In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00432-CV

CITY OF NORTH RICHLAND HILLS, Appellant

V.

BLANCA QUINONEZ, INDIVIDUALLY AND AS GUARDIAN OF J.G., A MINOR, Appellee

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On Appeal from the 17th District Court
Tarrant County, Texas
Trial Court No. 017-317914-20

Before Sudderth, C.J.; Birdwell and Wallach, JJ.
Memorandum Opinion by Chief Justice Sudderth

MEMORANDUM OPINION

In two issues, Appellant City of North Richland Hills (NRH) appeals the judgment following a jury trial involving a vehicle collision between NRH Police Officer Kevin Brown and Appellee Blanca Quinonez.[1] Specifically, in its first issue NRH complains of the trial court's denial of its motion for directed verdict arguing that Quinonez failed to plead or offer any proof that Officer Brown acted with conscious indifference or reckless disregard while responding to an emergency call or situation. In its second issue, NRH contends that the evidence was insufficient to support a jury verdict of $40,000 for physical pain sustained in the past and requests that we suggest a remittitur in an amount that conforms to the evidence. We affirm.

I. Background

On July 11, 2018, while leaving the apartment complex parking lot en route to a hit-and-run call, Officer Brown's vehicle hit Quinonez's vehicle. As a result of the collision, Quinonez sustained injuries[2] to her back and neck.[3]

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[1]The collision occurred in the parking lot of the apartment complex where Officer Brown resided, and Officer Brown was travelling approximately 10 mph at the time.

[2]Dr. Cornell Cummings, Quinonez's treating physician, diagnosed her injuries as "intervertebral disc displacement and vertebral herniation" and testified that, in his medical opinion, these injuries were caused by the collision.

[3]According to Dr. Cummings, when he first saw Quinonez following the collision, she complained of "back pain, shoulder pain and specifically midback and low back pain." She described the pain as "sharp and shooting" and "radiating to her left leg and thigh." Dr. Cummings testified that Quinonez complained of "difficulty

Two years later, Quinonez filed suit against NRH for negligence, seeking past and future damages for medical care, physical pain and suffering, and mental anguish. The jury awarded Quinonez damages of $34,910.77 for past medical care and $40,000 for past physical pain, and the trial court signed a $74,910.77 judgment on the verdict.

II. Standard of Review for Legal Sufficiency Challenges

We may sustain a legal sufficiency challenge only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *see also Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998) (op. on reh'g). In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We indulge "every reasonable inference deducible from the evidence" in support of the challenged finding. *Gunn v.*

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bending and standing for long periods of time" that "interfere[ed] with her ability to perform her job duties," adding that Quinonez had related that "her pain was worse in the morning, as well as after work."

McCoy, 554 S.W.3d 645, 658 (Tex. 2018) (quoting *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017)).

When a party attacks the legal sufficiency of an adverse finding on an issue on which the party had the burden of proof, the party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.[4] *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). If no evidence supports the finding, we will then examine the entire record to determine if the contrary position is established as a matter of law. *Dow Chem. Co.*, 46 S.W.3d at 241. We will sustain the issue only if the contrary position is conclusively established. *Id.* Evidence conclusively establishes a fact when the evidence leaves "no room for ordinary minds to differ as to the conclusion to be drawn from it." *Int'l Bus. Mach. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019).

[4]NRH repeatedly couches its issue as a "no evidence" challenge, yet it assumed the burden of proof on this issue by failing to object to Question No. 1 in the charge, which asked "At the time of the occurrence, do you find that Officer Kevin Brown was responding to an emergency?" Because the jury was instructed that "a 'yes' answer must be based on a preponderance of the evidence," Question No. 1 placed the burden of proof on NRH. But for purposes of our analysis here, it makes no difference which party bore the burden of proof. After weighing the evidence under the no-evidence standard, as NRH has articulated the issue on appeal, we find more than a scintilla of evidence to support the jury's "no" answer. Because there was legally sufficient evidence to support the jury's "no" answer and there is no evidence that would conclusively negate the jury finding, NRH could not have prevailed under a challenge that it had established the contrary as a matter of law.

Anything more than a scintilla of evidence is legally sufficient to support a finding. *4Front Engineered Sols., Inc. v. Rosales*, 505 S.W.3d 905, 909 (Tex. 2016); *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins.*, 77 S.W.3d 253, 262 (Tex. 2002); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

III. Immunity, Texas Tort Claims Act (TTCA), and Exceptions

Municipalities, such as NRH, are generally immune from suit and liability unless immunity is waived by state law. *See City of San Antonio v. Maspero*, 640 S.W.3d 523, 528 (Tex. 2022). Generally speaking, the TTCA provides a waiver of immunity for personal injury damages caused by a municipal employee acting within his scope of employment and arising from that employee's operation or use of a motor vehicle. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1). But the TTCA waiver does not apply to an "action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others." *Id.* § 101.055(2). Thus, if a municipal employee causes personal injury damages while operating a motor vehicle during the scope of his employment but

while responding to an emergency call or situation, the municipality still enjoys immunity from those personal injury claims as long as the employee's action either complied with the law or was taken without conscious indifference or reckless disregard for the safety of others. *Id.*

IV. Analysis

1. Issue One: Denial of Motion for Directed Verdict

In its first issue, NRH raises two sub-issues challenging the trial court's denial of its motion for directed verdict. The first sub-issue complains of a pleading deficiency. The second sub-issue relates to the legal sufficiency of the evidence.

a. Pleading Deficiency

In the first sub-issue, NRH argues that Quinonez failed to plead that Officer Brown "acted with conscious indifference or reckless disregard for the safety of others while responding to an emergency call or reacting to an emergency situation." Assuming without holding that Quinonez's pleadings were defective in this regard, we nevertheless overrule the sub-issue because NRH waived it.

Texas Rule of Civil Procedure 90 provides that a party waives its right to complain about a pleading defect if it fails to complain of the defect by special exception:

> Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the

> judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account . . . .

Tex. R. Civ. P. 90. And Rule 91 requires that a special exception be sufficiently specific—a generic exception will not suffice:

> A special exception shall not only point out the particular pleading excepted to, but it *shall also point out intelligibly and with particularity* the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

Tex. R. Civ. P. 91 (emphasis added); *see Ford v. Performance Aircraft Servs., Inc.*, 178 S.W.3d 330, 335 (Tex. App.—Fort Worth, 2005, pet. denied).

Although NRH filed special exceptions in response to Quinonez's lawsuit, it did not specially except to Quinonez's failure to allege that Officer Brown acted with conscious indifference or reckless disregard while responding to an emergency call or situation. Because NRH failed to specially except to this alleged pleading defect with particularity, as required by Rules 90 and 91, NRH cannot now complain of the pleading defect on appeal.[5] We overrule this sub-issue.

b. Sufficiency of Evidence

In its second sub-issue, NRH argues that the trial court erred by denying its motion for directed verdict because "there was no evidence offered that shows

[5]Nor does it appear from the record that NRH ever sought to obtain a hearing or ruling on its special exceptions. Failure to secure a hearing and ruling on special exceptions also waives the pleading defect. *See Katim Endeavors, Inc. v. Lockheart Chapel, Inc.*, No. 02-18-00358-CV, 2019 WL 4122607, at *5 (Tex. App.—Fort Worth, Aug. 29, 2019, no pet.) (mem. op.) ("[A] defendant must obtain a ruling on its special exceptions or else they are waived.").

Officer Brown acted with conscious indifference or reckless disregard for the safety of others while responding to an emergency call or reacting to an emergency situation." [Capitalization altered.] But this is not what NRH argued in the trial court in its motion for directed verdict.

In NRH's motion for directed verdict, it argued only that there was legally insufficient evidence to support the jury's finding that Officer Brown was not responding to an emergency.[6] NRH wholly failed to challenge whether there was legally sufficient evidence for the jury to conclude that Officer Brown was acting with conscious indifference or reckless disregard.

At the conclusion of the charge conference, after both sides had rested and closed, NRH made an oral motion for directed verdict. *See Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (noting that the specificity requirement for a motion for directed verdict may be satisfied orally or in writing). In its motion, NRH limited its legal sufficiency argument to the issue of emergency and made no mention of conscious indifference or reckless disregard. It cannot now complain on appeal about the denial of its motion on a ground not

[6]NRH also made factual sufficiency arguments in its motion for directed verdict. We disregard NRH's against-the-great-weight-and-preponderance-of-the-evidence argument because factual sufficiency challenges are not properly raised by motion for directed verdict. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 220 (Tex. 2011) (recognizing that the presence of some evidence "will defeat the directed verdict").

included therein.[7] *See Long v. Ahlgren*, No. 11-11-00279-CV, 2013 WL 5890906, at *4 (Tex. App.—Eastland 2013, no pet.) (mem. op.) ("When we review a trial court's denial of a motion for directed verdict, our review is limited to the specific grounds alleged in the motion.").

But even assuming that NRH did not waive the emergency-related portion of its legal sufficiency challenge by failure to challenge the absence of evidence of conscious indifference or reckless disregard, a thorough review of the record reveals the following evidence in support of the jury's "no" answer to the question of whether Officer Brown was "responding to an emergency":

- Quinonez testified, and Officer Brown admitted, that at the time of the collision, the emergency lights on Officer Brown's vehicle were not activated.
- Quinonez testified, and Office Brown admitted, that at the time of the collision, Officer Brown had not activated the sirens on his vehicle.
- Quinonez testified that just prior to the collision there was no objective manifestation that Officer Brown was en route to an emergency.
- Quinonez testified that when Officer Brown exited his vehicle after the collision he apologized multiple times, explained that he had been looking at his computer rather than the road ahead, and mentioned nothing about responding to an emergency.

[7]NRH filed a post-verdict motion for judgment notwithstanding the verdict which challenged the sufficiency of the evidence as to conscious indifference and reckless disregard. The trial court denied the motion. But NRH does not complain of the denial of its motion for judgment notwithstanding the verdict on appeal. In its first issue—the only issue in NRH's brief that addresses the emergency-related element of proof—NRH limited its complaint to the denial of its motion for directed verdict.

- Quinonez testified that at no point did Officer Brown try to leave the scene of the collision because he had an emergency that he needed to respond to.

- Quinonez testified that after Sergeant Richard Curtis arrived at the scene to investigate and make a report, no one indicated that Officer Brown was responding to an emergency at the time of the collision.

- The police report about the collision[8] stated that Officer Brown was "patrolling the complex while checking the vehicle[']s computer for an in[-]progress call just down the road," but it did not indicate that Officer Brown was responding to an emergency call.

- Officer Brown testified that he was not going very fast, "maybe 10 [mph]" at the time of the collision.

- Officer Brown testified that at the time of the collision, he was not in a rush to get where he was going and that his intended destination was a mere three or four blocks away.

- Officer Brown testified that at the time of the collision, he was not en route to the actual location where the hit-and-run incident[9] had occurred but to a location where he believed the alleged perpetrator might be headed.

- Officer Brown testified that his purpose in going to this location was to assist as a "supplemental patrol officer"[10] but that he had not been dispatched as the responding officer to the call.

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[8]The "Crash Report" was introduced into evidence at trial as Plaintiff's Exhibit 23.

[9]According to Officer Brown, the call he was monitoring on his computer "[i]nitially went out as a hit-and-run call, but as more and more details were coming out, it ended up being an aggravated assault, family violence. Essentially an ex-boyfriend was trying to run the girlfriend and her friend off the road and was ramming her vehicle."

[10]Officer Brown testified that for the past five years he had served as a school resource officer in a middle school. His job was to provide "security and safety of the middle school, build[] relationships with the kids[,] and then handl[e] any kind of criminal matter that might arise." However, in the summer months when school was

- Officer Brown testified that no one on the dispatch call told him to go to the location where he was intending to go.

- Officer Brown testified that the perpetrator of the hit-and-run never arrived at the location that he "thought they were gonna go" but had been "intercepted by other officers prior to arriving at that location."

- Sergeant Curtis characterized Officer Brown's response as "self-dispatching," which, as he explained, meant that Officer Brown was "close by logistically" and decided "I'm going to that call."

- Sergeant Curtis confirmed that Officer Brown was never mentioned in the hit-and-run dispatch call, nor does Officer Brown's name appear anywhere in the supplemental investigative report of the hit-and-run incident.

- Sergeant Curtis explained that one reason Officer Brown's name does not appear in the hit-and-run report could have been that "he actually never put himself on the call."

Because we hold that this evidence amounts to more than a scintilla of evidence supporting Quinonez's contention that Officer Brown was not responding to an emergency call or reacting to an emergency situation, we overrule this sub-issue.

2. Issue Two: Factual Sufficiency of Evidence to Support Damage Award

In its second issue, NRH complains that "the evidence is insufficient to support the jury verdict awarding Appellee $40,000.00 for past physical pain." [Capitalization altered.] But NRH failed to preserve this error for review.

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not in session he worked as a supplemental patrol officer, which meant that he would "come in and help out answering calls for service," and serve as a "backup on calls, paper calls, that kind of stuff." Because the collision between Quinonez and Officer Brown occurred in July, school was not in session, and Officer Brown was serving as a supplemental patrol officer.

To preserve error on a factual sufficiency challenge, a party must complain in a motion for new trial that the evidence is factually insufficient to support a jury answer or that the answer is against the great weight and preponderance of the evidence. Tex. R. Civ. P. 324(b)(2)–(3); *Cecil v. Smith*, 804 S.W.2d 509, 510–11 (Tex. 1991); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). According to the record before us, NRH did not file a motion for new trial.

We overrule issue two.

V. Conclusion

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

/s/ Bonnie Sudderth

Bonnie Sudderth
Chief Justice

Delivered: May 26, 2022