AFFIRM; and Opinion Filed March 31, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01407-CV

CMH SET AND FINISH, INC., Appellant
V.
CHRISTOPHER L. TAYLOR, Appellee

On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause No. CV-12-0684

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Schenck

CMH Set and Finish, Inc. ("CMH") appeals the trial court's judgment in favor of Christopher L. Taylor on his claims for personal injury and property damage in this case. In three issues, CMH argues (1) the evidence of causation was insufficient to support the jury's verdict, (2) the trial court erred by denying CMH's request for a jury instruction regarding sole proximate cause, and (3) the trial court erred by denying CMH's motion to transfer venue. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL AND PROCEDURAL BACKGROUND

CMH is the parent corporation of several entities, one of which manufactures wallboards and cabinet material. CMH owns a warehouse in Hillsboro, Texas, at which its employees cut lumber to match the specifications requested by its manufacturing plants, load the lumber onto

trailers owned by CMH, and then tow the loaded trailers with CMH-owned trucks to the manufacturing plants.

On August 4, 2010, CMH tasked one of its truck drivers, Donna Kitchen Jones, to drive a truck carrying a trailer of lumber from its Hillsboro warehouse to one of its manufacturing facilities in Bonham, Texas. Before leaving Hillsboro at 4:00 a.m., Jones used a flashlight to survey her assigned truck and trailer outside the warehouse. Jones then set out for the manufacturing plant. Approximately two hours into the trip, two wheel-and-tire assemblies weighing approximately 200 pounds each slid off the left side of the trailer's rear axle and rolled into oncoming traffic, colliding with a pickup truck driven by Taylor.

Taylor filed suit against CMH and Jones, alleging their negligence caused the accident, and against his insurer United Services Automobile Association ("USAA") for benefits under his policy's uninsured/underinsured motorist coverage. Taylor filed his suit in Grayson County, Texas, alleging venue was proper under the Texas Insurance Code. CMH and Jones filed motions to transfer venue, denying that venue was proper in Grayson County, Texas, and requesting the case be transferred to Collin County, Texas, where the accident took place. However, neither defendant requested a hearing on any venue motion until after Taylor non-suited his claims against USAA, which was approximately eighteen months after the motions were initially filed. The trial court denied the venue motions.

At trial, CMH's primary defense was that if the accident was caused by improperly torqued lug nuts on the wheel-and-tire assemblies, then the unknown third party who improperly installed the lug nuts would have been the sole proximate cause. At the charge conference, CMH requested that the charge include an instruction on sole proximate cause, which the court refused. The jury found that CMH was negligent, assigning it all fault for Taylor's injuries. CMH filed a

motion for judgment notwithstanding the verdict, motion for new trial, and motion for reconsideration of its motion to transfer venue, which were all denied.

On appeal, CMH raises three issues. First, CMH argues Taylor failed to offer competent proof and thus legally sufficient evidence on the required element of causation, such that the trial court improperly denied its motion for judgment notwithstanding the verdict. Second, CMH contends that since it established it did not perform the work or repairs that caused the accident, a non-party was the sole proximate cause, such that the trial court erred by refusing to submit the appropriate instruction to the jury. Third, CMH appeals the trial court's decision to deny its motion to transfer venue.

EVIDENCE OF CAUSATION

A. Standard of Review

The test for legal sufficiency is the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We credit evidence favoring the jury verdict if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex. 2009). We will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Id.*

B. Applicable Law

The liability questions were submitted to the jury under a proximate-cause standard, which includes two elements: cause in fact and foreseeability. *HMC Hotel Props. II Ltd. v. P'ship v. Keystone-Texas Prop. Holding Corp.*, 439 S.W.3d 910, 913 (Tex. 2014). The cause-in-fact element is satisfied by proof that (1) the act was a substantial factor in bringing about the harm at issue, and (2) absent the act ("but for" the act), the harm would not have occurred. *Id.* Foreseeability requires only that the injury be of such a general character as might reasonably

have been anticipated, and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similar situated might reasonably have been foreseen. *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015).

C. Evidence in the Record

At trial, among other evidence, the jury heard testimony from Hank Pitman, the owner of the company CMH hired to repair the trailer on the road after the accident, and from Taylor's retained expert Pete Sullivan regarding CMH's negligence. Hank Pitman testified he could tell the lug nuts had come off from not being tightened or torqued to the specifications for that type of lug nuts. He stated that he could tell from examining the wheel studs and the fact that the lug nuts were shaved off that the lug nuts must have been loose, causing the wheels to wobble and break the studs before finally coming off the trailer's axle. Hank Pitman also testified that Jones told him that she had noticed a flat tire on the trailer before she left. According to Hank Pitman, Jones said that when she called her dispatch, she was told it would be repaired and that she could not leave until the repair was complete. Hank Pitman said he did not know who repaired the tire, but it was repaired before Jones left the warehouse that morning. Sullivan testified regarding CMH's duty to inspect and maintain the tractor-trailer. He stated that improperly torqued lug nuts would have been visible to a professional truck driver during a proper pre-trip inspection.

The jury also heard testimony from Jack Putman, as corporate representative of CMH, and from Jones. Jack Putman testified CMH had no written policies or procedures regarding driver's safety or pre-trip inspections by truck drivers. He agreed that wheels should not come off of tractor-trailer, but at the time of trial, he was not aware that CMH had blamed any outside vendors for the accident. He admitted CMH was responsible for the maintenance of the tractor-trailer involved in the accident. Additionally, Jack Putman admitted that generally speaking if the wheels come off a tractor-trailer as it is traveling down the highway, "bad things can

happen," including the possibility of a person being killed. Jones testified that when she was hired, CMH in Hillsboro was a "brand-new company" without many systems in place regarding maintenance, training, and inspection. CMH did not provide any training or written policies and procedures to Jones regarding how to perform a proper pre-trip inspection. Jones described the sequence of events on the day of the accident, including what steps she took to inspect the tractor-trailer before she left the warehouse. She contradicted Hank Pitman's testimony regarding any flat tire repairs, denying she had any issues with any of the tires that morning.

D. Sufficiency of the Evidence of Causation

In its first issue, CMH raises multiple challenges to the evidence of causation in the record. CMH argues Taylor failed to submit any reliable expert testimony that loose lug nuts caused the accident, asserting that (1) this case is one where the cause of a mechanical failure is outside the general experience of the lay person and thus expert testimony is required to show causation, (2) Sullivan was not a qualified expert on accident reconstruction or failure analysis, and (3) his causation opinions were unreliable because they lacked foundational proof, contained analytical gaps, and did not eliminate another possible cause of the accident, a cracked rim. Additionally, CMH contends Sullivan failed to establish a causal connection between CMH's negligence in maintaining its vehicles and the loose lug nuts that caused the accident.

We need not address CMH's first assertion as to whether this is a case requiring expert testimony because such testimony was provided as is explained herein. Taylor properly designated Sullivan as an expert, and CMH, by rule 194 disclosure, designated Hank Pitman as an expert, identifying Hank Pitman as "the mechanic who worked on the trailer in question after the accident" and disclosing that he "may offer testimony about his experience in the cause of the

tire/wheel separations on heavy trucks and trailers."[1] As for CMH's second assertion, that Sullivan was not an expert on accident reconstruction, Sullivan specifically testified he was not purporting to offer opinions on accident reconstruction. Instead, Sullivan offered opinions on CMH's responsibilities for inspection and maintenance under the Federal Motor Carrier Safety Regulations. He testified that because CMH registered its trucks and trailers with the United States Department of Transportation, CMH is bound by the Federal Motor Carrier Safety Regulations ("FMCSR") and is the party primarily responsible for inspection and maintenance.

We next address CMH's assertion that Sullivan's causation opinions were unreliable because they lacked foundational proof, contained analytical gaps, and did not eliminate another possible cause of the accident, a cracked rim. Expert testimony is unreliable if there is too great an analytical gap between the data on which the expert relies and the opinion offered. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 349 (Tex. 2015). As discussed above, Sullivan's testimony was with regard to CMH's responsibility for inspection and maintenance. We note that the jury heard evidence of cause-in-fact from not only Sullivan but also CMH's own designated expert Hank Pitman. Hank Pitman, who was hired to repair the tractor-trailer after the accident, testified he could tell at least one of the lug nuts was loose or had been loose because of how the lug nuts were shaved off. His opinion, based on the damage to the lug nuts, was the lug nuts were not tightened to the proper specification. Hank Pitman also opined that a cracked rim may have caused the wheel to shake and cause the lug nuts to be shaved off. However, Sullivan testified that a cracked rim would be "easy" for a properly trained driver to identify, leading any causation debate back to Jones. Indeed, whether the jury believed it was

[1] We note that Hank Pitman was called as a witness for Taylor rather than CMH despite the fact that it was CMH who designated Hank Pitman as an expert witness.

improperly torqued lug nuts or a cracked rim that caused the wheel-and-tire assemblies to detach, there was evidence either should have been spotted by Jones before she began the trip.

Finally, we address CMH's contention that Sullivan failed to establish a causal connection between CMH's negligence and the detachment of the wheels. The jury reasonably could have believed Hank Pitman's testimony that Jones had told him on the morning of the accident she discovered the trailer had a flat tire before she left Hillsboro and that she had it repaired surreptitiously by a third party in view of CMH having no other means to effect the repair. Jones contradicted Hank Pitman and testified that she had no flat tires or other repairs that day. It is the jury's role to resolve such conflicts. Here, the jury also heard testimony from Jones that "CMH in Hillsboro was a brand-new company" and "there were not a lot of systems in place . . . regarding maintenance, training, [or] inspection." Jones also testified that CMH failed to include in her training any written policies and procedures about pre-trip inspections. The jury could have believed that because CMH in Hillsboro was a brand-new company, CMH did not provide Jones with the resources she needed to have the tire properly repaired or the training she needed to properly inspect the wheel and tire following a repair. In either case, the requisite evidence of cause in fact is present.

With respect to foreseeability, the jury heard Jack Putman admit CMH was responsible for the maintenance of the tractor-trailer involved in the accident and that generally speaking if the wheels come off a tractor-trailer as it is traveling down the highway, "bad things can happen," including the possibility of a person being killed. We conclude Taylor offered legally sufficient evidence to support the jury's verdict and overrule CMH's first issue.

JURY INSTRUCTION ON SOLE PROXIMATE CAUSE

In its second issue, CMH argues the trial court improperly denied its requested instruction on sole proximate cause. CMH's requested instruction read as follows.

> There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any party could have been a proximate cause.

CMH asserts Taylor's theory on causation was that an unknown person improperly torqued the lug nuts on CMH's trailer, allowing a wheel to detach. CMH points to the evidence in the record that CMH used third-party vendors to service its tires, although the evidence did not establish who, if anyone, improperly torqued the lug nuts on the morning of the accident. Taylor counters that the evidence on which CMH relies was insufficient to warrant the inclusion of an instruction on sole proximate cause.

We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000) The trial judge has considerable discretion to determine necessary and proper jury instructions. *Id.* When a trial judge refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000) (per curiam). The omission of an instruction is reversible error only if the omission probably caused the rendition of an improper judgment. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006) (per curiam). An instruction on sole proximate cause should only be submitted to the jury if there is evidence that a person's conduct that is not submitted to the jury is the sole proximate cause of the occurrence. *Perez v. DNT Global Star, L.L.C.*, 339 S.W.3d 692, 699 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

The evidence CMH relies upon does not support a theory that some unnamed party was the sole proximate cause of the accident. Hank Pitman testified that his conclusion was that the lug nuts on the tires were loose, causing the wheel-and-tire assemblies to fall off. CMH's representative Jack Putman testified that CMH hired several third-party vendors to service its tires. However, the pleadings and remaining evidence establish Taylor's theory was that CMH

was not negligent simply because the lug nuts were loose. Instead, the pleadings and remaining evidence establish Taylor's theory was that CMH was negligent because it was responsible for properly maintaining and inspecting the tractor-trailer. The fact that CMH is unable to identify who might have serviced its vehicle after the fact does not support the conclusion it shares no portion of the responsibility for the accident. Accordingly, we cannot conclude the trial court erred by refusing to submit a jury instruction on sole proximate cause. We overrule CMH's second issue.

MOTION TO TRANSFER VENUE

In its third issue, CMH argues the trial court should have granted its motion to transfer venue to Collin County where the accident occurred. Taylor responds that CMH waived its venue objection by signing an agreed scheduling order without making its agreement subject to its venue motion.

Taylor filed suit against CMH, Jones, and USAA, alleging venue was proper in Grayson County pursuant to the Texas Insurance Code. Section 1952.110 of the Texas Insurance Code provides that an action against an insurer in relation to uninsured or underinsured motorist coverage may be brought only in (1) the county in which the policy holder or beneficiary instituting the action resided at the time of the accident involving the uninsured or underinsured motor vehicle or (2) the county in which the accident occurred. TEX. INS. CODE ANN. § 1952.110 (West 2015). Taylor's claim against USAA was for the uninsured/underinsured motorist coverage under his own policy with USAA, and he alleged in his petition that he resided in Grayson County at the time of the accident. CMH and Jones filed a motion to transfer venue before filing their answer or any other pleading, and in that motion they denied venue was proper in Grayson County and denied they or the tractor-trailer Jones drove was "uninsured/underinsured" as defined in the Texas Insurance Code. Their venue motion did not

request a hearing, and neither CMH nor Jones requested a hearing for approximately eighteen months. A few days prior to CMH and Jones's request for hearing, Taylor non-suited his claims against USAA without prejudice and filed an amended petition, which deleted his claims against USAA.

At the hearing on the venue motion, Taylor argued CMH and Jones had waived their venue objection by failing to request a hearing for eighteen months and by signing an agreed scheduling order that set a trial date in Grayson County without making their agreement subject to the motion to transfer venue. The record reflects the signature of counsel for CMH and Jones appears on a scheduling order entered by the trial court five months before CMH and Jones requested a hearing on their venue motion. On review of the agreed scheduling order, we note there is no indication the signature was subject to the venue motion. Further, the agreed scheduling order did not set a deadline to hear any pending motions or otherwise refer to the venue motion.

The trial court's order denying the venue motion does not indicate whether it was denied because the trial court determined the venue objection was waived or because it concluded venue was proper in Grayson County.[2] We first address the waiver issue. *Carlile v. RLS Legal Sols., Inc.*, 138 S.W.3d 403, 406 (Tex. App—Houston [14 Dist.] 2004, no pet.). We review a trial court's determination of waiver under these circumstances for abuse of discretion. *Toliver v. Dallas Fort Worth Hosp. Council*, 198 S.W.3d 444, 446 (Tex. App.—Dallas 2006, no pet.). A party may impliedly waive venue rights by taking some action inconsistent with an intent to pursue the venue motion. *Id.* Generally, such actions invoke the judicial power and jurisdiction of the courts. *Id.* at 447.

[2] The order simply states that after reviewing the venue motion and hearing arguments of counsel, the trial court was of the opinion the venue motion should be denied.

Rule 87 of the Texas Rules of Civil Procedure provides that "[t]he movant has the duty to request a setting on the motion to transfer." TEX. R. CIV. P. 87. At least one other court of appeals has concluded that "implicit in the language and purpose of this rule [is] that a movant may not sit on his rights indefinitely without incurring waiver." *Whitworth v. Kuhn*, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ) (per curiam). The Austin Court of Appeals went on to state that where a litigant waited more than a year after filing his motion to transfer venue before requesting a hearing on that motion, "the trial court could have refused his motion on that basis." *Id.* (ultimately affirming the trial court's denial of the venue motion because the litigant failed to deny the venue facts in the plaintiff's allegations). The Amarillo Court of Appeals addressed a delay of thirty-two months from the date of the filing of the venue motion to the date the trial court ruled on the motion, noting that "it may be that delay in obtaining a hearing provides grounds for the trial court to deny a motion to transfer." *Bristol v. Placid Oil Co.*, 74 S.W.3d 156, 159 (Tex. App.—Amarillo, no pet.). However, noting that the movant requested a hearing in its motion and in its first amended answer and there was no other evidence than the delay to support a conclusion the movant was less than diligent, the Amarillo court concluded the trial court had the discretion to entertain the motion on the merits. *Id.* at 160. Additionally, the Fort Worth Court of Appeals has held that in the absence of a showing that a movant pursues a hearing on a venue motion before the trial court, an appellate court may look to other matters in the record to determine whether or not the movant has either expressly or impliedly waived the rights conferred upon him by the venue statute. *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 311 (Tex. App.—Fort Worth 1988, writ denied).

Of course, a movant may impliedly waive its venue objections through actions rather than delay, such as filing responses to no-evidence motions for summary judgment and motions for

new trial, to compel, and for continuance;[3] urging the trial court to deny opponent's motion to consolidate and, after consolidation was ordered, filing and urging a motion to reconsider the trial court's decision ordering consolidation;[4] moving to rule for costs without conditioning motion on previously filed venue motion;[5] or moving to strike opponent's motion for suggestion of death that requested plaintiff's surviving spouse be substituted as plaintiff.[6] On the other hand, courts have refused to find waiver where a party filed a counterclaim, which was expressly contemplated by the venue statute in the Texas Family Code, and filed a jury demand, a motion to vacate the ex parte temporary orders, two motions for sanctions, and a certificate of written discovery;[7] filed pleadings in federal court;[8] or filed a motion for continuance of a hearing on a preliminary matter.[9] What distinguishes the results in these lines of authority is the nature of the relief sought in advance of the ruling on venue. Where the movant seeks relief that is ancillary to the merits or inherently preliminary, courts are reluctant to find waiver. Additionally, even where none of the movant's actions or lack of diligence alone suffices to waive his venue motion, courts review the record as a whole to determine whether the movant's actions and delay collectively establish waiver. *See Carlile*, 138 S.W.3d at 409.

No Texas appellate court has yet addressed the waiver effect of a party signing an agreed scheduling order without explicitly preserving its venue objection or otherwise seeking a ruling on a pending venue motion. Accordingly, we look to whether the scheduling order addressed the

[3] *Carlile*, 138 S.W.3d at 408–09 (holding that filing a response to no-evidence motion for summary judgment and motions for new trial, to compel, and for continuance—none of which was made subject to the venue motion—all collectively established a waiver of the venue motion).

[4] *Cope Constr. Co. v. Power*, 590 S.W.2d 721, 722 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ.

[5] *Nacol v. Williams*, 554 S.W.2d 286, 287–88 (Tex. Civ. App.—Eastland 1977, writ dism'd.

[6] *Olympic Trampolines, Inc. v. Bashaw*, 462 S.W.2d 345, 346–47 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

[7] *In re Leder*, 263 S.W.3d 283, 287 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding) (holding that such actions were ancillary to the main action and did not invoke the power of the trial court in a manner inconsistent with the party's continuing intention to insist on a change of venue).

[8] *Toliver*, 198 S.W.3d at 447–48.

[9] *Gentry v. Tucker*, 891 S.W.2d 766, 768 (Tex. App.—Texarkana 1995, no pet.) (holding that such filing does not invoke the court's general jurisdiction in the main suit).

main action or instead addressed only ancillary or preliminary issues. *See In re Leder*, 263 S.W.3d at 287; *Carlile*, 138 S.W.3d at 408–09. The scheduling order addressed deadlines for supplemental witness lists, supplemental objections to designation of deposition testimony, objections to trial exhibits, and the date of trial. We cannot conclude such matters addressed by the scheduling order were merely ancillary or preliminary. Furthermore, despite the fact that the hearing on the venue motion was scheduled but had not yet taken place, the scheduling order did not include a deadline for pending motions generally or, more specifically, the long fallow venue motion so as to suggest any intention to carry it forward as a live issue. However, we need not decide that the CMH's agreement to the scheduling order alone established waiver.

Neither CMH nor Jones requested a hearing on their venue motion until eighteen months after the motion was filed. In its appellate brief, CMH argues Taylor "destroyed venue by dismissing the [USAA]," thereby implying the motion was frivolous when filed because venue was proper at the time CMH filed its venue motion up until Taylor dismissed USAA. In contrast, in a motion before the trial court,[10] CMH and Jones argued "the delay [of eighteen months] was necessitated by the plaintiff's refusal to nonsuit [USAA], which was never a proper party to this lawsuit," and in their arguments on that same motion in which they argued Taylor never had a valid claim against USAA. However, if USAA was never a proper party because Taylor had no valid claims against them, then there was no reason for CMH and Jones to have delayed in seeking a hearing on their venue motion. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (West 2016) (requiring trial court to transfer action to another county if the county in which the action is pending is not a proper county); *see also Sun Oil Co. (Delaware) v. Hall*, 566 S.W.2d 696, 698 (Tex. Civ. App.—Austin 1978, no writ) (holding that if a claim on which venue

[10] Rule 87 provides that "[e]xcept on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer." Because CMH and Jones requested a hearing on their venue less than forty-five days before trial, they filed a motion for leave of court to shorten time for notice of their hearing on their motion to transfer venue, in which the above argument was made to explain why they delayed in requesting the hearing. TEX. R. CIV. P. 87.

could be maintained in the county of suit is fraudulently asserted, the plea of privilege must be sustained). Thus, either the venue motion was improper from the time of its filing or it was properly filed and CMH waived its venue objection by delaying eighteen months to seek a hearing and by agreeing to a scheduling order that set the case for trial without making such agreement subject to its venue objection. Accordingly, we overrule CMH's third issue.

CONCLUSION

The trial court's judgment is affirmed.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CMH SET AND FINISH, INC., Appellant	On Appeal from the 59th Judicial District Court, Grayson County, Texas
No. 05-14-01407-CV V.	Trial Court Cause No. CV-12-0684. Opinion delivered by Justice Schenck,
CHRISTOPHER L. TAYLOR, Appellee	Justices Bridges and Lang-Miers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee CHRISTOPHER L. TAYLOR recover his costs of this appeal and the full amount of the trial court's judgment from appellant CMH SET AND FINISH, INC. and from National Indemnity Company as surety on appellant's supersedeas bond.

Judgment entered this 31st day of March, 2016.