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Court of Appeals of Texas, San Antonio.

Lorraine KENYON, Individually and as Executrix of the Estate of Theodore Kenyon, Appellant
v.
ELEPHANT INSURANCE COMPANY, LLC, Appellee

No. 04-18-00131-CV
|
Delivered and Filed: April 24, 2019

From the 224th Judicial District Court, Bexar County, Texas, Trial Court No. 2016CI14055, Honorable Michael E. Mery, Judge Presiding

Attorneys and Law Firms

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Nissa M. Dunn, for Appellee Elephant Insurance Company, LLC.

Sitting: Sandee Bryan Marion, Chief Justice, Rebeca C. Martinez, Justice, Luz Elena D. Chapa, Justice

OPINION

Opinion by: Sandee Bryan Marion, Chief Justice

***1** Appellant Lorraine Kenyon, Individually and as Executrix of the Estate of Theodore Kenyon, ("Kenyon") brings this permissive interlocutory appeal from the trial court's order granting partial summary judgment in favor of Appellee Elephant Insurance Company, LLC ("Elephant").

In her first issue, Kenyon argues the trial court erred in ruling Elephant did not owe Kenyon a duty with respect to her claims for common law negligence, negligent undertaking, negligent failure to train and license, negligence per se, and gross negligence. Because we conclude the trial court's ruling is correct as a matter of law, we affirm the trial court's order granting summary judgment on Kenyon's negligence claims.

In her second issue, Kenyon argues the trial court erred in granting summary judgment on her claims for Texas Insurance Code and Texas Deceptive Trade Practices Act ("DTPA") violations based on alleged misrepresentations. Neither this court nor the trial court expressly granted Kenyon permission to appeal this portion of the summary judgment order. Accordingly, this appeal is dismissed in part for want of jurisdiction as it relates to Kenyon's second issue. [1]

1 In her third issue, Kenyon argues the trial court generally erred in granting summary judgment in Elephant's favor. To the extent Kenyon's third issue is duplicative of her first issue, it is overruled. To the extent Kenyon's third issue is duplicative of her second issue, we lack jurisdiction to consider it.

Background

A. Factual background

On March 10, 2016, Kenyon was involved in a single-vehicle accident when she lost control of her vehicle on a rain-slick road in San Antonio. While inside her vehicle on the side of the road, Kenyon first called her husband Theodore and then Elephant, her insurer. A volunteer firefighter stopped by on his way to another call and asked whether Kenyon was okay. Kenyon declined assistance and told the firefighter "it was okay."

Elephant's first notice of loss ("FNOL") representative Kaitlyn Moritz ("Moritz") answered Kenyon's call from Elephant's call center in Virginia. Kenyon described the accident and asked Moritz: "Do you want us to take pictures?" Moritz answered: "Yes, ma'am. Go ahead and take pictures. And—And we always recommend that you get the police involved but it's up to you whether you call them or not." Moritz testified she was trained to get information about the accident, who was at fault, and whether there were any injuries, as well as to encourage the insured to take photographs of the accident scene. Moritz

was not trained to inquire about the insured's safety or to ask whether the insured is in a safe location.

While Kenyon was on the phone with Moritz, Theodore arrived at the scene. Kenyon told Theodore "they need pictures," and he began taking photographs of Kenyon's damaged vehicle. As Theodore was taking photographs, another motorist, Kimberly Pizana ("Pizana"), lost control of her vehicle and collided with Theodore. Theodore later died of his injuries.

B. Procedural background

***2** Individually and as executrix of Theodore's estate, Kenyon sued Pizana for negligence and Elephant for common law negligence, negligent undertaking, negligent failure to train and license, negligence per se, and exemplary damages based on gross negligence. Kenyon also asserted Insurance Code and DTPA claims against Elephant based on Elephant's alleged misrepresentation that photographs were required for coverage, as well as additional claims related to Elephant's alleged failure to timely settle and pay her uninsured/underinsured motorist ("UIM") coverage claims.

Elephant filed traditional and no evidence motions for summary judgment. After a hearing, the trial court found Elephant "owed no duty to [Kenyon] with respect to [her] negligence, negligent undertaking, negligent failure to train and license, negligence per se, and gross negligence claims" and granted summary judgment in Elephant's favor on each of those claims. Pursuant to Texas Civil Practice and Remedies Code § 51.014(d) and Texas Rule of Civil Procedure 168, as well as the parties' mutual agreement, the trial court expressly permitted Kenyon to file an interlocutory appeal of this portion of the summary judgment order. The trial court also granted summary judgment in Elephant's favor on all of Kenyon's remaining claims except those related to UIM coverage. The UIM coverage claims and Kenyon's negligence claim against Pizana are the only claims that remain pending in the trial court. Kenyon timely filed a petition for permissive appeal in this court, which was granted.

Jurisdiction

As a preliminary matter, we consider whether and to what extent we have jurisdiction over this permissive interlocutory appeal.

The trial court's summary judgment order satisfies the technical requirements for permissive appeal by stating: (1) the "controlling issue of law" appealed, which is "[w]hether [Kenyon] [is] entitled to assert a cause of action for common law negligence, negligent undertaking, negligent failure to train and license, negligence per se, or gross negligence against [Elephant] for damages arising from the death of Theodore Kenyon"; (2) there is substantial ground for difference of opinion on this controlling issue of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); *City of San Antonio v. Tommy Harral Constr., Inc.*, 486 S.W.3d 77, 80–81 (Tex. App.—San Antonio 2016, no pet.).

In addition, the trial court made a substantive ruling on the specific legal issue presented, holding Elephant "owed no duty to [Kenyon] with respect to [her] negligence, negligent undertaking, negligent failure to train and license, negligence per se, and gross negligence claims." *See* *Tommy Harral*, 486 S.W.3d. at 80 ("Because an appellate court may only address an action taken by the trial court, the record presented upon a permissive appeal must reflect the trial court's substantive ruling on the specific legal issue presented for appellate-court determination."). Therefore, we have jurisdiction over this permissive appeal to the extent it is limited to the "controlling question of law" articulated by the trial court. Kenyon's first issue squarely addresses this question.

Kenyon's second issue, however, addresses whether the trial court erred in granting summary judgment on Kenyon's claims for Insurance Code and DTPA violations. We lack jurisdiction to review that question. *See* *id.* at 82–83 (concluding appeal must be dismissed because "jurisdictional requirement that the record affirmatively reflect the trial court's substantive ruling on the issue presented on appeal has not been satisfied"). Accordingly, we dismiss Kenyon's second issue for want of subject matter jurisdiction.

Discussion

***3** Kenyon argues the trial court erred in granting traditional summary judgment in Elephant's favor on her claims for common law negligence, negligent undertaking, negligent failure to train and license, negligence per se, [2] and exemplary damages based on gross negligence.

[2] Kenyon did not address her claim for negligence per se in her appellate briefing or during oral argument. Accordingly, to the extent Kenyon argues the trial court erred in granting summary judgment on this claim, Kenyon's argument is waived. *See* TEX. R. APP. P. 38.1.

A. Standard of review

We review the grant of traditional summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The party seeking traditional summary judgment has the burden to show no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Id.* at 215–16 (citing TEX. R. CIV. P. 166a(c)). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.* at 215.

B. Common law negligence

The trial court granted Elephant's motion for traditional summary judgment on Kenyon's common law negligence claim based on its conclusion that Elephant did not owe Kenyon a duty of care. Kenyon argues the trial court erred because an insurer owes its insured a common law duty to "exercise reasonable care in providing [post-accident] guidance so as not to increase the risk of harm to its insured." During oral argument, Kenyon asserted this duty necessarily obligated Elephant to ascertain whether Kenyon was safe before permitting or encouraging her (and Theodore) to take photographs of her vehicle.

The question before the trial court and this court is whether Texas law recognizes a duty on the part of an insurer who accepts a call from its insured and provides "post-accident guidance." Kenyon and Elephant agreed during oral argument that there does not appear to be any Texas precedent for recognizing such a duty under these or similar circumstances. Accordingly, we apply the "*Phillips* factors" analysis, described below, to determine whether to recognize such a duty in this case. [3]

[3] We disagree with the dissent that Kenyon relies on a "special relationship" giving rise to a duty of care. Kenyon does not reference "special relationship" anywhere in her brief except in the section addressing negligent failure to train, in which she states the standard of review "[i]n the absence of a special relationship between an actor and another that imposes a duty." Instead, Kenyon urges us to perform the *Phillips* factors analysis to recognize a duty in this case. To the extent Kenyon would argue a duty is supported by a special relationship between insured and insurer, we hold that argument is waived. *See* TEX. R. APP. P. 38.1. Regardless, any special relationship in the insurance context imposes on insurers a duty of good faith and fair dealing in processing claims. *See Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). We do not believe such a duty would extend to require an insurer to "exercise reasonable care in providing [post-accident] guidance so as not to increase the risk of harm to its insured."

i. *Phillips* factors analysis

***4** "The threshold inquiry in a negligence case is duty.... [T]he existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question." *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *accord Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503 (Tex. 2017). In a case in which a duty has not been recognized under the particular circumstances presented, we must determine whether such a duty should be recognized. *Pagayon*, 536 S.W.3d at 503. The supreme court has articulated considerations for doing so:

> The considerations include social, economic, and political questions and their application to the facts at hand. We have weighed the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Also among the considerations are whether one party would generally have superior knowledge of the risk

> or a right to control the actor who caused the harm.

Id. at 504 (quoting *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004)). "Of all these factors, foreseeability of the risk is the foremost and dominant consideration." *Phillips*, 801 S.W.2d at 525 (internal quotation marks and citation omitted).

Some of these considerations, such as risk and foreseeability, "may turn on facts that cannot be determined as a matter of law and must instead be resolved by the factfinder." *Humble Sand & Gravel*, 146 S.W.3d at 182. Such cases are "unusual," however, because "the factual situation presented must be evaluated in the broader context of similarly situated actors." *Pagayon*, 536 S.W.3d at 504 (citing *Humble Sand & Gravel*, 146 S.W.3d at 182). "The question is whether a duty should be imposed in a defined class of cases, not whether the facts of the case at hand show a breach." *Id.* In addition, the material facts in most cases are either undisputed or can be viewed in the light required by the procedural posture of the case. *Id.*

Here, the facts material to our inquiry are essentially undisputed and, in any event, must be viewed in the light most favorable to Kenyon as the summary judgment nonmovant. *See id.*; *see also Knott*, 128 S.W.3d at 215 ("When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor."). Accordingly, we apply the facts in the record and weigh the relevant considerations to determine whether to recognize the duty Kenyon advocates.

ii. Foreseeability of risk

"In the absence of foreseeability, there is no duty." *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 954 (Tex. 1996) (per curiam); *accord Midwest Emp'rs Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770, 779 (Tex. App.—San Antonio 2009, no pet.). "Harm is foreseeable if a person of ordinary intelligence should have anticipated the danger created by an act or omission." *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018). Where courts are asked to determine whether a defendant has a duty to protect a plaintiff from the tortious or criminal conduct of third parties, "[f]oreseeability usually is determined by whether the defendant is aware of prior, similar conduct by third parties." *Id.* (internal quotation marks and citation omitted). The prior conduct of third parties must be sufficiently similar to give the defendant notice of the general nature of the danger. *Id.* We must consider not only the foreseeability of a general danger, but whether the injury to the plaintiff (or someone similarly situated) could be anticipated. *Id.*

***5** Here, Kenyon argues "[i]t is readily foreseeable that in sending an insured out into the accident scene to take photographs, the insured might be struck by another vehicle and injured." In support, Kenyon cites Elephant's FNOL representative Moritz's testimony that she understands "there may be dangerous situations or circumstances" surrounding an insured who calls to report a single-vehicle accident. Kenyon also cites the testimony of the responding police officer, who stated it is generally not advisable for motorists to photograph crash scenes because doing so "put[s] [one]self in danger."

There is no evidence in the record, however, that Elephant was aware of any prior, similar incidents in which an insured was injured (much less struck by another vehicle) while photographing an accident scene. There also is no evidence Elephant was aware of the potential risk of injury to Theodore. A fair reading of the transcript of Kenyon's call to Elephant demonstrates Moritz was not aware Theodore had arrived at the scene and commenced taking photographs at Kenyon's instruction. Even where it is generally foreseeable that "there may be dangerous situations or circumstances," a defendant has no legal duty to protect a plaintiff from a particular injury the defendant could not reasonably have foreseen. *See Timberwalk Apartments, Partners v. Cain*, 972 S.W.2d 749, 757 (Tex. 1998); *Bos*, 556 S.W.3d at 304; *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 657 (Tex. 1999); *see also Harpole*, 293 S.W.3d at 780–81. Absent anything in the record demonstrating Elephant was aware of prior, similar injuries, the foreseeability consideration weighs against finding a duty in this case. *See Bos*, 556 S.W.3d at 303.

iii. Superior knowledge of the risk or right to control the actor who caused the harm

Kenyon argues Elephant had superior knowledge of the risk because Kenyon told Moritz it was her first accident.

In response, Elephant cites Kenyon's testimony indicating she was in the best position to assess the risk to Theodore:

> Q. [by Elephant's counsel] Well, between you and Ms. Moritz, were you in the better position to evaluate your situation—situation to determine if you were in a safe place?
>
> [objection]
>
> [A.] [by Kenyon] Yes....
>
> Q. At that point in time, are you feeling like you're in a safe place?
>
> A. Yes.... I'm off the road.... Yeah. No one's going to hit me, I thought....
>
> Q. When your husband came up and you had that conversation with him about the photographs, did you feel like your husband was in a dangerous place at that time?
>
> A. No.
>
> Q. If you had felt that he was in a dangerous position, would you have taken action to make sure he was no longer in a dangerous position?
>
> A. Yes.
>
> Q. Like tell him to get out of the road or, "Let's get out of here," or something like that?
>
> A. Yes....
>
> Q. ... When your husband got there and you had felt like y'all were in a dangerous place and another car could come around and hit y'all at any moment, would you have asked your husband to go take photographs?
>
> [objection]
>
> [A.] Of course not.

Moritz took Kenyon's call from Elephant's call center in Virginia.

While Elephant and its employees may have more knowledge regarding motor vehicle accidents generally, Kenyon was in a better position than a person located in Virginia to assess the risk of Theodore's and her particular circumstances at the time of the accident. *See* *Ovalle v. Mares*, No. 04-04-00806-CV, 2005 WL 3532809, at *2 (Tex. App.—San Antonio Dec. 28, 2005, no pet.) (mem. op.) (holding defendant did not owe duty to minor plaintiff she was supervising to prevent plaintiff from getting into car with intoxicated driver because plaintiff knew driver, spoke to driver beforehand, and therefore had superior knowledge of driver's intoxicated state at the time). Therefore, because Kenyon was in a better position than Elephant to assess the risk of her particular circumstances, and because there is no dispute Elephant did not have the right to control the driver who struck Theodore, these considerations weigh against finding a duty in this case.

iv. Burden of guarding against injury

***6** Kenyon argues the burden of imposing a duty on an insurer in a case like this one is "negligible," since all "Elephant [had] to do was to take a moment to ask its insured if they are in a safe location and, if not, to relocate themselves to a safe place and then call back." Elephant responds that imposing such a burden on an insurer "would be tantamount to imposing strict liability on insurers to protect the safety of their insureds from harm caused by third parties over whom the insurer has no control."

While the burden to inquire whether an insured is in a safe location when she calls to report a claim is not onerous, the burden to actually assess whether an insured is safe and secure enough to report a claim or take photographs of vehicle damage is likely too onerous for an insurer that is not present at the accident scene. Further, as Elephant argues, even if an insurer is required merely to ask whether its insured is in a safe location, doing so would not have changed the outcome in this case. Kenyon testified she felt she was in a safe place at the time she called Elephant, and she did not believe Theodore was in danger while photographing her vehicle.

For these reasons, this consideration weighs against finding a duty in this case.

v. Conclusion

Because the considerations regarding risk and foreseeability, superior knowledge and right to control the actor who caused the harm, and burden on the defendant all weigh against finding a common law duty of care in this case, we conclude the trial court did not err in concluding

Elephant owed no duty to Kenyon with respect to her common law negligence claim.

C. Negligent undertaking

The trial court also granted summary judgment in Elephant's favor on Kenyon's negligent undertaking claim. The premise of Kenyon's claim is that even if Elephant did not owe Kenyon a duty of care from the outset, Elephant assumed a duty by undertaking to answer Kenyon's telephone call and "lead her through the post-accident process."

i. Legal standard

A duty may arise when a party undertakes to provide services either gratuitously or for compensation. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000); *Harpole*, 293 S.W.3d at 778. The elements of a cause of action for negligent undertaking are:

(1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; and

(2) the defendant failed to exercise reasonable care in performing those services; and either:

(a) the plaintiff relied upon the defendant's performance; or

(b) the defendant's performance increased the plaintiff's risk of harm.

Harpole, 293 S.W.3d at 778 (citing *Stutzman*, 46 S.W.3d at 838). There is no cause of action for negligent undertaking unless the defendant acted or agreed to act expressly for the plaintiff's protection. *See Knife River Corp.-S. v. Hinojosa*, 438 S.W.3d 625, 632 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *see also Guillory v. Seaton, LLC*, 470 S.W.3d 237, 242 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (holding non-party to contract had no cause of action against contracting party that did not agree to provide services for the benefit or protection of non-party plaintiff).

ii. Analysis

To determine whether Elephant assumed a duty to Kenyon, we must determine whether Elephant undertook to perform services for Kenyon that it knew or should have known were necessary for Kenyon's protection. *See Stutzman*, 46 S.W.3d at 838. Kenyon argues Elephant undertook to "lead her through the post-accident process" "[b]y creating a call center and training FNOL employees to answer the insureds['] calls, often from the scene of an accident, and gather information from them beyond the information necessary to open a claim." Kenyon also argues Elephant "specifically trained [Moritz] not to inquire about the insured's safety, despite the knowledge that the insured in general, and Mrs. Kenyon specifically, was in a dangerous position." [4]

4 Elephant argues there is no evidence that Elephant affirmatively directed FNOL representatives not to inquire about insureds' safety. Rather, the record only reflects that Elephant did not specifically require FNOL representatives to ask about insureds' safety.

***7** Kenyon does not cite any authority that this or similar conduct constitutes an undertaking giving rise to a duty of care beyond Elephant's contractual duty to process Kenyon's claim in good faith. Although Kenyon clearly believed she was calling Moritz for "instruction" regarding her claim, Kenyon testified she did not ask Moritz for safety advice and did not expect Moritz to provide safety advice. Further, Kenyon expressly argues any undertaking on Elephant's part was *not* for Kenyon's benefit: "Elephant undertook to guide her through the post-accident process, *but did so only to benefit itself*, and was intentionally indifferent to Mrs. Kenyon's and Mr. Kenyon's safety" (emphasis added). [5]

5 To the extent Kenyon is arguing Elephant is liable based on its *failure* to act for her benefit, a failure to act does not give rise to a negligent undertaking claim. *See Thornton v. Henkels & McCoy, Inc.*, No. 13-12-00585-CV, 2013 WL 5676026, at *3 (Tex. App.—Corpus Christi Oct. 17, 2013, no pet.) (mem. op.) (holding defendant that failed to repair sagging cable line was not liable for negligent undertaking because claim requires an "affirmative course of action" and cannot be predicated upon an alleged negligent omission or failure to act) (citing *Coastal Corp. v. Torres*, 133 S.W.3d 776, 780–81 (Tex. App.—Corpus Christi 2004, pet. denied)).

Therefore, because Elephant did not undertake any action for Kenyon's protection, we conclude the trial court did

not err in concluding Elephant owed no duty to Kenyon with respect to her negligent undertaking claim.

D. Negligent failure to train and license

The trial court also granted summary judgment in Elephant's favor on Kenyon's negligent failure to train and license claim. Kenyon argues Elephant was negligent in its training of FNOL representatives, including Moritz, which "left [Moritz] ill-equipped to handle Mrs. Kenyon's call in a manner that did not increase the risk of danger to her and her husband."

"The elements of a cause of action for negligently hiring, supervising, training, or retaining an employee are the following: (1) the employer owed the plaintiff a legal duty to hire, supervise, train, or retain competent employees; (2) the employer breached that duty; and (3) the breach proximately caused the plaintiff's injury." *Wal-Mart Stores, Inc. v. Sanchez*, No. 04-02-00458-CV, 2003 WL 21338174, at *5 (Tex. App.—San Antonio June 11, 2003, pet. denied) (mem. op.) (citing *LaBella v. Charlie Thomas, Inc.*, 942 S.W.2d 127, 137 (Tex. App.—Amarillo 1997, writ denied)). An employer is not liable unless the employee commits an actionable tort under common law. *Id.* (citing *Gonzales v. Willis*, 995 S.W.2d 729, 739–40 (Tex. App.—San Antonio 1999, no pet.), *overruled in part on other grounds by Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447–48 (Tex. 2004)).

Here, the only tortious conduct Kenyon alleges Moritz committed was negligently failing to "exercise reasonable care in providing [post-accident] guidance so as not to increase the risk of harm to [Elephant's] insured"—*i.e.*, the same conduct Kenyon alleges as the basis for her common law negligence claim. Because we have concluded Elephant (and its agent) did not owe Kenyon such a duty in this case, we also conclude the trial court did not err in holding Elephant owed no duty to Kenyon with respect to her negligent failure to train and license claim.

E. Gross negligence

Finally, the trial court granted summary judgment in Elephant's favor on Kenyon's request for exemplary damages based upon gross negligence. During the hearing on Elephant's motion for summary judgment, Kenyon's counsel represented that her claim for gross negligence is based on the same conduct giving rise to her claim for common law negligence—*i.e.*, Elephant was consciously indifferent to an actual risk that Kenyon (or Theodore) would be harmed by taking photographs of the vehicle at the accident scene. Again, because we agree with the trial court that Elephant did not owe Kenyon a common law duty of care in this case, we conclude the trial court did not err in concluding Elephant did not owe Kenyon a duty with respect to her claim for exemplary damages based on gross negligence. [6]

6 The dissent expresses concern that under our decision today, nothing an insurer could say or do while on the phone with an insured at the scene of an accident could breach the duty of ordinary care. We do not intend to reach such a sweeping conclusion. Rather, we recognize that by taking an affirmative act, a party may incur a "duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." *See* RESTATEMENT (SECOND) OF TORTS § 302, cmt. a. Based on the facts of this case, however, we do not believe Elephant affirmatively acted so as to trigger a duty.

Conclusion

***8** Because we conclude Elephant did not owe Kenyon a duty with respect to her claims for common law negligence, negligent undertaking, negligent failure to train and license, negligence per se, and gross negligence, we affirm the trial court's order to the extent it granted Elephant's motion for summary judgment on those claims. Because we conclude, and Kenyon agrees, we lack jurisdiction to consider Kenyon's second issue, this appeal is dismissed in part for want of jurisdiction as it relates to the trial court's order granting summary judgment on Kenyon's Insurance Code and DTPA claims.

DISSENTING OPINION

Dissenting Opinion by: Luz Elena D. Chapa, Justice

I respectfully dissent because Elephant owed Kenyon a duty due to the nature of their relationship. The "special relationship" between an insurer and an insured was implicated when Elephant began intaking Kenyon's insurance claim. Alternatively, the risk–utility factors weigh in favor of recognizing a duty.

BACKGROUND

Questions of duty must be "decide[d] from the facts surrounding the occurrence in question." *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). In a summary judgment case involving a question of duty, courts must therefore consider all facts and evidence, and we must do so in a light most favorable to the nonmovant, Kenyon. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007) (per curiam). In her appellant's brief and summary judgment response, Kenyon relies on the following facts and evidence.

A. Kenyon was contractually obligated to call Elephant "as soon as practical" after an accident and cooperate fully with Elephant's investigation.

Elephant executed a contract for auto insurance covering Kenyon and her husband, Theodore. The auto policy insured the Kenyons against bodily injury and property damage caused by auto accidents. The auto policy provides:

- "This policy is a contract...."
- "Coverage will not apply unless ... there is ***full compliance*** with the duties stated in this policy."
- "If a person or auto insured by this policy is involved in an accident or loss for which this insurance may apply, ***report it to us*** within 24 hours or ***as soon as practicable by calling us***.... If we show that your failure to provide notice prejudices our defense, ***there is no liability coverage*** under this policy."
- "You and any person claiming coverage must provide us with [various] accident or loss information as soon as practicable...." [1]
- A person claiming coverage must:
  - "***Cooperate with us in the investigation*** ... of any claim...."
  - "***Provide us with all photographs and documents the person has*** related to the: 1. Loss: 2. Accident; 3. Damages; 4. Bodily injury; or 5. Any issue regarding the applicability of this policy to the loss or accident."
  - "***Allow us to*** ... ***photograph*** and appraise any damaged auto and/or trailer before any repair or disposal."

(emphasis added). These provisions placed a contractual obligation on Kenyon to fully comply with the duty to call Elephant as soon as practical after an accident and "cooperate with" Elephant during that process. Otherwise, Kenyon would lose coverage.

1 This provision does not require the insured to submit photographs.

B. Elephant routinely instructs insureds to take photographs at the scene of an accident.

Elephant has first notice of loss (FNOL) representatives who intake insurance claims. The summary judgment evidence shows these FNOL representatives "understand ... that sometimes an insured calls ... to report a single-vehicle loss ... [and] there may be dangerous situations or circumstances for that person at the scene of the accident." Despite this known risk, Elephant insists that its FNOL representatives ask insureds to cooperate in the investigation of the claim by taking photographs of the scene of an accident. Taking photos triggers the insured's obligation to "provide [Elephant] with all photographs and documents the [insured] has." If an insured does not take photos as requested, Elephant could deny coverage, claiming there was not "full compliance with the [insured's] dut[y]" to "[c]ooperate ... in the investigation."

***9** Under Kenyon's policy, the insured must "[a]llow [Elephant] to ... photograph ... any damaged auto ... before any repair or disposal." Elephant's practice also involves "send[ing] an adjuster out to take photos and/or document vehicle damage" on "the next day, the next week, [or] the next month." According to Elephant, the reasons for asking insureds to photograph and document the scene of the accident are to assess possible fraud and determine who is at fault for an accident.

C. Kenyon's husband was struck by a car while taking photographs of a one-car accident pursuant to Elephant's instructions.

On October 21, 2015, less than five months before Kenyon's one-car accident, a supervisor sent an email to Elephant's FNOL representatives. The email reminded them, "We need to ask for the below information on every FNOL call, every time." The "below information" included "the 4 P's": information about the **p**olice, **p**assengers, and license **p**late numbers. The other "P" was **p**hotographs. The email instructed that if the insured "***is calling from the scene of accident, encourage them to take photos of all vehicles involved***. The adjuster may need this to determine liability" (emphasis added).

On March 10, 2016, Katlyn Moritz, one of the FNOL representatives who recalled receiving the October 21, 2015 email, received a call from Kenyon:

- Kenyon gave Moritz her insurance policy number, and stated she was calling from the scene of a one-car accident that "just happened."
- Moritz told Kenyon she was going to ask her questions "to get ***the information we need***" (emphasis added).
- Moritz heard Kenyon talk to someone Kenyon said was from the Fire Department who had stopped by to help, but left.
- Kenyon told Moritz she got into the car accident because her car started to slide and spin, and then hit a guardrail, indicating the car accident occurred near the side of the road. Kenyon stated it was raining and the road was "really wet."
- Kenyon relayed that the accident was sufficiently severe that Kenyon's car had a busted wheel, it had lots of scrapes and dents, the bumper fell off, and the car was not drivable.
- Kenyon asked Moritz, "Do you want us to take pictures?" Moritz responded, "Yes, ma'am. ***Go ahead and take pictures***" (emphasis added).
- While talking to Moritz, Kenyon repeatedly used the phrase "we," and Kenyon told Moritz she had already called her husband, Theodore.
- When Kenyon mentioned her husband, Moritz again mentioned the pictures stating, "Okay. And pictures -- And you said you're going to take pictures."
- Moritz opined as to Kenyon's liability for the guardrail.
- Kenyon then began screaming, and told Moritz, "They've just run over my husband. The same thing happened to another car."

When Moritz told Kenyon "Go ahead and take pictures," Kenyon told Theodore that "they need photos." Following those instructions, Theodore went to the side of the road to take photographs of the accident. Theodore was then hit by another car whose driver lost control and slid off the road like Kenyon.

THE EXISTENCE OF A LEGAL DUTY

In Texas, negligence consists of three elements: (1) "the existence of a legal duty"; (2) "a breach of that duty"; and (3) "damages proximately caused by the breach." *Windrum v. Kareh*, No. 17-0328, 2019 WL 321925, at *3 (Tex. Jan. 25, 2019). The first element is the "existence" of a legal duty. *Id.* Although Elephant moved for summary judgment on the element of breach with traditional and no-evidence grounds, the trial court granted summary judgment on the first element of duty, which was an element Elephant challenged only in its traditional motion. Here, if a legal duty exists, that is the end of the inquiry, and questions of breach of the relevant standard of care are irrelevant. *Dobbins v. Mo., K. & T. Ry. Co. of Tex.*, 41 S.W. 62, 63 (Tex. 1897). [2]

2 "If there be no duty, the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required." *Id.*

A. The specific legal questions presented in this permissive appeal.

10** Kenyon based her negligence claim on the existence of one duty: "Due to the special relationship*** ... resulting from the ***insurer/insured relationship***," Elephant had a "duty to act as a reasonable and prudent insurance company" (emphasis added). Kenyon alleged one breach of this duty: Elephant "instructed the insureds to take

photographs from the scene." In its traditional motion, Elephant argued it did not have a duty to protect the safety of its insureds. The trial court granted Elephant's motion only on this ground. As to Kenyon's negligence claim, the issue in her petition for permissive appeal is that Elephant owed a duty "as a result of the insurer-insured relationship." We granted Kenyon's petition to address this specific legal question.

Kenyon does not use the magic words "special relationship" in her brief when arguing her negligence claim. Rather, she argues a duty of ordinary care arises in the "insure[r]'s gathering of information" when "insureds [are] required to report their claims in order to ensure that their coverage will not be compromised." Elephant presented arguments as to the "special relationship" in its brief and at oral argument. A duty arising from a "special relationship" is the only duty Kenyon alleged to establish her negligence claim, and we must infer this is the specific legal question the trial court substantively ruled upon. Because this court has held that our jurisdiction in a permissive appeal is limited to the specific legal question addressed by the trial court's substantive ruling, the majority's holding that Kenyon waived her argument and in effect waived any duty arising from a "special relationship" due to inadequate briefing raises concerns that the majority's discussion might exceed the scope of this court's jurisdiction. *See generally* City of San Antonio v. Tommy Harral Constr., Inc., 486 S.W.3d 77 (Tex. App.—San Antonio 2016, no pet.).

Nevertheless, in light of all the proceedings, the questions before this court are:

1. Does the duty that already exists in the insurer–insured relationship apply during the process of intaking an insurance claim at the scene of an accident?

2. Alternatively, should we recognize a duty under the facts of this case?

I would answer both questions in the affirmative.

B. The existing legal duty in the insurer–insured relationship applies during the process of intaking an insurance claim at the scene of an accident.

"There are some cases in which a duty exists as a matter of law because of a special relationship between the parties. In such cases, the duty analysis ends there." *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 292 (Tex. 1996). "In the insurance context a special relationship arises" between an insurer and an insured. *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). This "special relationship" arises out of the contract between the insurer and the insured, and includes the duty to use the "degree of care and diligence [of] a man of ordinary care and prudence." *Id.* Texas courts recognize this duty because "unscrupulous insurers [could] take advantage of their insureds' misfortunes in ... resolution of claims." *Id.* This is true when an insured calls from the scene of a recent car accident to open a claim: an unscrupulous insurer could certainly take advantage of the insured's misfortunes in intaking the claim. *See id.* In such a situation, the "insurance company has exclusive control over the ... processing ... of [the] claim[ ]," which necessarily includes the process of intaking the claim when an auto policy requires the insured's full cooperation. *See id.* Whether Elephant breached the applicable standard of care is simply not before this court. *See Dobbins*, 41 S.W. at 63.

***11** Noteworthy, in its traditional and no-evidence motion, Elephant did not dispute that a duty arising from a special relationship already exists. Instead, Elephant argued it did not "breach" this duty by instructing Kenyon to take photographs. As to the "existence of a duty" element, the sole ground presented in Elephant's motion is: "Elephant owes no duty to protect its insureds' physical safety" because "the relationship between insurer and insured does not impose a duty on the insurer to protect the safety of its insureds." As to her negligence claim, Kenyon did not allege—and has repeatedly disclaimed, both here and in the trial court—any such duty of protecting her physical safety. She relies solely on a duty of ordinary care arising out of a special relationship. Because the only duty-related ground in Elephant's traditional motion does not challenge the sole duty Kenyon alleged to establish her negligence claim, the trial court's order granting summary judgment on that ground should be reversed. *See Maley v. 7111 Sw. Freeway, Inc.*, 843 S.W.2d 229, 234 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (reversing and remanding when sole summary judgment ground lacked merit). [3]

3 Any other arguments Elephant presents on appeal are immaterial because "summary judgment cannot be affirmed on grounds not expressly set out in the

motion." *Stiles v. Resolution Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

C. Alternatively, if no such duty exists, the risk–utility factors support recognizing a duty.

"The common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 899 (Tex. 2000). In doing so, we first identify the risk and assess whether that risk is foreseeable. *Phillips*, 801 S.W.2d at 525. If the risk is not foreseeable, "there is no duty." *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 954 (Tex. 1996) (per curiam). If the risk is foreseeable, however, we weigh the severity and likelihood of foreseeable injuries against the burden on the defendant, and consider other social, economic, and political consequences. *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017). For example, when a duty to warn is alleged, if neither party has "superior knowledge of the risk," there may be no such duty to warn as matter of law. *See Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993) (citing, as an example, a case declining to recognize manufacturers' duty to warn of dangers of alcoholism). And, in other cases, a right to direct and control another's activities may establish a duty as a matter of law. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). Foreseeability of the risk is the primary and dominant consideration, but we cannot assess foreseeability without first identifying the risk. *See Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 36 (Tex. 2002).

1. The risk is the general danger of a car hitting a person who is present on the side of the road.

The risk is "the general danger, not the exact sequence of events that produced the harm." *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) (quotation marks omitted). The general danger in this case is the risk of a car hitting a person who is present on the side of the road. The majority identifies the risk as "an insured [being] injured (much less struck by another vehicle) while photographing an accident scene." But this is the "sequence of events that produced the harm," not "the general danger." *See id.*

2. Bodily injury or death resulting from a car hitting a person who is present on the side of the road is foreseeable as a matter of law.

"[W]hen it comes to foreseeing the general hazard of automobile travel, [t]here is nothing to anticipate; the negligence of other motorists is omnipresent." *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 565 (Tex. 2015) (internal quotation marks omitted). I respectfully disagree with the majority's suggestion that this case is similar to foreseeability cases involving rape, false sexual assault accusations, or a coach violating the rules of football, where evidence of prior similar incidents might be required. *See Timberwalk Apts., Partners v. Cain*, 972 S.W.2d 749, 756–57 (Tex. 1998). Because "the negligence of other motorists is omnipresent," other drivers' negligence is foreseeable as a matter of law. *Romero*, 456 S.W.3d at 565.

***12** Even if evidence of prior similar incidents were necessary, Elephant had the initial burden to produce evidence conclusively establishing it lacked knowledge of such prior similar incidents because "a defendant who seeks to negate foreseeability on summary judgment must prove more than that [third-party] conduct occurred. The defendant has the burden to prove that the conduct was not foreseeable." *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex. 1999). The burden shifts to the plaintiff "[w]hen a defendant presents evidence that the plaintiff's injuries resulted from intervening criminal conduct that rises to the level of a superseding cause." *Spears v. Coffee*, 153 S.W.3d 103, 106 (Tex. App.—San Antonio 2004, no pet.).

Even if Elephant had met its summary judgment burden to show the absence of prior similar incidents, Kenyon satisfied her burden to respond with evidence raising a fact issue as to foreseeability of the risk. *See Pena*, 990 S.W.2d at 754; *Spears*, 153 S.W.3d at 106.

- Deposition testimony from a police officer, Michael Pena, shows that in his experience with "hundreds and hundreds of crashes," at car accident sites, "people walking around taking pictures ... creates a bigger hazard" because of other drivers on the roads.
- Moritz testified in her deposition that "when an insured calls ... to report a single-vehicle loss like Ms. Kenyon ... there may be dangerous situations or circumstances for that person at the scene of the accident."
- It is undisputed that Moritz was aware of a recent, nearly identical accident as the driver who hit Theodore: Kenyon's accident. As noted in the call

transcript, "The same thing happened to another car."

This evidence establishes the reasonable foreseeability of the general risk of a car hitting someone present by the side of the road.

And, for the first time on appeal, Elephant argues Theodore was not a foreseeable plaintiff. But Elephant did not raise this ground in its motion, and "summary judgment cannot be affirmed on grounds not expressly set out in the motion." *Stiles*, 867 S.W.2d at 26.

3. The evidence establishes the likelihood of severe bodily injury and death outweighs the utility of getting photographs from an insured at the scene of an accident.

"[C]ommon experience and practical sense" teaches that bodily injury caused by car accidents can be severe, and death is an ultimate, irreversible loss. *See Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970). The likelihood of subsequent car accidents causing death or severe bodily injury at the scene of a car accident where an insured is photographing the scene is at a minimum moderate. "From the rural Texan who braves harrowing two-lane highways to the urban commuter who plans his route to avoid daily accident-related congestion, the dangers of driving are ubiquitous." *Romero*, 456 S.W.3d at 566. Officer Pena's deposition testimony also shows insurers routinely ask insureds to take photographs at the scene of an accident "all the time, ... [W]e have more issues with people getting out of cars to photograph crash scenes than anything else[.] I've seen it done in the middle of the highways [and] on these little back roads."

Additionally, the likelihood of an insured feeling compelled to do what the insurer instructs, or even suggests, is high because, as here, "[c]overage will not apply unless ... there is full compliance with the duties" to (1) call "as soon as practicable" and (2) "[c]ooperate with [the insurer] in the investigation." Furthermore, immediately after a car accident, the insured is in a position where "unscrupulous insurers [could] take advantage of their insureds' misfortunes" and the insurer can contractually exercise "exclusive control" of intaking the claim. *See Arnold*, 725 S.W.2d at 167. Thus, a moderate risk of severe bodily injury or death posed by an insurer asking an insured to take photographs at the scene of a one-car accident must be weighed against the utility of an insurer obtaining photographs from the insured at the scene of the accident.

***13** The utility of having insureds take photographs at the scene of a one-car accident is low. Moritz testified Elephant "send[s] out an appraiser to take photos and/or document the vehicle damage." Thus, Elephant has a practice of obtaining photographs from its own adjusters, and photographs help assess whether there is fraud. Because Elephants' own adjusters are much better positioned than an insured to know what photographs Elephant needs, photographs from untrained insureds will likely have little value. Moritz stated photographs are helpful also because the insurer must determine who is at fault. But, when insureds like Kenyon have a comprehensive policy, and the accident involves a single vehicle, determinations of fault are less significant than in other accidents involving multiple drivers.

On this factor, the majority holds "the burden to actually assess whether an insured is safe and secure is likely too onerous for an insurer that is not present at the accident scene." But Kenyon has repeatedly disclaimed any duty to ensure her safety as part of her negligence claim. Furthermore, the deposition testimony of Moritz and another Elephant employee, as well as the email from the FNOL supervisor, shows Elephant has a template for FNOL representatives to follow and a practice of instructing insureds to take photographs at the scene of an accident. The burden would be marginal for Elephant to modify its FNOL representatives' template or altogether abandon its practice of instructing insureds to take photographs at the scene of one-car accidents, because Elephant acquires photographs and documentation from its adjusters. The summary judgment evidence establishes Elephant has created a template for use by its FNOL representatives who are trained to identify the people involved, and can therefore readily determine whether the accident involves only one car. In sum, the moderate likelihood of severe bodily injury and death outweighs the minimal utility of getting photographs from an insured at the scene of a one-car accident. *See Phillips*, 801 S.W.2d at 525; *Mayes*, 236 S.W.3d at 756.

4. Superior knowledge of the risk has little importance because this is not a duty-to-warn case.

When a plaintiff alleges a duty to warn, if both parties equally know of the risk, then there may be no duty

to warn. *See* *Graff*, 858 S.W.2d at 920 (citing case holding there is no duty to warn of known dangers of alcoholism). Because Kenyon's live pleading does not allege a duty to warn, this factor has little applicability, if any. Nevertheless, because the dangers of the road are ubiquitous and omnipresent, they are equally foreseeable to insurers and insureds alike. *See* *Romero*, 456 S.W.3d at 565. The insured's ability to better assess how the "sequence of events [might] produce[ ] the harm" might give rise to affirmative defenses such as assumption of the risk and contributory negligence. *See* *Mellon Mortg.*, 5 S.W.3d at 655. But the mere existence of possible affirmative defenses does not foreclose the existence of a cause of action in the first place.

5. Right to Control

The majority holds Elephant had no right to control the driver who hit Theodore. But the right to control Kenyon could also give rise to a duty. *See* *Bright*, 89 S.W.3d at 606. "A contract may impose control upon a party thereby creating a duty of care." *Id.* By its terms, the auto policy "is a contract." The contract required Kenyon to "[c]ooperate with [Elephant] in the investigation" or lose coverage, thereby imposing control upon Kenyon. The evidence shows Elephant told Kenyon, "Go ahead and take pictures," and Elephant routinely asks for such photos for investigating claims. This contractual right to require Kenyon's cooperation is compounded by the disparate positions of an insurer and insured who had just been in a car accident. *See* *Arnold*, 725 S.W.2d at 167. Thus, the auto policy "impose[s] control upon [Kenyon] thereby creating a duty of care." *See* *Bright*, 89 S.W.3d at 606.

6. The routine practice of instructing insureds to take photographs at the scene of an accident threatens the safety of police officers and other first responders.

***14** Even if the balance of the risk–utility factors remained a close question, the risk to police officers and first responders tips the scale in favor of recognizing a duty. *See* *Pagayon*, 536 S.W.3d at 504. The evidence establishes Elephant has a practice of obtaining information from the police department and persuading the insured to take photos at the scene of an accident. Officer Pena explained why having insureds take photographs at the scene of an accident increases risks to police officers and other first responders who may be present:

> A. ... I don't [know] why insurance companies want photographs.
>
> Q. Is that an advisable thing to do from the from the point of view of a ... traffic control officer or sheriff's officer?
>
> A. No.
>
> ....
>
> A. It's not advisable to put yourself in danger, as well as put[ting] the responding officers, whether it be officer, firefighter, EMT, ... at more of a risk because not only do we have to worry about people involved in the crash, damage to vehicles, open the roadway, people driving, we have to worry about other people walking around taking pictures. It creates a bigger hazard and [is] very bad.

(objections to form, names, and formatting omitted). The risk to the safety of officers and other first responders weighs in favor of recognizing a duty in this case. *See id.*

7. Conclusion

When a driver, who had just been in a car accident, is on or near the side of the road taking photographs of the scene, the general risks from other cars on the road is foreseeable as a matter of law. The magnitude of harm is severe bodily injury and death, and given the degree to which an insured is contractually controlled by and situationally reliant on an insurer, insureds are likely to get out of their cars and take photos and, in cases like this one, get hit by another car. This risk is unjustifiable because Elephant hires adjusters to take photographs and document vehicle damage, rendering photographs taken by insureds duplicative, especially in a one-car accident where questions of fault are less important. The risk here is even more unjustifiable considering the danger Elephant's practice poses to police officers and other first responders. Considering all the facts and evidence presented in this case, I would hold Elephant owed Kenyon a duty.

GROSS NEGLIGENCE

As demonstrated by the majority's summary disposition of Kenyon's gross negligence claim, the majority effectively holds that nothing an insurer could say or do while on the phone with an insured at the scene of an accident could breach the duty of ordinary care. Suppose an insurer did have "actual, subjective awareness" that "tak[ing] advantage of [an insured's] misfortunes" by demanding photographs immediately with threat of denying coverage "involved an extreme degree of risk" to the insured. *See* *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012) (stating gross negligence involves "actual, subjective awareness of the risk," and action "with conscious indifference to the rights, safety, or welfare of others."). Regardless of whether the facts of this case rise to the level of gross negligence, by holding Elephant did not owe Kenyon any duty at all, the majority forecloses the possibility of liability for ordinary negligence in such situations regardless of how grossly negligent an insurer's conduct is.

CONCLUSION

The sole question in this permissive appeal is whether Elephant owed Kenyon a duty because of their insurer–insured relationship. On this record, I would hold a duty already exists or that a duty should exist. For the foregoing reasons, I respectfully dissent.

All Citations

--- S.W.3d ----, 2019 WL 1779933

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