Affirmed and Memorandum Opinion filed March 3, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00010-CV

DAVID GÓMEZ, Appellant

V.

CALVIN COOKE, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2014-00497

M E M O R A N D U M   O P I N I O N

In this personal-injury case arising from a motor-vehicle collision, appellant David Gómez challenges the summary judgment granted in favor of appellee Calvin Cooke, the defendant below, on Gómez's claims of negligence and negligence per se. Because the summary-judgment evidence conclusively establishes that the collision was an unavoidable accident, we affirm.

I. Background

Four days into a cross-country road trip with his wife Vivian, Calvin Cooke was driving the couple's pickup truck with their camper in tow when he collided with a half-dozen vehicles on a Houston roadway. Just before the accident, Vivian had been looking at a GPS device and talking with her husband about an upcoming right turn. When she felt the truck instead begin moving toward the left, Vivian looked at Calvin and discovered that his hands were in his lap, "his head was down, and he was completely unresponsive." She looked forward and saw cars stopped ahead of them, and in the seconds before collision, Vivian tried unsuccessfully to move Calvin's foot off the gas pedal. The Cookes' truck or camper struck at least six vehicles, including the car driven by David Gómez. When emergency medical services personnel arrived, they noted that the left side of Calvin's face drooped and the left side of his body was weak. They transported Calvin to Ben Taub General Hospital, where doctors concluded that Calvin lost consciousness while driving because he had suffered a stroke.

Gómez filed a personal-injury suit against Calvin, alleging that Calvin was negligent and negligent per se. In his answer, Calvin asserted that the accident was unavoidable due to an unforeseen medical emergency. On this ground, Calvin moved successfully for traditional and no-evidence summary judgment, that is, he argued both that the evidence establishes that the accident was caused by a medical emergency that he did not and should not have foreseen, and that there is no evidence that he should have foreseen such an emergency.

Gómez asks us to reverse the judgment on the grounds that (a) whether the collision was an unavoidable accident is not a question of law to be decided by the trial court, but a question of fact to be decided by a jury; and (b) the summary-

judgment evidence raises a question of fact about whether Calvin's incapacity was foreseeable.

II. UNFORESEEABLE ACCIDENT

Negligence consists of a duty, a breach of that duty, and damages proximately caused by the breach. *See Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam). If a statute was designed to prevent injury to the class of persons to which the injured party belongs, then the unexcused violation of the statute constitutes negligence per se. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

An unavoidable accident, however, is "an event not proximately caused by the negligence of any party to it." *Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex. 1995) (quoting *Dall. Ry. & Terminal Co. v. Bailey*, 151 Tex. 359, 370, 250 S.W.2d 379, 385 (1952) (op. on reh'g)). Stated differently, it is an accident "that ordinary care and diligence could *not* have prevented, or one which could not have been foreseen or prevented by the exercise of reasonable precautions." *Otis Elevator Co. v. Shows*, 822 S.W.2d 59, 63 (Tex. App.—Houston [1st Dist.] 1991, writ denied). For this reason, unforeseeable loss of consciousness is a complete defense to the claim that a driver negligently caused a motor-vehicle accident. *See First City Nat'l Bank of Hous. v. Japhet*, 390 S.W.2d 70, 75 (Tex. Civ. App.—Houston 1965, writ dism'd).

By pleading that the collision was an unavoidable accident, Calvin raised an inferential-rebuttal defense. *See Lemos v. Montez*, 680 S.W.2d 798, 800 (Tex. 1984). A defendant asserting an inferential-rebuttal defense seeks to establish the truth of a theory that is contrary to or inconsistent with the plaintiff's theory, thereby disproving a factual element of the plaintiff's claim. *See Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). A summary-judgment movant relying

on an inferential-rebuttal defense bears the burden to produce evidence establishing the defense as a matter of law. *See Villanova v. Fed. Deposit Ins. Corp.*, No. 08-11-00361-CV, 2014 WL 2881540, at *7 (Tex. App.—El Paso June 25, 2014, no pet.). Because we conclude that Calvin established his right to traditional summary judgment on this ground, we do not address the no-evidence portion of his motion. *See Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 70 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

A. Standard of Review

To prevail in a traditional motion for summary judgment, the movant must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The burden then shifts to the non-movant to respond with evidence raising a genuine issue of material fact. If the subject matter is one "concerning which the trier of fact must be guided solely by the opinion testimony of experts," then summary judgment may be based on uncontroverted expert testimony "if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *Id.*

We review the grant of summary judgment de novo. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015). We apply the legal-sufficiency standard, that is, we review the evidence presented by the motion and response in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Gonzalez v. Ramirez*, 463 S.W.3d 499, 504 (Tex. 2015) (per curiam); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

B. Summary Judgment on Questions of Fact

In his first issue, Gómez asserts that summary judgment was improper because the determination of whether the collision was an unavoidable accident presents a question of fact, not a question of law, and factual issues must be decided by the jury. This is an overstatement. Juries do not decide all factual matters; they decide material questions of fact if the evidence is conflicting, or if undisputed evidence supports conflicting inferences. *See City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) (conflicting evidence); *id.* at 821 (conflicting inferences). When the material facts have been conclusively established, however, there is nothing left for a jury to decide, and summary judgment is appropriate. *See id.* at 814–16, 824–25; *see also* TEX. R. CIV. P. 166a(c).

We overrule this issue.

C. Foreseeability of Incapacity

In his second issue, Gómez argues that the summary-judgment evidence raises a genuine issue of material fact about whether Calvin's incapacity was foreseeable. According to Gómez, Calvin foresaw, or should have foreseen, that he would suffer a stroke while driving. We conclude, however, that unforeseeability was conclusively established by the uncontroverted summary-judgment evidence. This evidence includes the crash report, Calvin's medical and hospital records, and excerpts from the depositions of Vivian, Calvin, and Calvin's treating physician.

The summary-judgment evidence shows that Calvin had hypertension for at least ten years before the accident. Dr. Donald J. Fairbanks began treating Calvin in 2011, and in the record of their first visit, Dr. Fairbanks wrote that Calvin had benign hypertension.

Significantly, Calvin testified that he had never been told that he was at risk of having a stroke. Dr. Fairbanks's testimony demonstrates why this is so:

> Q: In your professional opinion, does high blood pressure cause a stroke, or is it a risk factor?
>
> A: It's a risk factor.
>
> . . . .
>
> Q: [I]s there any way to predict whether somebody is more prone to have a stroke?
>
> A: We base it on risk factors.
>
> . . . .
>
> A: [O]ther risk factors were not present in Cal. He doesn't smoke. He doesn't have diabetes. He doesn't have [a] history of coronary artery disease. He's not had a transient ischemic attack.
>
> He's got very little in the way—there are no other risk factors. His weight was good. His cholesterol, I would suspect, was good . . . . So, you know, as far as if you were to try to stratify his risk, it would be minimal.
>
> . . . .
>
> A: All of us should be as healthy as Calvin—
>
> Q: Okay.
>
> A: —was—
>
> Q: And—
>
> A: or appeared.

Calvin seemed to be healthy on the day of the accident. He testified that he felt fine that day and had no problems or symptoms to indicate that he should not drive. Vivian similarly testified that Calvin had been behaving normally before the accident, and "there was nothing different." Moreover, Calvin had been examined by Dr. Fairbanks just eleven days earlier; Vivian accompanied him. In the records from that visit, Dr. Fairbanks stated that Calvin's benign hypertension was

unchanged. Both Calvin and Vivian testified that Calvin told Dr. Fairbanks about their upcoming cross-country trip. Far from advising Calvin against the trip, all three witnesses testified that Dr. Fairbanks told Calvin to bring back pictures. As Dr. Fairbanks testified,

> Q: In your treatment of Mr. Cooke, at any time, did you believe he was a risk to drive?
>
> A: Never.

Despite this uncontroverted evidence, Gómez argues that the trial court erred in granting summary judgment because Calvin admitted that he did not independently research hypertension before the collision. This evidence is immaterial. *See* TEX. R. CIV. P. 166a(c) (to prevail in a motion for traditional summary judgment, the movant must establish that "there is no genuine issue as to any *material* fact") (emphasis added); *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("[A] fact is 'material' only if it affects the outcome of the suit under the governing law." (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))). Calvin is a layman, and determining the effect and foreseeable course of a medical condition is a matter for experts. *See Nat'l Life & Accident Ins. Co. v. Shern*, 389 S.W.2d 726, 729–30 (Tex. Civ. App.—Austin 1965, no writ). Calvin had no duty to independently research a medical condition.

Dr. Fairbanks, on the other hand, is an expert. He testified that stroke is predicted based on risk factors, and Calvin had no risk factors other than hypertension. Consequently, Dr. Fairbanks concluded that Calvin's risk was "minimal," and he neither told Calvin that there was a risk of stroke nor foresaw a risk that Calvin would suffer a stroke and become incapacitated while driving.

Calvin is not required to know more than an expert, or to foresee what his treating physician could not. We overrule Gómez's second issue.

III. Conclusion

Having overruled each of the issues presented, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.