

“Addressing the Elephant in the Room,” by J. Mitchell Smith

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The facts of the case are relatively simple. The case was pled by Plaintiff Lorraine Kenyon (Kenyon) as a simple negligence case.

Kenyon drove on a rain slick road in San Antonio, Texas. Kenyon had a one car automobile accident. Kenyon did not call the police; rather, she first called her husband, Theodore Kenyon. Kenyon then called Elephant Insurance Co.'s first notice of loss (FNOL) representative at a call center in Virginia. Kenyon declined help from Fire Department personnel who stopped to offer aid. After her husband Theodore arrived at the accident site, Kenyon asked Elephant's FNOL representative, "do you want us to take pictures"? Elephant's representative responded with, "Yes ma'am. Go ahead and take pictures." Then, unsupervised by Elephant or law enforcement, third party Theodore began to take photographs and was struck by another third party, Kimberly Pizana, who also experienced the same type of one-car crash as Kenyon. Theodore died due from his injuries.

Kenyon asserted generic claims against Elephant for negligence, negligent undertaking, and negligent failure to train and license. Elephant moved for summary judgment on the grounds of: (1) no duty/no negligence; (2) no negligent undertaking as Elephant did not undertake an affirmative course of action for the Kenyons' benefit or protection; and (3) no negligent failure to train and license as there existed no underlying tort (common law negligence) giving rise to such a claim.

The trial court, correctly, granted Elephant's traditional and no-evidence motions for summary judgment finding Elephant owed no duty to Kenyon under the factual circumstances present.

The trial court determined no duty existed because of Texas Supreme Court precedent that clearly sets the boundaries of said duty. As between an insurer and its insured, a cause of action for breach of the duty for good faith and fair dealing is stated when it is alleged there is no reasonable basis for the denial of a claim or delay in payment of a claim, or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay. *Arnold v. National County Mutual Fire Ins. Co.*, (Tex. 1987). That is it. No other *implied* duties between the insurer and insured exist in Texas.¹

From the simple facts recited above, the court of appeals embarked upon a long analytical journey, turned an answer to a question asked into an "instruction," - a word utilized with vigor throughout the en banc majority opinion - expanded the "special relationship" defined by the Texas Supreme Court in *Arnold* well outside of its judicial wall, and created a new species of common law duty of good faith and fair dealing. The purported limitation of this duty to the unique facts of the case begs the question of why the en banc majority would write pages to find a duty for a 'one off' accident, never likely to happen again. Judicial activism to satisfy the plaintiffs' bar, perhaps? The appellate court's reasoning opens the proverbial can of worms to possible actions over claims handling not recognized previously in Texas, and it should be of grave concern to insurers.

In *Arnold*, the Texas Supreme Court's justification for a duty was both clear and narrow. In the insurance context, a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which could allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims. *Arnold*, 725 S.W.2d at 167 (emphasis added). Without such a cause of action, insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed. *Id.* An insurance company has *exclusive control* over the evaluation, processing and denial of claims. *Id.* (emphasis added). For these reasons, a duty is imposed that "[An] indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business. *Id.*, quoting, *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved).

And importantly, "a cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable

basis for a denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay.” *Id.* This states in concise terms both the duty and its justification. Kenyon’s case, despite its unfortunate circumstances, did not fit this standard or warrant expanding the standard into a new common law duty.

The “special relationship” between Kenyon and Elephant existed only within the confines of the insurance contract and required Elephant to determine whether a reasonable basis existed for a denial or delay in payment. Mr. Kenyon’s unfortunate death did not result from any unequal power to bargain the settlement of the claim, nor did it result from an exclusive control over when and how to pay the claim. In short, none of the reasons that justified recognizing the duty in *Arnold* exist on these facts, and much less support expanding it.

1. No Duty, No Negligence

Despite much window-dressing, Kenyon’s case rose or fell on negligence. In Texas, the elements of a negligence claim are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 352 (Tex. 2015). As the court of appeals reiterated on numerous and repetitive occasions in its written opinion, the only issue on appeal was the question of duty. That is where the analysis should have ended. It did not.

Instead, the en banc majority decided the new common law duty of good faith and fair dealing supported a duty to exercise care to prevent bodily injury or death, purportedly under very limited factual circumstances: (1) an insured calls her auto insurance company to report an accident or loss; (2) the auto insurance company hires and trains FNOL representatives who answer such calls and provides them a script of questions or prompts; (3) such an FNOL representative who answers an insured’s call learns the insured is at the scene of a recent one-car accident or is trained to determine whether other drivers are involved in the accident; (4) the FNOL representative can determine the insured’s coverage; and (5) the auto insurance company has a practice of hiring adjusters to independently document and take pictures of car damages. *Kenyon*, 2020 WL 1540392 at *25.

A new extra-contractual duty accompanied by extra-contractual, bodily injury damages belies all these qualifiers. The expansion of the concise definition given the “special relationship” will disrupt settled Texas jurisprudence.

As the San Antonio Court of Appeals Chief Justice noted in her dissent, in a case such as this where a duty has not been recognized previously, “we must determine whether such a duty should be recognized.” *Kenyon*, 2020 WL 1540392 at * 31 (citing *Pagayon v. Exxon Mobil Corporation*, 536 S.W.3d 499, 503 (Tex. 2017). “The supreme court has articulated considerations, known as the ‘Phillips factors,’ 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.

Kenyon, 2020 WL 1540392 at 31 (quoting *Pagayon*, 536 S.W.3d 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.” *Kenyon*, 2020 WL 1540392 at 31 (quoting *Phillips*, 801 S.W.3d at 525 (and omitting internal quotation marks and citation)).

There is no foreseeability present, regardless of the manner in which the facts are construed. “Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant’s conduct brings about the injury.” *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018) (quoting *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995) (emphasis added)). “While there may be dangerous situations or circumstances surrounding the scene of a traffic accident generally,” it is not reasonably foreseeable that by taking Kenyon’s call from the scene and answering (not instructing) her questions, Elephant actually increased the risk of physical injury to Kenyon. *Kenyon*, 2020 WL 1540392 at *32.

2. No Negligent Undertaking

As the appellate Chief Justice also correctly noted in her dissent, 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.” 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, 838 (Tex. 2000). One who undertakes such an enterprise should recognize the services “as necessary for the protection of the other’s person or things. *Id.* (emphasis added). Thus, there is no cause of action for negligent undertaking unless the Defendant acted or agreed to act expressly for the Plaintiff’s protection. Whether Elephant undertook to perform services for Kenyon that it knew or should have known were necessary for Kenyon’s protection is the key inquiry. *See Stutzman*, 46 S.W.3d at 838.

Again, the en banc majority relied upon five factual predicates to reach its flawed conclusion:

- an insured calls her auto insurance company to report an accident or loss;

- the auto insurance company hires and trains FNOL representatives who answer such calls and provides them a script of questions or prompts;
- such an FNOL representative who answers an insured's call learns the insured is at the scene of a recent one-car accident or is trained to determine whether other drivers are involved in the accident;
- the FNOL representative can determine the insured's coverage; and
- the auto insurance company has a practice of hiring adjusters to independently document and take pictures of car damages.

Kenyon, 2020 WL 1540392 at *25. This is not evidence of Elephant's undertaking the performances of services it knew or should have known were necessary for Kenyon's protection. Elephant's FNOL was simply responding to an insured's call reporting the occurrence of a one-car accident and Elephant's opening of a claim.

Kenyon herself argued Elephant undertook to "lead her through the post-accident process" "[b]y creating a call center and training FNOL employees to answer the insured[s] calls, often from the scene of an accident, and gather information necessary to open a claim." *Id.* at *33. The Chief Justice wrote, "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." *Id.* (*emphasis added*). One may agree. Kenyon did not ask for safety advice nor did she expect any from Elephant. Kenyon herself asserted, "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." *Id.* (*emphasis supplied* by Chief Justice Marion).

Elephant did not undertake any action that it knew or should have known were necessary for Kenyon's protection, and Elephant owed no duty to Kenyon with respect to her negligent undertaking claim.

3. No Negligent Failure to Train and License

The Texas Supreme Court has yet to decide whether a duty is owed to third parties to exercise reasonable care in supervising or training employees, agents, or representatives. *Endeavor Energy Res., L.P. v. Cuevas*, 593 S.W.3d 307, 311 (Tex. 2019); *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 842 (Tex. 2018); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 n.27 (Tex. 2010). Any such theory requires both the employer's negligence in supervising or training and the employee's negligence; both acts must proximately cause the plaintiff's injury. *Endeavor Energy*, 564 S.W.3d at 311; *JBS Carriers*, 564 S.W.3d at 841-42; *Wansey v. Hole*, 379 S.W.3d 246, 247 (Tex. 2012). If the employee was not liable, then neither is the employer. *Wansey*, 379 S.W.3d at 247. Further, a plaintiff must prove that a reasonable employer would have provided training beyond that which was given and the failure to provide specific training caused plaintiff's injuries. *JBS Carriers*, 564 S.W.3d at 842. Specifically, but for the lack of the training, the occurrence would have been avoided. *Id.* at 843.

The elements of a cause of action for negligently hiring, supervising, training, or retraining 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*) (memo. op.) (citing *La Bella 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 the 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. Zetwanger*, 144 S.W.3d 438, 447-48 (Tex. 2004)).

The failure to train theory is a mirrors image of the duty theory. The en banc majority concluded the same set of factual evidence that supports Kenyon's common law negligence claim requires a duty to train to prevent the tort. Without the underlying tort, the trial court did not err in rendering summary judgment on Kenyon's negligent failure to train and license claim.

Elephant's traditional summary judgment ground clearly attacked the duty element of Kenyon's negligence claim. The court of appeals' reach around and seizure of the "special relationship" language to craft a new common law duty of good faith and fair dealing was erroneous and warrants correction.

The duty of good faith and fair dealing growing out of the "special relationship" between insurers and their insureds should not be expanded outside of the limited scope of *Arnold*. There was no reason for the en banc majority to ignore established Texas law and judicially expand the duty of good faith and fair dealing to include a duty upon an insurer to exercise reasonable care during claims handling to prevent physical harm to an insured. Further, Elephant's traditional motion set forth the proper ground to defeat Kenyon's clear negligence cause of action. Put simply, there was no duty, therefore no negligence.

The Texas Supreme Court has requested merits briefing on Elephant's petition for review. This is an indication the court will accept the case and render an opinion. Further reporting on this developing issue will be provided in a future newsletter. Hopefully, the Texas Supreme Court

will reign-in the renegade lower courts.

Endnotes

¹This concerns common law negligence claims only, and not statutory, Texas Insurance Code remedies that might otherwise apply.

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