IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2009 Session

COLIN MARTIN v. MARY KATRINA DOUGHTIE AND GRANGE MUTUAL CASUALTY INSURANCE COMPANY

Appeal from the Circuit Court for Davidson County
No. 06C-1187 Barbara N. Haynes, Judge

No. M2009-00701-COA-R3-CV - Filed January 4, 2010

Guest who was injured during a party at residence where alcohol was consumed brought negligence action against the host. The guest also sued his uninsured/underinsured motorist carrier seeking payment under the policy. The trial court granted the insurance carrier's motion for summary judgment finding that the policy did not extend coverage under the circumstances. The trial court subsequently granted the host's motion for summary judgment finding that she owed no duty of care to the guest at the time of the injury. The guest appeals the trial court's action with respect to both defendants. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR.and ANDY D. BENNETT, JJ., joined.

Mark W. Honeycutt, Nashville, Tennessee, for the appellant(s), Colin Martin.

Owen Randolph Lipscomb, Samuel P. Helmbrecht, and Paul L. Sprader, Nashville, Tennessee, for the appellee(s), Mary Katrina Doughtie and Grange Mutual Casualty Insurance Company.

OPINION

I. Factual and Procedural Background

On September 24, 2005, Mary Katrina Doughtie, one of the Appellees, held a party

at her house commemorating the birthday of her recently deceased 9 year-old son, Tyler.[1] Ms. Doughtie had visited Tyler's grave site earlier in the day with family and friends after which they went to Ms. Doughtie's house around 5:00 or 6:00 p.m. where they had food, balloons, party favors and a cake in honor of Tyler's birthday. Approximately 25 to 30 friends and family were invited. The Appellant, Colin Martin, attended the party at the invitation of Ms. Doughtie's adult son, Danny Fulcher, a long-time friend of Mr. Martin. Mr. Martin, who had attended many other social gatherings at Ms. Doughtie's house in the past, arrived around 9:00 p.m. and brought a bottle of vodka for himself to drink. Ms. Doughtie drank beer during the party, but did not provide alcohol to her guests; she did, however, expect that they would bring alcohol to consume. Several guests purchased and brought a keg of beer, which was placed outside in a portion of the driveway that came around the back of the house where a deck was located. Mr. Fulcher drank beer from the keg throughout most of the evening.

After several hours at the party, a dispute arose between a few guests, including Mr. Martin and his roommate, Rusty Meade. Mr. Meade had complained to Mr. Martin that another guest had made derogatory remarks about women and this angered Mr. Martin. An altercation ensued that ultimately involved approximately 15 to 20 of the guests, including Mr. Fulcher. Some of the guests involved in the fight were attempting to break it up. Once the fight broke up, Mr. Martin sat on a retaining wall that ran along a circular portion of Ms. Doughtie's driveway with two other guests.[2] Not long after the fight, Mr. Fulcher, who was intoxicated at the time, got into his car that was parked in Ms. Doughtie's driveway; he drove the car into the rear portion of an unoccupied car, which was also parked in the driveway.[3] Mr. Fulcher then struck the unoccupied parked car a second time. As a result of the collision, the parked car was propelled forward and struck Mr. Martin, pinning him to the wall; the impact broke Mr. Martin's right leg and severely bruised his left leg.

Mr. Martin filed suit against Mr. Fulcher and Ms. Doughtie, alleging that Mr. Fulcher

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[1] The record is unclear whether the party started on the evening of September 23 or 24 and went into the early morning hours of the following day; however, the precise date is not relevant to the resolution of the case. Consequently, for ease of reference we will simply refer to the date of the party as September 24, 2005.

[2] The two other individuals sitting on the wall with Mr. Martin were DeWayne Mabry and Mr. Meade. Both Mr. Mabry and Mr. Meade filed suits related to injuries allegedly sustained as a result of the same acts of Mr. Fulcher. All three cases were consolidated by order of the trial court; however, only Mr. Martin's suit is before this Court.

[3] Neither Mr. Martin nor Mr. Fulcher recalled exactly how long after the fight the incident occurred, but estimates were between five minutes and an hour.

negligently operated his vehicle causing Mr. Martin's injury and that Ms. Doughtie negligently failed to prevent Mr. Fulcher from causing injury. Ms. Doughtie and Grange Mutual Casualty Company ("Grange"), Mr. Martin's insurance carrier and an unnamed defendant served as the alleged uninsured/underinsured motorist carrier in this matter, duly filed Answers.[4]

Following discovery, Grange filed a motion for summary judgment; Mr. Martin responded to the motion and a hearing was held. The trial court concluded that Mr. Martin was "not entitled to uninsured/underinsured motorist coverage from Grange pursuant to the terms and conditions of the subject insurance policy as a matter of law," and dismissed Grange from the case.

The trial court subsequently entered an Agreed Order of Compromise and Settlement, which dismissed the claims of Mr. Mabry against Mr. Fulcher and Ms. Doughtie, but ordered that "[t]he claims of Plaintiff Colin Martin shall remain pending against defendant Mary Katrina Doughtie until further Order of this Court...."[5] Ms. Doughtie thereafter filed a Motion for Summary Judgment to which Mr. Martin responded and, following a hearing, the court entered an order granting Ms. Doughtie's motion and dismissing the case. The court found that "upon the undisputed facts in the record before the Court, defendant Mary Katrina Doughtie did not owe a duty of care to the plaintiff Colin Martin at the time of the events giving rise to this action." Mr. Martin appeals the grant of summary judgment to both Grange and Ms. Doughtie, asserting that the court applied an improper standard of review for summary judgment and subsequently erred in its conclusions of law resulting in dismissal of Mr. Martin's claims against both defendants.

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[4] Mr. Martin sought uninsured/underinsured motorist coverage from Grange based on a policy issued to Evans Glass Company, Inc. (policy period March 1, 2005, through March 1, 2006) relating to the personal injuries Mr. Martin suffered at Ms. Doughtie's house on September 24, 2005. Evans Glass Company, Inc. is a business operated by Mr. Martin's uncle that contracted with Grange for automobile insurance. The Named Insureds under the policy include Evans Glass Company, Inc., Evans Family Children's Trust Number 1, and Evans Family Children's Trust Number 2. Mr. Martin is a member of one or possibly both of the Evans Family Children's Trusts.

[5] While the order did not dismiss Mr. Martin's claims against Mr. Fulcher, the record shows that Mr. Martin settled all claims against Mr. Fulcher. The report of the Rule 31 mediator that precipitated the Agreed Order of Compromise and Settlement stated that "all matters in controversy between plaintiff Colin Martin and defendant Robert Danny Fulcher were also resolved." Also, following entry of the agreed order, Mr. Martin sought amendment to his complaint removing Mr. Fulcher as a defendant. The record does not show the disposition of Mr. Meade's action.

II. Standard of Review

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977).

Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). To be entitled to summary judgment, the moving party must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008); *see also McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 215 n.5 (Tenn. 1993). The Tennessee Supreme Court has explained that "[b]oth methods require something more than an assertion that the nonmoving party has no evidence," *Hannan*, 270 S.W.3d at 8 (citing *Byrd*, 847 S.W.2d at 215), or presenting evidence that merely "raises doubts about the nonmoving party's ability to prove his or her claim." *Id.* (citing *McCarley*, 960 S.W.2d at 588). The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that "tends to disprove an essential factual claim made by the nonmoving party." *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *see Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). "If the moving party is unable to make the required showing, then its motion for summary judgment will fail." *Id.*; *Byrd*, 847 S.W.2d at 215.

If, however, "the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist." *Martin*, 271 S.W.3d at 84 (citing *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215). This may be accomplished by: (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.07. *Id.* (citing *McCarley* , 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6).

When reviewing the evidence, we first determine whether factual disputes exist. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. We consider the

evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall*, 113 S.W.3d at 721; *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Byrd*, 847 S.W.2d at 215. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588.

III. Analysis

A. Grange's Motion for Summary Judgment

Grange moved for summary judgment, contending that Mr. Martin was not entitled to coverage under the policy because he was not "occupying" a "covered auto," as those terms are defined by the policy, at the time of his injuries.

The respective rights of an insured and an insurance company are governed by their contract of insurance. *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 148 (Tenn. Ct. App. 2001). As with any other contract, courts must give effect to the parties' intentions as reflected in their written contract of insurance. *Id.*; *Black v. Aetna Ins. Co.*, 909 S.W.2d 1, 3 (Tenn. Ct. App. 1995); *Blaylock & Brown Constr. Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 149 (Tenn. Ct. App. 1990). In so doing, the insurance policy should be construed as a whole in a reasonable and logical manner, *Black*, 909 S.W.2d at 3, giving the policy's terms, as written, their natural and ordinary meaning. *Id.*; *Tata v. Nichols*, 848 S.W.2d 649, 650 (Tenn. 1993); *Quintana v. Tennessee Farmers Mut. Ins. Co.*, 774 S.W.2d 630, 632 (Tenn. Ct. App. 1989). While language that is susceptible to more than one reasonable interpretation is ambiguous and should be construed in favor of the insured, *Tata*, 848 S.W.2d at 650, "the courts should not favor either party if the policy's language is unambiguous and free from doubt and should enforce unambiguous policies as written." *Quintana*, 774 S.W.2d at 632 (internal citations omitted). "The courts are not at liberty to rewrite an insurance policy solely because they do not favor its terms and must avoid forced constructions that render a provision ineffective or extend a provision beyond its intended scope." *Merrimack*, 59 S.W.3d at 148 (citing *Black*, 909 S.W.2d at 3; *Demontbreun v. CNA Ins. Cos.*, 822 S.W.2d 619, 621 (Tenn. Ct. App. 1991)) (internal citations omitted). Absent fraud, overreaching, or unconscionability, the courts must give effect to a provision in an insurance policy when its terms are clear and its intent certain. *Id.*

A court's initial task in construing a contract is to determine whether the language of the contract is ambiguous. *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). Summary judgment is appropriate in contract cases where the terms of the contract are not ambiguous making the issue a pure question of law. *Id.* If the terms of the contract are ambiguous, then the court applies established rules of construction to determine the parties' intent. *Id.* "Only if ambiguity remains after the court applies the pertinent rules of construction does [the legal meaning of the contract] become a question of fact such that summary judgment is not proper." *Id.*

In support of its Motion for Summary Judgment, Grange relied on a Statement of Material Facts, a Memorandum of Law, Mr. Martin's pleadings, Mr. Martin's Response to Request for Admissions, Mr. Martin's testimony in an Examination Under Oath, and a copy of Grange's Uninsured/Underinsured motorist insurance policy endorsement in effect at the claimed date of loss. Grange pointed to the insurance policy issued to Evans Glass Company, Inc., and relied on the declarations page, which listed, among others, two organizations – Evans Family Children's Trust #1 and Evans Family Children's Trust #2 – as named insureds. Grange relied on the fact that Mr. Martin sought coverage as a beneficiary of one of these trusts. Finally, Grange pointed to the relevant portions of the policy for uninsured motorist coverage, which states in pertinent part:

> **A. Coverage**
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> 1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured", or "property damage" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".
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> **B. Who Is An Insured**
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> *If the Named Insured is designated in the declarations as:*
>
> 1. An individual, then the following are "insureds":
>
> a. The Named Insured and any "family members".
>
> b. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
>
> c. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
>
> 2. A partnership, limited liability company, corporation or *any other form of organization*, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute

for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

. . .

F. Additional Definitions

As used in this endorsement:

. . .

2. The following are added to the Definitions section:

a. "Family Member" means a person related to an individual Named Insured by blood, marriage or adoption, who is a resident of such Named Insured's household, including a ward or foster child.

b. "Occupying" means in, upon, getting in, on, out or off.

(Emphasis added).

Grange asserted that, because Mr. Martin receives coverage under the policy by virtue of his status as a beneficiary of one of the Evans Family Children's Trusts, an organization listed as a named insured on the policy's declarations page, he is only entitled to coverage if the events causing his injury meet the criteria of B.2 – that an "insured" for purposes of section A, is "anyone 'occupying' a covered 'auto'. . . ." Grange relied on Mr. Martin's admissions in response to Grange's Statement of Material Facts that, at the time of his injury, he was not within ten feet of his parked vehicle, a covered "auto" under the policy, nor was he "in, upon, getting in, on getting out or touching" either his vehicle, the unoccupied parked car that struck him after being struck by the automobile being driven by Mr. Fulcher, or the automobile being driven by Mr. Fulcher. Grange also relied on Mr. Martin's admissions that, at the time of the incident causing his injury, he "was not involved in any repair work, maintenance work or any activity involved in the use of" his vehicle, the unoccupied, parked automobile, or the automobile being driven by Mr. Fulcher.

Based on this evidence, Grange made a properly supported motion demonstrating that Mr. Martin was not entitled to uninsured motorist coverage under the terms of the policy thereby shifting the burden of production to Mr. Martin to do one of the following: (1) point to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitate the evidence attacked by the moving party; (3) produce additional evidence establishing the existence of a genuine issue for trial; or (4) submit an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.07. *Martin*, 271 S.W.3d at 84 (citing *McCarley* , 960 S.W.2d at 588; *accord Byrd*, 847

S.W.2d at 215 n.6).

In response to the summary judgment motion and supporting materials, Mr. Martin filed his own affidavit, a memorandum in opposition to the motion, a response to Grange's statement of material facts and an additional statement of material facts. Mr. Martin admitted that the facts set forth in Grange's Statement of Material Facts were undisputed but asserted that he "believed that the deposition of the policy issuing insurance agent is necessary to show that [Grange] knew that all members of the Evans Children's Family Trust [sic] were to receive full coverage under the policy." Mr. Martin also asserted that he did not disagree with Grange's interpretation of the policy with respect to Section B.2(a), however, he contended that there was a question of fact as to whether he should be considered an "individual" under the policy and, as a result, be entitled to coverage under Section B.1(a). Mr. Martin relied on his affidavit as establishing the existence of a genuine issue for trial.

In his affidavit, Mr. Martin stated that he was a beneficiary of "the Evans Family Children's Trust" and that "[i]t [was his] understanding that all of the beneficiaries of the Evans Family Children's Trusts have full automobile insurance coverage, including uninsured motorist coverage, through Grange Insurance." In response, Grange submitted the affidavit of Mary L. Harrington, Grange's Commercial Team Leader, which stated in pertinent part:

> 1. That she is employed by the Grange Mutual Casualty company as the Commercial Team Leader and that in such capacity she has access to certain business records of the Company, including insurance records concerning the policy of insurance issued to Evans Glass Company, Inc., including the full Declarations Pages for said policy.
> . . .
> 3. That after examining the records concerning said insured, she states that Grange Mutual Casualty Company has issued to said insured a Commercial Package Policy CPP2315296.
> 4. That she has assembled a facsimile of the complete Declarations Pages of that policy, a copy of which is attached hereto, and that such facsimile shows the policy coverages and amounts thereof in effect on September 24, 2005.
> . . .
> 5. The Declarations Pages do not list any individual(s) as a Named Insured in the subject policy. The Named Insured is not designated in the Declarations Pages as an individual. Under the subject policy, the Named Insured is a corporation, Evans Glass Company, Inc. The following organizations are also Insureds on this policy:

Evans Glass Company, Inc.
Evans Family Children's Trust #1
Evans Family Children's Trust #2
W A Evans, Jr Trustee

Colin Martin is not listed as a Named Insured on this policy.

As a preliminary matter, Mr. Martin contends that the trial court applied an improper standard of review in considering Grange's summary judgment motion. Mr. Martin asserts that the motion was granted "notwithstanding the request that the deposition of the insurance agent be taken to ascertain whether it was the intention of the parties that the Trusts' beneficiaries were intended to have full, individual coverage under the policy."

One of the methods a party opposing a motion for summary judgment may use to show that summary judgment is premature and, thus, should be denied is submitting an affidavit in accordance with Rule 56.07, Tenn. R. Civ. P. The rule provides as follows:

> 56.07. When Affidavits Are Unavailable. Should it appear *from the affidavits of a party opposing the motion* that such party cannot for reasons stated present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Tenn. R. Civ. P. 56.07 (emphasis added). We review the trial court's denial of Mr. Martin's request for additional time for discovery under the abuse of discretion standard. *Hill v. Giddens*, No. W2006-02496-COA-R3-CV, 2007 WL 4200417, at *9 (Tenn. Ct. App. Nov. 29, 2007) (citing *Sanjines v. Ortwein & Assocs., P.C.*, 984 S.W.2d 909, 909 (Tenn.1998); *Moorehead v. State*, 409 S.W.2d 357, 358 (Tenn.1966)).

Mr. Martin did not file an affidavit in accordance with Rule 56.07; the affidavit he submitted in response to Grange's motion did not include any facts essential to justify further discovery. Notwithstanding, Mr. Martin's memorandum, in which he asserted that "Plaintiff believes that the deposition of the policy issuing insurance agent is necessary to show that Defendant knew that all members of the Evans Children's Family Trust were to receive full coverage under the policy," provided no facts supporting why this discovery had not been completed. Moreover, there is nothing in the record to indicate that Mr. Martin did not have sufficient time for meaningful discovery, that he had attempted to depose the policy issuing agent or that Grange did anything to thwart the taking of the agent's deposition. *See In Re Estate of Phillips*, No. E2004-00116-COA-R3-CV, 2004 WL 2086331, at *2 (Tenn. Ct. App.

Sept. 20, 2004) (holding that the "opponent of a motion for summary judgment possesses no absolute right to additional time for discovery, and if there has been a reasonable opportunity for discovery, the party is obliged to make an affirmative showing that there is some evidence not presently before the court and why more time and additional discovery is needed"); *Frazier v. Brock's Open Air Market*, No. E2002-00203-COA-R3-CV, 2002 WL 31059221, at *5-6 (Tenn. Ct. App. Sept. 17, 2002); *Hughes v. Effler*, No. E2000-03147-COA-R3-CV, 2001 WL 881352, at *2 (Tenn. Ct. App. Aug. 7, 2001).

Mr. Martin also contends that the trial court erred in granting Grange's motion because there "is an issue of fact and a jury should be able to make the determination as to whether the parties intended the policy [to] grant[] Martin full, individual coverage." The substance of Mr. Martin's opposition to Grange's motion is that there is a "question of who was the proper named insured," the resolution of which, Mr. Martin contends, is necessary in order to resolve the legal issue of coverage. Mr. Martin argues that the case of *Christenberry v. Tipton*, 160 S.W.3d 487 (Tenn. 2005), is analogous to that at bar and relies on his affidavit as having established a genuine issue for trial.[6] Not only do we find that the facts here distinguish this case from *Christenberry* because Mr. Martin is not listed by name anywhere in the insurance policy, but we do not find that Mr. Martin's affidavit established a genuine issue for trial.

Rule 56.06, Tenn. R. Civ. P., requires that "[s]upporting and opposing affidavits shall be made on personal knowledge . . . . [and] set forth specific facts showing that there is a genuine issue for trial." *Id.* Accordingly, Mr. Martin's statement in his affidavit that it was his "understanding" that beneficiaries of the trusts were to receive "full automobile insurance coverage" failed to set forth specific facts, based on personal knowledge. Moreover, Grange did not dispute that Mr. Martin would be covered under the policy as a beneficiary of one of the Evans Family Children's Trusts if the circumstances of his injury met the terms of coverage; rather, it asserted that the circumstances in which Mr. Martin was injured did not meet the terms of coverage.

Since Mr. Martin failed to establish a genuine issue of fact for trial, we review the trial court's conclusion that, based on the undisputed facts, he was not entitled to coverage under

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[6] The *Christenberry* court considered whether Mr. Christenberry's insurance policy, which included the plaintiff's name as a "driver" but failed to list the plaintiff as a named insured, was ambiguous and should be construed as providing coverage to the "drivers" as an additional class of "insureds." 160 S.W.3d 487 (Tenn. 2005). The *Christenberry* court found that summary judgment was inappropriate because the list of drivers in the policy created an ambiguity since the policy did not explain the purpose of the list; moreover, there was evidence that the insurance company was told when the policy was negotiated that the plaintiff was "to be included as [Mr. Christenberry] was required to provide her a car and carry insurance on her and her automobile." *Id.* at 494-95.

the policy issued by Grange. In interpreting a contract of insurance, we start with the presumption that the policy as written reflects the parties' intentions. *See Merrimack*, 59 S.W.3d at 148; *Black*, 909 S.W.2d at 3; *Blaylock & Brown Constr. Inc.*, 796 S.W.2d at 149. Mr. Martin is not listed as a Named Insured nor is his name listed anywhere in the policy. While Mr. Martin's vehicle, a 1998 Chevy pickup truck, is one of the vehicles listed in the "Schedule of Covered Autos You Own," there is no ambiguity as to the purpose of this list. We do not agree with Mr. Martin's assertion that, because he is not listed by name and instead the trusts are listed as insureds on the declaration pages, the policy is ambiguous. We find no ambiguity in the policy's declarations pages as to who is a Named Insured nor do we find ambiguity with respect to who is a Named Insured under the policy.

The relevant portion of the contract provided that where the Named Insured was an organization, such as one of the Evans Family Children's Trusts, uninsured motorist coverage was provided to "anyone 'occupying' a covered 'auto.'" The contract defined "occupying" as "in, upon, getting in, on, out or off." Mr. Martin's truck that he drove to the party on September 24, 2005, was a covered automobile under the policy; however, Mr. Martin admitted that he was not in, upon, getting in, on, out or off, or otherwise anywhere near his truck at the time of the accident. Consequently, the trial court did not err in concluding that Mr. Martin was not entitled to uninsured motorist coverage under the facts of the case.

B. Ms. Doughtie's Motion for Summary Judgment

Ms. Doughtie filed a motion for summary judgment asserting that Mr. Martin could not prove an essential element of his claim; specifically, that Mr. Martin could not prove that she owed him a duty of care and that Mr. Martin could not prove that her actions or inactions were the proximate or legal cause of his injuries due to Tenn. Code Ann. § 57-10-101.[7]

To prevail on his claim, Mr. Martin must prove by a preponderance of the evidence five essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct

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[7] Tenn. Code Ann. § 57-10-101 provides:

> The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.

Id. The Tennessee Supreme Court has held that the effect of this statute was to codify the common-law rule that an individual who furnishes alcohol to another is not liable for any damages resulting from the other's intoxication, even if those damages are foreseeable, because the statute "constitutes the legislative determination that persons who furnish alcohol are not at fault for injuries inflicted by an intoxicated person." *Biscan v. Brown*, 160 S.W.3d 462, 472 (Tenn. 2005).

by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 819 (Tenn. 2008) (citing *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). "The threshold element is duty of care because without a legal duty, there can be no conduct that breaches the duty." *Bailey v. Grooms*, No. E2008-01520-COA-R3-CV, 2009 WL 3460654, at *3 (Tenn. Ct. App. Oct. 28, 2009) (citing *Hale v. Ostrow*, 166 S.W.3d 713, 715 (Tenn. 2005)). Accordingly, if Ms. Doughtie shows that Mr. Martin, as the nonmoving party, cannot prove an essential element, such as the duty of care, she is entitled to summary judgment. *See Martin*, 271 S.W.3d at 83; *see also Hannan*, 270 S.W.3d at 5.

A duty of care is the legal obligation owed by a defendant to a plaintiff to conform one's conduct to a reasonable person standard of care to avoid unreasonable risks of harm to others. *Downs ex rel. Downs*, 263 S.W.3d at 819 (citing *McCall*, 913 S.W.2d at 153; *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008)). The rule requires that persons refrain from engaging in affirmative acts that a reasonable person should recognize as an unreasonable risk of harm to another. *Satterfield*, 266 S.W.3d at 355 (citing *Restatement (Second) of Torts* §§ 284, 302 (1965)); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009); *see also West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005); *Draper v. Westerfield*, 181 S.W.3d 283, 291 (Tenn. 2005); *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 177 (Tenn. 1992)). The law does not generally impose, however, an affirmative duty to control the conduct of other persons to prevent them from causing physical harm to others or to protect others from the harm of third persons. *Satterfield*, 266 S.W.3d at 355; *Giggers*, 277 S.W.3d at 364; *see also Downs ex rel. Downs,* 263 S.W.3d at 819-20; *Draper*, 181 S.W.3d at 291; *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 904 (Tenn. 1996)*; Bradshaw v. Daniel*, 854 S.W.2d 865, 871 (Tenn. 1993).

In support of summary judgment, Ms. Doughtie filed a Statement of Undisputed Facts, Memorandum of Law, and the depositions of Mr. Martin, Ms. Doughtie and Mr. Fulcher. Ms. Doughtie relied on her deposition testimony as well as that of Mr. Fulcher and Mr. Martin to show that, while Mr. Fulcher is her son, he was an independent adult at the time of the events giving rise to this case. Ms. Doughtie asserted that Mr. Fulcher's actions were not foreseeable and relied on her testimony as well as that of Mr. Martin that Mr. Fulcher was not known to be a violent person. Ms. Doughtie contended that, based on the evidence, "[she] had no unique knowledge of Mr. Fulcher, Mr. Martin or the circumstances existing between them on this night such that she had, or created, a duty to protect Mr. Martin."[8] Ms.

[8] Ms. Doughtie also noted the fact that Mr. Martin alleged in the amended complaint that she provided alcohol to her guests and that the Tennessee Supreme Court held in *Biscan* that Tenn. Code Ann. § 57-10-101 "make[s] it impossible for one who has been injured by an intoxicated person to state [a] claim (continued...)

Doughtie's submission was sufficient to establish that Mr. Martin could not establish an essential element of his claim, *i.e.*, that she owed him a duty of care, thereby shifting the burden to Mr. Martin to produce evidence of specific facts establishing that genuine issues of material fact exist. *See Martin*, 271 S.W.3d at 84.

Mr. Martin responded by filing a memorandum, a response to Ms. Doughtie's statement of undisputed facts, a statement of additional material facts, and the affidavit of Seagie Smith;[9] Mr. Martin did not dispute any of the material facts submitted by Ms. Doughtie. Mr. Martin contended that Ms. Doughtie was not entitled to summary judgment because a special relationship existed between Ms. Doughtie and all of her guests, including Mr. Martin and Mr. Fulcher, such that she owed a duty of care to prevent Mr. Martin's injuries; that Ms. Doughtie, as the owner of the premises, owed him, as her invitee, a duty to remove or warn of dangers on her property; and that the vehicles of intoxicated guests parked in the driveway constituted a dangerous condition of which Ms. Doughtie had a duty to remove or warn and that she failed to do either. Finally, Mr. Martin contended that, even if Ms. Doughtie did not owe him a duty of care, she assumed such a duty because she had taken the car keys of intoxicated guests in the past and that when she failed to take intoxicated guests' car keys or patrol the party on the night in question she failed to meet the duty. Ms. Doughtie did not dispute the additional material facts, although she challenged some of Mr. Martin's statements as either incomplete or mischaracterizations of the record.

Although duty is a question of law to be determined by the court, *see Biscan*, *supra,* the nature of the duty a defendant may owe a plaintiff may be dependent upon the resolution of certain factual issues. *Downs ex rel. Downs*, 263 S.W.3d at 82. Consequently, our first inquiry is to determine whether there are disputed questions of fact, which are material, such as to preclude summary judgment. *See* Rule 56.04, Tenn. R. Civ. P.

Our review of the testimony shows that the only disputed question relates to whether or not a fight occurred. When asked directly, Mr. Fulcher did not recall a "fight"; however,

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[8](...continued)
for negligence against the person or entity who furnished the alcoholic beverage or beer because the statute removes, as a matter of law, the required element of legal causation." *Biscan*, 160 S.W.3d at 472. Consequently, she contended, that Mr. Martin could not prove the essential element of proximate causation in his claim of negligence against her. In response, Mr. Martin asserted that Tenn. Code Ann. § 57-10-101 was inapplicable to the case because the testimony of Mr. Martin, Mr. Fulcher and Ms. Dougthie showed that Ms. Doughtie did not purchase the alcohol that was consumed by Mr. Fulcher or any of the other guests. These contentions will be discussed, *infra.*

[9] In her affidavit, Ms. Smith stated that she attended the party at Ms. Doughtie's home and saw Ms. Doughtie on the back deck when the fight began.

in later testimony, when describing what he remembered of the accident and whether the accident was related to the fight, he stated that he was not sure whether the two were related but that he knew the accident happened within "so many minutes" after "that whole controversy." In addition, Ms. Doughtie pointed to her testimony as well as that of Mr. Fulcher that they did not recall there being a fight during the party in question. We do not find, however, that this is a material question of fact, such that it was inappropriate for the trial court to consider the questions of law raised by Ms. Doughtie in her motion for summary judgment. The record shows clearly that some type of altercation occurred and the resolution of the legal issues raised by the motion for summary judgment does not depend on the resolution of whether a fight actually occurred. We will, therefore, examine the legal issue of whether Ms. Doughtie owed Mr. Martin a duty of care viewing the facts in the light most favorable to Mr. Martin.

1. Relationship Between Ms. Doughtie and Mr. Martin

Mr. Martin contends that Ms. Doughtie owed him a "general duty of reasonable care" as her invitee on the premises and that she "owed a duty to Martin to prevent foreseeable harm because of the special relationship between them." While Mr. Martin characterizes this alleged duty as "general," he later argues that two "protected classes for special relationships" existed between himself and Ms. Doughtie – that of "possessor of land [and invitee] and social host [and guest]." The essence of Mr. Martin's argument, therefore, is that Ms. Doughtie owed him a duty of reasonable care by virtue of one or two special relationships between them. We will examine the nature of each of these alleged special relationships and, as a consequence, the nature of any duty that might arise because of such relationship.

a. Possessor of Land and Invitee

Tennessee courts have recognized that a special relationship exists between a private property owner and his or her invitee or guest such that an owner or possessor of premises has a duty to exercise reasonable care under the circumstances to protect a guest or invitee from unreasonable risk of harm or provide aid to an injured guest. *See Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994) (explaining that Tennessee abolished the distinction between business invitees and social guests such that all property owners owed to an invitee, social or business, a duty of reasonable care under the circumstances); *Rice v. Sabir*, 979 S.W.2d 305, 308 - 310 (Tenn. 1998); *Bradshaw v. Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993); *McClung*, 937 S.W.2d at 895; *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985); *Restatement (Second) of Torts* § 314A. Tennessee courts have recognized that this duty includes the responsibility of maintaining the premises in a reasonably safe condition by either removing or repairing potentially dangerous physical conditions or by

warning against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence. *Rice*, 979 S.W.2d at 308; *Blair v. Campbell*, 924 S.W.2d 75, 76 (Tenn. 1996); *Eaton*, 891 S.W.2d at 593-94.

Property owners are not, however, absolute insurers of their guests' safety. *Eaton*, 891 S.W.2d at 594 (citing *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980); *Roberts v. Roberts*, 845 S.W.2d 225, 227 (Tenn. Ct. App. 1992)). Neither are they obligated to control the conduct of other guests. *Wilkerson v. Altizer*, 845 S.W.2d 744, 747 (Tenn. Ct. App. 1992) (declining to adopt the special relationship between private property owners and their guests recognized in section 318 of the *Restatement*)[10]; *see also Bailey,* 2009 WL 3460654; *Newton v. Tinsley*, 970 S.W.2d 490 at 493 n.3 (Tenn. Ct. App. 1997); *Nichols v. Atnip*, 844 S.W.2d 655, 662 (Tenn. Ct. App. 1992). The scope of the duty must be assessed individually and on a case by case basis. *Downs ex rel. Downs*, 263 S.W.3d at 820; *Biscan*, 160 S.W.3d at 480-82.

In determining whether a defendant owes a duty to act for the protection of a particular plaintiff courts "must first establish that the risk [of harm] is foreseeable, and, if so, must then apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable." *Giggers*, 277 S.W.3d at 365 (citing *Satterfield*, 266 S.W.3d at 366). Foreseeability of the injury does not, therefore, immediately give rise to a duty of care, but foreseeability must be established as a threshold to the duty analysis. *Id.* If foreseeability is established, the court will then determine whether the risk to the plaintiff was unreasonable. *Id.*; *Downs ex rel. Downs*, 263 S.W.3d at 820. A risk of harm is unreasonable and gives rise to a duty to act with due care "if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall*, 913 S.W.2d at 153; *Satterfield*, 266 S.W.3d at 377.

The question of whether Ms. Doughtie's duty of care as the owner and possessor of

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[10] *The Restatement (Second) of Torts* § 318 provides:

> *Duty Of Possessor Of Land Or Chattels To Control Conduct Of Licensee* – If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor: (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.

the premises encompasses the duty to guard against the acts set forth in Mr. Martin's complaint involves the threshold inquiry into the foreseeability of the risk to which Mr. Martin was exposed, i.e., whether it was "a reasonably foreseeable probability, not just a remote possibility, and that some action within the defendant's power more probably than not would have prevented the injury." *Doe*, 845 S.W.2d at 178.[11] Accordingly, the question before us is whether Mr. Martin has made "any showing from which it can be said that the defendant[] reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries." *Doe*, 845 S.W.2d at 178. We find that he has not met the threshold of establishing that his injuries were foreseeable.

Mr. Martin contends that the presence of and access to the vehicles of intoxicated guests in Ms. Doughtie's driveway constituted a dangerous "instrumentality" that Ms. Doughtie should have removed or warned against. Mr. Martin also contends that his injuries were foreseeable because drinking and driving is a known danger that Ms. Doughtie was aware of because she had taken the car keys of intoxicated party guests in the past. Mr. Martin contends that his injuries were actually "more foreseeable" than injuries resulting from an intoxicated driver on public roads because his injuries occurred in Ms. Doughtie's driveway, a place, he contends, she "controlled." Mr. Martin also contends that his injuries were foreseeable because of Mr. Fulcher's "history of violence" and, therefore, Ms. Doughtie should have reasonably foreseen that he would "intentionally" injure Mr. Martin.

We reject Mr. Martin's contention that his injuries were "more foreseeable" because they happened in Ms. Doughtie's driveway. A driveway is generally an accepted place, and arguably the most appropriate place, to park a vehicle when visiting a residence. Consequently, it was improbable that Ms. Doughtie, at the time her guests arrived and parked in her driveway, could have reasonably foreseen from the mere presence of cars parked in her driveway that Mr. Martin would be injured. "In order to impute to the owner knowledge of a dangerous thing, or place, the danger therefrom must be such as is recognized by common experience, or might reasonably be expected or anticipated by a person of ordinary prudence and foresight." *Friedenstab v. Short*, 174 S.W.3d 217, 224 (Tenn. Ct. App. 2004) (quoting *Illinois Central Ry. Co. v. Nichols*, 173 Tenn. 602, 118 S.W.2d 213, 217 (1938)).

We do not find support in the record for Mr. Martin's assertion that Mr. Fulcher had

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[11] *See also Satterfield*, 266 S.W.3d at 366-67 (explaining that a court's consideration of foreseeability is limited to assessing whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid since almost any outcome is possible and can be foreseen). "The mere fact that a particular outcome might be conceivable is not sufficient to give rise to a duty." *Satterfield*, 266 S.W.3d at 367.

a "history of violence." Mr. Martin testified that he and Mr. Fulcher had been best friends since they were young children and that, while he had heard that Mr. Fulcher may have been involved in a criminal act once, he did not know the specifics. When asked about his personal knowledge of Mr. Fulcher and any violent tendency, Mr. Martin testified that he had never witnessed any acts of violence by Mr. Fulcher. Moreover, he testified that he did not believe that Mr. Fulcher would have intentionally wanted to hurt him. Ms. Doughtie testified that she did not know Mr. Fulcher to be violent, though, she believed he had "defended himself" in a fight before. Finally, assuming that a fight did occur during the party and that both Mr. Fulcher and Mr. Martin became involved, there was no evidence that the fight was between Mr. Fulcher and Mr. Martin. Mr. Martin testified that the fight started as an argument between Mr. Martin's roommate, Rusty Meade, and another party guest, Ryan, because Ryan was apparently "degrading some women." Mr. Martin testified that once the fight broke out, around fifteen to twenty guests became embroiled in the fight either taking part or trying to break it up. Mr. Fulcher testified that while he did not remember being involved in the fight, it was likely that any involvement by him was in an effort to break up the fight. The testimony of Mr. Martin, Mr. Fulcher and Ms. Doughtie was that Ms. Doughtie had hosted similar parties in the past where most of the same people were present and that at no time did injuries such as those sustained by Mr. Martin occur.

The only remaining facts upon which Mr. Martin relies for the contention that his injuries were foreseeable are that driving while intoxicated is a recognized "foreseeable and serious" harm; that this particular group of people got into fights in the past; and that there was a fight during the party on the night Mr. Martin was injured. We do not disagree with Mr. Martin that driving a vehicle on public roads while under the influence is extremely dangerous, as such activity is prohibited by statute, *see* Tenn. Code Ann. § 55-10-401; we do not agree, however, that the probability or likelihood of Mr. Martin being injured in the manner sustained was foreseeable, even given the presence of alcohol at the party. Ms. Doughtie's "conduct must be judged in light of the possibilities apparent to h[er] at the time, and not by looking backward 'with the wisdom born of the event.'" *Doe*, 845 S.W.2d at 178 (citing 5 Prosser and Keeton, *The Law of Torts* § 31, p. 170 (1984) (footnotes omitted)). As the *Doe* court explained, "[t]he standard is one of conduct, rather than consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred." *Id.* It was not reasonably foreseeable that Mr. Fulcher would crash his car not once, but twice, into another car parked in the driveway and that the parked car would be propelled into a retaining wall on which Ms. Doughtie's guests happened to be sitting. Moreover, it was not reasonably foreseeable that Ms. Doughtie's guests would sit on a retaining wall at the edge of the driveway as such walls are not typically used as seating and there is no evidence in the record that Ms. Doughtie told her guests or otherwise encouraged them to use the retaining wall as seating.

b. Social Host and Guest

Mr. Martin contends that Ms. Doughtie owed him a duty to prevent his injuries because he was her social guest. In support of this contention, Mr. Martin asserts that "[a] social host, who attempts to create a safe haven by disallowing intoxicated persons to leave by taking their keys shows that 'the foreseeability of harm to [the party invitees] and others is proven by the host's recognition of the need for the rule in the first place and supports a finding of a special relationship.' Mike Faulk, 'One Too Many: Sellers, Servers Must Know 'How Much Is Too Much' to Avoid Alcohol-Related Injuries,' Tenn. B.J. May 2007, at 12 (citing *Biscan*, 160 S.W.3d at 481)." Mr. Martin further argues that "Doughtie saw the fight in her back yard, Fulcher had a history of violence and she knew that her son had 'defended himself' before[]" and that "[e]ven if Doughtie did not have a history of taking keys, she could have asked Martin to leave after the scuffle."

A social host, like the owner or possessor of premises, owes her guests a duty of reasonable care under the circumstances. *Bailey*, 2009 WL 3460654, at *4. The analysis for determining whether a particular social host owed a duty to a particular guest under the circumstances is the same as a property owner or possessor of land and depends on the foreseeability of the harm. *Id*. Mr. Martin contends that his injuries were foreseeable to Ms. Doughtie as his social host for the same reasons he contended they were foreseeable to Ms. Dougthie as the owner and possessor of land. As discussed above, Mr. Martin's injuries were not reasonably foreseeable and, thus, no duty on the part of Ms. Doughtie arose. To find otherwise would necessarily cast the premises owner or social host in the role of an absolute insurer of the guest's safety, including taking actions to control the conduct of the host's other adult guests, neither of which is contemplated by our negligence law. *See Bailey*, 2009 WL 3460654 (holding that a property owner and social host does not owe a legal duty of care to prevent his adult social guests from becoming intoxicated and injuring each other); *Wilkerson*, 845 S.W.2d at 747; *Nichols*, 844 S.W.2d at 662; *Newton*, 970 S.W.2d at 493 n.3; *see also Eaton*, 891 S.W.2d at 594-95; *McCormick*, 594 S.W.2d at 387; *Roberts*, 845 S.W.2d at 227.

Under these facts, we do not find that it was reasonably foreseeable that Mr. Martin would suffer injuries in the manner in which they occurred. Consequently, Ms. Doughtie was under no duty when Mr. Martin's injuries occurred to prevent her adult guests from becoming intoxicated and injuring Mr. Martin.

2. Relationship Between Ms. Doughtie and Mr. Fulcher

Mr. Martin asserts that a special relationship existed between Ms. Doughtie and Mr. Fulcher such that she was obligated to prevent Mr. Fulcher from causing harm to third

parties, including Mr. Martin. He contends that Tennessee courts recognize four special relationships that give rise to such a duty – parent and child, possessors of land and guests, social hosts and guests, and those who have custody over another. As discussed above, we do not find that Ms. Doughtie's status as the owner and possessor of the premises and as host obligated her to control the conduct of her adult guests, including her son, to prevent them from injuring her other adult guests. With respect to the other two relationships Mr. Martin alleges, we do not find that the record supports a finding of a special relationship between Ms. Doughtie and Mr. Fulcher.

A family relationship alone does not create a "special relationship" because it does not necessarily carry with it the capacity or authority to control. *See Nichols*, 844 S.W.2d at 662; *Ollice v. Pugh*, 1987 WL 4902 at *4 (Tenn. Ct. App. May 27, 1987). The only family relationship recognized by the Restatement is that of a parent with his or her *minor* child. *See Restatement (Second) of Torts* § 316 (a parent is under a duty to exercise reasonable care so to control his *minor* child) (emphasis added). In this case, Mr. Fulcher was the adult child of Ms. Doughtie who was employed and lived in his own apartment. While the testimony in the record was that Mr. Fulcher was intoxicated at the party, there is nothing in the record to indicate that he was incapacitated or unable to take care of himself at the time he injured Mr. Martin. There is nothing in the record to indicate that he was dependent upon Ms. Doughtie or that Ms. Doughtie had the capacity or authority to control him.

Finally, Mr. Martin cites to Section 319 of the *Restatement* contending that Ms. Doughtie had custody over Mr. Fulcher such that she was under a duty to exercise reasonable care to control him. Section 319, however, only applies where a person "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others." *Restatement (Second) of Torts* § 319.[12] In this case, there is no evidence that Ms. Doughtie took charge of Mr. Fulcher. Moreover, the record does not show that Ms. Doughtie knew or should have known that he was likely to cause bodily harm to others. As discussed above, Mr. Martin testified that he did not know Mr. Fulcher to be a violent person. Consequently, we do not find that there was a special relationship between Ms. Doughtie and Mr. Fulcher such that she had a duty to control his conduct to protect others.

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[12] *Restatement (Second) of Torts* § 319 provides:

> *Duty Of Those In Charge Of Person Having Dangerous Propensities* – One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

3. Assumption of a Duty of Care

Mr. Martin contends, in the alternative, that, if Ms. Doughtie was not under a legal duty to exercise reasonable care to prevent his injuries, she assumed such a duty because "in the past [she] had taken keys from party patrons who had had too much to drink." Mr. Martin relies on Section 324A of the *Restatement* asserting that Ms. Doughtie is liable to him for injuries he sustained when she failed to "patrol the party or take the keys of any of the attendees, thereby breaching a duty she assumed." Mr. Martin does not indicate which circumstance described in Section 324A applies to the present case beyond quoting *Barron v. Emerson Russell Maintenance Co.*, No. W2008-01409-COA-R3-CV, 2009 WL 2340990 at *10 (Tenn. Ct. App. Jul. 30, 2009), that "[t]his section 'applies specifically to parties who voluntar[ily] assume the duty to protect others from foreseeable risk.'" *Id.* (quoting *Collins v. Arnold*, No. M2004-02513-COA-R3-CV, 2007 WL 4146025, at * 14 (Tenn. Ct. App. Nov.20, 2007) *perm. appeal den.* (Tenn. Apr. 14, 2008)).

Section 324A of the *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A. While the Tennessee Supreme Court has not explicitly adopted Section 324A of the *Restatement* as establishing the only situations under which liability attaches under an assumed duty, "the Tennessee Supreme Court has quoted and applied the conditions set out in *Restatement* § 324A(a)-(c) in a context indicating that those conditions establish the applicable bases for liability when there has been a breach of the assumed duty of reasonable care." *Collins*, 2007 WL 4146025, at *14; *see Biscan*, 160 S.W.3d at 483; *Speaker v. Cates Co.*, 879 S.W.2d 811, 813 (Tenn.1994). Generally, the rule is that "[o]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully." *Biscan*, 160 S.W.3d at 482-83 (citing *Stewart v. State*, 33 S.W.3d 785, 793 (Tenn. 2000)). Whether or not a person has assumed a duty to act is a question of law. *Id.*

Other cases that have analyzed whether a defendant assumed a duty of care to protect their social guests from harm have emphasized the creation and communication of certain "rules" that were designed to protect the guests from harm. For example, in *Biscan*, the party host, Mr. Worley, established a "rule" with his daughter prior to the start of the party that if any guests became intoxicated, they would have to turn in their car keys and spend the night at Mr. Worley's house. *Biscan*, 160 S.W.3d 467. Mr. Worley and his daughter publicized this rule to some of the guests and Mr. Worley testified that he imposed the rule for the protection of his minor guests and that he undertook to provide a safe environment in which the minors could consume alcohol. *Id*. For a while Mr. Worley "patrolled and walked around" in an attempt to "keep an eye on things," but eventually he fell asleep in another room during the party and made no effort to enforce his rule or otherwise keep the minor guests from driving. *Id.* The *Biscan* court found that Mr. Worley had assumed a duty to keep the minors in attendance safe and that he failed to act carefully after assuming his duty when he stopped patrolling the party and fell asleep. *Id.* at 483.

In a more recent case by the Eastern Section of the Court of Appeals, the court found that the party host, Mr. Proffitt, did not assume a duty of care to protect his guests because he did not impose any rules on his guests that he failed to enforce. *Bailey*, 2009 WL 3460654, at *7-8. In addition to the fact that Mr. Proffitt did not establish any sort of arrangement that guests should give him their car keys or that guests would be asked to leave if their behavior became problematic, the *Bailey* court found several other facts that distinguished *Bailey* from *Biscan*. Most notably, the *Bailey* court explained that the court in *Biscan* found a special relationship arose between Mr. Worley and his social guests because they were minors and "public policy considerations favor imposing a duty to act for the protection of minors where such a duty might be absent when dealing with adults" because the legislature has delineated public policy that minors are prohibited from consuming alcohol. *Bailey*, 2009 WL 3460654, at *8 (quoting *Biscan*, 160 S.W.3d at 480).

We believe the present case more closely resembles *Bailey* than *Biscan*. Like *Bailey*, the guests consuming alcohol at Ms. Doughtie's house on the night Mr. Martin was injured were all adults.[13] Moreover, there is nothing in the record showing that Ms. Doughtie established any "rules" for her guests on the night of the party. Mr. Martin implies that, because Ms. Doughtie had on occasion taken the car keys of intoxicated guests, she was duty bound to continue to do so at all future parties, including the night of September 24, 2005. Mr. Martin cites no authority, however, for such a proposition and we have found none. Moreover, since Ms. Doughtie did not establish rules with respect to how her adult guests

[13] While the evidence shows minors were present, there is no evidence that any of the minors consumed alcohol and Mr. Martin makes no assertion that the nature of Ms. Doughtie's duty, if any, derives in any way from the presence of the minors at her house on September 24.

were to conduct themselves during the party, she was not obligated to "patrol" the party. We do not find evidence in the record to hold as a matter of law that Ms. Doughtie assumed a duty to protect her guests from other intoxicated guests on September 24, 2005.

4. Effect of Tenn. Code Ann. § 57-10-101

Ms. Doughtie asserted in her motion for summary judgment that Mr. Martin could not prove an essential element of his claim – that Ms. Doughtie's actions or inactions were the proximate cause of his injuries – because Tenn. Code Ann. § 57-10-101 establishes that the consumption of alcohol, not the furnishing of alcohol, is the proximate or legal cause of injuries resulting from an intoxicated person. Ms. Doughtie pointed to the fact that Mr. Martin alleged in his complaint that Ms. Doughtie furnished beer to her social guests, including Mr. Fulcher, who was intoxicated when he negligently drove his car into another car that hit and injured Mr. Martin. Mr. Martin contends that Ms. Doughtie is not shielded from liability because she did not purchase the beer that her guests were drinking; rather, her guests brought the keg of beer and other alcohol that they were consuming. Inasmuch as we have determined that Ms. Doughtie successfully negated an essential element of Mr. Martin's claim, we need not determine this issue.

V. Conclusion

Having found that the contract for insurance issued by Grange is not ambiguous, we find that the trial court properly granted summary judgment to Grange because under the terms of the policy Mr. Martin is not entitled to coverage. We further find that the trial court properly granted Ms. Doughtie's motion for summary judgment as she did not owe a duty of care to Mr. Martin nor did she assume such a duty. Consequently, we affirm the judgments of the trial court.

Costs of this appeal are assessed to Collin Martin.

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RICHARD H. DINKINS, JUDGE