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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LUCIA GOMEZ, Plaintiff and Appellant, v. ALLIANCE UNITED INSURANCE COMPANY, Defendant and Respondent.	A152242 (Alameda County Super. Ct. No. RG17846809)

Plaintiff Lucia Gomez (Gomez) was injured and her mother, Ann Gomez (decedent), was killed when the car Gomez was driving was hit by a car driven by Manuel Ramos. Five days before the accident, Ramos was able to purchase his car from a dealership and obtain automobile liability insurance coverage through defendant Alliance United Insurance Company (Alliance) despite having no driver's license. Gomez sued Alliance for common law negligence and wrongful death, alleging that Alliance breached a duty of care to her by issuing a policy of insurance to Ramos even though Alliance knew he was unlicensed. The trial court concluded that Alliance did not have a common law duty of care to determine that Ramos was licensed before issuing him a policy, and Alliance's demurrer to the third amended complaint was sustained without leave to amend. Gomez appeals from the judgment in favor of Alliance. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As set forth in the operative third amended complaint, Alliance writes automobile insurance policies to the "substandard insurance market"—the market for drivers with risk factors that make it difficult for them to obtain insurance in the standard market. Alliance is allegedly "the only carrier in the State of California who sells auto policies to unlicensed drivers who also indicate on their applications that they are the sole person who will drive the 'covered' vehicle." Alliance allegedly markets its insurance products through agents, including Premier Insurance Services (Premier), who call on used car dealers catering to the Hispanic community. Premier services dealerships in Hayward, including a used car dealership called Luxor Auto Sales, Inc. (Luxor).

In May 2016, Luxor sold a used 2006 Dodge Charger to Ramos for a down payment of $1,500 and the remainder of the purchase price financed by Luxor. As part of the transaction, Luxor required Ramos to obtain automobile insurance within " '0 days' " and insisted that Luxor be insured on the covered vehicle. Luxor was named as a " 'loss/payee' " on the policy so that in the event the covered vehicle was damaged before the amount financed was paid off, Luxor would be reimbursed before Ramos. Without the insurance issued by Alliance, Luxor would not have allowed Ramos to drive the car off its lot.

Gomez further alleges that Ramos was the only intended driver of the covered vehicle identified on the application form. The application package was submitted electronically to Alliance, and within one minute, Alliance issued a "Gold Policy" to Ramos. According to Gomez, to be issued a Gold Policy, the applicant had to have a valid driver's licensed or verifiable U.S. driving experience, but Ramos had neither. Gomez alleges that Alliance issued the policy to Ramos knowing he was not licensed, would be the only driver of the vehicle, did not have any U.S. driving experience, had never driven before, was not a "rated" driver, could not buy the vehicle without insurance, and could not drive the car without first obtaining insurance. By selling Ramos an auto policy, Alliance knowingly enabled Ramos to buy a vehicle and drive it off the Luxor lot. Five days after purchasing the Dodge Charger, Ramos was allegedly

driving 50 miles per hour and ran a stop sign when he collided with Gomez's vehicle, killing decedent and leaving Gomez permanently partially disabled.

The third amended complaint asserts a single cause of action for common law negligence and wrongful death damages. Gomez alleges that Alliance owed her and the motoring public a duty not to enable knowingly dangerous drivers to drive on the roads of California by issuing automobile insurance policies to persons who do not have valid driver's licenses or any verifiable driving experience.

In sustaining Alliance's demurrer to the third amended complaint, the trial court incorporated its rulings on a prior demurrer to the second amended complaint. In that order, the trial court held that the facts alleged by Gomez did not support the conclusion that Alliance owed a duty to the motoring public to determine that Ramos was insurable before it issued the policy. The trial court cited *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35 (*Nipper*) and the public policy considerations discussed therein to conclude that insurers do not have a duty to police or control the driving qualifications of California motorists.

The trial court acknowledged that under *Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659 (*Barrera*), an automobile insurer owes a duty to undertake a reasonable and timely investigation of an insured's insurability, and the failure to do so bars the insurer from successfully defending against a claim for coverage. However, the trial court held that under *Fireman's Fund Ins. Co. v. Superior Court* (1977) 75 Cal.App.3d 627 (*Fireman's Fund*), *Barrera* did not create a general duty of care to investigate an insured prior to the issuance of a policy.

The trial court reasoned that although unlicensed drivers pose a danger to the public, there were no statutes or regulations requiring insurers to verify the license status of an applicant prior to issuing a policy, and in the absence of legislative action, the court held it should not create such an obligation. The court ruled there were competing public policies in favor of providing insurance to unlicensed drivers, and the Legislature was best positioned to weigh these policies in crafting appropriate legislation.

The trial court further reasoned that the risk of harm was not foreseeable because the absence of insurance, like the absence of a license, does not prevent someone from operating a vehicle, and the provision of insurance does not necessarily encourage an unlicensed driver to operate a vehicle. The trial court concluded that Alliance could not foresee the risk of harm because it "had no way to know that Ramos would not obtain a license after the purchase, or that Ramos would operate the vehicle in a reckless manner after purchasing it."

Finally, the trial court ruled that the new allegations in the third amended complaint did not compel a different result. The trial court found that even if the policy issued to Ramos was similar to assigned risk plans issued by the California Automobile Assigned Risk Plan (CAARP),[1] the statutory licensing requirement under CAARP did not support the existence of an analogous common law duty on insurers outside of CAARP. The court also found unavailing Gomez's theory that she and decedent were third-party beneficiaries of the insurance policy between Ramos and Alliance, as Gomez sought to establish a tort duty, not a contractual obligation, and "there is no dispute that [Alliance] has already paid out the policy limits." The trial court reaffirmed its prior conclusion on the demurrer to the second amended complaint that the chain of causation between Alliance's issuance of insurance to Ramos and the injuries to Gomez and decedent was too attenuated to find foreseeable harm supporting a duty of care.

Judgment was entered in favor of Alliance. Gomez timely appealed from the judgment.

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[1] CAARP "was originally created by the Legislature to provide insurance to 'those marginal motorists who, because they were considered "bad risks," were otherwise unable to secure and maintain such insurance.' These persons included ' "violators of traffic laws, . . . persons with minor physical disabilities, the young and the old drivers, and, of course, those who had bad accident records." [Citation.] To this extent the plan complements the state's financial responsibility laws by providing a limited fund of insurance to compensate persons injured by drivers who otherwise would be uninsurable.' [Citation.]" (*California State Auto. Assn. Inter-Ins. Bureau v. Garamendi* (1992) 6 Cal.App.4th 1409, 1413.)

DISCUSSION

On appeal, Gomez argues the trial court erred in finding that Alliance did not owe a duty of care to investigate Ramos's insurability. Gomez contends that the duty articulated in *Barrera* applies to the instant case because the relevant public policy considerations discussed in *Barrera* are not limited to situations where the insurer denies coverage on the grounds of rescission, but apply to any situation involving the potential danger of unlicensed drivers. Gomez further argues that the burden *Barrera* imposes on insurers to check Department of Motor Vehicles records is minimal, while the benefit is significant and would have prevented Ramos from obtaining the automobile that he later crashed into Gomez's car. Gomez argues it is highly foreseeable that insuring a knowingly unlicensed driver will substantially increase the risk of harm to the motoring public because it is widely recognized that unlicensed drivers are dangerous and the frequent causes of fatal traffic accidents.

I. Standard of Review

" 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]' [Citation.] 'Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making " ' "contradictory averments, in a superseding, amended pleading." ' " [Citation.]' [Citation.] When the trial court has sustained the demurrer without leave to amend, this court must determine 'whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]' [Citation.]" (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1122.)

"In order to succeed in an action for negligence, the plaintiff must establish that the defendant owed him or her a legal duty, the defendant breached that duty, and the breach proximately caused his or her injuries. [Citation.] The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' [Citation.] ' "Duty is a question of law for the court, to be reviewed de novo on appeal." ' [Citations.]" (*Doe, supra,* 8 Cal.App.5th at p. 1128.)

II. *Barrera*'s Duty to Investigate Insurability

In *Barrera,* our Supreme Court held that an automobile liability insurer has a duty to undertake a reasonable investigation of an insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. (*Barrera, supra,* 71 Cal.2d at p. 663.) If the insurer fails to undertake this investigation, it cannot later rescind the insurance policy when the applicant files a claim, or defend a third-party suit upon the ground of its own failure to reasonably investigate the application. (*Ibid*.)

This holding was based on several public policy grounds. The court noted the " 'quasi-public' " nature of the insurance business and the reasonable expectations of the public that "the insurer will duly perform its basic commitment: to provide insurance." (*Id*. at p. 669.) The court also considered the public policy underlying the financial responsibility law, which seeks to make owners of motor vehicles financially responsible to those injured by them in the operation of such motor vehicles. (*Id*. at pp. 671–672.) The *Barrera* court held that the "extra-contractual" duty of insurers to act promptly upon an application for insurance inures to the benefit of injured third parties, as it "arises from the public policy that protects the innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant." (*Id*. at pp. 674–675.) The consequence for breach is that the insurer "cannot assert [] a right of rescission" and "cannot complain of the denial of the statutory right, when its conduct is culpable and directly contributes to the presence on the highway of a financially irresponsible motorist." (*Id*. at p. 678.)

Alliance contends that *Barrera* applies only when the insurer denies coverage or rescinds the policy, and here, Gomez does not allege a denial of coverage but seeks tort damages for amounts in excess of policy limits. Gomez argues that *Barrera* is not so limited because the public policies it is based upon apply more broadly.

The narrower view of *Barrera* is supported by *Fireman's Fund*, in which the court held that "a careful reading of *Barrera* and later kindred decisions compels the conclusion that the duty defined in *Barrera* must in any event be limited to automobile liability insurers who *deny coverage* for reasons arising out of their own negligence." (*Fireman's Fund*, *supra*, 75 Cal.App.3d at p. 633, italics added.) As the *Fireman's Fund* court pointed out, *Barrera* held that "[t]he purpose of the imposition of the duty *cannot be the avoidance of death or injury to a third person*; rather, it is to avoid the possibility that the third person will be unable to obtain compensation for the loss." (*Fireman's Fund*, *supra*, at p. 635, citing *Barrera*, *supra*, 71 Cal.2d at pp. 679–680, italics added.) The *Fireman's Fund* court held, "*Vice* [*v. Automobile Club of Southern California* (1966) 241 Cal.App.2d 759 (*Vice*)] and *Nipper* make clear that no duty is breached by an automobile insurer's failure to investigate the qualifications of prospective insureds before issuance of liability policies; they illustrate the rule that liability insurance may be issued to one unqualified to drive." The restriction added by *Barrera* in such instance serves only to prevent the insurer from seizing upon its insured's lack of qualification as a basis for *denying coverage*. It is not the issuance of a policy which brings the *Barrera* rule into action, but rather an insurer's attempt – by denying coverage – to avoid the consequences of its actions." (*Id.* at p. 637, italics added.)

Gomez argues that *Fireman's Fund* is distinguishable because it involved different public policies applicable to aircraft insurance. (See *Fireman's Fund*, *supra*, 75 Cal.App.3d at pp. 633–634.) Notwithstanding this factual difference, the analysis and rationale of *Fireman's Fund* are sound and apply here. The weight of authorities cited in *Fireman's Fund* confirms that insurers do not assume a broad duty of care to the public by issuing insurance to applicants. (See *Vice*, *supra*, 241 Cal.App.2d at p. 764 [automobile club not liable in negligence for issuing policy to incompetent and

unlicensed driver because it was not foreseeable that issuance of policy would mislead insured to think he had right to drive]; *Matthias v. United Pacific Ins. Co.* (1968) 260 Cal.App.2d 752, 754–756 (*Matthias*) [property insurer with alleged knowledge of dangerous condition was not subject to direct tort liability to persons injured by condition]; *Nipper, supra,* 19 Cal.3d at pp. 46–47 [CAARP and insurance broker had no common law duty of care to plaintiff and other members of motoring public].) Furthermore, the common law has traditionally imposed liability to control the conduct of another person to avoid foreseeable harm only when the defendant bears some special relationship to the dangerous person or to the potential victim, and there is no authority "which suggests that an insurer (or other person to whom an application for insurance is tendered) either stands in a special relationship with the applicant or his potential victims, or alternatively owes any affirmative duty of inquiry or disclosure regarding the applicant." (*Nipper, supra,* 19 Cal.3d at p. 47.)

Gomez argues that *Nipper* supports her position because it held that the only requirement for drivers to obtain insurance under CAARP was a valid driver's license. Actually, the *Nipper* court stated that "the only requirement for coverage [under CAARP] is the possession of a valid and unrevoked operator's license either at the time of making application for the coverage, *or* the automatic reinstatement of such license *following the provision of such insurance coverage*." (*Nipper, supra,* 19 Cal.3d at p. 44, italics added.) Thus, coverage under CAARP could be provided before reinstatement of a revoked license. In any event, the question here is not whether a driver must be licensed to be insured, but whether the insurer is liable in tort to a third party if it insures a driver who is unlicensed.

Gomez cites *Honsickle v. Superior Court* (1999) 69 Cal.App.4th 756, 766 (*Honsickle*) for the position that an application for insurance by an unlicensed driver is "invalid" and "an absurdity on its face" and should immediately be rejected. This reliance on *Honsickle* is unavailing. At issue in *Honsickle* was Civil Code section 3333.4, which prohibits the recovery of noneconomic damages by an uninsured driver arising out of the operation of a motor vehicle. The plaintiff, who was uninsured, argued

that Civil Code section 3333.4 should not apply to her because she had previously tried, but failed, to obtain insurance. (*Honsickle*, *supra*, 69 Cal.App.4th 756 at pp. 760–761.) In rejecting this purported "good faith" exception to the statute, the court commented that "[a]n application for insurance coverage for an unlicensed driver is an absurdity on its face. As a matter [of] law, such an invalid application for insurance could not, in any event, be a 'good faith' exception to [Civil Code section 3333.4]." (*Id.* at p. 766.) This statement has no application here because the instant matter does not involve Civil Code section 3333.4. Moreover, this portion of *Honsickle* has been construed as dicta and criticized as unsupported by reasoning, analysis or authority. (*Landeros v. Torres* (2012) 206 Cal.App.4th 398, 412.) The *Honsickle* dicta does not support the existence of a common law duty of care on the part of insurers to reject an application for insurance by an unlicensed driver.

Under *Fireman's Fund* and *Nipper*, Alliance did not owe a duty of care to determine that Ramos was a licensed driver.[2] Accordingly, the trial court properly sustained Alliance's demurrer to the third amended complaint. Because Gomez has not explained how the pleadings could be recast to show a legal duty, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

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[2] In her reply brief, Gomez argues that a duty exists under the factors identified in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*). We generally do not consider arguments raised by the appellant for the first time in a reply brief. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) In any event, Gomez fails to demonstrate that Alliance owed Gomez a duty under the *Rowland* factors. Even assuming, for the sake of argument, that the kind of injury experienced in this case was generally foreseeable, the public policy considerations—including the social utility of insurance, the consequences to the community of imposing a duty with resulting liability for breach (e.g., higher premiums, less coverage overall), and the absence of moral blame as that term has been understood in its legal sense (see *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270) —support an exception from the ordinary duty of care of Civil Code section 1717 for the conduct at issue in this case. (See *Rowland*, *supra*, 69 Cal.2d at p. 112.)

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.

(A152242)