Reversed and Rendered and Majority and Dissenting Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00849-CV

HNMC, INC., Appellant

V.

FRANCIS S. CHAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LENY REY CHAN, JONATHAN CHAN, AND JUSTIN CHAN, Appellees

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2015-18367

M A J O R I T Y   O P I N I O N

The dispositive issue in this appeal is whether a premises owner owed a legal duty to a pedestrian who left its property and was killed in an adjacent public roadway after being struck by a negligent driver. Generally, a premises owner does not owe a duty to ensure the safety of persons who leave the owner's property and suffer injury on an adjacent public roadway. Though Texas courts have

recognized four common-law exceptions to this general rule, none apply to the facts of this case as a matter of law. We hold that the premises owner did not owe the deceased a duty to protect her from, or otherwise warn of, the dangers of crossing the public roadway. We reverse the trial court's judgment in favor of appellees and render a take-nothing judgment in the premises owner's favor.

Background

Leny Chan worked as a nurse for more than thirty years at Houston Northwest Medical Center ("HNMC"). After her shift ended on March 17, 2015, Chan exited the building from the northeast door. Adjacent to the northeast side of the building is Cali Drive, a public roadway owned and maintained by Harris County. Chan's car was parked in a surface parking lot owned by HNMC across Cali Drive. The quarter-mile long parking lot had two pedestrian gates toward each end of the lot and a single operative vehicle entrance/exit at a mid-block location, almost directly across from the northeast hospital exit. Two marked pedestrian crosswalks were located at each end of the block on Cali Drive; there is no marked crosswalk located at the mid-block location near the hospital's northeast exit.[1]

As she had done in the past when leaving the hospital, Chan walked across Cali Drive at a mid-block location directly outside the northeast exit door instead of using one of the two marked crosswalks toward each end of the block. According to appellees, it was common for persons leaving the hospital at the northeast exit to cross Cali Drive at mid-block and enter the parking lot by walking

[1] In the past, a marked crosswalk was located at mid-block near the hospital's northeast exit. However, Harris County abandoned the crosswalk at some point prior to the accident, and it was no longer clearly visible on the roadway because the paint stripes had deteriorated or faded. Additionally, no crosswalk signs appeared at this location, as stood at other designated crosswalks in the vicinity of the hospital.

through the vehicle entrance/exit. There was no pedestrian gate in the immediate vicinity of the vehicle entrance/exit. The perimeter of the parking lot, other than the pedestrian gates and the vehicle entrance/exit, was fenced.

As Chan crossed Cali Drive toward the parking lot, a car driven by James Budd exited the lot, turned left into the roadway, and struck Chan. Chan died from her injuries.

Chan's husband and two sons (appellees) sued Budd and Budd's employer, Siemens Medical Solutions USA, Inc., asserting claims for wrongful death and negligence. Siemens designated Harris County and HNMC as responsible third parties. As to HNMC, Siemens alleged that the hospital failed to take adequate measures to prevent ingress and egress to and from Cali Drive, encouraged pedestrians to approach and cross Cali Drive at unsafe locations, and failed to advise pedestrians on HNMC's property of known risks existing on and near the premises. These risks, according to Siemens, facilitated the unsafe pedestrian conditions existing when Chan crossed Cali Drive and proximately caused Chan's death.

Appellees then added HNMC as a named defendant, alleging that HNMC was negligent for:

- failing to structure its premises surrounding Cali Drive, including its parking lots and access points, in a reasonably safe design to ensure the safe entry and exit of pedestrians to and from Cali Drive;
- failing to install barriers to crossing Cali Drive at unsafe locations;
- failing to post any signage near the subject crosswalk directing pedestrians to alternate locations to cross Cali Drive; and

- failing to warn of the alleged known dangerous conditions at the location.

HNMC moved for summary judgment on the ground that HNMC owed no legal duty to Chan as a pedestrian in a public street. The trial court did not rule on this motion.

After trial on the merits, the jury found that the negligence of Budd, HNMC, Harris County, and Chan proximately caused Chan's death. The jury found Budd 40% responsible, HNMC 20% responsible, Harris County 30% responsible, and Chan 10% responsible. The jury awarded a total of $10 million to Chan's husband and $2.5 million to each of Chan's sons. The trial court signed a final judgment incorporating the jury's findings. After the court signed its judgment, appellees settled with Budd and Siemens and filed a release of judgment as to them, leaving only the judgment against HNMC in place.

HNMC appeals and seeks either a rendition of a take-nothing judgment or a new trial.

Issues

HNMC raises five issues. First, the hospital argues that its subscription to the statutory workers' compensation coverage scheme bars appellees' claims.[2] Second, HNMC argues that it owed no duty to ensure Chan's safety while she crossed the public roadway. Third, HNMC argues that the case was submitted to the jury under an erroneous theory of liability—general negligence—when it should have been submitted under a more specific premises defect theory. Fourth,

[2] Except in instances of intentional acts or gross negligence, recovery of workers' compensation benefits is "the exclusive remedy" of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee. Tex. Lab. Code § 408.001.

HNMC argues that the evidence is legally and factually insufficient to support the jury's verdict. Finally, the hospital argues that certain evidentiary rulings were harmful error. Because HNMC's second issue is dispositive, we address only that issue. *See* Tex. R. App. P. 47.1.

Analysis

A. General Principles of a Premises Owner's Duty

The threshold inquiry in any negligence case is whether the defendant owes a legal duty to the plaintiff. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The existence of a duty is generally a question of law for the court, although in some instances it may require the resolution of disputed facts. *Fort Bend Cty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991).

In this case, we start with the general rule that a property owner, such as HNMC, has no duty to ensure the safety of a person who leaves the owner's property and suffers injury on an adjacent public roadway, or to ensure that person's safety against the dangerous acts of a third party. *See Hirabayashi v. N. Main Bar-B-Q, Inc.*, 977 S.W.2d 704, 706 (Tex. App.—Fort Worth 1998, pet. denied); *Dixon v. Houston Raceway Park, Inc.*, 874 S.W.2d 760, 762-63 (Tex. App.—Houston [1st Dist.] 1994, no writ) (property owner has no duty to ensure the safety of persons who leave owner's property and suffer injury on adjacent highways); *Gonzales v. Trinity Indus., Inc.*, 7 S.W.3d 303, 307 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). This is because a premises owner's duty to invitees generally emanates from the owner's control over the premises occupied and therefore applies only to hazards existing on those premises; the duty does not extend beyond the limits of the premises owner's control. *See Dixon*, 874 S.W.2d at 762 (citing *Grapotte v. Adams*, 111 S.W.2d 690, 691 (Tex. 1938)).

A case from the San Antonio Court of Appeals illustrates this general principle. In *Naumann v. Windsor Gypsum, Inc.*, the driver of a tractor-trailer left a plant, turned onto the highway, and collided with another vehicle. *See Naumann v. Windsor Gypsum, Inc.*, 749 S.W.2d 189, 190 (Tex. App.—San Antonio 1988, writ denied). The tractor-trailer's driver was not under the plant owner's control. The vehicle's occupants sued the plant owner, alleging that the owner "design[ed] its plant in a manner that forces tractor-trailers exiting its property to block both lanes of [the highway] . . . thereby creating a hazard to motorists." *Id.* The plant owner moved for summary judgment, arguing that it owed no duty to control the traffic on the public highway abutting its property. *Id.* The court of appeals agreed. Despite the plant owner's knowledge of truck drivers' propensity to block both lanes when turning onto the highway, the court concluded that the plant owner "had every right to expect [drivers] to exercise due care and to enter the highway safely." *Id.* at 192. Therefore, the court held that the plant owner did not owe a duty to the injured motorists as a matter of law. *Id.*

The Austin Court of Appeals addressed allegations of negligence similar to those asserted here in *Cabrera v. Spring Ho Festival, Inc.* There, a festival attendee left the festival grounds to cross an adjacent street to reach the lot where she was to be picked up. *See Cabrera v. Spring Ho Festival, Inc.*, No. 03-09-00384-CV, 2010 WL 3271729, at *1 (Tex. App.—Austin Aug. 20, 2010, no pet.) (mem. op.). As she crossed the street, she was struck and killed by a vehicle. *Id.* Her parents sued the festival operator, alleging that the operator was negligent "in failing to choose a safe location for the festival, failing to provide adequate procedures for the safe ingress and egress of festival attendees, [and] failing to provide adequate on-site parking." *Id.* The operator moved for summary judgment, arguing that it owed the deceased no duty at the time of the accident. *Id.*

The court of appeals agreed. Because the accident did not occur on the festival premises, and because the festival operator had no right to control traffic or otherwise occupy the roadway, the court held that "under the general rule of premises liability espoused by Texas courts," the festival operator owed no duty to ensure the attendee's safety as she crossed the street. *Id.* at *3.

Here it is undisputed that Chan was not on HNMC's property when Budd's vehicle struck and killed her and that Budd was not under HNMC's control. Chan was crossing a public roadway owned and maintained by Harris County. HNMC had every right to expect that motorists such as Budd would exercise due care when turning onto Cali Drive, and that pedestrians such as Chan would exercise due care in crossing a public roadway. Accordingly, under the general rule of premises liability applicable here, HNMC had no duty to ensure Chan's safety as she walked across Cali Drive. *See Naumann*, 749 S.W.2d at 192; *Cabrera*, 2010 WL 3271729, at *3; *Hirabayashi*, 977 S.W.2d at 706.[3]

B. Exceptions to the General Principle

Texas courts have recognized four common-law exceptions to the general rule just discussed that a premises owner has no duty to prevent accidents or warn of hazards on adjacent property that it neither owns nor controls. Under these

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[3] Appellees argue that HNMC owed Chan a duty because a premises owner "must exercise reasonable care not to jeopardize or endanger the safety of persons using the highway," citing *Atchison v. Tex. & Pac. Ry. Co.*, 186 S.W.2d 228, 229-30 (Tex. 1945); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910-11 (Tex. 1981); *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343, 350 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Beaumont Iron Works Co. v. Martin*, 190 S.W.2d 491, 495-96 (Tex. App.—Beaumont 1945, writ ref'd w.o.m.); *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863, 865 (Tex. App.—Amarillo 1941, writ ref'd); and *Nw. Mall, Inc. v. Lubri-Ion Int'l, Inc.*, 681 S.W.2d 797, 802 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). These cases concern instances where an owner "negligently releases upon the highway an agency that becomes dangerous by its very nature once upon the highway." *Dixon*, 874 S.W.2d at 763. There is no allegation that HNMC released a dangerous agency into Cali Drive and therefore appellees' cases are inapplicable.

exceptions, an owner assumes a duty of care if it: (1) agrees or contracts either expressly or impliedly to make safe a known, dangerous condition of real property, *see Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997); (2) creates the dangerous condition, *see Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942); (3) assumes actual control over the adjacent property, *see Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993); or (4) knows about, but fails to warn of, an obscured danger on land directly appurtenant to the premises owner's land, *see Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 615 (Tex. 1950). Whether HNMC owed a duty under one or more of these exceptions is a legal question for the court based on the particular facts of the case. *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 289 (Tex. 1996). Having submitted a negligence question to the jury inquiring as to HNMC's conduct, the court necessarily concluded HNMC owed a duty to Chan, although the specific basis for the duty is not stated in the record.

1. *HNMC did not agree to make Cali Drive safe for pedestrians.*

Appellees argue that the present evidence supports a duty under all four exceptions, but they rely most heavily on the first—i.e., that HNMC agreed to make Cali Drive safe for pedestrians.

The jury received exhibits detailing correspondence between Terry Anderson, HNMC's director of plant operations, and Jerry Eversole, a county commissioner with Harris County. In 2009, Anderson wrote Eversole after a vehicle struck one of the hospital's nursing staff as he crossed Cali Drive at a pedestrian crossing. Acknowledging "other scares at our Pedestrian Crossings around the perimeter of the campus," Anderson characterized the issue as "too serious to ignore for the protection of our patients, visitors, staff and physicians." Anderson asked Eversole to "please consider installing speed bumps at [HNMC's]

Pedestrian Crossings." The county rejected Anderson's request, because "speed bumps have always been illegal on county roadways."

Anderson wrote Eversole again in 2010 and described another incident of a vehicle striking a pedestrian as she crossed Cali Drive. In the 2010 letter, Anderson sought a meeting with the county "to review options about this continuous danger facing our patients, staff and physicians." Internal email correspondence between county employees indicates that a meeting occurred shortly after Anderson's request, and the county agreed to "initiat[e] a study of the streets around the hospital campus." In that same internal correspondence, a county employee stated that "[t]he hospital has a design project underway which will change the hospital's front entrance and alter some parking locations. Our recommendations will include some steps that the hospital will consider for their construction program."

The county then conducted a study along Cali Drive for pedestrian and patient safety, as well as a safety analysis "to determine what, if any, additional safety measures are warranted." In 2012, following the traffic engineering study, the county formally responded to Anderson's 2010 request for assistance and made the following recommendations:

1. Removal of 2 of 5 existing pedestrian crossings
2. Refresh pavement markings on the 3 remaining crossings
3. Replace existing pedestrian crossing signs and down arrows with larger signs
4. Install crosswalks at all-way stop sign intersections
5. Advise Houston Northwest Medical Center to arrange for removal of existing mid-block flasher & install TMUTCD approved warning beacons with advance signs

6. Advise Houston Northwest Medical Center to arrange for removal/relocating of parking lot access points to align with the 3 remaining crossings

The county commissioner indicated that the county would complete the first four modifications or improvements but stated that it would be "the responsibility of Houston Northwest Medical Center to arrange for the completion of items 5 and 6." It is undisputed that HNMC did not take any measures to complete items 5 and 6 before Chan's death.

According to appellees, because HNMC alerted Harris County to the hospital's concerns about pedestrian safety on Cali Drive and because Harris County responded with recommendations, HNMC agreed to make safe Chan's passage from the hospital to the parking lot. We disagree.

The cited exception does not apply here because HNMC did not agree, contractually or otherwise, impliedly or expressly, to make safe the known danger of crossing the roadway. The Supreme Court of Texas's decision in *Wilson v. Texas Parks & Wildlife Department* provides a relevant contrasting illustration. *See Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999) (per curiam). There, two fishermen drowned in a flood on the Pedernales River, and their survivors sued the Texas Parks and Wildlife Department. Although the department did not own, occupy, or otherwise control the river, the supreme court remanded the case for retrial on the ground that there was some evidence that the department had voluntarily undertaken a duty to make the premises safe by constructing a flood warning system with an audible alarm, putting up signs warning people to leave the area if they heard the alarm, and otherwise informing visitors that the department's flood monitoring system would provide adequate warning if dangerous flood conditions arose. *Id.* at 635-36. However, on the day that the two fishermen drowned during a flood on the river, the flood monitoring

system was not functioning properly. *Id.* at 635. Accordingly, the supreme court concluded that evidence existed supporting the plaintiffs' assertion that the department agreed to undertake a duty to make the river safe for park visitors' use and that the department breached such a duty. *Id.* at 636. Thus, once a defendant undertakes to provide a safe premises or correct a danger on premises it does not own, occupy, or control, it has a duty to do so with ordinary care. *See id.*; *see also Gundolf v. Massman-Johnson*, 473 S.W.2d 70, 73 (Tex. App.—Beaumont 1971, writ ref'd n.r.e.) (contractor owed invitee a duty because contractor undertook to remove algae that caused plaintiff's injury but "failed to remove *all* of the algae from the tail race slab") (emphasis added).

In contrast, when a claimant alleges that the defendant simply failed to ensure the safety of a third party's premises—without a concomitant agreement to do so—then the exception does not apply and no duty of care exists. *See, e.g.*, *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986) (city had no duty to invitee when city did not promise to make third party's storage building safe from arson during previous fire investigations); *see also Holland v. Mem'l Hermann Health Sys.*, 570 S.W.3d 887, 898 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (exception did not apply because the evidence did not demonstrate any affirmative action on hospital's part to make safe a known, dangerous condition in the roadway).

Here appellees presented no evidence that HNMC agreed to ensure Chan's safety as she crossed Cali Drive. Appellees cite no evidence, nor do we see any in the record, establishing that HNMC voluntarily undertook a duty to make it safe for pedestrians to cross Cali Drive. Appellees point to the correspondence between HNMC and Harris County, particularly Harris County's recommendations following its traffic study, but this evidence is not legally sufficient to establish an

agreement by HNMC to make the roadway safe for pedestrians. HNMC asked Harris County to address the issue because Harris County owns and controls the roadway. Harris County recommended a list of corrective measures and took the position that two action items were HNMC's and not the county's responsibility. But there exists no evidence that HNMC agreed with those recommendations or agreed to undertake, or in fact undertook, any of the listed items. Indeed, appellees' main contention is that HNMC failed to take any action whatsoever. *See Holland*, 570 S.W.3d at 898 (rejecting exception because "the crux of Holland's allegations against Memorial Hermann is that it failed to act—whether by warning, making safe, or otherwise"). Seeking recommendations from Harris County to address pedestrian safety is not the same thing as expressly or impliedly agreeing to implement any measures ultimately recommended.[4]

Appellees also focus on the "design project" referenced in the 2010 email correspondence among Harris County personnel, specifically the statement that "[t]he hospital has a design project underway which will change the hospital's front entrance and alter some parking locations." In a post-submission letter, appellees discuss the design project under a heading, "The record establishes the Hospital's undertaking to alter its parking-lot design as necessary to improve pedestrian safety." Even assuming, as appellees invite us to do, that the hospital's design project and the county's study were part and parcel of an overall pedestrian safety improvement plan, there is still no evidence that HNMC undertook affirmative steps to make Cali Drive safer for pedestrian and then failed to complete those particular measures in a safe manner. *Cf. Crown Derrick Erectors,*

[4] A recommendation is merely advice or a suggestion; it ordinarily is not binding. *See* Black's Law Dictionary, "Recommendation" (11th ed. 2019) ("1. A specific piece of advice about what to do, esp. when given officially. 2. A suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious.").

Inc. v. Dew, 117 S.W.3d 526, 532 (Tex. App.—Beaumont 2003) ("Crown Derrick was acting to correct a danger it agreed to correct and that arose out of its own work. Having undertaken to erect a barrier to protect a dangerous area on its work site, Crown Derrick owed a duty to exercise ordinary care in doing so."), *rev'd on other grounds*, 208 S.W.3d 448 (Tex. 2006); *Gundolf*, 473 S.W.2d at 73. There is no evidence what changes, if any, HNMC contemplated making to its premises as part of its purported design project, where those changes would be made, or—most pertinently—whether HNMC actually undertook any of them and did so negligently.

For these reasons, we conclude that HNMC did not agree to make Cali Drive safe for pedestrians to cross and thus did not assume a duty to Chan under the first exception.

2. *HNMC did not create the danger to pedestrians on Cali Drive.*

The second exception applies when the premises owner creates the hazardous condition that causes or contributes to the plaintiff's injury. *See, e.g.*, *Page*, 701 S.W.2d at 835; *Buchanan*, 159 S.W.2d at 110 ("To illustrate: One who in the exercise of a lawful right, and without negligence on his part, makes an excavation across a street or sidewalk or on his premises in close proximity to a public way, or parks a vehicle in a road, or otherwise obstructs the road with a foreign substance, is bound to give warning of the danger created thereby."); *Hirabyashi*, 977 S.W.3d at 707.

Appellees argue that HNMC created a danger to pedestrians crossing Cali Drive in the following ways:

- pedestrians parking in the east parking lot must cross Cali Drive;

- its operation (along with its refusal to act on government recommended remedies) concentrates, rather than separates, vehicles and pedestrians into the same area;
- pedestrians who use the northeast building exit are funneled into crossing Cali Drive at an unsafe mid-block location; and
- pedestrians are exposed to an increased risk from drivers turning left who are forced to keep their attention away from pedestrians because of the vision-obstructing signs.

None of these allegations supports a theory that HNMC created the hazardous condition at issue on Cali Drive. The fact that pedestrians must cross Cali Drive to reach a parking lot is not a hazardous condition. *See Hirabayashi*, 977 S.W.2d at 707-08. We also disagree that HNMC's configuration of its entry and exit doors physically "funneled" pedestrians into crossing the street mid-block. Pedestrians were not compelled to cross Cali Drive at a mid-block location. Pedestrians who chose to park in the lot across the street could use one of at least two marked crosswalks to cross Cali Drive; the fence surrounding the lot contained pedestrian gates near each marked crosswalk. We decline to impose a duty on a premises owner to align its doors with marked crosswalks, especially considering that Harris County, not HNMC, solely controlled the placement and maintenance of those crosswalks.

Finally, the alleged "vision-obstructing signs" are irrelevant to the facts of this case. When Budd exited the parking lot, Chan was crossing Cali Drive to Budd's left. Budd turned left and hit her. The signs on which appellees focus were to Budd's right. There existed no visual obstruction to his left, a fact he readily admitted. At trial, Budd agreed that he had "a completely clear view" to the left.[5]

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[5] Appellees rely on several cases holding that premises owners owed a duty to travelers because the owner obstructed the traveler's view on the road. *See Atchison*, 186 S.W.2d at 229;

Appellees nevertheless contend that the signs created a hazard because "drivers leaving this parking lot must focus their attention northward, scanning for southbound vehicles, rather than focusing southward where pedestrians [such as Chan] cross from the Hospital exit." This argument assumes that drivers will then fail to check the surroundings to their left before making a left turn. In other words, appellees contend that drivers will be looking *right* when turning *left*, and that the hospital is responsible for guarding against such negligent behavior. This ignores the general principle that a premises owner is not responsible for the potentially negligent acts of third parties who leave the owner's property. *See, e.g.*, *Naumann*, 749 S.W.2d at 192 ("An owner or occupier of property is not an insurer of the safety of travelers on an adjacent highway and is not required to provide against the acts of third persons."). HNMC had every right to expect drivers leaving its parking lot and pedestrians crossing Cali Drive to exercise due care while on the roadway. *Id*.

3. *HNMC did not assume actual control over any part of Cali Drive.*

The third exception arises when a premises owner or occupier assumes actual control over adjacent property. Here, HNMC did not take any affirmative action to assume control or possession of the roadway. There is no dispute that Harris County owned and was exclusively responsible for maintaining Cali Street. *See Garrett v. Houston Raceway Park, Inc.*, No. 14-94-00929-CV, 1996 WL 354743, at *2 (Tex. App.—Houston [14th Dist.] June 27, 1996, no writ) (not designated for publication) ("Moreover, the burden of controlling traffic on a

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Hamrick v. Kansas City S. Ry. Co., 718 S.W.2d 916, 918 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); *Zapata v. Kariyaparambil*, No. 14-96-00901-CV, 1997 WL 566222, at *3 (Tex. App.—Houston [14th Dist.] Sept. 11, 1997, no pet.) (not designated for publication). Because there was no analogous visual obstruction in this case, appellees' cited authorities are unpersuasive.

public road is a governmental function that cannot be transferred to a private entity.").

Compare the present facts with those the supreme court confronted in *Alexander*. In that case, Wal-Mart leased its store building from the property owner, but Wal-Mart did not own, lease, or otherwise possess any of the exterior premises. *Alexander*, 868 S.W.2d at 323. However, Wal-Mart built a concrete ramp leading from the parking lot to the sidewalk in front of the building. *Id.* at 323-24. Subsequent settling of the ground created a ridge at the base of the ramp, over which a customer tripped. *Id.* at 324. The customer sued, but Wal-Mart argued that it owed no duty to the customer, because it did not occupy the area where the customer was injured. *Id.* The court rejected that argument, reasoning that Wal-Mart assumed actual control of the ramp area by building the ramp on its own initiative and at its own expense, even though the ramp was outside the boundaries of the leasehold. *Id.* The court's holding was not premised on a factual determination that Wal-Mart *created* the hazard, but instead on the legal conclusion that, once Wal-Mart built the ramp outside the part of the premises it occupied, it had a duty of reasonable care to maintain the safety of the ramp area. *Id.* at 325.

The evidence here does not show that HNMC actually exercised control over Cali Drive. Again, appellees argue that HNMC placed the "vision-obstructing sign" on the county's right-of-way adjacent to the street, thereby assuming control over the county's property and assuming a duty to protect others against the danger. As stated above, however, the sign was not the hazardous condition that caused Chan's injury.

4. *HNMC did not fail to warn of an obscured danger.*

Finally, there was no obscured danger of which HNMC knew and about which HNMC should have warned pedestrians. *See Holland*, 570 S.W.3d at 899 (fourth exception "has been applied to extend the duty to keep a premises safe from obscured dangers present near the entries and exits of premises"). For instance, the Supreme Court of Texas has held that a property owner assumed a duty to warn invitees about a hidden dangerous condition created by a doorway that opened into a drug store directly over a set of steps not level with the adjacent garage floor. *See Renfro Drug*, 235 S.W.2d at 615. Another court has held that a parking lot owner owed a duty to erect barriers or to warn invitees of a creek between the lot and a nearby theater; the creek was obscured by the manner in which the lot attendant parked the cars, so that the rear of the cars extended out over the creek bed. *See Parking, Inc. v. Dalrymple*, 375 S.W.2d 758, 762-63 (Tex. App.—San Antonio 1964, no writ).

Here, in contrast, "[t]he obvious presence of cars passing on a roadway is not an 'obscured' danger." *Hirabayashi*, 977 S.W.2d at 707-08. There is no evidence that Chan's ability to observe cars either in the roadway or turning out of HNMC's parking lot was obscured. In fact, another nurse who was crossing the street with Chan at the time of the accident agreed at trial that there was nothing that "in any way would have blocked or obscured [her] view of a vehicle leaving [the parking lot]." HNMC has no duty to warn invitees entering and exiting its property of the known danger of crossing the roadway. *See id.*

C. Foreseeability of Danger

Appellees argue that, regardless of the general rule that a premises owner owes no duty to protect passers-by in an adjacent public roadway and assuming none of the four exceptions apply, HNMC nevertheless owed a duty to pedestrians

based on the foreseeability of dangers it knew from previous incidents. The evidence establishes that HNMC was concerned about pedestrian safety along Cali Drive, stemming from at least 2009: the hospital wrote to Harris County several times, alerting the county of vehicle-pedestrian accidents and seeking the county's help in addressing the hospital's safety concerns.

But foreseeability alone is not sufficient to justify the imposition of a duty. *See, e.g.*, *Naumann*, 749 S.W.2d at 192 (rejecting imposition of duty on landowner to protect passing motorists, even though landowner knew of danger posed by premises exit). Whether to impose a common-law negligence duty involves balancing several interrelated factors. *Golden Spread Council*, 926 S.W.2d at 289-90; *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). We must weigh 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. *Golden Spread Council*, 926 S.W.2d at 289-90. Also among the relevant considerations is whether one party had superior knowledge of the risk or a right to control the actor who caused the harm. *Id.*; *Graff*, 858 S.W.2d at 920.

Weighing these factors here, any foreseeability of the risk by HNMC is not enough to impose a duty. Although the degree of harm in the event of injury can be high, as this case unfortunately illustrates, few if any of the other factors support imposing a duty. The record shows two prior similar incidents, but those occurred five to six years before Chan's incident. The evidence does not show that the risk and likelihood of injury was great. As to the utility, burden, and consequences of imposing a duty on the defendant, creating a duty to protect pedestrians from

dangers inherent in crossing a street and of which every member of the community is aware would impose a substantial burden on property owners, which is not easily or reasonably justified. *See, e.g.*, *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 411 (Tex. 2009) (declining to impose a duty on employers to protect the public from fatigued employees: "Expecting employers to monitor or control such factors would be unreasonable, especially when the risk of driving while fatigued is within the common knowledge of all drivers, and employees generally know not to drive when they are too tired."). The responsibility of maintaining the safety of, or controlling traffic on, public roadways generally lies with the government. *See Garrett*, 1996 WL 354743, at *2; *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 226-27 (Tex. App.—Houston [14th Dist.] 1994, writ denied). In a post-submission letter, appellees summarize the steps that HNMC could have taken to ensure pedestrian safety along Cali Drive:

> A pedestrian gate [next to the vehicle entrance/exit] might have helped somewhat by angling pedestrians away from the driveway. But the Hospital should have taken measures to stop or discourage pedestrians from crossing the street in that unsafe location. For example, it could have installed a grassy area, bushes, or other obstruction, such as cabling or a fence. The Hospital also could have closed the building's northeast exit or transformed it into an emergency exit.

But whether HNMC could have taken the steps cited by appellees is not sufficient to balance the scales in favor of imposing a duty on HNMC in this instance. *Accord, e.g.*, *Buchanan*, 159 S.W.2d at 110 (a person may owe a moral duty to warn a passerby about a dangerous condition, "but being a mere bystander, and in nowise responsible for the dangerous condition, he owes no legal duty to render assistance"). Expanding the scope of a premises owner's duty with respect to adjacent public roadways anytime the owner has a mere ability to take some action that might decrease a risk on the roadway would make it nearly impossible

to discern where a premises owner's liability begins and ends. Finally, HNMC did not control and had no right to control Budd or Chan, nor was HNMC shown to have superior knowledge of the risk relative to any of the other parties.

Based on current precedent governing premises liability, we are unwilling to expand a premises owner's duty to pedestrians in circumstances such as those presented here.

D. Other Jurisdictions

Finally, we find support for our holding today in similar cases from other jurisdictions. Of particular note is a recent decision from the California Supreme Court. In that case, a vehicle struck and injured a pedestrian walking from a parking lot to a church building across the street. *Vasilenko v. Grace Family Church*, 404 P.3d 1196, 1198 (Cal. 2018). The pedestrian sued the church, arguing that the church created a foreseeable risk of harm by maintaining an overflow parking lot in a location that required invitees to cross the street, and that the church was negligent in failing to protect against that risk. *Id.* The church moved for summary judgment on the ground that it did not have a duty to assist the pedestrian with crossing a public street that the church did not own, possess, or control. *Id.* After observing that the ability of landowners to reduce the risk of injury from crossing a public street is limited, the California Supreme Court agreed that

> a landowner does not have a duty to assist invitees in crossing a public street when the landowner does no more than site and maintain a parking lot that requires invitees to cross the street to access the landowner's premises, so long as the street's dangers are not obscured or magnified by some condition of the landowner's premises or by some action taken by the landowner.

Id.

In reaching this conclusion, the court reasoned in part—as we do today—that the danger posed by crossing a public street mid-block is obvious, and there is ordinarily no duty to warn of obvious dangers. *Id.* at 1202.[6] Based on the similarity of facts between today's case and *Vasilenko*, we find the California court's reasoning and its ultimate holding persuasive to our own analysis of the issue of duty.

Conclusion

Leny Chan died tragically from injuries sustained when struck by a third party in a public roadway. Under the circumstances presented here, HNMC, as the adjacent premises owner, owed no legal duty to warn or otherwise protect Chan from the danger of crossing the roadway. Because HNMC owed no duty, appellees' negligence claim fails as a matter of law. We sustain HNMC's second issue, reverse the trial court's judgment, and render judgment that appellees take nothing from HNMC.

/s/ Kevin Jewell
Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Poissant (Poissant, J., dissenting).

[6] The *Vasilenko* court also noted cases from other jurisdictions that have considered this issue, stating that its holding was consistent with the weight of those authorities. *See Vasilenko*, 404 P.3d at 1207 (citing *Davis v. Westwood Grp.*, 652 N.E.2d 567, 570 (Mass. 1995) (holding that defendant racetrack had no duty to protect invitees crossing a public street between its parking lot and the racetrack); *Swett v. Vill. of Algonquin*, 523 N.E.2d 594, 600-02 (Ill. 1988) (declining to impose a duty on landowner to protect or warn invitee when the configuration of the landowner's premises requires invitees to cross a public street); *Laumann v. Plakakis*, 351 S.E.2d 765, 766-67 (N.C. App. 1987) (same); *Obiechina v. Colls. of the Seneca*, 171 Misc.2d 56, 60-62 (N.Y. Sup. Ct. 1996) (same)). These additional authorities further bolster our decision.