Opinion issued August 24, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00340-CV

ZACHARY J. WILLIAMS, Appellant

V.

MAX B. MUTIA, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Case No. 15-DCV-227230

MEMORANDUM OPINION

Appellant Zachary J. Williams challenges a no-evidence summary judgment rendered in favor of appellee Max B. Mutia in this personal-injury suit arising from an auto-pedestrian collision. In two issues, Williams contends (1) genuine issues of material fact precluded the summary judgment, and (2) his inability to give an oral

deposition for medical reasons should not weigh against him because Mutia had no Sixth Amendment right of confrontation in this civil case. Because a genuine issue of material fact exists on Williams's negligence claim, we remand that claim for trial; however, we affirm the remainder of the summary judgment.

Background

In October 2015, Williams filed his original petition, seeking to recover for personal injuries he sustained when he was hit by a vehicle making a right turn from an H-E-B grocery store parking lot onto a roadway. Williams alleged that he had the right-of-way as a pedestrian on a "sidewalk that turned into a crosswalk" at the parking lot exit. But the vehicle's driver, Mutia, failed to keep a proper lookout, to yield the right-of-way, to timely brake, and to control his speed. Williams sued Mutia for negligence, negligence per se, and gross negligence.

Mutia answered the suit and generally denied Williams's claims. Three months later, in February 2016, Mutia filed his first motion for a no-evidence summary judgment ("first no-evidence motion"), asserting that Williams had no evidence of two essential elements of negligence—causation and damages—after an adequate time for discovery. Williams responded to Mutia's first no-evidence motion and attached as evidence (1) the Texas Peace Officer's Crash Report prepared in connection with the collision and (2) his own affidavit stating that he sustained physical and economic injuries because of the collision.

The appellate record does not indicate whether Mutia set his first no-evidence motion for a hearing or obtained the trial court's ruling before he moved for a second no-evidence summary judgment in October 2017 ("second no-evidence motion"). Mutia's second no-evidence motion challenged different elements of negligence: duty and breach.

Before he responded to Mutia's second no-evidence motion, Williams twice amended his petition. In his first amended petition, Williams alleged additional ways in which Mutia failed to exercise the "ordinary [care] that a reasonable and prudent driver would have exercised under the same or similar circumstances." In his second amended petition, Williams pleaded the statutory basis for his negligence per se claim—the requirement in Transportation Code Section 552.003 that drivers yield the right-of-way to a pedestrian crossing a roadway in a crosswalk.

On the day he filed his second amended petition, Williams also filed a response to Mutia's second no-evidence motion. As evidence of negligence, Williams again offered the crash report, along with his first amended petition and Mutia's deposition transcript. Williams argued that these exhibits demonstrated Mutia's breaches of his common-law duty to use ordinary care in operating a motor vehicle and duty under the Texas Transportation Code to timely brake, to keep a proper lookout, to control his speed, to yield the right-of-way to a pedestrian, to stop

before entering a crosswalk, to turn his vehicle to avoid a collision, and to keep a safe distance.

In his deposition, Mutia testified that the collision occurred during the day when it was "bright" and "sunny" at the H-E-B grocery store he visits once or twice a week. He described the events immediately before the collision:

> I was coming out from H-E-B, me and my wife. That was in the afternoon. We went to the entrance and turned right. We stopped. It was pretty busy. Turn and look. Nobody's there. And I turned right. And this kid just hit my right front fender on the [passenger] side, the side front fender.

Although he believed Williams may have been running at the time of the collision, Mutia acknowledged that he did not see Williams before hitting him. When asked whether he braked or did anything to avoid hitting Williams, Mutia answered: "I did. But like I said, he ran right into my car." Mutia estimated that his speed in the turn was five or ten miles per hour, and he described the impact of the collision as "pretty light." After the impact, Mutia got out of the vehicle to check on Williams. Williams initially said he was "okay," but later complained of hip pain.

Mutia agreed that, as a licensed driver, he generally followed the rules of the road. He also agreed there was a stop sign and a crosswalk at the "entrance or exit of the H-E-B." In addition, even though there were trees near the area where the collision occurred, Mutia told his insurer in a statement recorded after the collision that there were "no obstructions."

Mutia spoke with an investigating officer after the collision. Williams did not. The crash report prepared by the investigating officer identified Mutia as the driver and Williams as the pedestrian. The investigator's narrative stated:

> [Mutia's vehicle] stopped at the exit of 4724 Highway 6 which connects to Austin Parkway. Driver 1 [Mutia] looked both ways and proceeded to turn right onto Austin Parkway. While [Mutia's vehicle] was turning a pedestrian [Williams] jogged into the path of the vehicle and was struck. [Williams] was transported to Sugar Land Methodist. [Mutia] and [his wife] stated [Williams] attempted to run around the vehicle by running in front of it as they were turning.

A diagram consistent with the investigator's narrative was attached to the report. Mutia agreed the diagram was a "fair and accurate depiction of the accident." The investigating officer did not issue Mutia a citation and did not attribute fault to either Mutia or Williams in the crash report.

After considering the evidence, the trial court granted summary judgment in Mutia's favor, ordering that Williams "take nothing against" Mutia and denying "[a]ll other such relief."

Williams moved for reconsideration on two grounds. He argued, first, that genuine issues of material fact existed and, second, that the summary dismissal of his claims deprived him of due process under the federal and state constitutions and the reasonable accommodations mandated by federal and state statutes such as the Americans with Disabilities Act and the Texas Persons with an Intellectual

Disability Act.[1] On this second point, Williams asserted he was unable to sit for an oral deposition because of “multiple intellectual and health disabilities” and should have been permitted to give a deposition upon written questions. In support of this assertion, Williams attached to his motion for reconsideration a letter from a medical doctor stating Williams’s diagnoses of “mild retardation,” “attention deficit/hyperactivity disorder,” and “cardiac problems.” The letter advised against Williams’s participation in a deposition on the doctor’s assertion that “stressful situations” aggravate these conditions. The trial court denied the motion for reconsideration.

Summary Judgment

In his first issue, Williams argues that the trial court erred in granting summary judgment because he raised a genuine issue of material fact on Mutia’s negligence. Construing Williams’s appellate brief liberally, as we must, we understand his first issue to concern the trial court’s summary judgment on both his negligence and negligence per se theories.[2] *See* TEX. R. APP. P. 38.9 (briefing rules to be construed liberally); *see also Thomas v. Uzoka*, 290 S.W.3d 437, 445 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (recognizing that “[n]egligence per se is not a separate

---

[1] *See* U.S. CONST. amend. XIV, § 1 (federal guarantee of due process); TEX. CONST. art. I, § 19 (state guarantee of due course of law); *see also* 42 U.S.C. §§ 12101–213 (Americans with Disabilities Act); TEX. HEALTH & SAFETY CODE §§ 591.001–597.055 (Persons with an Intellectual Disability Act).

[2] Williams has not challenged the summary judgment on gross negligence.

cause of action that exists independently of a common-law negligence cause of action. Rather, negligence per se is merely one method of proving a breach of duty, a requisite element of any negligence cause of action.”). Mutia has not filed a brief on appeal.

A. Standard of Review

After adequate time for discovery, a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). A no-evidence summary judgment is essentially a pretrial directed verdict, to which we apply the same legal sufficiency standard of review. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003); *Valero Mktg. & Supply Co. v. Kalama Int’l, LLC*, 51 S.W.3d 345, 350 (Tex. App.—Houston [1st Dist.] 2001, no pet.). To defeat a no-evidence motion for summary judgment, the nonmovant must produce evidence raising a genuine issue of material fact as to each of the challenged elements of his claim. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A genuine issue of material fact exists if the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Evidence that is “so weak as to do no more than create a mere surmise or suspicion” does not create a genuine issue of material fact. *Kia Motors*

Corp. v. Ruiz, 432 S.W.3d 865, 875 (Tex. 2014). In our review, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *See King Ranch*, 118 S.W.3d at 751.

B. Williams's Burden

Before we can determine whether the trial court erred in granting summary judgment in this case, we must determine Williams's burden in opposing the summary judgment. This, in turn, requires us to determine which of Mutia's summary-judgment motions the trial court granted.

As mentioned, Mutia moved twice for a no-evidence summary judgment, challenging different "essential elements of negligence" in each motion. The motions share the same title—"Defendant's Motion for Summary Judgment"—without any designation of their first- or second-filed status. But the record contains only one summary-judgment order. The order grants "Defendant's Motion for Summary Judgment," without specifying which of the identically titled motions was granted or stating the ground for the trial court's ruling. Because the reference to the motion granted is singular, we conclude the order grants only one of the summary-judgment motions. A file-stamp indicates the order signed by the trial court was filed by Mutia as a proposed order on October 24, 2017, the same day he filed the second no-evidence motion. This, and the closer proximity in time between Mutia's filing of the second no-evidence motion and the trial court's

summary-judgment ruling, leads us to conclude that the trial court granted Mutia's second no-evidence motion. *Cf. Retzlaff v. Tex. Dep't of Criminal Justice*, 135 S.W.3d 731, 737–38 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (original motion for summary judgment rendered a nullity by amended motion for summary judgment); *State v. Seventeen Thousand and No/Dollars U.S. Currency*, 809 S.W.2d 637, 639 (Tex. App.—Corpus Christi-Edinburg 1991, no writ) (trial court could no longer consider party's first motion for summary judgment after party filed second motion asserting different grounds for relief on same claim; second motion "supercede[d] and supplant[ed]" first motion).

Mutia's second no-evidence motion challenged two essential elements of negligence—the existence of a legal duty and a breach of that duty. *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005) (negligence requires showing of (1) legal duty owed by one person to another, (2) breach of that duty, and (3) damages proximately caused by that breach). Thus, if Williams failed to produce a scintilla of evidence as to either of these elements, the summary judgment in Mutia's favor was proper. *See* TEX. R. CIV. P. 166a(i).

C. Duty of Ordinary Care and Breach

The summary-judgment evidence shows Mutia was the driver of the vehicle that hit Williams. As a driver, Mutia owed "a general duty to exercise the ordinary care a reasonably prudent person would exercise under the same circumstances to

avoid a foreseeable risk of harm to others." *Segura-Romero v. Castineira*, No. 01-19-00147-CV, 2020 WL 2988371, at *4 (Tex. App.—Houston [1st Dist.] June 4, 2020, no pet.) (mem. op.). This included the general duty to keep a proper lookout. *Kahng v. Verity*, No. 01-07-00695-CV, 2008 WL 2930195, at *4 (Tex. App.—Houston [1st Dist.] July 31, 2008, no pet.) (mem. op.); *Montes v. Pendergrass*, 61 S.W.3d 505, 509 (Tex. App.—San Antonio 2001, no pet.). A proper lookout requires a person "to see what a person in the exercise of ordinary care and caution for the safety of herself and others would have seen under like circumstances," taking steps "to guard against accidents as necessary." *Montes*, 61 S.W.3d at 509 (internal quotation omitted). "The duty to keep a proper lookout encompasses the duty to observe, in a careful and intelligent manner, traffic and the general situation in the vicinity[.]" *Carney v. Roberts Inv. Co.*, 837 S.W.2d 206, 210 (Tex. App.—Tyler 1992, writ denied). Although a driver is not required to anticipate negligent or unlawful conduct by others, a driver may not close their eyes "to that which [is] plainly visible and which would have been observed by a person of ordinary prudence similarly situated." *Montes*, 61 S.W.3d at 509 (internal quotation omitted).

In determining whether Williams raised a genuine issue of material fact on Mutia's breach of this legal duty, a comparison of two cases from our sister courts is instructive. *See Vicknair v. Peters*, No. 12-13-00034-CV, 2014 WL 357082, at *3–4 (Tex. App.—Tyler Jan. 31, 2014, no pet.) (mem. op.) (affirming summary

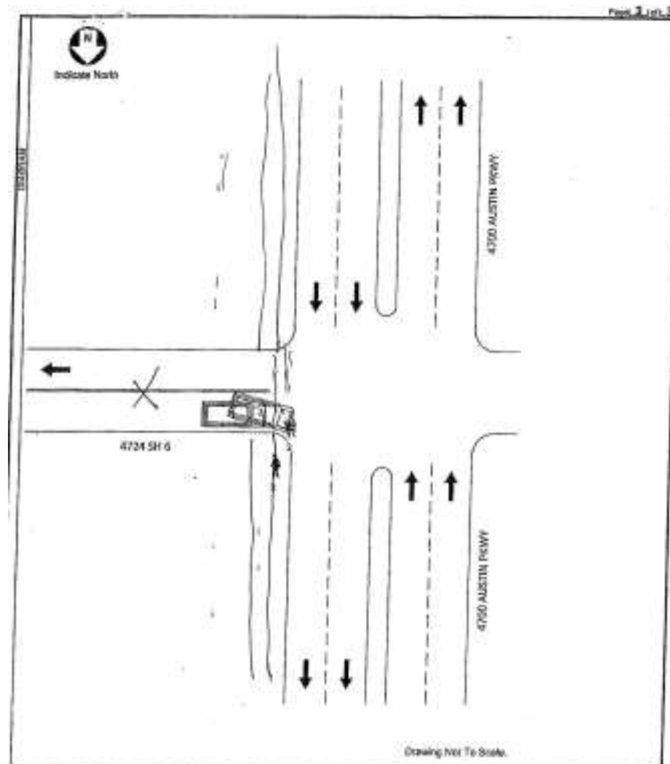
judgment when no fact issue existed on breach of duty to keep proper lookout); *Montes*, 61 S.W.3d at 509 (reversing summary judgment when fact issue existed on breach of duty to keep proper lookout). The first case—*Vicknair*—also arises from an auto-pedestrian accident. *See* 2014 WL 357082, at * 1. There, the decedent was driving on a highway when she collided with a median wall. *Id.* The decedent's vehicle came to rest in a position that blocked the highway's interior lane. *Id.* The disabled vehicle was obscured because the collision occurred in the darkness of the early morning hours on an unlit portion of the highway. *Id.* While the decedent was outside her vehicle retrieving personal belongings from the trunk, she was hit by another car traveling on the highway. *Id.* The driver testified that "nothing obstructed his view of the roadway at the time the collision occurred, his headlights were turned on and functioning, and he could see the roadway in front of him." *Id.* at *4. But he did not see the decedent or her vehicle until it was too late to avoid a collision. *Id.* at *1. In affirming a no-evidence summary judgment for the driver, the court of appeals concluded the driver's testimony was no evidence of a breach of the duty to keep a proper lookout because "[t]his is not a case where the evidence shows that [the driver] could have seen [the decedent] and her vehicle if he was paying attention, but failed to do so. Instead, the evidence shows that [the driver] could not see [the decedent's] vehicle until it was too late." *Id.* at *4.

In contrast, the *Montes* court reversed a summary judgment after concluding that a fact issue existed on whether the defendant failed to keep a proper lookout. *See* 61 S.W.3d at 509. There, the decedent and the defendant were driving in the same direction on a highway when construction in the area required the outside lane, where the decedent was traveling, to merge into the inside lane, where the defendant was traveling. *Id.* at 508. When the decedent attempted to pass the defendant and move into the inside lane of traffic, their two vehicles collided. *Id.* The defendant testified he saw the "arrow" alerting traffic about the merge, he could see vehicles on his left-hand side if he was "looking for them or [wanted] to look for them," and he did not see the decedent's car until it hit him. *Id.* at 509. The court of appeals held this testimony supported a reasonable inference "that a person in the exercise of ordinary care and caution for the safety of himself and others would have seen [the decedent] attempting to pass [the defendant] as they approached the construction area and that [the defendant] breached this duty by not looking for a vehicle to his left, which he knew would have to merge into the right-hand lane." *Id.* Thus, the summary judgment in the defendant's favor was erroneous. *Id.* at 509, 511.

Here, Williams relies on Mutia's deposition testimony and the crash report diagram as raising a genuine issue of material fact on Mutia's breach of a legal duty. Viewing this evidence in the light most favorable to Williams, we conclude this case is analogous to *Montes* in that the evidence supports a reasonable inference that a

person exercising ordinary care and caution for his own and others' safety would have seen Williams approaching the crosswalk at the parking lot exit. This was not Mutia's first time at the H-E-B grocery store. He agreed it was the H-E-B "[he] always goes to" and estimated he shopped there once or twice a week. He knew of the stop sign and crosswalk at the parking lot exit where the collision occurred, and he testified he stopped there and looked before beginning his turn. But Mutia did not see Williams before Williams ran into his vehicle.

Mutia agreed the diagram attached to the crash report, reproduced below, was "pretty much" a fair and accurate depiction of the collision:



The diagram does not purport to be to scale, but it shows Williams near the crosswalk before the collision and the collision occurring either in or just outside of the

crosswalk. Neither the diagram nor Mutia's testimony indicated any obstruction that would have prevented Williams from seeing Mutia before the collision. Unlike in *Vicknair*, where the collision occurred in the dark on an unlit highway, this collision occurred when it was "bright" and "sunny." And Mutia told his insurer there were no obstructions of his view.

The total weight of this evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions as to whether Mutia, if he had been paying attention, could have seen Williams, and thus a genuine issue of material fact exists as to Mutia's breach of his duty to keep a proper lookout. *See Montes*, 61 S.W.3d at 509. Although there is some evidence that Mutia exercised care and caution by stopping and looking before beginning his turn and that Williams jogged into the path of Mutia's vehicle, the issue is for a jury to decide. We simply hold, given our standard of review, that the evidence raised a genuine issue of material fact sufficient to defeat summary judgment on the challenged duty and breach elements of negligence. *See King Ranch*, 118 S.W.3d at 751.

We therefore sustain Williams's first issue as it relates to his negligence claim against Mutia.

D. No Duty/Breach Based on Statute

By pleading a negligence per se claim, Williams asserted that Mutia owed him a duty of care imposed by statute. *See Carter v. William Sommerville & Son,*

Inc., 584 S.W.2d 274, 278 (Tex. 1979) ("Negligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person."). In the second no-evidence motion, Mutia argued there was no evidence of a duty or breach of a legal duty. This was sufficient to challenge Williams's negligence per se claim. *See* TEX. R. CIV. P. 166a(i); *see also AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 298 (Tex. 2020) (summary-judgment motion asserting there was no evidence defendant "had any duty" or "breached any legal duty" to plaintiff was sufficient to challenge negligence per se claim). Thus, to the extent Williams wished to pursue a negligence per se claim based on a duty imposed by statute, he bore the burden to respond to Mutia's motion with summary-judgment evidence raising a genuine issue of material fact on the existence and breach of such a duty. *See* TEX. R. CIV. P. 166a(i).

"Negligence per se is a common-law doctrine in which a duty is imposed based on a standard of conduct created by a penal statute rather than on the reasonably prudent person test used in pure negligence claims." *Smith v. Merritt*, 940 S.W.2d 602, 607 (Tex. 1997). But "not every penal statute creates an appropriate standard of care for civil liability purposes[.]" *Id.* "Where a statute incorporates the ordinarily prudent person standard, negligence per se does not apply because the statute does not establish a specific standard of conduct different from the common-law standard of ordinary care." *Supreme Beef Packers, Inc. v. Maddox*, 67

S.W.3d 453, 456 (Tex. App.—Texarkana 2002, pet. denied); *see Waring v. Wommack*, 945 S.W.2d 889, 891 (Tex. App.—Austin 1997, no writ) (holding violation of TEX. TRANSP. CODE § 545.152 for failing to yield to oncoming traffic is not negligence per se because it "comes within the class of statutes in which the common-law standard of the reasonably prudent man must be used.").

In his summary-judgment response, Williams argued generally that Mutia breached duties established in the Transportation Code. On appeal, Williams identifies the specific provisions of the Transportation Code that he contends require reversal of the trial court's summary judgment, though he has cited no case imposing a negligence duty based on these, or any similar or analogous, statutory provisions. *See* TEX. TRANSP. CODE §§ 545.256, 545.401, 547.004, 552.003, 552.006, 552.008. We conclude the statutory provisions cited by Williams do not support a claim for negligence per se in this case.

The summary-judgment evidence fails to implicate more than one of the provisions. For example, Mutia identifies the requirement in Section 545.256(a) that a driver "emerging from an alley, driveway, or building in a business or residence district shall . . . stop the vehicle before moving on a sidewalk or the sidewalk area extending across an alley or driveway[.]" *Id.* § 545.256(1). Even analogizing that provision to cases holding that a motorist who fails to stop at a stop sign may be negligent per se, *see Sheppard v. Judkins*, 476 S.W.2d 102, 109–10 (Tex. App.—

Texarkana 1971, writ ref'd n.r.e.), Mutia testified that he stopped his vehicle at the stop sign. No evidence contradicted his testimony. Thus, to the extent the requirement to stop in Section 545.256(1) states a standard of care for negligence per se, there is no evidence that Mutia breached it.

Likewise, there is no evidence of a breach of any standard of care stated in Section 547.004, which provides that "[a] person commits an offense . . . if the person operates or moves . . . a vehicle that: (1) is unsafe so as to endanger a person; (2) is not equipped in a manner that complies with the vehicle equipment standards and requirements established by this chapter; or (3) is equipped in a manner prohibited by this chapter." TEX. TRANSP. CODE § 547.004(a). Because Williams presented no summary-judgment evidence of the condition of Mutia's vehicle, no fact issue exists.

Other statutory provisions cited by Williams do not state a standard of care for negligence per se. More than one states a statutory right-of-way rule. *See* TEX. TRANSP. CODE §§ 545.256(a)(2) (driver "emerging from an alley, driveway, or building in a business or residence district shall: . . . (2) yield the right-of-way to a pedestrian to avoid collision"); 552.003(a) (driver "shall yield the right-of-way to a pedestrian crossing a roadway in a crosswalk"); 552.006(c) (driver "emerging from or entering an alley, building, or private road or driveway shall yield the right-of-way

to a pedestrian approaching on a sidewalk extending across the alley, building entrance or exit, road, or driveway"). Such statutes:

> come within the class of statutes in which the common-law standard of the reasonably prudent [person] must be used in determining as a matter of fact, not as a matter of law, whether the conduct of a motorist is negligent. The duties imposed by these particular statutes are not absolute, they are conditional.

Booker v. Baker, 306 S.W.2d 767, 773–74 (Tex. App.—Dallas 1957, writ ref'd n.r.e.); *see also Babiy v. Kelley*, No. 05-17-01122-CV, 2019 WL 1198392, at *4 (Tex. App.—Dallas Mar. 14, 2019, no pet.) (mem. op.) (noting TEX. TRANSP. CODE § 541.401(8)'s definition of "right-of-way" is conditioned on a determination that "another vehicle or pedestrian" is approaching "from a direction, at a speed, and within a proximity that could cause a collision unless one grants precedence to the other," and thus duty to yield right-of-way is not absolute). They thus do not create an appropriate standard of care for negligence per se. *See Booker*, 306 S.W.2d at 773–74; *see also Babiy*, 2019 WL 1198392, at *3–5 (construing TEX. TRANSP. CODE § 552.002's right-of-way rule as incorporating reasonably-prudent-driver standard); *Canales v. Womack*, No. 01-07-00222-CV, 2008 WL 2388132, at *2 (Tex. App.—Houston [1st Dist.] June 12, 2008, no pet.) (mem. op.) (construing TEX. TRANSP. CODE § 545.256's right-of-way rule as incorporating reasonably-prudent-driver standard); *Cty. of Dallas v. Poston*, 104 S.W.3d 719, 722–23 (Tex. App.—Dallas 2003, no pet.) (construing TEX. TRANSP. CODE § 545.155's right-of-way rule as

requiring inquiry into "whether a reasonably prudent driver under the same or similar circumstances would have yielded the right-of-way," not as imposing absolute duty).

Sections 545.401 and 552.008—the remaining two provisions relied on by Williams—also do not create an appropriate standard of care for negligence per se. *See* TEX. TRANSP. CODE §§ 545.401, 552.008. Section 545.401(a) provides that "[a] person commits an offense if the person drives a vehicle in willful or wanton disregard for the safety of persons or property." *Id.* § 545.401(a). The statute thus "states an offense occurs when there is willful or wanton disregard but it does not impose a special standard of care, and thus may not support negligence per se." *Fret v. Melton Truck Lines, Inc.*, No. SA-15-CV-00710-OLG, 2016 WL 10590158, at *3 (W.D. Tex. Nov. 29, 2016) (citing *Freudiger v. Keller*, 104 S.W.3d 294, 297 (Tex. App.—Texarkana 2003, pet. denied)), *rev'd in part on other grounds*, 706 F. App'x 824 (5th Cir. 2017). Section 552.008 provides only that "the operator of a vehicle shall . . . exercise due care to avoid colliding with a pedestrian on a roadway." TEX. TRANSP. CODE § 552.008(1); *see Supreme Beef Packers*, 67 S.W.3d at 456 (negligence per se does not apply where statute incorporates ordinary care standard).

We therefore overrule Williams's first issue as it relates to his negligence per se claim against Mutia.

Right of Confrontation

In his second issue, Williams asks: "Does a defendant have the same right to face their accuser in a civil trial as in a criminal trial [under the Sixth Amendment to the United States Constitution,] even in the face of medical excuse for the plaintiff and the accused having had the opportunity to submit deposition on written questions to aid in their discovery?" *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). We will not consider the application or scope of the Sixth Amendment in this case because Williams did not raise the issue in the trial court, as required by the rules for preserving error.

To preserve a complaint for appellate review, a party must present to the trial court a timely and specific request, objection, or motion, and obtain a ruling from the trial court. *See* TEX. R. APP. P. 33.1(a). Otherwise, error is not preserved. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991). These error-preservation rules apply to constitutional challenges. *See Texas Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (failure to assert constitutional claim in trial court bars appellate review of claim); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (refusing to consider party's constitutional arguments because, "[a]s a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal").

The appellate record does not show that Williams made any request, objection, or motion seeking the trial court's ruling that he was not subject to oral deposition because Mutia had no Sixth Amendment right of confrontation. There are no discovery motions regarding the Sixth Amendment and depositions contained in the appellate record. The issue was not raised in Mutia's summary-judgment motion or Williams's summary-judgment response. Although Williams argued in his motion for reconsideration that the lack of reasonable accommodation for his intellectual and physical disabilities violated other constitutional and statutory provisions—specifically, the federal and state guarantees of due process of law and certain statutory protections for persons with qualifying disabilities—these were different complaints not implicating the Sixth Amendment.[3] *See* TEX. R. APP. P. 33.1(a); *see also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (complaint raised on appeal must match complaint presented to trial court). Because any question about the scope of the Sixth Amendment's right of confrontation is raised for the first time on appeal, it is not preserved for our review. *See* TEX. R. APP. P. 33.1(a); *see also Sherry*, 46 S.W.3d at 861; *Dreyer*, 871 at 698.

We therefore overrule Williams's second issue.

[3] Williams has not raised these due-process or statute-based arguments on appeal.

Conclusion

Because a genuine issue of material fact exists as to whether Mutia breached a duty to exercise ordinary care, we reverse the summary judgment on Williams's negligence claim against Mutia and remand only that claim for trial. We otherwise affirm the trial court's summary judgment.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Guerra, and Farris.