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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PACIFIC COAST DRILLING
COMPANY, INC., et al.,

Plaintiffs and Appellants,

v.

FARMERS NEW WORLD LIFE
INSURANCE COMPANY, et al.,

Defendants and Respondents.

A140423, A141464

(Sonoma County
Super. Ct. No. SCV-250701)

Sean Boylan died as a result of a collision between a plane he was piloting and another aircraft. Although he had recently bought life insurance policies naming his wife and his business as beneficiaries, no death benefits were forthcoming because the policies excluded aviation risks. The beneficiaries sued the insurer and its agent, alleging that failure to provide insurance policies that covered aviation activities constituted negligence and breach of contract. The beneficiaries also alleged claims of professional negligence and negligent misrepresentation against the agent.

The superior court granted defendants' motions for summary judgment on plaintiffs' Third Amended Complaint. In this consolidated appeal, plaintiffs contend only that the superior court improperly disposed of their claims of negligence per se arising from violation of Insurance Code statutes concerning applications for replacement life insurance policies. But plaintiffs' Third Amended Complaint did not allege any claims based on a theory of negligence per se, nor did it allege that Boylan sought to

replace existing life insurance policies. Because plaintiffs introduced new factual allegations and a new legal theory for the first time in opposing the motions for summary judgment, without seeking to amend their complaint, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Allegations and Claims in the Third Amended Complaint

According to the operative Third Amended Complaint, in February 2009 Boylan applied to Farmers New World Life Insurance Company (Farmers) for two life insurance policies through Gianna Volpi, a Farmers agent who did business as Volpi Insurance Agency (Volpi). Boylan requested coverage appropriate for his “homelife, professional obligations, and his lifestyle, particularly including his hobby of being a pilot and frequently operating aircraft.” At the time he applied for insurance, his aviation medical certificate had been revoked as a result of a 2003 arrest for driving under the influence. Volpi, who had been friends with Boylan and his wife for several years, knew Boylan had suffered from alcoholism for many years of his life and had three convictions for driving under the influence, and also knew that in 2009 Boylan had been sober for some time and was working toward regaining his aviation medical certificate so that he could fly aircraft once again.

Boylan applied for two 10-year term policies, each with a face amount of \$1 million. He applied for a personal life insurance policy with his wife, Leona Boylan, as beneficiary, and for a key person life insurance policy with his business, Pacific Coast Drilling Company, Inc. (Pacific), as owner and primary beneficiary. Boylan presumed that Volpi knew he wanted to obtain a key person policy for business succession planning in connection with his status as a key person in Pacific and 25 percent owner of the company. In applying for the key person policy, Boylan requested quotes for a premium reflecting his aviation activities, and a premium with an aviation exclusion.

Farmers issued a key person policy to Boylan with Pacific as beneficiary, and Pacific paid the monthly premiums from May 2009 until Boylan’s death. At some point, Farmer’s also issued a personal policy to Boylan with Leona Boylan as beneficiary, for which Boylan paid the monthly premiums himself. After Boylan died in November 2009

as a result of an aviation accident, Farmers issued Pacific a refund of the sum of cash premiums paid, plus 3.5 percent interest, but declined to pay policy proceeds to Pacific or Leona Boylan because of aviation exclusions in the policies.

Pacific and Leona Boylan (plaintiffs) alleged eight causes of action against Volpi and Farmers in the operative complaint. The first cause of action alleged that Volpi and Farmers were negligent in failing to provide Boylan with insurance policies with coverage for aviation risk, as Boylan “specifically requested.” The second cause of action alleged that Volpi and Farmers were negligent in failing to procure a key person life insurance policy with aviation coverage for which Pacific was both owner and beneficiary. The third and fourth causes of action alleged that Volpi breached a professional duty of care as Boylan’s insurance agent or broker by failing to procure a key person insurance policy and a personal life insurance policy that “included coverage for his aviation activities as he requested.” The fifth and sixth causes of action alleged breach of contract against both Volpi and Farmers with respect to the key person and personal life insurance policies, respectively, for failure to provide insurance policies that included coverage for Boylan’s aviation activities. The seventh and eighth causes of action alleged negligent misrepresentation against Volpi with respect to the key person and personal life insurance policies, respectively, for “impliedly represent[ing]” to Boylan that Volpi was attempting to procure coverage that included his aviation activities.

B. *Defendants’ Motions for Summary Judgment*

The defendants moved for summary judgment, or in the alternative summary adjudication, on all plaintiffs’ claims. The only issue plaintiffs raise on appeal is whether the superior court erred in granting summary judgment on plaintiffs’ first through fourth causes of action for negligence, in light of plaintiffs’ argument that under the doctrine of negligence per se there were triable issues of fact for a jury. We will limit our discussion accordingly.

Volpi argued that because she assisted Boylan in obtaining the insurance he requested, she was entitled to summary judgment on the claims against her for negligence

and professional negligence. Volpi cited *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927 for the proposition that an insurance agent owes no duty to recommend unrequested coverage, or advise whether specific coverage is available, unless one of three conditions is met: the agent misrepresents the nature or scope of the coverage offered, the insured requests a particular type or extent of coverage, or the agent holds himself out as having expertise in a given field of insurance. In view of the undisputed facts that Boylan requested quotes for policies with and without aviation coverage, that Farmers elected to make offers for policies without aviation coverage, and that Boylan signed policy acceptance forms stating that the policies were issued with aviation exclusions after discussion with Volpi, Volpi was entitled to summary judgment on plaintiffs' claims that she breached any duty to procure aviation coverage.

Volpi also argued that plaintiffs' complaint rested on the false assumption that she was required to obtain policies with aviation coverage, and Farmers was required to issue such policies, even though Boylan had asked for quotes with and without aviation coverage. Relying on *Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58 (*Quelimane*), she argued that there is no duty to provide insurance coverage, even if the refusal affects third parties. She argued that under California law, plaintiffs cannot recover for negligence under the theory that Volpi should have provided Boylan policies with aviation coverage, when he himself requested a quote for policies with and without aviation coverage. There is no basis for plaintiffs' theory that Volpi or Farmers should have to provide certain coverage merely because an insurance applicant has a particular hobby. Instead, Farmers is free to offer whatever coverage it deems appropriate as directed by its underwriting guidelines, and an applicant is free to accept or reject the terms of the offered policy. Boylan freely chose to accept the Farmers policies without aviation coverage, and therefore Volpi is entitled to summary judgment on the negligence claims.

Farmers argued that it was entitled to summary judgment on the negligence claims against it, claiming that plaintiffs failed to come forward with facts supporting their first or second causes of action. Farmers argued that plaintiffs failed to establish any duty in

tort that Farmers owed to plaintiffs, citing *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 254-255, for the proposition that “negligence is not among the theories of recovery generally available against *insurers*.” Farmers contended that its “duties are circumscribed by the insurance policy and plaintiffs are thus limited to claims premised on the contract.” Farmers relied on *Quelimane, supra*, 19 Cal.4th at page 43, for the proposition that under California law, “[a]n insurer does not have a duty to do business with or issue a policy of insurance to any applicant for insurance,” and argued that Farmers had no duty in tort to Boylan or plaintiffs to provide any particular type of coverage. In view of the undisputed facts that Boylan requested insurance quotes with and without aviation coverage, that he received and accepted policies that excluded aviation coverage, and that he died while piloting an airplane, Farmers contended that there could be no action for negligence and it was entitled to summary judgment.

C. *Plaintiffs’ Opposition to Summary Judgment*

Plaintiffs opposed the motions, not by disputing the defendants’ proffered facts, but by alleging additional undisputed facts. Among the facts they alleged in opposition but not in the Third Amended Complaint are these: when Boylan applied for insurance with Volpi, he had a personal life insurance policy with aviation coverage; and Volpi and Farmers “did not comply with the California Replacement Statute’s requirements provided in Insurance Code section 10509 *et seq.*”¹ In particular, Volpi “did not ask [Boylan] whether the life insurance policies were going to be replacement policies as required by [section] 10509.4(a).”² Also, Volpi “did not present to [Boylan] a Notice

¹ All unspecified statutory references are to the Insurance Code. Sections 10509 through 10509.9 constitute requirements for life insurers in connection with the replacement of life insurance and annuity policies.

² Section 10509.4, subdivision (a) provides, “Each agent who accepts an application shall submit to the insurer with which an application for life insurance or annuity is presented, or as part of each application, both of the following: [¶] (1) A statement signed by the applicant as to whether replacement of existing life insurance or annuity is involved in the transaction. [¶] (2) A signed statement as to whether or not the agent knows replacement is or may be involved in the transaction.”

Regarding Replacement of Life Insurance, as required by [section] 10509.4,” or send a copy of the replacement notice to Farmers as required by section 10509.4, subdivision (b)(3).³ However, Boylan himself informed Volpi that the personal policy was to be a replacement for an existing policy.

Plaintiffs opposed summary judgment on their claims for negligence and professional negligence by arguing that that defendants were negligent in failing to treat the personal life insurance policy as a replacement transaction under sections 10509 et seq., that the doctrine of negligence per se applies, and that pursuant to *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306 (*Daum*), there are questions of fact as to whether defendants violated section 10509.4, and whether the violation proximately caused plaintiffs’ injury.

D. *The Superior Court Grants Defendants’ Motions*

The superior court published a tentative ruling granting both motions in advance of the scheduled hearing. The tentative ruling discussed Volpi’s motion in detail, but

³ Section 10509.4, subdivision (b) provides, “Where a replacement is involved, the agent shall do all of the following: [¶] (1) Present to the applicant, not later than at the time of taking the application, a ‘Notice Regarding Replacement of Life Insurance,’ in the form as described in subdivision (d). The notice shall be signed by both the applicant and the agent and left with the applicant. Obtain with or as part of each application a list of all existing life insurance or annuities to be replaced and properly identified by name of insurer, the insured and contract number. If a contract number has not been assigned by the existing insurer, alternative identification, such as an application or receipt number, shall be listed. (2) Leave with the applicant the original or a copy of all printed communications used for presentation to the applicant. (3) Submit to the replacing insurer with the application a copy of the replacement notice.” Section 10509.4, subdivision (d) sets out the notice to be presented to the applicant: “NOTICE REGARDING REPLACEMENT [¶] REPLACING YOUR LIFE INSURANCE POLICY OR ANNUITY? [¶] Are you thinking about buying a new life insurance policy or annuity and discontinuing or changing an existing one? If you are, your decision could be a good one—or a mistake. You will not know for sure unless you make a careful comparison of your existing benefits and the proposed benefits. [¶] Make sure you understand the facts. You should ask the company or agent that sold you your existing policy to give you information about it. [¶] Hear both sides before you decide. This way you can be sure you are making a decision that is in your best interest. [¶] We are required by law to notify your existing company that you may be replacing their policy.”

stated simply that Farmers’ motion was unopposed. At the hearing, after the judge was informed that plaintiffs had filed and served an opposition to Farmers’ motion, and that Farmers had prepared and filed reply papers and objections in response, the hearing on Farmers’ motion was continued.

After oral argument, the superior court adopted its tentative ruling in favor of Volpi. As to plaintiffs’ arguments that their negligence per se claims defeated summary judgment, the superior court ruled: “Plaintiffs also try to argue that Volpi is liable under Ins. Code § 10509.4, but they do not allege such a breach in any way in the operative complaint while the evidence shows that [Boylan] did not inform Volpi that he was ‘replacing’ an existing policy until May 2009, after the initial applications; Volpi faxed the new information about the ‘replacement’ to Farmers once [Boylan] provided it to her; [Boylan’s] old policy was about to expire and [he] sought out and expressly requested policies from Volpi both with and without aviation coverage; [Boylan] took several months to think over the policies after receiving the offers before he came to Volpi and agreed to them; and nothing shows that if there were a breach of this statute that it caused any harm to [Boylan], in part because nothing shows that the expiring policy had aviation coverage.” At the continued hearing, the superior court granted Farmers’ summary judgment motion.

Plaintiffs appealed each of the judgments, and we granted plaintiffs’ unopposed motion to consolidate the appeals.

DISCUSSION

We review an order granting summary judgment de novo, but we limit our review to the issues that have been raised and supported in appellant’s brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) “Issues not raised in an appellant’s brief are deemed waived or abandoned.” (*Ibid.*, citing *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811; see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [“[W]hen legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration.”].) On appeal, plaintiffs claim that the superior court erred in granting

defendants summary judgment because there are triable issues of fact as to the application of negligence per se. Specifically, plaintiffs claim that it is a question of fact for the jury whether defendants complied with sections 10509.4 through 10509.6, and defendants' alleged failure to comply with those Insurance Code provisions proximately caused plaintiffs' harm.

A. *Applicable Law*

The doctrine of negligence per se “creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.” (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353, fn. 2 (*Millard*).) The doctrine is codified in Evidence Code section 669, subdivision (a). To state a cause of action for negligence under a theory of negligence per se, “the plaintiff must plead four elements: (1) the defendant violated a statute or regulation, (2) the violation caused the plaintiff’s injury, (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent, and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect. (Evid. Code, § 669.)” (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1184-1185, disapproved on another ground in *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 188, fn. 6.) Ordinarily, the first two elements are questions for the trier of fact, and the last two are determined by the trial court as a matter of law. (*Daum, supra*, 52 Cal.App.4th 1285.)

The operative complaint determines the issues that a defendant must address to prevail on a motion for summary judgment. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 (*Laabs*)). “Thus, a ‘defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.’ (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) ‘To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party’s evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.]’ (*Distefano*

v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.) “[T]he pleadings “delimit the scope of the issues” to be determined and “[t]he complaint measures the materiality of the facts tendered in a defendant’s challenge to the plaintiff’s cause of action.” [Citation.] [Plaintiff’s] separate statement of material facts is not a substitute for an amendment of the complaint. [Citation.]’ (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201-1202, fn. 5.)” (*Laabs, supra*, 163 Cal.App.4th at p. 1253.) California law is clear that a party cannot amend its pleadings by raising issues for the first time in an opposition to summary judgment. (*Id.* at pp. 1253, 1257.)

B. *Analysis*

As plaintiffs concede, they failed to plead the elements of negligence per se in their Third Amended Complaint. The Third Amended Complaint does not allege violation of any Insurance Code provision or statute or regulation; it does not allege that plaintiffs’ injuries were caused by any statutory violations; it does not allege that any statute was designed to prevent the injuries of which plaintiffs complain; and it does not allege that plaintiffs belonged to the class of persons that a statute was intended to protect. (Evid. Code, § 669, subd. (a).) The Third Amended Complaint does not even allege that Boylan was shopping for replacement life insurance policies. And plaintiffs do not contend that they sought to amend their Third Amended Complaint to include such allegations.

The Third Amended Complaint alleges that defendants were negligent in failing to provide Boylan with life insurance policies that included aviation coverage. Because plaintiffs did not allege in their Third Amended Complaint that the doctrine of negligence per se applied to the facts of this case, and did not allege facts that would support application of the doctrine of negligence per se, they are precluded from relying on negligence per se to defeat summary judgment. (*Laabs, supra*, 163 Cal.App.4th at p. 1253; *Millard, supra*, 156 Cal.App.4th at p. 1353 [plaintiff whose complaint alleged negligence but not a theory of negligence per se and who did not seek to amend complaint to include such allegations cannot defeat summary judgment by raising a

theory of negligence per se]; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1019 [same] (*Lopez*).

Plaintiffs argue in their opening brief that the primary right doctrine allows us to conclude that the substance of their negligence per se claim was properly before the trial court on summary judgment, and is properly before us. Plaintiffs' sole authority for this argument is *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419 (*Bird*), which they quote for the proposition that "the nature of a cause of action does not depend upon the label the plaintiff gives it or the relief plaintiff seeks but on the primary right involved." (*Id.* at p. 427.) Plaintiffs appear to believe that because they alleged claims that Farmers and Volpi were negligent in failing to provide Boylan with policies that included aviation coverage, despite his request that they do so, their complaint somehow also incorporates claims of negligence for violating sections 10509.4 through 10509.6. Plaintiffs cite no authority to support such a position. Plaintiffs argue that courts should "focus on the gravamen of [their] trial court claims, rather than their individual titles." That is precisely what the superior court did, and what we do here. The gravamen of plaintiffs' negligence claims in their Third Amended Complaint is that the defendants' failure to procure life insurance policies with coverage for aviation activities constitutes negligence. The problem with plaintiffs' claim is not that the complaint labeled it "negligence" as opposed to "negligence per se." The problem is that the complaint does not include allegations to support a claim of negligence per se. (*Millard, supra*, 156 Cal.App.4th at p. 1353; *Lopez, supra*, 98 Cal.App.4th at p. 1019.)

Further, *Bird* is inapposite. *Bird* arose from a fee dispute in which the plaintiff, who was ultimately convicted of criminal offenses, sued attorneys who had represented him in the criminal matter. (*Bird, supra*, 106 Cal.App.4th at p. 421.) He alleged breach of a written retainer agreement, breach of fiduciary duty, fraud, and money had and received, and he renounced any claim that defendants were negligent in representing him. (*Ibid.*) The defendants demurred, relying on cases holding that a convicted criminal defendant must allege actual innocence in order to state a cause of action for legal malpractice against former defense counsel. (*Id.* at p. 424.) Although some of the

allegations in the complaint “appeare[d] to implicate the quality of the legal services provided” (*id.* at p. 429), the Court of Appeal held that the lawsuit was brought to enforce the “primary rights” to be billed according to the retainer agreement and to be free from unethical or fraudulent billing practices, and that in such circumstances the plaintiff did not need to allege or prove actual innocence. (*Id.* at p. 432.)

The primary right doctrine does not help plaintiffs here. As our Supreme Court has explained, “The primary right theory is a theory of code pleading that has long been followed in California. It provides that a ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) The primary right, which is “the plaintiff’s right to be free from the particular injury suffered” is distinct from the legal theory on which liability is premised, and the remedy sought. (*Id.* at pp. 681-682.) The primary right theory prevents a plaintiff from enforcing a single primary right in two lawsuits, alleging one theory for the harm in one suit and another theory in the second. (*Id.* at p. 682.) It does not expand the scope of a complaint, and is irrelevant to the issues we confront here.

In their reply brief, plaintiffs take an entirely different approach. Relying on *Cal Sierra Construction, Inc. v. Comerica Bank* (2012) 206 Cal.App.4th 841, they argue for the first time that their appeal raises “the purely legal issue of [defendants’] non-compliance with [s]ections 10509.4 (a)-(d) to 10509.6” and that because their theory presents a question of law to be applied to undisputed facts in the record, we have discretion to allow them to advance their theory of negligence per se on appeal, even though they did not plead it in the Third Amended Complaint.

We need not address this argument. Much as the issues on summary judgment are framed by the pleadings, the issues on appeal are framed by the appellant’s opening brief. “ “Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for

the first time will not be considered, unless good reason is shown for failure to present them before.”’ (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Plaintiffs here offer no explanation for their delay in advancing this argument.

In any event, the argument is not persuasive. First, this appeal is not about whether defendants complied with Insurance Code provisions, it is about whether the defendants are entitled to summary judgment as to the claims alleged in plaintiffs’ Third Amended Complaint. Second, plaintiffs make inconsistent statements about whether facts are disputed, undercutting their argument that compliance with the Insurance Code is a pure question of law. In connection with their new argument, the plaintiffs contend that “[t]he facts underlying this appeal are clearly undisputed as [defendants] have never claimed or offered evidence that Volpi complied with [section] 10509.4 in providing [Boylan] with the subject replacement insurance policy.” But in their opening brief, plaintiffs maintain that there is a factual dispute as to whether defendants complied with the Insurance Code. This assertion is repeated in their reply brief, alongside the assertion that there are no disputes of fact as to this issue. Furthermore, plaintiffs’ emphasis on defendants’ supposed failure to offer evidence of compliance with the Insurance Code demonstrates plaintiffs’ disregard of the established law that on summary judgment defendants have no burden to offer evidence about claims not made in the operative complaint. (*Laabs, supra*, 163 Cal.App.4th at p. 1253.)

Plaintiffs’ only challenge on appeal to the grant of summary judgment rests on a theory of negligence per se, which was not pleaded in the Third Amended Complaint, and consequently they fail to present us with any basis for reversing the superior court’s orders.⁴

⁴ Even if plaintiffs had amended their Third Amended Complaint to include the facts they alleged in opposition to summary judgment, and even if plaintiffs could establish that all those facts were undisputed, we fail to see how plaintiffs could defeat summary judgment on claims related to the key person life insurance policy, because the additional facts do not include a statement that the key person life insurance policy was a replacement for a previously existing policy. Furthermore, plaintiffs do not allege any

DISPOSITION

The judgments of the trial court are affirmed. Respondents shall recover their costs on appeal.

causal connection between defendants' alleged statutory violations and their injuries, even for the personal life insurance policy, and it is not clear how they could do so. It is undisputed that Boylan told Volpi he had previously been turned down for insurance by other carriers, that Boylan and Volpi discussed the fact that Boylan was applying for policies with and without aviation coverage, that Boylan informed Volpi that he was seeking to replace his personal life insurance policy in May 2009 (well after he had applied for coverage and weeks before he bought the new policy), that Volpi explained to Boylan in early June 2009 that the quotations she presented to him did not include aviation coverage, after which Boylan accepted the policies, and that Boylan had requested extra time to consider the personal insurance policy. Moreover, Plaintiffs have not shown that Boylan's previous personal life insurance policy included aviation coverage.

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A140423, A141464, *Pacific Coast Drilling Company, Inc., et al. v. Farmers New World Life Insurance Company, et al.*