In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00256-CV

SOUTHLAKE PLASTIC SURGERY, P.A., Appellant

V.

ALLERGAN, INC., Appellee

On Appeal from the 348th District Court
Tarrant County, Texas
Trial Court No. 348-308838-19

Before Sudderth, C.J.; Birdwell and Womack, JJ.
Memorandum Opinion by Justice Womack

MEMORANDUM OPINION

I. INTRODUCTION

This appeal arises out of a dispute involving Appellant Southlake Plastic Surgery, P.A., nurse practitioner Brenda Ray, and Appellee Allergan, Inc. over the profits earned from cosmetic procedures Ray performed on Southlake's patients. In one issue, Southlake challenges the trial court's granting of Allergan's traditional motion for summary judgment on the basis that Allergan had no duty to protect Southlake from the alleged criminal acts of Ray. Because the trial court did not err by granting summary judgment, we affirm.

II. BACKGROUND

Southlake is a Texas professional association founded by Dr. Mark Mason,[1] a licensed medical professional. In addition to being a nurse practitioner, Ray is a "nurse injector." In May 2002, Ray entered into a two-page contract with Mason. The contract provided that Ray "can perform Botox[2] administration, sclerotherapy, collagen, microdermabrasion[,] and promote and sell Obagi under general supervision

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[1]To avoid confusion, we will refer to Mark Mason as Mason and Sarah Mason, his wife and Southlake's practice manager, as Sarah.

[2]In its motion for summary judgment, Allergan noted that it "corrected the names of the products alleged to their true name." In addition, Allergan identified certain names and products with a trademark symbol. However, the summary judgment evidence did not "correct" the names or use trademark symbols. Therefore, consistent with the evidence, we have neither changed the names of the products nor used trademark symbols in this opinion.

in [Mason's] main office set[]ting[.]" Payment for all treatments and procedures was to be "made through [Ray,]" and profits were to be split "50/50" between Mason and Ray. Ray worked as an independent contractor at Southlake from May 2002 to December 2016. Ray was not an employee of Allergan at any time from 2002 to 2018.

According to Southlake, "Ray was responsible for buying product and advancing the costs associated with the treatments." As time progressed, "Ray took complete control over Southlake's Botox practice. Appointments were made with Ray through the Southlake office, Ray would treat the patients at Southlake, and Ray would even collect payment from patients using her own credit card machine."

In 2008, a second contract, which was one page, was entered into between Ray and Mason. It made no reference to the first contract. The second contract provided that "[s]tarting June 2008, product payments will be made directly to Allergan and Medicis by [Ray]" and "[t]ransactions paid to [Ray]/[t]ransaction fees paid by [Ray]." It stated, "Profit varies depending on product/procedure." The contract then provided examples of product costs and profits, noting the profits as "50/50" in the examples given.[3]

[3]The contract also provided, "Supplies/Product ordered through SLPS accounts," and "Medical supplies paid by SLPS." While "SLPS" is not defined, from the context it appears to refer to Southlake.

Also in 2008, Allergan launched its "Brilliant Distinctions" program, an online program that is similar to a frequent-flyer program where consumers earn points based on their use of product treatments and then redeem those points for savings on future treatments. As explained by Heidi Shurtz, the Executive Director of Consumer Marketing for Allergan,

> When a consumer wants to use points on a future treatment, the consumer generates a coupon with a unique code through their account. They present the coupon and code to the physician providing the treatment who enters the coupon code into the physician's provider portal. The physician then discounts the cost of the service by the coupon amount, and the physician's Brilliant Distinctions account is credited for the same amount as a form of reimbursement. . . . The accumulated reimbursements are then paid to a bank account linked to the physician's Brilliant Distinctions account, which can occur weekly, monthly, or quarterly—depending on the physician's preference.

According to Shurtz, a medical practice must first have an "Allergan Partner Privileges" (APP) account before it can create a Brilliant Distinctions account. To obtain an APP account, Allergan validates that the medical practice is a current practice that is purchasing Allergan products and purchasing enough products to qualify to participate in the APP program. The practice creates a username and password to log into its APP account. When the practice registers for Brilliant Distinctions, it must log in with a username and password to its APP account, then provide contact information, including a physical address, email address, and bank information. In addition, it must read and accept the Brilliant Distinctions terms and conditions. Once registered for the program, the bank account is validated by a

penny deposit. By Shurtz's account, there is "zero requirement" for the account to be in the name of the physician. "Businesses can make a decision on where they get their money deposited. So there's no rule that says in order to register for [Brilliant Distinctions], it has to be this particular account."

Southlake, who had an APP account, created a Brilliant Distinctions account on August 15, 2009. When it was created, Allergan did not call or e-mail Mason to determine whether or not the bank account that was put in online was actually his bank account.[4] Rather, as Shurtz explained, the bank account is validated by a penny deposit. According to Mason, Ray "along with the Allergan representative" created this account and linked it to Ray's personal bank account.

Mason stated that he was unaware that money from Brilliant Distinctions reimbursements was supposed to be sent directly to the practice's bank account to offset discounts given to Brilliant Distinctions patients. He understood that Brilliant Distinctions worked like "[p]revious iterations of Allergan rebates. . . . [A]pplying coupons to current invoices, thus decreasing the cost of goods." Prior to Brilliant Distinctions, there was no program at Allergan where monies were electronically transferred back to a physician.

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[4]When asked whether it would have been prudent for Allergan to have contacted the physician in this case to determine whether or not somebody had done something improperly in terms of putting the bank account information in the Web portal, Shurtz replied, "I think the first $20 coupon that comes in that doesn't get reimbursed when they think it should be reimbursed would require them to ask the question, Where are my reimbursements?"

According to Shurtz, there is "no way to register for Brilliant Distinctions unless you've gone through the APP site, which is also password protected and owned by the practice." Therefore, Ray "had to have gained entry into APP from somebody in the practice."

With Southlake's knowledge, Ray purchased products from Allergan for Southlake's use by using Southlake's account with Allergan. According to Mason, "I always liked [Ray] and completely trusted her[,] so I gave her unlimited access to our Allergan account. I also naively let [Ray] do all of the collections for these patients using her own credit card machine." Southlake admits that anyone who has Southlake's username and password to its online Brilliant Distinctions account has the ability to change the bank account linked to the account.

Southlake alleges that, as a result of Ray linking her personal bank account to the Brilliant Distinctions program, "money that was owed to Southlake by Allergan for reimbursement of the [] discounts was sent directly to Ray's bank account—not Southlake's—even though the linked Brilliant Distinctions program, and Allergan [APP] account, was owned by Southlake and in its name." Over a five-year period, Mason said that Allergan wrongfully deposited over $200,000 into Ray's personal bank account. Since the Brilliant Distinctions program was created and more than 25,000 practice groups participated, this is the first time anybody had notified Shurtz that there had been an unauthorized use of the program or the bank account associated with it.

Southlake filed suit against Ray for breach of contract, conversion/theft, and fraud and against Allergan for negligence. Allergan answered, and after conducting discovery, filed a traditional motion for summary judgment on Southlake's negligence claim arguing that (1) Allergan had no duty as a matter of law to protect Southlake from the criminal acts of Ray and (2) Allergan disproved the element of proximate cause as a matter of law because there is no genuine issue of material fact that Southlake's alleged injury was caused by Southlake's and/or Ray's acts or omissions. The trial court granted the motion for summary judgment "on the issue of no duty being owed by Allergan to Southlake based on the pleadings and uncontroverted facts" and denied the motion "on the issue of proximate causation." By separate order, the trial court severed Southlake's claim against Allergan. This appeal followed.

III. DISCUSSION

On appeal, Southlake raises one issue complaining of the trial court's granting Allergan's traditional motion for summary judgment. Southlake states that "[t]he Texas Supreme Court has provided several factors to determine whether a duty exists under the common law, chief among them the foreseeability of the risk of harm." They contend that the trial court erred in finding no duty exists when all of these factors weighed in favor of the existence of a duty, and genuine issues of material fact existed as to the existence of a duty.

Allergan responds that it had no duty (1) to warn Southlake that entrusting employees or contractors with "unlimited access" to its valid, password-protected

accounts could lead to an abuse of trust and possibly theft or (2) to personally verify with Southlake every transaction or account change made through Southlake's account. Alternatively, Allergan argues that Southlake's financial losses were not proximately caused by Allergan's failure to protect or warn against Ray's conduct as a matter of law.

A. Standard of Review

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant that conclusively negates at least one essential element of a plaintiff's cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); *see* Tex. R. Civ. P. 166a(b), (c).

B. Applicable Law

The threshold inquiry in a negligence case is duty. *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)). The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Id.* When a duty has not been

recognized in particular circumstances, the question is whether one should be. *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503 (Tex. 2017). We look at several factors to determine the existence of a duty:

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

Id. at 504 (citing *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004)). While some of these factors may turn on facts that cannot be determined as a matter of law, such cases are unusual. *Pagayon*, 536 S.W.3d at 504.

As a general rule, there is no duty "to control the conduct of others." *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 34 (Tex. 2002). In addition, a person generally has no legal duty to protect another from the criminal acts of third parties. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). However, if a criminal's conduct is a foreseeable result of the prior negligence of a party, there may be liability. *Phan Son Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999). Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. *Mo. Pac. R.R. Co. v. Am. Statesman*, 552 S.W.2d 99, 103 (Tex. 1977).

"To impose liability on a defendant for negligence in failing to prevent the criminal conduct of another, the facts must show more than conduct that creates an opportunity to commit crime—they must show both that the defendant committed negligent acts and that it knew or should have known that, because of its acts, the crime (or one like it) might occur." *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 64 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Barton v. Whataburger*, 276 S.W.3d 456, 462 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). A defendant who seeks to negate foreseeability on summary judgment must prove more than intervening criminal conduct by a third party. *Phan Son Van*, 990 S.W.2d at 754. Once the defendant has negated the ordinary foreseeability element of proximate cause, the burden then shifts to the plaintiff to raise a fact issue by presenting controverting evidence that the criminal conduct was foreseeable. *Id.*

C. Application of Law to Facts

In its brief, Southlake contends that Allergan owes a duty of reasonable care under a common-law analysis:

> [W]hen companies such as [Allergan] propose or pitch a new program to businesses for the reimbursement or payment of fees to the business's bank accounts, those companies, like [Allergan], must have a duty or obligation to contact ownership to ensure that they are aware of, and that they consent to, such a program, and that they authorize the bank accounts into which the money is transferred.

Allergan responds that Texas law does not recognize, and the trial court correctly rejected, "Southlake's expansive duty."

In its traditional motion for summary judgment, Allergan argued that it had no duty to protect Southlake from Ray's alleged criminal acts for several reasons:

- There was no contract between Southlake and Allergan that imposed any duty or obligation on Allergan to control the acts of Ray or of any other Southlake employee;

- Ray paid for Allergan products on behalf of Southlake as required by her contracts with Southlake;

- Mason provided Ray with unlimited access to Southlake's Allergan account because he "completely trusted her";

- Southlake and Ray paid each other's bills with Allergan with the express consent of both parties;

- Sarah had knowledge of the Brilliant Distinctions program since at least 2015;

- Since 2014, Southlake had Brilliant Distinctions program information on its website and actively marketed the program; and

- Allergan received no similar misuse reports from any of its other 25,000 participating practice groups in the past nine-plus years that was remotely similar to Southlake's allegations.

Allergan's summary judgment evidence includes Southlake's responses to requests for admission and interrogatories, numerous emails and text messages, copies of the contracts between Ray and Southlake, Twitter and Facebook feed captures, excerpts from the deposition of Allergan's corporate representative, and Shurtz's declaration.

In response, Southlake contends that Ray's criminal conduct was the foreseeable result of Allergan's negligence, and a genuine issue of material fact exists

that Allergan is the proximate cause of Southlake's damages. Southlake contends that it showed:

- Allergan failed to get Southlake or Mason's consent to start the Brilliant Distinctions program;
- Allergan failed to get Southlake's or Mason's consent to deposit money to their bank account;
- Allergan failed to get Southlake's or Mason's consent to deposit money to a third-party's bank account;
- Allergan failed to inform Southlake or Mason of changes made to the banking information of Southlake's account;
- Allergan failed to verify with Southlake or Mason any payment procedures;
- Allergan failed to have any policies, procedures, and/or safeguards in place to prevent fraud and/or theft; and
- Allergan failed to "know its customer" and allowed Ray to fraudulently establish the Brilliant Distinctions account.

Southlake's summary judgment evidence includes the affidavit of their expert witness, F. David Moore, Mason's affidavit, and Shurtz's deposition.

As noted above, in determining whether a duty exists, a court must consider several interrelated factors, including the risk, foreseeability, likelihood of injury weighed against the social utility of the actor's conduct, magnitude of the burden of guarding against the injury, and consequences of placing the burden on the defendant.

Phillips, 801 S.W.2d at 525.[5] Of all the factors, foreseeability of the risk is the "foremost and dominant" consideration. *Id.* (quoting *El Chico Corp.*, 732 S.W.2d at 311).

Therefore, the central question here is whether Southlake has established a genuine issue of material fact that presents a basis for imposing a duty on Allergan. And because almost all of the summary judgment evidence focuses on the foreseeability factor, we too focus on that factor. However, we also consider which party had "superior knowledge of the risk or a right to control the actor who caused the harm." *Humble Sand*, 146 S.W.3d at 182. Finally, we look at the magnitude and consequences of the burden on Allergan.

1. Foreseeability of risk of harm

Pursuant to Ray and Southlake's agreement, Ray bought products and used them to perform treatments on Southlake's patients. Because he "completely trusted" Ray, Mason stated that he gave Ray "unlimited access to [Southlake's] Allergan account."

Emails and text messages show that Southlake knew that Ray not only had access to the Allergan website but also the passwords. On June 22, 2015, Sarah wrote Ray, "I don't think I ever got the new password for the Allergan site. I just got a VM

[5]In its brief, Southlake concedes that "the only [factors] disputed before the trial court were the foreseeability of the risk of harm, the magnitude of the burden of guarding against the injury on [Allergan], and the consequences of placing that burden on [Allergan]."

to check on some outstanding invoices[,] so I wanted to go on and check to pay." Later in July 2016, Sarah sent Ray an email that stated, "I was trying to pay on the Allergan website and when I tried to enter your login, it says 'user is locked.' When you are in, could you pay $4,000 on our MC on file[,] and just email me back that it has been paid?"

Ray's access to the Allergan website extended to access to the Brilliant Distinctions account. Emails between Ray and Southlake discuss the Brilliant Distinctions program and the points that it provides. In November 2015, Ray sent Sarah as well as three other Southlake employees an email with the subject line, "Brilliant [D]istinctions breast program." She noted, "I will make sure the pt is registered on [B]rilliant [D]istinctions[,]" and "I will keep a log by my cc machine so we can keep a list of the pts." In the same month, Sarah received an email from Steve Saulnier with Allergan asking, "Who will be entering the ALLERGAN gel implant serial numbers into [the website] for the BD 500 points . . . ?" Sarah forwarded the email to several people at Southlake, including Ray, with the response, "This would be a job later for the front office person to do when they are also sending the implant info in." In an April 2016 email with the subject "coupons for Brilliant [D]istinctions," Ray told Sarah and several other Southlake employees, "If a pt uses a coupon for anything, they need to have an account." Later in August 2016, Ray and Sarah exchanged several emails about the coupons and product commissions used in July and August.

The summary judgment evidence establishes that Southlake knew that Ray had access and control of Southlake's APP portal to the Allergan website. In her deposition, Shurtz said that Southlake's Brilliant Distinctions account could only be created with access to Southlake's APP account. She explained that "the practice would have to log in with username and password into their APP portal. In the APP portal, it would validate that they were eligible to register for Brilliant Distinctions." Later in her deposition, Shurtz adds, "The account was created for Southlake Plastic Surgery. In order to create the account, somebody from that practice had to have access to APP that validated that was a valid, eligible account. And then they moved to the next step, which was Brilliant Distinctions."

In addition to allowing Ray access to the APP portal on Allergan's website, the summary judgment evidence indicates that Southlake and Ray paid each other's bills on the Allergan website. On April 2, 2014, Ray sent Sarah an email notifying her that she "placed a botox order last week and they wouldn't place the order without this Skin Medica bill being paid. I put it on my Amex card. If you want to pay that same amount towards a botox bill we can do that on Allergan direct." Sarah responded, "I will go online today and take care of that! Sorry . . . . I am not accustomed to going online to pay." Five days later, Sarah asked, "Is there an AX on the Allergan credit card option?" Ray responded, "[T]here is a mc and visa only on file." In August 2015, Ray again told Sarah that "Allergan needed payment on this one as well to clear my order for tomorrow so I put it on my Amex. I owe y'all close to this with the

rebates and the month end." After Sarah responded that Ray could just post it at the month's end, Ray said, "It[']s never a problem since we exchange money all month long!!"

The summary judgment evidence also supports that Mason faulted himself for not knowing more about the business side of the practice and for not exercising greater control over Ray. Mason sent Ray an email on November 30, 2016, requesting "numbers" for 2015 and 2016 gross collections, cost of goods and supplies, as well as expenses. In the email, he complained that none of these numbers were included on the last month's report: "I asked Sarah why these were not included[,] and she told me the reports have never included these numbers. I am disappointed that Sarah has never asked for them in the past. And, I am mad at myself for not paying closer attention to the business aspect of this practice." Mason admitted in a December 8, 2016 email to Allergan that "I always liked [Ray] and completely trusted her so I gave her unlimited access to our Allergan account. I also naively let [Ray] do all of the collections for these patients using her own credit card machine."

In attempting to show foreseeability and therefore impose a duty on Allergan, Southlake relies heavily on Shurtz's deposition and what Southlake describes as Allergan's "complete lack of any policies, procedures, or safeguards." When asked what effort Allergan took to determine that the bank account in the portal belonged to the physician, Shurtz replied that "we don't regulate where they put the reimbursements." In response to inquiries about Allergan's policy regarding verifying

that banking information was authorized by the physician or company, she stated, "There is zero requirement for that BD account to be in the name of the physician; therefore, there is no policy enforcing that there is a zero requirement on what bank account a business may or may not use in Brilliant Distinctions." By Shurtz's account, Allergan took no action to actually call Mason or Southlake to determine whether the bank account that was input into the system was, in fact, an authorized account into which his money was supposed to go. It also did not send an email asking Mason to confirm whether the bank account that was placed online was actually Southlake's bank account.

In its summary judgment evidence, Southlake offered testimony of its expert, Moore, a licensed private investigator and certified fraud examiner, to argue "that Allergan had a duty to implement policies, procedures, and safeguards to prevent money from being sent to the wrong account." Moore testified that the standard of care for companies is to put policies and procedures in place to prevent fraud and theft. Moore is critical of Allergan for its "failure of redundancies" with its systems. According to Moore, Allergan, at the creation of the Brilliant Distinctions program, "failed to have any policies, procedures, and protocols in place to prevent fraud and/or theft" and "failed to know its customer and allowed Ray to fraudulently establish the Southlake Brilliant Distinction[s] program with Allergan." In Moore's view, "Allergan's breach of this duty, and their negligence, were the proximate cause of damages to Southlake, causing it to lose revenue due to the fraud and theft of Ray."

Despite the opinions of Moore, "expert testimony is insufficient to create a duty where none exists at law." *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Similarly, expert opinions do not create a fact issue precluding summary judgment. *Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224, 228 n.3 (Tex. App.—Dallas 2008, no pet.).

As Allergan points out in its brief, foreseeability requires actual probability, not just academic possibility. *Doe v. Boys Club of Greater Dall., Inc.*, 907 S.W.2d 472, 478 (Tex. 1995) (holding that foreseeability requires more than someone viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury). In considering whether a duty exists, courts must consider both the risk and the likelihood of injury. *Phillips*, 801 S.W.2d at 525.

Allergan offered deposition testimony that it had experienced no prior instances of criminal conduct similar to that alleged in this case. Shurtz testified:

> Q. You say there were, like, 25,000 practice groups that participate in the Brilliant Distinctions program?
>
> A. Yes.
>
> Q. Are you aware of similar complaints as those made by Dr. Mason and his practice arising during the time this program existed?
>
> A. No.
>
> . . . .
>
> Q. No one has ever notified you in the almost ten years this program has existed and the more than 25,000 practice groups that participate

> that there has been an unauthorized use of the program or the bank account . . . associated with it?
>
> A. No. In fact, I get calls about missing $20 coupons.
>
> Q. Is it fair to say that Dr. Mason's complaint[is] fairly unique and unusual?
>
> A. Yes.

Southlake presented no summary judgment evidence disputing this testimony. In determining whether criminal conduct is foreseeable, courts must consider whether any criminal conduct previously occurred, how recently it occurred, how often it occurred, how similar it was to the conduct at issue, and what publicity was given to the previous conduct to indicate that the defendant knew or should have known about it. *Durham v. Zarcades*, 270 S.W.3d 708, 719 (Tex. App.— Fort Worth 2008, no pet.).

Despite the evidence of no prior acts similar to what it alleges are Ray's criminal acts, Southlake contends that this is a "non[-]sequitur" because Texas courts make clear that "only the general danger need be foreseeable, not the exact sequence of events that produced the harm." *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989). But under the facts of this case, we cannot conclude that it was generally foreseeable that Southlake would give Ray unlimited and unsupervised access to its password-protected APP account and that Ray would then link her personal bank-account information to the Brilliant Distinctions account, which was also password protected.

Finally, there is some summary judgment evidence that there was an agreement that Southlake carried the responsibility to control access to the Allergan website, including the use of passwords. Although a copy of the "terms and conditions" that participants must agree to before using the Brilliant Distinctions account is not in the summary judgment evidence, there is evidence that such an agreement exists and that somebody with Southlake consented to it. Shurtz testified that in order to register for a Brilliant Distinctions account, the provider has to agree to be bound by certain terms and conditions. At her deposition, Shurtz read from a document stating, "Terms & Conditions last updated, Sarah Mason on 3-5-2015." The terms and conditions include maintaining the security of any password, user ID, or other form of authentication involved in obtaining access to password protected or secure areas of websites, applications, and other services. According to Shurtz, this included Southlake's online portal with Brilliant Distinctions. The agreement also provides that any access to websites, applications, or other services through the username and password "will be treated as authorized by you." And even if Ray had created the Brilliant Distinctions account, Shurtz testified,

> There's no way to register for Brilliant Distinctions unless you've gone through the APP site, which is also password protected and owned by the practice. So if the practice had given access to [Ray] for her to access APP, then she could have registered for Brilliant Distinctions there and put her e-mail in . . . but she had to have gained entry into APP from somebody in the practice.

According to Shurtz, Mason could go onto the website, access his provider portal, and obtain a report showing the total amount of reimbursements that Southlake obtained under the Brilliant Distinctions program. However, there is no summary judgment evidence that he ever did so.

2. Magnitude and consequences of burden

Even if we were to assume that Southlake's injury was foreseeable, foreseeability alone is insufficient to create a new duty. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 411 (Tex. 2009). Southlake contends, "Finding that [Allergan] had a duty to seek authorization from [Southlake] before diverting money intended for and owned by [Southlake] to a third party cannot be found to be overly burdensome when [Allergan] had already been provided all of the necessary information to properly send money." Allergan responds that the proposed duty would impose a heavy burden on companies that offer online-account management to, among other things:

- verify their customers' bank information, even when that information is input by a valid, password-protected account;

- warn their customers against trusting others with their account credentials—and thus against delegating management of an online account to employees or others; and

- notify a company's owner personally whenever the company engages in any financial transaction using a valid, password-protected account.

However, there is little summary judgment evidence discussing or weighing this burden.

When Shurtz was asked how long it would take her or anyone from Allergan to ask Mason whether or not the bank account that had been input into Allergan's website was actually an account that Southlake had authorized to be placed there, she responded, "I guess the general time that it would take to make a phone call." But she stated that the amount of time "would probably add up" because "there were about 40,000 or 50,000 accounts" at that time. Southlake says that Shurtz's testimony was rebutted by Moore, who stated that Allergan "should have had a policy in place where physician owners of medical practices were contacted to discuss the Brilliant Distinctions program and to obtain their authority and consent to attaching a bank account to the online account." This, however, does not address either the burden issue or the fact that Allergan did seek authorization from Southlake by requiring it to agree to certain terms and conditions and to go through two password-protected portals before entering bank-account information to authorize Brilliant Distinctions reimbursements.

Applying the factors that determine duty—especially foreseeability—to the facts of this case, we conclude that Allergan could not have foreseen that Southlake would allow Ray unfettered access to its APP account; that Ray would allegedly access not one, but two, password-protected sites; that Ray would allegedly enter her own personal bank account in order to divert money from Southlake; and that Southlake

would fail to monitor either Ray's or Southlake's use of both the APP and Brilliant Distinctions accounts. The facts here support that Southlake, rather than Allergan, had the "superior knowledge of the risk" that Ray could take advantage of the trust placed in her and that Southlake, rather than Allergan, had the "right to control" Ray. *Humble Sand*, 146 S.W.3d at 182.

Therefore, we conclude that Southlake failed to raise a genuine and material fact issue that a company in a situation such as Allergan's owes a duty either (1) to warn its customers that allowing its independent contractors unsupervised and unlimited access to not one, but two, of its password-protected accounts could lead to abuse and possibly theft or (2) to personally verify with their customers every transaction made through these password-protected accounts. Having found no genuine issue of material fact regarding duty, we do not address Allergan's alternative argument that Southlake's financial losses were not proximately caused by Allergan's failure to protect or warn against Ray's alleged criminal conduct. *See* Tex. R. App. P. 47.1; *Pettus v. Pettus*, 237 S.W.3d 405, 420 n.12 (Tex. App.—Fort Worth 2007, pet. denied). We overrule Southlake's sole issue.

IV. CONCLUSION

Having held that the trial court did not err by granting Allergan's traditional motion for summary judgment, we affirm the trial court's judgment.

/s/ Dana Womack

Dana Womack
Justice

Delivered: June 11, 2020