a question of law to be decided by the court." *Remsburg v. Montgomery*, 376 Md. 568, 581 (2003).

resolve any of the factors in Sumo's favor, we decline to find a duty based on the 7-factor test.

i. Foreseeability of harm

The first factor looks at the foreseeability of harm to the plaintiff in a particular case. "Foreseeability as a factor in the determination of the existence of a duty involves a prospective consideration of the facts existing at the time of the negligent conduct." *Henley v. Prince George's Cnty.*, 305 Md. 320, 336 (1986). In the context of duty, the "foreseeability of harm test … is based upon the recognition that a duty must be limited to avoid liability for unreasonably remote consequences." *Valentine*, 353 Md. at 551. Therefore, the question in this case is whether it was foreseeable to Garda World, and not unreasonably remote, that as a result of its employee shooting at the robbers' getaway car, the robbers would later shoot and carjack a member of the public, after travelling about a mile and a half down the road in an attempt to reach Washington, D.C.

We do not think so. After being shot at from close range by multiple assailants, and having his money bag stolen, the Garda World security guard shot at the robbers' getaway car. The robbers then continued driving in an attempt to reach Washington, D.C. In fact, they travelled for a couple of minutes—about a mile and a half—before deciding to steal Sumo's car. They shot Sumo and stole his car to complete their flight into Washington, D.C. Such third party harm is so remote as to make the imposition of a tort duty

unreasonable. At the time that the security guard shot at the getaway car, he had no way of knowing:

> (1) that his shots would be successful at disabling the getaway car;
>
> (2) that the robbers would not ditch the getaway car right from the start because their vehicle had been seen by the public;
>
> (3) that the robbers would not ditch the getaway car and flee into Washington, D.C. on foot because they were so close to the D.C. border anyway;
>
> (4) that the robbers would not simply push on in the disabled vehicle and try to make it to Washington, D.C.; and
>
> (5) that the robbers would choose to delay their escape by carjacking a member of the public about a mile and a half from the scene of the robbery.

Because a "prospective consideration of the facts existing at the time of the negligent conduct" does not reveal that the harm suffered by Sumo was foreseeable, we hold that this factor does not militate in Sumo's favor. *See Henley*, 305 Md. at 336.

ii. Degree of certainty that Plaintiff suffered the injury

Under the second of the seven factors, we must consider the degree of certainty that the actions of the plaintiff would cause the defendant's injuries. This factor does not favor Sumo either. As explained above, there could have been very little certainty that the actions of the Garda World security guard in shooting at the robbers' getaway car would lead to

Sumo's injuries a mile and a half down the road. Therefore, this factor does not favor civil liability.

iii. Closeness of connection between conduct and the injury

The third factor of the seven is, by another name, proximate cause. "This [third] factor is like a 'proximate cause element' in that consideration is given to whether … there would ordinarily be so little connection between breach of the duty contended for, and the allegedly resulting harm, that a court would simply foreclose liability by holding that there is no duty." *Kiriakos*, 448 Md. at 488 (citations omitted). "The nature of the risk at issue is also relevant here … [because] as the magnitude of the risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury." *Id.* (citation omitted). We will therefore balance the connection between the breach of duty and the harm, and the nature of the risk.

While the nature of the risk here is high—armed and dangerous robbers making a mad dash for Washington, D.C.—there is almost no connection between the Garda World employee's alleged breach of duty and the resulting harm suffered by Sumo. As explained in our discussion of the first factor, foreseeability, the robbers had lots of options for their next move after the Garda World security guard shot at their getaway car. Garda World also had no control over the ensuing criminal acts that were intentionally committed by the robbers. Ultimately, the likelihood that the robbers would continue to drive the vehicle for

about a mile and a half, then decide to shoot Sumo and steal his car to flee into Washington, D.C., is so remote that we "simply foreclose liability by holding that there is no duty." *See Kiriakos*, 448 Md. at 488.

iv. Moral blame

The fourth factor considers the moral blameworthiness of the defendant. "Under [the moral blame] factor, our standard is not evidence of intent to cause harm … [r]ather, we consider the reaction of persons in general to the circumstances." *Id.* at 489 (citations omitted). Here, as explained above, the Garda World security guard shot at the robbers' getaway car after several assailants shot at him from close range, and the robbers stole his money bag. While it may not have been prudent for the security guard to shoot at the robbers' getaway car after having $3,911 stolen,[4] we find it difficult to attach too much blame to the immediate reaction of the security guard under the circumstances.

v. Policy of preventing future harm

The fifth factor considers whether the imposition of a duty will assist in the prevention of future harm. In *Kiriakos*, the Court of Appeals stated that:

> The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with the compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the

[4] Sumo suggests that it is a violation of private security guard rules and industry standards to shoot at fleeing robbers. Sumo, however, has not provided any support or proof to his claim. We, therefore, decline to address this point.

> occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Id. at 490 (citations omitted). In sum, the Court of Appeals has recognized the importance of providing a strong incentive, through civil liability, of preventing future harm.

In this case, however, we do not see how imposing a duty would help prevent future harm. Even if we could point to some general benefit to society from controlling the actions of security guards, the actions of this security guard under the circumstances, and the harm suffered by Sumo, are too remote for liability under the ordinary negligence principles of foreseeability and proximate cause. It would do no good to impose a duty on Garda World for such a remote sequence of events. Thus, this factor does not favor civil liability either.

vi. Extent of burden to Defendant and consequences of imposing a duty

The sixth factor examines the extent of the burden on the defendant and the consequences of imposing a duty. The imposition of a duty on Garda World under the facts of this case would lead to a burden on security companies, and to an overly expanded field of potential liability. *First*, creating a bright line rule that a security company's actions in attempting to prevent a robbery gives rise to a duty (and therefore civil liability) to all members of the public no matter how far from the scene of the robbery, is not productive. Security guards will be unsure of their ability to respond to certain dangerous situations, particularly when attacked by armed robbers, for fear of incurring possible civil liability to remote individuals. This indecisiveness, in turn, might put security guards at risk during a

confrontation, and sends a message to potential robbers that armored cars are fair game. *Second*, imposing a duty in this case could lead to an overly expanded field of potential liability. If we held for Sumo on this factor, essentially we would be holding that actions that hinder fleeing criminals can give rise to a duty (and therefore civil liability) to remote individuals who have the misfortune of later coming in contact with that criminal. Such a result is not acceptable. Therefore, for these two reasons, we hold that this sixth factor does not land in Sumo's favor either.

vii. Insurance

Because there is no evidence in the record regarding the availability, cost, and prevalence of insurance for the armored car industry—from which we could deduce the effect of an imposition of a duty on such insurance—we will not address this final factor.

CONCLUSION

In sum, we hold that Sumo's argument—that a defendant owes a duty of care to one harmed by a third party if the defendant's affirmative conduct creates a previously non-existent risk of third party harm to the plaintiff—does not create a duty in this case between himself and Garda World. Sumo's argument does not fit into any of the three exceptions to the general rule of "no duty" for third party harm. Moreover, the facts of this case do not satisfy the 7-factor test to determine whether a duty exists. Therefore, we affirm the circuit court's dismissal of Sumo's complaint.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.