Opinion issued July 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00319-CV

CYNTHIA GARCIA, INDIVIDUALLY AND AS NEXT FRIEND OF G.G., E.G., A.G. AND M.G., MINOR CHILDREN AND AS REPRESENTATIVE OF THE ESTATE OF GILBERTO GARCIA, Appellant

V.

KELLOGG BROWN & ROOT SERVICES, INC., KELLOGG BROWN & ROOT, LLC, AND KBR, INC., Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2016-20374

MEMORANDUM OPINION

Appellant Cynthia Garcia, individually, as next friend of her minor children, and as representative of the Estate of Gilberto Garcia, sued appellees Kellogg Brown

& Root Services, Inc., Kellogg Brown & Root, LLC, and KBR, Inc. (collectively, KBR) and other defendants for negligence and gross negligence arising from an accident involving a tunnel-boring machine that resulted in Gilberto's death.[1] The project on which Gilberto was killed was owned by the San Jacinto River Authority (River Authority), and the River Authority subcontracted with SJ Louis Construction (SJ Louis), Gilberto's employer, for tunnel-boring services. The River Authority also contracted with KBR to provide construction management services. KBR moved for summary judgment, arguing that it owed no duty to keep Gilberto safe in his work on the River Authority's project, and the trial court granted summary judgment in favor of KBR. Garcia eventually reached an agreed judgment with SJ Louis and the other defendants.

In six issues on appeal, Garcia argues that (1) the trial court erred in granting KBR's traditional and no-evidence motion for summary judgment because (2) KBR owed Gilberto a duty because it retained control over ensuring work performed complied with laws, regulations, and permitting requirements; (3) KBR owed Gilberto a duty because it undertook to coordinate and monitor workers compliance with applicable laws and safety requirements; and (4) KBR owed Gilberto a duty

[1] The trial court's final judgment also included an agreed judgment between Garcia and other parties who were named defendants in this case but who are not parties to this appeal, including SJ Louis Construction. Garcia does not challenge the trial court's judgment with regard to any party except KBR.

because it undertook to note, report, and correct unsafe practices at the worksite; and the trial court erred in granting summary judgment because it (5) based its ruling on an incorrect reading of the agreements between the owner of the project, the River Authority, and KBR; and (6) failed to find the existence of a fact issue as to KBR's breach of its duties owed to Gilberto.

Because we conclude that KBR did not owe a duty to keep Gilberto safe in his work on the River Authority's project, we affirm the judgment of the trial court.

Background

The River Authority began a Groundwater Reduction Project (the Project or GRP Program) in Magnolia, Texas. The Project involved the creation of water transmission lines throughout Montgomery County and consisted of 18 different projects for which the River Authority, as the property owner, subcontracted with various entities.

A. The River Authority's Contract with KBR

The River Authority contracted with KBR as a "Construction Management and Inspection (CM&I) Consultant." The River Authority paid KBR to provide general construction management, administration, and inspection services for the Project. The contract provided that KBR "shall work as an extension of [the River Authority's] staff during the execution of its duties and responsibilities" and would "be subject to oversight, monitoring, and direction" by the River Authority. The

contract further stated that together with the River Authority, KBR "shall lead the construction management, administration and coordination of the policies, procedures, and protocols to be implemented by the GRP Program participants" and that the "policies, procedures, and protocols are contained within the GRP Program's Program Management Plan (PMP)," which the River Authority would provide to KBR.

The contract provided that KBR's services included, but were not limited to, activities such as "Construction contract management administration"; "Construction contract compliance"; "Internal and external stakeholder coordination per [the River Authority's] direction"; "Inspection"; "Claims management and avoidance"; "Schedule management"; "Risk assessment and mitigation"; "Quality assurance"; "Safety management"; "Materials testing oversight"; and "Records management." KBR was tasked with "ensur[ing] all assigned GRP Program Projects are timely completed within prescribed budgets and quality standards."

Regarding safety, the contract generally stated that KBR "shall work to ensure the safety of the public and [KBR], [KBR's] subconsultants / subcontractors [and] workers." The contract between the River Authority and KBR further provided that KBR was responsible for the safety of its own employees and subcontractors, but not for the work of the River Authority's construction contractors:

> CONSULTANT [KBR] shall be responsible for [its] own activities at sites including the safety of its employees, and that of its

> subconsultants, subcontractors and suppliers but shall not assume control of or responsibility for the site. Construction contractors of [the River Authority] shall have sole responsibility for providing materials, means, and methods of construction, for controlling their individual work areas and safety of said areas for all parties, and for taking all appropriate steps to ensure the quality of their work and the safety of their employees and of the public in connection with their performance of work or services provided under contracts with [the River Authority]. [KBR] shall comply with the site safety program and rules established by the construction contractors.

KBR's contract with the River Authority expressly stated that KBR was tasked with inspecting and reporting on the work of construction contractors, though it did not name any specific contractors. For example, KBR was obligated to "[m]onitor the Construction Contractor's conduct of any required quality control testing to assure, in [KBR's] professional opinion that required quality control testing is performed in accordance with the Contract Documents"; to "[c]oordinate and monitor compliance of Construction Contractor regarding required permits and relevant laws"; to "[p]rovide on-site observation of the progress and quality of work for the Construction Contract," including to "document and advise the Construction Contractor of any observed deviations from the contract documents in a timely manner so as to minimize delay in the progress of the work"; and to "[i]nspect, observe and document the Construction Contractor's activities to verify that the work complies with the contract documents." These provisions, however, did not obligate KBR to ensure the safety of the construction work, nor did it grant KBR a

right of control over the work of the construction contractors. Rather, the contract expressly disclaimed any such control by KBR:

> [KBR] shall not control or have charge of, and shall not be responsible for Construction Contractor construction means, methods, techniques, sequences, procedures of construction, health or safety programs or precautions connected with the work and shall not manage, supervise, control or have charge of construction.

B. The River Authority's Contract with SJ Louis

One of the construction contractors hired by the River Authority was SJ Louis, Gilberto's employer. The River Authority hired SJ Louis to build a tunnel approximately 35 feet under Lake Creek in Magnolia. KBR was not a party to the agreement between the River Authority and SJ Louis. The contract states that SJ Louis would be "solely responsible" for its means, methods, techniques, sequences, and procedures of construction.

SJ Louis's contract expressly references the "CMT Consultant"—a role filled by KBR—and provides that the consultant, also referred to at times as the "Owners Representative," is "responsible for the testing of construction materials engineering, and the verification testing services necessary for acceptance of the Work by the Owner[.]" SJ Louis's contract with the River Authority further states,

> Contractor [SJ Louis] shall give all notices and comply with all Legal Requirements applicable to furnishing and performing the Work, including arranging for and obtaining any required inspections, tests, approvals or certifications from any public body having jurisdiction over the Work or any part thereof. Except where otherwise expressly required by applicable laws and regulations, neither Owner, Owner's

> Representative, nor Principal Architect/Engineer shall be responsible for monitoring Contractor's compliance with any Legal Requirements.

SJ Louis's contract with the River Authority likewise provided that SJ Louis was responsible for safety precautions and programs associated with its work:

> Contractor [SJ Louis] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Prior to commencement of the Work, Contractor shall submit a site security plan for approval by Owner [the River Authority]. By reviewing the plan or making recommendations or comments, Owner will not assume liability nor will Contractor be relieved of liability for damage, injury or loss. . . .
>
> [SJ Louis] will provide a Safety Manager for this Project. . . .
>
> . . . .
>
> [The Safety Manager] will ensure compliance with all provisions of the Contract Documents, [Occupational Safety and Health Administration] (OSHA), other governmental agencies, industry safety requirements and standards. . . .

The contract between the River Authority and SJ Louis expressly disclaimed any control over SJ Louis's work by either the River Authority or KBR in its capacity as a consultant or the Owner's Representative:

> Owner and Owner's Representative will not supervise, direct, control or have authority over or be responsible for Contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto. Owner and Owner's Representative are not responsible for any failure of Contractor to comply with Legal Requirements applicable to furnishing or performing the Work. . . .
>
> . . . . Contractor acknowledges and agrees that Owner's or Owner's Representative's direction to perform Work in accordance with the

> approved Master Project Schedule is not a demand for acceleration or a dictation of Contractor's means or methods.

C. The Accident

At the time of his accident, Gilberto was operating the tunnel-boring machine on behalf of SJ Louis. The particular machine used was selected by SJ Louis and approved by the River Authority's engineers. As Gilberto was operating the tunnel-boring machine, a conveyor belt unexpectedly "jumped," striking Gilberto in the head and pinning him to the side wall. He was pronounced dead at the scene.

OSHA investigated the accident and found that the conveyor on the tunnel-boring machine was unstable. It determined that this was a "serious" violation of the applicable regulation, stating that "[t]he employer [did] not ensure that all conveyors in use [met] the applicable requirements for design, construction, inspection, testing, maintenance, and operation."

Leland Dupont, an inspector for KBR, stated that he was employed to oversee the work of contractors on tunnel projects and to monitor adherence to certain plans and specifications. Dupont was at the SJ Louis worksite daily, but he said KBR had no relationship to SJ Louis other than to inspect their work for compliance with the terms of SJ Louis's contract with the River Authority. He later testified by deposition that nobody from KBR told anyone from SJ Louis what to do, nor did KBR have the right to do so. He said that while he had concerns about the tunnel-boring machine that killed Gilberto, his concern was whether it was the most appropriate machine

for the groundwater conditions. He testified that there was no concern in his mind that an accident like Gilberto's might occur, and he considered it a "freak" accident. At the time of the accident, Dupont did not know where Gilberto was or what work he was engaged in. Dupont did not tell SJ Louis's employees how to operate their machinery.

David Bradley, KBR's project manager, stated in his deposition testimony that he would monitor contractors like SJ Louis to see that they complied with construction quality standards. He said SJ Louis had gotten approval from engineers employed by Espey Consultants (Espey), another contractor with the River Authority, to use the tunnel-boring machine. He also said Espey had no contract with KBR. Moreover, Bradley testified that he had no knowledge of anyone from KBR telling Gilberto or any other SJ Louis worker how to perform their work.

Mike Cook, SJ Louis's on-site tunneling superintendent, had no concerns about the safety of the tunnel-boring machine that Gilberto was operating at the time of his death. Cook confirmed that no one from KBR had any control of SJ Louis's activities at the worksite, and no one from KBR was in control of safety procedures for SJ Louis's work. He stated in his deposition testimony that SJ Louis had its own safety personnel on site and was responsible for its own safety. Prior to the accident, Cook, on behalf of SJ Louis, discussed the work with Gilberto and familiarized himself with Gilberto's qualifications to operate the machinery. He believed

Gilberto was qualified to operate the tunnel-boring machine safely, and he never anticipated that an accident like the one that killed Gilberto could ever occur.

D. The Procedural History

Gilberto's widow, Garcia, filed a wrongful-death suit against KBR, among others, alleging negligence, negligence per se, and gross negligence resulting in Gilberto's death. Garcia asserted that KBR breached its duty to Gilberto, in relevant part, by failing to provide adequate safety equipment, failing to warn of improper conditions, failing to comply with applicable safety standards, statutes, and regulations, failing to properly train and supervise its employees, providing negligent instructions and orders, and failing to maintain a safe premises. Garcia alleged that KBR's negligence actually and proximately caused Gilberto's death and lead to a loss of companionship and loss of consortium.

KBR moved for traditional and no-evidence summary judgment against Garcia, asserting that it "had no contractual relationship of any kind with [Gilberto] or his employer." KBR asserted that the River Authority "made the ultimate decision to hire S.J. Louis to construct the project" and that "the tunnel boring machine involved in the accident was specified in the contract documents based on bid submittals to [the River Authority] from S.J. Louis." KBR also asserted that although Garcia pled the case "as [a] general negligence case, there is no claim of any negligent activity by KBR." Rather, all of Garcia's claims arose out of the allegedly

dangerous condition of the tunnel-boring machine. KBR argued that it was entitled to judgment as a matter of law because it "was not the owner or occupier of the premises, did not control the premises, had no contractual or other special relationship with [Gilberto] Garcia or his employer, and owed no duty to warn Garcia or his employer about any dangerous condition of the premises." In its no-evidence motion for summary judgment, KBR asserted there was no evidence to support the elements of duty, breach, or proximate causation.

As summary-judgment evidence, KBR included, among other items: (1) the contract between the River Authority and KBR; (2) the contract between the River Authority and SJ Louis; and (3) the depositions of Leland Dupont (a KBR inspector), Mike Cook (SJ Louis's onsite tunneling superintendent), and David Bradley (KBR's project manager).

Garcia responded, arguing that KBR owed a general negligence duty "of reasonable care" and that it owed "duties to ensure his employer followed applicable laws concerning his work" and "to ensure his employer's compliance with various contractual provisions." Garcia cited evidence such as "KBR's extensive contractual duties," the OSHA report finding a "serious" violation of safety, and KBR's own "CM&I Safety Plan." Garcia further asserted that KBR's failure to fulfill its duties resulted in Gilberto's death.

The trial court granted KBR's traditional and no-evidence motions for summary judgment. Garcia subsequently reached an agreed judgment with the remaining defendants, and the trial court rendered final judgment. This appeal followed.

Summary Judgment

In six issues on appeal, Garcia asserts that the trial court erred in granting KBR's traditional and no-evidence motion for summary judgment. Resolution of these issues requires that we determine (1) whether KBR had a duty to Gilberto or his employer SJ Louis, and (2) if it did, whether it breached that duty by failing to maintain ordinary care in overseeing SJ Louis's (and by extension Gilberto's) work.

A. Standard of Review

We review a trial court's grant of summary judgment de novo. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018). A defendant moving for summary judgment must conclusively negate at least one essential element of the plaintiff's cause of action. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Lujan v. Navistar Fin. Corp.*, 433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet.). If the movant establishes its entitlement to summary judgment, the burden then shifts to the nonmovant to raise a genuine issue of material fact. *See Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (per curiam); *see also Amedisys, Inc. v. Kingwood*

Home Health Care, LLC, 437 S.W.3d 507, 511 (Tex. 2014) ("But if the movant does not satisfy its initial burden, the burden does not shift and the non-movant need not respond or present any evidence.").

A party may also, after adequate time for discovery, move for no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. *See id.*; *Mack Trucks, Inc v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must grant the motion unless the nonmovant presents more than a scintilla of evidence raising a fact issue on the challenged elements. TEX. R. CIV. P. 166a(i).

We review the evidence presented in the motion and response in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor, "but we cannot disregard 'conclusive evidence'—that evidence upon which 'reasonable people could not differ in their conclusions.'" *Helix Energy Sols. Grp., Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017).

B. Duty

Negligence actions in Texas require "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009) (quoting *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002)). Generally, "[l]iability is grounded in the public policy behind the law of negligence which dictates every person is responsible for injuries which are the reasonably foreseeable consequence of his act or omission," and "one person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control." *Id.* (quoting *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)). Similarly, "Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000); *Knife River Corp.-S. v. Hinojosa*, 438 S.W.3d 625, 631 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Special relationships include those existing between employer and employee, parent and child, and independent contractor and contractee under special circumstances. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *Gonzales v. O'Brien*, 305 S.W.3d 186, 189 n.2 (Tex. App.—San Antonio 2009, no pet.).

The existence of a duty is a question of law. *Escoto*, 288 S.W.3d at 404. As such, we review de novo a determination regarding whether a legal duty is owed.

See Black + Vernooy Architects v. Smith, 346 S.W.3d 877, 882–83 (Tex. App.—Austin 2011, pet. denied). In deciding whether to impose a duty, the court must balance 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. *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 710 (Tex. 2003); *Diaz v. R & A Consultants*, 579 S.W.3d 460, 466 (Tex. App.—El Paso 2019, pet. denied) (citing *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 289–90 (Tex. 1996)).

1. Contractual Control

Garcia argues that KBR was delegated and retained contractual control over site safety and was, thus, obligated to ensure SJ Louis's compliance with laws, regulations, and permitting requirements such that it owed a duty to Gilberto to ensure that SJ Louis's work was done in a safe manner. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002) (holding that party can prove right to control in two ways: (1) by evidence of contractual agreement that explicitly assigns right to control or (2) in absence of such contractual agreement, by evidence of actual exercise of control).

Garcia relies on a line of cases holding that when a contractor retains some control over how an independent contract performs its work, the general contractor must exercise that control in a reasonable manner. *See Lee Lewis Constr., Inc. v.*

Harrison, 70 S.W.3d 778, 783 (Tex. 2001); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). These cases are distinguishable from the instant case because no contractual relationship exists between KBR and Gilberto's employer, SJ Louis. KBR did not hire SJ Louis; rather, SJ Louis was an independent contractor of the River Authority's. Garcia argues, however, that KBR's contract with the River Authority created a duty owed by KBR to SJ Louis and its employees. We disagree with Garcia, and we conclude that KBR's contract with the River Authority does not provide for any such control by KBR over SJ Louis's work.

KBR's contract with the River Authority obligated it to perform construction management services and allowed it to inspect and report on the work of the River Authority's construction contractors like SJ Louis. KBR was authorized to engage in activities such as "Internal and external stakeholder coordination per [the River Authority's] direction"; "Inspection"; "Claims management and avoidance"; "Schedule management"; "Risk assessment and mitigation"; "Quality assurance"; "Safety management"; "Materials testing oversight"; and "Records management." KBR was tasked with "ensur[ing] all assigned GRP Program Projects are timely completed within prescribed budgets and quality standards" and with overall administration of documents related to the Project. KBR's contract with the River Authority permitted it to observe the construction process and report to and coordinate with the River Authority.

Control sufficient to create a duty of care requires "more than a general right to order the work to start or stop, to inspect progress or receive reports." *Redinger*, 689 S.W.2d at 418. Furthermore, "merely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to subject a premises owner to liability." *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). Rather, there must be such a retention of a right of supervision that the independent contractor is not entirely free to do the work in his own way. *Id.* None of the responsibilities delegated to KBR in its contract with the River Authority rises beyond the right to inspect and report or to make recommendations regarding the manner in which contractors, like SJ Louis, performed their work for the River Authority. Nothing in the contract gave KBR the right to change or influence a construction contractor's work. KBR, instead, had the ability to report to the River Authority.

KBR's contract with the River Authority expressly disclaimed any right to control the manner of the construction contractor's work:

> CONSULTANT [KBR] shall be responsible for [its] own activities at sites including the safety of its employees . . . but *shall not assume control of or responsibility for the site*. *Construction contractors of [the River Authority] shall have sole responsibility for providing materials, means, and methods of construction, for controlling their individual work areas and safety of said areas for all parties*, and for taking all appropriate steps to ensure the quality of their work and the safety of their employees and of the public in connection with their performance of work or services provided under contracts with [the River Authority].

[Emphasis added]. KBR's contract with the River Authority further stated:

> [KBR] shall not control or have charge of, and shall not be responsible for Construction Contractor construction means, methods, techniques, sequences, procedures of construction, health or safety programs or precautions connected with the work and shall not manage, supervise, control or have charge of construction.

And SJ Louis's own contract with the River Authority likewise demonstrates that KBR did not have control over the way in which SJ Louis conducted its work for the River Authority:

> Contractor [SJ Louis] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Prior to commencement of the Work, Contractor shall submit a site security plan for approval by Owner [the River Authority]. By reviewing the plan or making recommendations or comments, Owner will not assume liability nor will Contractor be relieved of liability for damage, injury or loss. . . .

As in KBR's contract with the River Authority, SJ Louis's contract indicates that KBR's role involved inspecting and reporting.

Garcia isolates several contract provisions in asserting that KBR maintained a contractual right of control over SJ Louis's work or that the contract was at least ambiguous regarding whether KBR maintained a right of control. One such provision was item 31 from the list of specific "Construction Management and Administration Services" provided for in KBR's contract with the River Authority, which states that one of KBR's duties was to "[c]oordinate and monitor compliance of Construction Contractor regarding required permits and relevant laws." Garcia

likewise points to contract provisions requiring KBR to maintain its own safety plan, to engage in "[r]isk assessment and mitigation," quality assurance and "[s]afety management," and to monitor and inspect the work of the River Authority's contractors. Garcia also points to contract documents, such as SJ Louis's contract with the River Authority, which refers to KBR as the "Owner' Representative," in arguing that "where a premises owner—here, the River Authority—contractually delegates responsibilities to a contractor like KBR, the contractor shares a duty of care with respect to the safety of the premises 'while they control the property.'"

As discussed above, however, none of these contractual provisions do more than vest KBR with a right or obligation to inspect and report findings to the River Authority, or, at most, order the work to start or stop generally. Nothing in KBR's contract delegates control of the property to KBR, and the contract expressly states that KBR "shall not manage, supervise, control or have charge of construction" at the worksite. Garcia does not identify any contract language that vested KBR with the authority or obligation to direct the manner in which SJ Louis completed its work for the River Authority. Nor does Garcia identify any contract provision obligating KBR to ensure the safety of the worksite generally.[2]

[2] Garcia asserts that "KBR's contract with the River Authority expressly states that KBR owed discrete duties of care to coordinate and monitor SJ Louis's compliance with applicable laws, including OSHA regulations." This argument, however, is not supported by the language of the contract. Garcia cites language from KBR's proposal to the River Authority regarding potential obligation to develop a site

Garcia's argument that KBR owed Gilberto a duty because the River Authority's contracting with SJ Louis was "expressly contemplated in the contract documents" is likewise unavailing. KBR's contract with the River Authority made general references to "construction contractors." SJ Louis's separate contract with the River Authority established that SJ Louis was one of the River Authority's construction contractors. But it does not follow that SJ Louis was intended to benefit from KBR's contract with the River Authority or that KBR's contract vested KBR with the duty to ensure that SJ Louis's work was done in a safe manner. We have already concluded that KBR's contractual responsibilities did not grant it control over SJ Louis's work such that it created a duty for KBR to exercise that control in a reasonable manner. *See Lee Lewis Constr.*, 70 S.W.3d at 783; *Redinger*, 689 S.W.2d at 418. SJ Louis's status as a party "expressly contemplated" in the contract documents does not alter the nature of the contractual duties discussed above. KBR's contractual duties did not extend to directing the construction contractors' work or ensuring that employees of the River Authority's construction contractors were working in safe conditions, as discussed above.[3]

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safety plan including OSHA reporting, but this language from the proposal was not included in the final contract between KBR and the River Authority. The contract required only that KBR maintain a safety plan for its own workers.

[3] In its brief, KBR construes this argument of Garcia's as an assertion that SJ Louis was a third-party beneficiary of the contract between KBR and the River Authority. Generally, "the benefits and burdens of a contract belong solely to the contracting parties, and 'no person can sue upon a contract except he be a party to or in privity

Garcia argues that, "to the extent that KBR proposes another plausible interpretation" of the relevant contract, the contract is ambiguous and summary judgment in favor of KBR was inappropriate. We disagree. Whether a contract is ambiguous is a question of law. *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 449–50 (Tex. 2011). In determining whether a contract provision is ambiguous, we examine the contract as a whole in light of the circumstances when the parties entered into it. *Id.* "If a written contract is so worded that it can be given a definite or certain legal meaning when so considered and as applied to the matter in dispute, then it is not ambiguous." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 765 (Tex. 2018).

Here, the "scope and extent of KBR's contractual duties" was clearly and unequivocally set out in the contract between KBR and the River Authority. In our analysis above, we give the contract a definite and certain legal meaning as applied to the matter in dispute—KBR's contract with the River Authority did not vest KBR

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with it.'" *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017) (quoting *House v. Houston Waterworks Co.*, 31 S.W. 179, 179 (Tex. 1895)). We note, however, that Garcia is not attempting to enforce the contract as a third-party beneficiary. *See id.* (person seeking to establish third-party-beneficiary status must demonstrate that contracting parties "intended to secure a benefit to that third party" and "entered into the contract directly for the third party's benefit"); *see also S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam) ("A third party may only enforce a contract when the contracting parties themselves intend to secure some benefit for the third party and entered into the contract directly for the third party's benefit."). Garcia is instead arguing that the contract created a duty of care that flowed to Gilberto—an argument that we reject above.

with sufficient control over SJ Louis's work such that it created a duty to manage SJ Louis's work in a safe manner. No ambiguity exists. A disagreement over the meaning of a contract provision does not, by itself, render the provision ambiguous. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). An unambiguous contract will be enforced as written. *Anglo-Dutch Petroleum*, 352 S.W.3d at 451.

We overrule Garcia's arguments on this ground.

2. Actual Control

Even without a contractual agreement explicitly assigning a right to control, a party can prove the right to control if it provides evidence of the actual exercise of control. *See Bright*, 89 S.W.3d at 605–06; *Chapa*, 11 S.W.3d at 155. However, Garcia presented no evidence sufficient to raise a fact issue regarding KBR's exercise of actual control over SJ Louis's work.

Garcia asserted that the tunnel-boring machine and its use at the worksite was unsafe, and she asserted that the defendants, including KBR, failed to adequately supervise the work at the site. Garcia asserted in her response to KBR's motion for summary judgment and in her brief on appeal that KBR was obligated to ensure SJ Louis's compliance with laws, regulations, and permitting requirements such that it owed a duty Gilberto to ensure that SJ Louis's work was done in a safe manner. However, Garcia presented no summary-judgment evidence that KBR or any of its

representatives designed the work performed by SJ Louis, determined the type of equipment to be used, or otherwise directed Gilberto's work for SJ Louis. The uncontroverted evidence indicated that the tunnel-boring machine that Gilberto was operating at the time of his death was selected by SJ Louis. The specifications for the particular machine were incorporated into the contract documents between SJ Louis and the River Authority, and the machine used was approved by the River Authority's engineers. Thus, there is no evidence sufficient to raise a fact question regarding whether KBR exercised any actual control over SJ Louis's or Gilberto's work such that it created a duty to exercise that control in a reasonable manner. *See Bright*, 89 S.W.3d at 605–06; *Chapa*, 11 S.W.3d at 155.

We overrule Garcia's arguments to the extent she asserts that KBR exerted any actual control over Gilberto's work.

3. Negligent-Undertaking or Other Common-law Duty

Garcia also argues that KBR owed Gilberto negligent-undertaking duties because "one who undertakes services for another's protection must do so with reasonable care." Garcia asserts, "[I]n undertaking to perform services pursuant to its contract with the River Authority, KBR owed an 'independent duty to take reasonable care not to injure' persons or property, including Garcia and SJ Louis."

To establish a "negligent undertaking," the plaintiff must show that (1) the defendant undertook to perform services that it knew or should have known were

necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and (3) either the plaintiff suffered harm because of her reliance on the defendant's performance or the defendant's failure to exercise such care increased the plaintiff's risk of harm. *Nall v. Plunkett*, 404 S.W.3d 552, 555–56 (Tex. 2013) (citing RESTATEMENT (SECOND) OF TORTS § 324A (providing rule for liability to third person for negligent performance of undertaking)). A negligent undertaking differs from simple negligence in that the duty allegedly breached derives from the services undertaken. *See Torrington Co.*, 46 S.W.3d at 838–39. The critical inquiry concerning the duty element in a negligent undertaking is whether the defendant acted in a way that requires the imposition of a duty where one otherwise would not exist. *Nall*, 404 S.W.3d at 555. Such a duty may arise if a person affirmatively undertakes to provide services to another upon which reliance can be based. *See, e.g.*, *Osuna v. S. Pac. R.R.*, 641 S.W.2d 229, 230 (Tex. 1982) ("Having undertaken to place a flashing light at the crossing for the purpose of warning travelers, the railroad was under a duty to keep the signal in good repair, even though the signal was not legally required."). But a duty is not created without some affirmative course of action. *See Fort Bend Cnty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 397 (Tex. 1991).

Here, there is no evidence that KBR affirmatively undertook to provide any services to SJ Louis or Gilberto. *See Nall*, 404 S.W.3d at 555; *Torrington Co.*, 46

S.W.3d at 838–39. Garcia's assertion that KBR was negligent in performing its duties of inspection and supervision on behalf of the River Authority are essentially assertions that KBR failed to act to keep Gilberto safe. But such failures to act do not create a negligent-undertaking duty. *See Sbrusch*, 818 S.W.2d at 397; *Hinojosa*, 438 S.W.3d at 634 (recognizing "duty to perform without negligence only the task that the actor has undertaken to accomplish").

Garcia also cites the general principle that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." Garcia asserts that KBR owed an "ordinary-negligence duty in the performance of its contracted work." As discussed above, however, KBR's contracted work was to provide construction management and coordination services to the River Authority, and the contract granted it the rights to inspect construction work and report to the River Authority the progress of that work and whether it complied with the terms of the various construction contracts. The terms of KBR's contract did not create an obligation for KBR to ensure the safety of construction contractors like SJ Louis and its employees, and KBR's alleged failure to perform under that contract would not impact the safety conditions under SJ Louis's control.

Furthermore, this is not a case in which KBR created the danger that harmed Garcia. As Garcia asserts, the Supreme Court of Texas has recognized "that a common law duty to perform with care and skill accompanies every contract," and it has held that "the failure to meet this implied standard might provide a basis for recovery in tort, contract, or both under appropriate circumstances." *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014) (citing *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947)). However, in both *Chapman Custom Homes* and *Scharrenbeck*, workman performed work poorly, resulting in property damage, and, thus, these cases are factually distinguishable.

In *Scharrenbeck*, the defendant contracted to repair a heater in the plaintiff's home and performed his work so poorly that the house burned down. 204 S.W.2d at 509. A jury found that the plaintiff's loss was proximately caused by the defendant's negligence, but on appeal, the defendant argued that it had not breached any duty to the plaintiff. *Id.* at 510–11. The supreme court held, however, that a "duty arose by implication" and that "[h]aving undertaken as an expert and for a consideration to repair and adjust the heater, [the defendant repairman] owed [the plaintiff homeowners] the duty, as a matter of course, not negligently to burn their house in the undertaking." *Id.* at 510–11; *cf. LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 242–43 n. 35 (Tex. 2014) (stating that *Scharrenbeck*, which involved

suit by contracting party, has been limited by subsequent cases, such as *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986), holding that "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone").

Likewise, in *Chapman Custom Homes*, the supreme court held, "Having undertaken to install a plumbing system in the house, the plumber assumed an implied duty not to flood or otherwise damage the trust's house while performing its contract with the builder." 445 S.W.3d at 718. And the court made this holding in the context of determining that the economic loss rule, which "generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy," did not apply to bar recovery in that case. *Id.* The supreme court held, "The plumber's duty not to flood or otherwise damage the house is independent of any obligation undertaken in its plumbing subcontract with the builder, and the damages allegedly caused by the breach of that duty extend beyond the economic loss of any anticipated benefit under the plumbing contract." *Id.* at 718–19.

Neither *Scharrenbeck* nor *Chapman Custom Homes* involves a situation like the one here. This case is a wrongful death suit and does not implicate the economic loss principals or the interactions between contract and tort law implicated in *Scharrenbeck* or *Chapman Custom Homes*. Furthermore, unlike the defendants in

Scharrenbeck and *Chapman Custom Homes*, KBR's actions in performing under its contract with the River Authority did not create the condition that harmed Gilberto. As we discussed above, Garcia presented no summary judgment evidence that KBR or any of its representatives designed the work performed by SJ Louis, determined the type of equipment to be used, or otherwise directed Gilberto's work for SJ Louis.

General common law does not recognize a duty for KBR to direct how the River Authority's contractor, SJ Louis, managed Gilberto's work. *See Nabors Drilling*, 288 S.W.3d at 404 ("[O]ne person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control."); *Torrington Co.*, 46 S.W.3d at 837 ("Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances."); *see also Lee Lewis Constr.*, 70 S.W.3d at 783 ("Ordinarily, a general contractor does not owe a duty to ensure that an independent contractor performs its work in a safe manner."). We have already concluded that no special relationship existed between KBR and Gilberto—KBR was not Gilberto's employer, and KBR did not fill the role of a general contractor employing SJ Louis as an independent subcontractor. We have also concluded that no contract imposed a right or duty on KBR to control SJ Louis's or Gilberto's behavior.

And weighing the risk, foreseeability, and likelihood of injury against the social utility of KBR's conduct, the magnitude of the burden of guarding against the

injury, and the consequences of placing the burden on KBR to manage the work of other contractors over whom it had no authority, we decline to create a duty here. *See Solomon*, 106 S.W.3d at 710; *Black + Vernooy Architects*, 346 S.W.3d at 881 (declining to recognize novel common-law duty flowing from architect to houseguest of architect's customer, and observing that "creation of a new common-law duty is a task better suited for the supreme court, not intermediate appellate courts"). Any liability of KBR's must be "grounded in the public policy behind the law of negligence which dictates every person is responsible for injuries which are the reasonably foreseeable consequence of his act or omission." *See Nabors Drilling*, 288 S.W.3d at 404. We may also consider whether one party has superior knowledge of the risk and whether one party has a right to control the actor who caused the harm. *Black + Vernooy Architects*, 346 S.W.3d at 886 (citing *Graff v. Beard,* 858 S.W.2d 918, 920 (Tex.1993)).

KBR's contractual relationship with the River Authority precluded KBR from controlling the manner and means of Gilberto's work. That control was instead vested in Gilberto's employer, SJ Louis. It would be unreasonably burdensome to entities in KBR's position, and would undermine the parties' contractually-agreed roles and risk allocation, to recognize the duty that Garcia asserts here. *See id.* (holding that architect's lack of control over subsequent use of property weighed against imposing common-law duty); *see also Lee Lewis Constr.*, 70 S.W.3d at 783

(holding that one's duty of care with respect to another party's work "is commensurate with" control he retains over that work); *Graff*, 858 S.W.2d at 920 ("[I]n the absence of a relationship between the parties giving rise to the right of control, one person is under no legal duty to control the conduct of another, even if there exists the practical ability to do so.").

Accordingly, we conclude that no common-law duty existed between KBR and Gilberto, and we overrule Garcia's arguments on this ground.

We conclude, as a matter of law, that KBR did not owe a duty to Gilberto to ensure that his work was conducted in a safe manner. *See Nabors Drilling*, 288 S.W.3d at 404. Accordingly, we hold that the trial court correctly granted summary judgment in favor of KBR. *See Black + Vernooy Architecture*, 346 S.W.3d at 882 ("If the defendant has no duty, then he cannot be held liable for negligence."). We need not address Garcia's remaining issues regarding evidence of KBR's alleged breach of its duties.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.