COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00147-CV

RITA VIGIL — APPELLANT

V.

AMY KIRKLAND — APPELLEE

FROM THE 352ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 352-272421-14

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Rita Vigil filed a negligence suit against Appellee Amy Kirkland alleging personal injuries and damages after Vigil's vehicle was rear-ended by Kirkland's vehicle. A jury found that Kirkland's negligence, if any, did not proximately cause the occurrence; the trial court entered a take-nothing judgment

[1]*See* Tex. R. App. P. 47.4.

on the jury's verdict. Vigil raises two issues. She argues that the jury's failure to find that Kirkland's negligence proximately caused the occurrence is supported by legally and factually insufficient evidence and that the trial court abused its discretion by overruling her motion for new trial. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Vigil and Kirkland testified at trial regarding the cause of the accident. On the morning of August 3, 2012, Vigil had stopped her vehicle at a red light. About fifteen seconds later, a vehicle driven by Kirkland struck the rear end of Vigil's vehicle. Vigil estimated that Kirkland was traveling thirty miles per hour immediately before the impact.[2] Vigil said that the impact of the collision propelled her vehicle forward "[a]bout half a car" length. Vigil testified that repairs to her vehicle cost approximately $4,000 and that she sustained personal injuries to her back, neck, and shoulders necessitating medical treatment.[3]

Kirkland testified that the accident occurred while she was on her way home. She had driven to the elementary school where she had been employed to pick up her personal effects because she was moving to Alabama. Kirkland's nine-week-old son was with her; he was buckled in a rear-facing infant carrier in the backseat. A mirror mounted on the backseat enabled Kirkland to check on

[2]A police report admitted at trial reflects that the posted speed limit where the accident occurred was thirty-five miles per hour.

[3]Both sides called expert witnesses to testify regarding the reasonableness and necessity of Vigil's medical treatment.

him. Kirkland said that her son had been crying ever since they left the school. When he abruptly stopped crying, Kirkland thought he might be choking. She looked back at the mirror to check on him and noticed that he had fallen asleep. When she looked back at the road, Kirkland saw Vigil's vehicle stopped at the red light approximately seven to ten car lengths ahead of her. Although Kirkland applied her brakes, she was not able to stop her vehicle before it collided with Vigil's vehicle. When asked by Vigil's counsel, "What could have been done differently to prevent this accident," Kirkland responded, "I could have kept my eyes on the road."

III. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

A party challenging the legal sufficiency of an adverse finding on an issue on which the party had the burden of proof at trial must demonstrate on appeal that the evidence conclusively established, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). The reviewing court first examines the record for evidence that supports the finding, crediting favorable evidence if a reasonable fact-finder could, while disregarding contrary evidence, unless a reasonable fact-finder could not. *Id*.; *see City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If no evidence supports the finding, then the reviewing court will examine the entire record to determine if the contrary proposition is established as a matter of law. *Dow Chem. Co.*, 46 S.W.3d at 241.

A party attacking the factual sufficiency of an adverse finding on an issue on which the party had the burden of proof must demonstrate on appeal that the adverse finding is so against the great weight and preponderance of all of the evidence, the judgment should be set aside and a new trial ordered. *Id*. at 242; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

In performing evidentiary-sufficiency reviews, we must be mindful that the fact-finder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696–97 (Tex. 1986); *Nwokedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 199, 205 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). The fact-finder is responsible for resolving conflicts in the evidence, and it may believe one witness and disbelieve another. *McGalliard*, 722 S.W.2d at 697. We may not reweigh the evidence and set aside a finding merely because we are of the opinion that a different result is more reasonable. *Pool*, 715 S.W.2d at 634.

B. Analysis

1. The Law

The elements of a negligence claim are (1) the existence of a legal duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013). Vigil thus had the burden to prove that Kirkland was negligent and that this negligence was a proximate cause of the occurrence. *See Neese v. Dietz*, 845 S.W.2d 311, 313 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Question number one in the

court's charge asked the jury: "Did the negligence, if any, of Defendant [Kirkland] proximately cause the occurrence in question?" The terms "negligence," "ordinary care," and "proximate cause" were defined in question one, in accordance with standard, pattern-jury-charge definitions associated with a negligence question. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence* PJC 2.1, 2.4, 4.1 (2016).

The mere occurrence of a rear-end collision may be some evidence of negligence, but it is not negligence as a matter of law. *Campbell v. Perez*, No. 02-14-00248-CV, 2015 WL 1020842, at *4 (Tex. App.—Fort Worth Mar. 5, 2015, no pet.) (mem. op.); *Benavente v. Granger*, 312 S.W.3d 745, 749 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Pearson v. DeBoer, Inc.*, 99 S.W.3d 273, 276 (Tex. App.—Corpus Christi 2003, no pet.). To the contrary, the plaintiff must prove specific acts of negligence on the part of the following driver, as well as proximate cause. *Campbell*, 2015 WL 1020842, at *4; *Benavente*, 312 S.W.3d at 749. Whether the plaintiff succeeds in proving negligence by a preponderance of the evidence is within the jury's province to determine. *Campbell*, 2015 WL 1020842, at *4; *Pearson*, 99 S.W.3d at 276.

2. Legal Sufficiency

Vigil argues that the evidence established Kirkland's negligence as a matter of law. She points out that her vehicle had been stopped at the intersection for fifteen seconds prior to the accident, that Kirkland was traveling thirty miles per hour, that her vehicle was pushed forward half a car length as a

result of the accident, and that both vehicles sustained significant damage. She also notes that Kirkland admitted that neither an obstruction, weather condition, sudden emergency, act of God, or mechanical malfunction contributed to the cause of the collision.

Applying the legal sufficiency standard of review, however, we first examine the evidence that supports the jury's "no" answer to question one—we do not first examine the evidence pointed to by Vigil as contrary to the jury's "no" answer to question one. *See Dow Chem. Co.*, 46 S.W.3d at 241. We credit all evidence favorable to the jury's "no" answer if a reasonable fact-finder could; we disregard evidence that is contrary to the jury's "no" answer unless a reasonable fact-finder could not. *See City of Keller*, 168 S.W.3d at 827. Vigil argues that, applying this standard, "a reasonable fact finder would not give credit to the conflicting testimony that the Appellee Kirkland [gave] regarding why the accident happened."[4]

[4]Vigil contends that we should not credit Kirkland's testimony that she checked on her son after he abruptly stopped crying because she did not mention checking on her son when she made a recorded statement on the day of the accident and because the police report does not mention that fact. But even if the absence of any mention of Kirkland checking on her son in her recorded statement or the police report could be construed as a conflict in the evidence, the fact-finder is the sole judge of the credibility of the witnesses, and the fact-finder is responsible for resolving any conflicts in the evidence. *See McGalliard*, 722 S.W.2d at 696–97; *Nwokedi*, 428 S.W.3d at 199. We thus reject Vigil's argument that the jury could not credit Kirkland's testimony and that we should disregard it.

Kirkland testified that she was traveling below the posted speed limit of thirty-five miles per hour. She said that when her baby stopped screaming, she looked back to the mirror mounted on the back seat to check on him because she was worried he was choking. Seeing that he appeared to have fallen asleep, she looked back to the road and saw Vigil's vehicle seven to ten car-lengths in front of her, stopped at a red light. She applied her brakes, but realized she was not going to stop in time, so she turned her car to the side, to avoid striking Vigil squarely, "head-on."[5] After the accident, Vigil pulled over onto a side road, and Kirkland followed her. Kirkland exited her vehicle and checked on her baby, who had slept through the collision. She spoke with Vigil, and both women stated they were "okay."

The jury was free to believe Kirkland's testimony regarding why the accident happened, and we defer to the jury's credibility determinations. *See McGalliard*, 722 S.W.2d at 696–97; *Nwokedi*, 428 S.W.3d at 199. The jury could have determined that no specific act by Kirkland constituted the failure to use ordinary care, that is, the failure to do, or the doing of, that which a person of ordinary prudence would or would not have done under the same or similar circumstances. *See, e.g.*, *Campbell*, 2015 WL 1020842, at *5 (upholding jury finding of no negligence by defendant driver in rear-end collision); *Pearson*, 99

[5]Vigil asserts that the $10,341 damages to Kirkland's vehicle establish that she was traveling at "a high rate of speed," but evidence exists that Kirkland was not speeding and Kirkland's testimony that she turned her vehicle to the side may account for the greater amount of damage to her vehicle.

S.W.3d at 276–77 (same); *Stone v. Sulak*, 994 S.W.2d 348, 350 (Tex. App.—Austin 1999, no pet.) (same); *DeLeon v. Pickens*, 933 S.W.2d 286, 289–90 (Tex. App.—Corpus Christi 1996, writ denied) (same).

Vigil next argues that when Kirkland was asked at trial, "What could have been done differently to prevent this accident," her response, "I could have kept my eyes on the road," established her negligence as a matter of law. In support of this proposition, Vigil cites *Jordan v. Walker*, 448 S.W.2d 837 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.), a case she describes as being "directly on point." But the facts in *Jordan* are different from the present facts as is the statement made by the defendant driver.

The plaintiff in *Jordan* was a passenger in a fire department vehicle that had stopped when the vehicle in front of it stopped to make a left turn. *Id*. at 841. The defendant testified that she first saw the fire department vehicle when it was three car lengths in front of her, that she saw that it was stopping, and that she applied her brakes "softly." *Id*. She then looked into her rear-view mirror and saw a vehicle behind her that she thought was going to hit her. *Id*. She then applied her brakes "harder," but they "seemed to have . . . locked," and her vehicle ran into the fire department vehicle. *Id*. The defendant driver in the rear-end collision stated, "in my opinion the wreck resulted because I did not see the other vehicle stopping soon enough so that I could start applying my brakes sooner." *Id*. Based on all of these facts, the trial court found the defendant liable for the rear-end collision as a matter of law; only the issue of damages was

submitted to the jury. *Id*. at 838. The court of appeals held that the trial court did not err by withdrawing the liability issues from the jury. *Id*. at 842.

The facts in *Jordan* are distinguishable because the defendant in *Jordan* saw the fire department vehicle *before* she looked into her rear-view mirror. She saw that the fire department vehicle was stopping yet only applied her brakes "softly" prior to looking into the rear-view mirror. Here, by contrast, Kirkland testified that she did not see Vigil's stopped vehicle until *after* she had turned around to check on her baby. Once she turned around, Kirkland "pushed [her] brakes and tried to stop, but . . . didn't stop in time."

The defendant driver's statement in *Jordan* that in her opinion the wreck resulted because she did not see the other vehicle stopping in time to apply her brakes soon enough is different from Kirkland's statement about what she could have done differently. The defendant's statement in *Jordan* is based on the actual facts of that case; Kirkland's statement here is hypothetical. While Kirkland's statement of what she could have done may be some evidence that what she did do constituted negligence, it does not establish negligence as a matter of law. *See Campbell*, 2015 WL 1020842 at *2 (holding evidence legally sufficient to support jury's no-negligence finding for defendant who rear-ended plaintiff's vehicle despite defendant's testimony that he was liable and fully at fault, because "[g]iven the testimony as a whole, [defendant's] admission of fault was simply an admission that his car rear-ended Campbell's and not that he was

negligent in doing so" so that statement was some evidence of, but not conclusive evidence of, negligence).

Deferring to the jury's weight and credibility determinations, and crediting the evidence supporting the jury's "no" answer to question one that a reasonable fact-finder could credit, and disregarding contrary evidence that a reasonable fact-finder could not, some evidence exists supporting the jury's finding that Kirkland was not negligent. Kirkland testified that she momentarily glanced back to check on her baby because she was concerned he was choking. She did not see Vigil's stopped vehicle until after she had turned back from checking on her son; she was seven to ten car lengths behind Vigil's vehicle when she applied her brakes but was unable to stop before the collision. Some evidence exists that Kirkland used the degree of care that would be used by a person of ordinary prudence under the same circumstance when she glanced behind her to check on her nine-week-old baby after he abruptly stopped crying. *See Campbell*, 2015 WL 1020842, at *4. We hold that the evidence is legally sufficient to support the jury's "no" answer to question one. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Campbell*, 2015 WL 1020842, at *4.

3. Factual Sufficiency

After applying the factual sufficiency standard of review and looking to all of the evidence of negligence, we defer to the jury's resolution of weight and credibility determinations. *See, e.g.*, *Trelltex, Inc. v. Intecx, L.L.C.*, 494 S.W.3d 781, 790 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("This court is not a

fact-finder . . . . We may not, therefore, pass upon the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would also support a different result."). Here, the jury's "no" answer to question one is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See Dow Chem. Co.*, 46 S.W.3d at 242. Although there is evidence in the record that would support a finding that Kirkland was negligent, evidence also exists that supports the jury's finding that she was not negligent. Even Vigil acknowledges that "there may be some evidence that the Appellee Kirkland had a reason why she was not looking forward." This evidence—that Kirkland glanced back to check on her nine-week-old son whom she believed to be choking—is factually sufficient to support the jury's finding. *See Campbell*, 2015 WL 1020842, at *5; *Benavente*, 312 S.W.3d at 749–50.

We overrule Vigil's first issue.

IV. VIGIL'S MOTION FOR NEW TRIAL

In her second issue, Vigil argues that the trial court abused its discretion by denying her motion for new trial because the evidence established that Kirkland was negligent as a matter of law. We review the denial of a motion for new trial under an abuse of discretion standard. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). A trial court abuses its discretion if the court acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004).

As discussed above, the evidence is both legally and factually sufficient to support the jury's finding that Kirkland was not negligent. The trial court, therefore, did not abuse its discretion by denying Vigil's motion for new trial. *See Waffle House*, 313 S.W.3d at 813; *Low*, 221 S.W.3d at 614; *Cire*, 134 S.W.3d at 838–39.

We overrule Vigil's second issue.

V. CONCLUSION

Having overruled Vigil's two issues, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: June 8, 2017