Opinion issued December 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00084-CV

FELIPE MARTINEZ RUBIO, Appellant

V.

PAUL SHIELDS, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2019-79562

MEMORANDUM OPINION

Felipe Martinez Rubio brought this negligence lawsuit against Paul Shields seeking to recover for injuries he sustained in a car accident. Shields moved for summary judgment, asserting that no evidence showed he was driving the car that struck Rubio and, therefore, he did not owe Rubio a legal duty. The trial court

granted Shields's no-evidence motion. On appeal, Rubio contends a fact issue exists on whether Shields was the other car's driver.

We reverse and remand.

Background

In October 2019, Rubio filed his original petition alleging that he suffered "multiple and severe damages" when Shields backed his car into Rubio's car. According to Rubio, Shields was negligent in several respects, including by:

- failing to keep a proper lookout;
- failing to avoid the collision;
- operating his car at a higher rate of speed than a person of ordinary prudence would have done under the same or similar circumstances;
- failing to timely apply his brakes;
- failing to keep a proper distance; and
- driving "recklessly with a willful and wanton disregard for the safety of others."

Shields answered and, in interrogatory responses, admitted that he owned the car involved in the accident but denied that he was driving the car when the accident occurred. Shields claimed he was "inside [his] apartment watching TV" at the time, and he identified his nephew as a person who "caused and/or contributed to the collision."

After time for additional discovery, Shields filed a hybrid no-evidence and traditional motion for summary judgment. In the no-evidence part of his motion,

Shields challenged the duty element of Rubio's negligence claim. Shields asserted there was no evidence that he was driving the car that struck Rubio and, therefore, there was no evidence that he owed Rubio a legal duty. In the traditional part of his motion, Shields asserted that the evidence conclusively established that he was not driving the car.

Rubio responded to the summary-judgment motion on November 1, 2021, seven days before the hearing on November 8th. His only summary-judgment evidence was his own affidavit stating:

> My name is Felipe Martinez Rubio and I am at least eighteen (18) years of age, of sound mind, capable of making this affidavit, fully competent to testify to the matters stated herein, I have personal knowledge of each of the matters stated herein, and I know them to be true and correct.
>
> I was involved in a motor vehicle accident with Defendant Paul Shields on or about March 3, 2019. It is my understanding and belief that Defendant Paul Shields was the driver of the vehicle. Further it is also my understanding and belief that but for Defendant Paul Shields'[s] negligent behavior, this accident would not have occurred. In other words, this accident occurred because Defendant Paul Shields failed to operate his vehicle in a safe and prudent manner causing him to strike my vehicle and as a result, I was injured.[1]

Shields made no objections to Rubio's affidavit.

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[1] We note the affidavit's jurat did not identify Rubio as the person appearing before the notary public. Instead, the jurat recited that "Mauro Vargas" had personally appeared to attest that the statements in the affidavit were "true and correct." Rubio attributes the defect to a typographical error, which he corrected in an amended affidavit filed after the summary-judgment hearing. Shields did not object to the defective jurat in the trial court.

On the day of the hearing, without moving for or obtaining leave to late file summary-judgment evidence, Rubio filed an amended affidavit. The amended affidavit added this statement explaining the basis for his representation that Shields was driving the other car:

> I can confirm Mr. Shields'[s] identity based on his video deposition that I personally viewed. He is in fact the individual that was in the vehicle when the accident happened.

The amended affidavit was otherwise the same as the original affidavit.

The trial court granted the no-evidence portion of Shields's hybrid motion but did not rule on the traditional portion of the motion.

After the trial court ruled, Rubio moved for a new trial, to vacate the summary-judgment order, and for leave to late file his amended affidavit as summary-judgment evidence. He argued that his original affidavit was sufficient to create a fact issue on Shields's identity as the other car's driver. But even if it were not, the trial court should have considered the amended affidavit because his failure to initially state the basis for his knowledge of Shields's identity—viewing Shields's video deposition—was not the "result of conscious indifference but rather the result of an accident or mistake." Shields responded that Rubio had not presented any new argument or evidence that was unavailable when the trial court ruled on the summary judgment.

The trial court denied all of Rubio's requested relief by written order, and this appeal followed.

Standard of Review

After adequate time for discovery, a party may move for summary judgment asserting that there is no evidence of one or more essential elements of a claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). A no-evidence summary judgment is essentially a pretrial directed verdict, to which we apply the same legal sufficiency standard of review. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003); *Valero Mktg. & Supply Co. v. Kalama Int'l, LLC*, 51 S.W.3d 345, 350 (Tex. App.—Houston [1st Dist.] 2001, no pet.). To defeat a no-evidence motion, the nonmovant must produce evidence raising a genuine issue of material fact as to each of the challenged elements of his claim. *See* TEX. R. CIV. P. 166a(i); *see also Ford Motor Co. v Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A genuine issue of material fact exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Evidence that is so weak as to do no more than create a mere surmise or suspicion does not create a fact issue. *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014). In our review, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in his

favor. *King Ranch*, 118 S.W.3d at 751. We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

No-Evidence Summary Judgment

Rubio argues that the no-evidence summary judgment is improper because a fact issue exists on whether Shields was the other car's driver and, therefore, owed Rubio a duty of ordinary care.

In a negligence case, duty is the threshold inquiry. *Mason v. AMed-Health, Inc.*, 582 S.W.3d 773, 781 (Tex. App.—Houston [1st Dist.] 2019, pet. denied); *see also D. Hous., Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002) (setting out elements of negligence action, including element requiring proof of legal duty owed by one person to another). Typically, whether the defendant owes the plaintiff a legal duty is a legal question for the court, and that determination is made from the facts surrounding the occurrence in question. *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008); *Helbing v. Hunt*, 402 S.W.3d 699, 702–03 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). In some instances, however, the duty question requires the resolution of disputed facts. *See Fort Bend Cnty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991); *Sanders v. Herold*, 217 S.W.3d 11, 15 (Tex. App.—Houston [1st Dist.] 2006, no pet.). When facts are disputed, and one version of the facts would support imposing a duty, summary judgment is

improper. *Sanders*, 217 S.W.3d at 15 (citing *Mitchell v. Mo.-Kan., Tex. R.R. Co.*, 786 S.W.2d 659, 662 (Tex. 1990)).

Here, Rubio alleged that Shields is liable in negligence based on his breach of the standard of ordinary care owed by a driver. *See Gator Gone Safety Pilots v. Holt*, 622 S.W.3d 524, 539 (Tex. App.—Houston [14th Dist.] 2021, no pet.) ("Generally speaking, drivers have a duty to exercise the ordinary care a reasonably prudent person would exercise under the same circumstances to avoid a foreseeable risk of harm to others[.]" (quotation omitted)). Shields's no-evidence motion challenging the existence of a duty shifted the burden to Rubio to respond by producing more than a scintilla of evidence that Shields was driving the other car involved in the accident. *See* TEX. R. CIV. P. 166a(i).

Rubio's only timely filed summary-judgment evidence identifying Shields as the other car's driver was his original affidavit reciting his "personal knowledge of each of the matters stated" and stating that:

- he "was involved in a motor vehicle accident with . . . Shields on or about March 3, 2019";
- it is his "understanding and belief that . . . Shields was the driver of the vehicle"; and
- Shields's failure to operate "*his* vehicle in a safe and prudent manner" caused "*him* to strike [Rubio's] vehicle."

(Emphasis added.) Rubio contends that, viewed in the appropriate light, the affidavit is legally sufficient because it "expresses a factual inference for his identification of

Shields as the other driver: [Rubio] was there [at the accident]." According to Shields, however, Rubio's affidavit cannot defeat summary judgment because, as to his identity, the affidavit impermissibly rests on Rubio's mere "understanding and belief," rather than his personal knowledge, and is conclusory.

By rule, affidavits opposing summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f); *see also Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam); *CA Partners v. Spears*, 274 S.W.3d 51, 63 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). So, to have probative value, a summary-judgment affidavit must provide the basis for the affiant's personal knowledge. *See, e.g.*, *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam) (affidavit was legally insufficient because "nothing in the affidavit affirmatively show[ed] how [affiant] could possibly have personal knowledge about events occurring in the 1840s"). A mere recitation of personal knowledge is inadequate if the affidavit does not positively show a basis for the knowledge. *See Est. of Gajewsky v. John Hancock Life Ins. Co.*, No. 14-04-00748-CV, 2005 WL 1017628, at *3 (Tex. App.—Houston [14th Dist.] May 3, 2005, no pet.) (mem. op.); *see also* David Hittner & Lynne Liberato, *Summary Judgments in Texas State and Federal*

Practice, 60 S. TEX. L. REV. 1, 76 (2019) ("The key is whether the affidavit clearly shows the affiant is testifying from personal knowledge.").

Generally, a statement of subjective belief, which is not supported by other summary-judgment proof, is insufficient. *Ryland Grp.*, 924 S.W.2d at 122. This is because an affidavit stated in terms of the affiant's "understanding" of the "circumstances" constitutes mere speculation and has no probative force. *See Frank's Int'l, Inc. v. Smith Int'l, Inc.*, 249 S.W.3d 557, 566 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

Rubio's affidavit transcends mere speculation and, thus, has some probative force. Although the affidavit contains language expressing Rubio's "understanding and belief" that Shields was the other car's driver, it also contains unequivocal language reciting Rubio's "personal knowledge of each of the matters stated [t]herein." And other statements in the affidavit show a basis for that knowledge. *Cf. Taylor v. Discover Bank*, No. 03-17-00677-CV, 2018 WL 4016611, at *1 (Tex. App.—Austin Aug. 23, 2018, no pet.) (mem. op.) (affiant's statement that facts were "true and correct to the best of my knowledge" did not negate earlier assertion that affidavit was based on personal knowledge gained through review of relevant records); *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 91 n.1 (Tex. App.—Corpus Christi 1994, writ denied) (affidavit was sufficient despite being sworn as "true and correct to the best of my knowledge" because "statements within the affidavit

demonstrate the basis for [affiant's] personal knowledge"). Viewed in the appropriate light, the affidavit shows that Rubio's personal knowledge derives from his involvement in a car accident with Shields on March 3, 2019, which he clarifies is an accident in which Shields struck Rubio's vehicle. By showing *how* he became familiar with the attested-to facts—he was present when Shields drove his vehicle into Rubio's vehicle—Rubio satisfied the requirement that "affidavits shall be made on personal knowledge." TEX. R. CIV. P. 166a(f).

To the extent that Shields complains that Rubio did not expound on the basis for his personal knowledge—by stating, for instance, additional facts such as whether the driver told Rubio his name was Shields, whether he saw Shields's driver's license, or whether, as he stated in his late filed affidavit, he confirmed Shields's identity after viewing Shields's video deposition—Shields alleges a defect of form that he did not preserve for our review by making an objection and obtaining a ruling in the trial court. *See B. Gregg Price, P.C. v. Series 1 – Virage Master, LP*, No. 01-20-00474-CV, 2021 WL 3204753, at *8 (Tex. App.—Houston [1st Dist.] July 29, 2021, pet. filed) (mem. op.) ("[A] complaint that an affidavit fails to reveal the basis for the affiant's asserted personal knowledge constitutes a defect of form that must be preserved by objection and ruling in [the] trial court.").

We also are not persuaded that Rubio's affidavit is conclusory. A "conclusory" statement is defined as "[e]xpressing a factual inference without

stating the underlying facts on which the inference is based."[2] *See Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 n.32 (Tex. 2008) (citing BLACK'S LAW DICTIONARY 308 (8th ed. 2004)); s*ee also LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294, 301 (Tex. App.—Beaumont 2007, no pet.) ("Statements are conclusory if they fail to provide underlying facts to support their conclusions."). Conclusory affidavits are not sufficient to raise fact issues because they are not credible or susceptible to being readily controverted. *Ryland Grp.*, 924 S.W.2d at 122. Rubio attested to the who, what, and when of the accident made the basis of the lawsuit. We find these statements are not conclusory: they furnish some factual information that Shields could have rebutted (as he sought to do in the traditional portion of his summary-judgment motion). The affidavit, therefore, contains enough underlying facts to be legally sufficient.

For these reasons, we conclude the trial court erred by granting a no-evidence summary judgment for Shields.

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[2] An objection is not required to preserve error on a challenge to conclusory statements because they constitute no evidence. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

Conclusion

We reverse the trial court's judgment and remand to that court for further proceedings.

Sarah Beth Landau
Justice

Panel consists of Chief Justice Radack and Justices Landau and Hightower.