Reversed and Rendered and Opinion filed November 3, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-01032-CV

ROSS STORES, INC., Appellant

V.

JOSEPH MILLER, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2017-13603

OPINION

In this personal injury case, appellant Ross Stores, Inc. challenges the legal sufficiency of the evidence in support of the jury's negligence finding in favor of appellee Joseph Miller. Miller sued Ross Stores after he sustained injuries in a physical altercation at work. According to Ross Stores, Miller was not its employee, and Ross Stores did not assume control over the safety of the actors involved in this case. In a cross-point, Miller contends that Ross Stores waived its sufficiency challenge by failing to raise a misidentification defense or file special

exceptions below. Concluding that Ross Stores was not required to raise a misidentification defense or file special exceptions to bring its sufficiency challenge and the jury's negligence finding against Ross Stores is not supported by legally sufficient evidence, we reverse the trial court's judgment and render judgment that Miller take nothing by way of his claims against Ross Stores.

Background

Miller worked in the stockroom at Ross Store 334 in Houston, Texas. Store 334 is owned by Ross Dress for Less, Inc., a subsidiary of Ross Stores. After Miller had been working at the store for approximately one month, his coworker Rashaud Davenport instructed him regarding how to unload merchandise from a truck. Miller retorted that Davenport should not tell him what to do, and the men began to argue. Area supervisor Sara Decoster separated the two men and questioned them apart from each other. Decoster and an assistant manager then met together with both men. Decoster informed the men that their argument was unacceptable and employees should report any conflicts to management to avoid confrontation. Decoster gave the men three options: keep working together in the stockroom, change shifts and transfer to another area of the store to avoid working together, or quit the job. They chose the first option.

About a week later, Miller, Davenport, Decoster, and other employees were unloading boxes from a delivery truck onto a conveyor belt and sorting merchandise. Decoster asked Davenport to tell Miller to move some boxes out of the way. In response to Davenport's instruction, Miller became angry and confrontational. Davenport then punched Miller. Both men were terminated from their jobs.

Miller sued Ross Stores, alleging he sustained injuries based on negligent hiring, negligent training, and negligent supervision, retention, and monitoring by

Ross Stores. A jury found Ross Stores negligent and awarded damages to Miller.

Discussion

In three issues, Ross Stores contends that the evidence is legally insufficient to support the jury's negligence finding because the employees involved were Ross Dress for Less employees and Ross Stores did not exercise control over Ross Dress for Less's safety policies and procedures. Miller contends in a cross-point that Ross Stores is making a misidentification argument cloaked as a legal sufficiency challenge and that Ross Stores waived its argument by failing to raise the misidentification defense or file special exceptions in the trial court. Miller also argues the jury's negligence finding is supported by legally sufficient evidence. We first address Miller's cross-point and then turn to the sufficiency challenge.

I. Ross Stores did not waive its sufficiency challenge.

Miller contends Ross Stores' failure to file a verified pleading raising a misidentification defense or special exceptions in the trial court precludes Ross Stores from bringing a sufficiency challenge on appeal. We have held that a party's objection that it is not a proper party to a lawsuit is an issue of misidentification that must be raised by verified pleading. *CHCA E. Houston, L.P. v. Henderson*, 99 S.W.3d 630, 633–34 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing Tex. R. Civ. P. 93(4) (requiring pleading to be verified by affidavit when "there is a defect of parties, plaintiff or defendant")); *see also Allright, Inc. v. Burgard*, 666 S.W.2d 515, 517 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). Misidentification "arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 594 (Tex. 2017); *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999).

Ross Stores contends on appeal that it is not an improper party and was not required to raise a misidentification defense because it could have been held liable for negligence upon a showing that it assumed control over the safety of the actors involved. A corporation generally is not liable for the negligence of someone who is not its employee. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011); *see also R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 230 (Tex. App.—El Paso 2019, no pet.); *Abdel-Fattah v. Pepsico, Inc.*, 948 S.W.2d 381, 383 (Tex. App.—Houston [14th Dist.] 1997, no writ). But that does not mean that a corporation can never be liable for the negligence of its subsidiary's employees. If a parent corporation assumes control over the safety of its subsidiary's employees, the parent may be subject to tort liability. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 611 (Tex. 2002) (involving premises owner and independent contractor).

Whether Ross Stores employed the actors or assumed control over their safety is an element of Miller's negligence claim for which Miller bore the burden of proof at trial. *See Guerra*, 348 S.W.3d at 228; *see also Dow Chem. Co.*, 89 S.W.3d at 611. A defendant need not file a verified denial to challenge the sufficiency of the evidence in support of an affirmative finding on an element of the plaintiff's claim. *See Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 153–54 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding in suit to recover the balance due on a promissory note that defendant was not required to file a verified denial regarding a defect of parties when defendant alleged that plaintiff failed to prove an element of its claim because plaintiff did not establish it was the owner and holder of the note), *disapproved on other grounds by B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256 (Tex. 2020); *see also Price v. Sanchez*, No. 14-15-00508-CV, 2016 WL 4216581, at *2 (Tex. App.—Houston [14th Dist.]

Aug. 9, 2016, no pet.) (mem. op.) ("[E]ven though appellants did not file verified denials, they did not waive their right to challenge the legal sufficiency of the evidence against them."). Accordingly, the lack of evidence supporting this element is not a defense that Ross Stores was required to assert in a verified pleading.[1] *See Alphaville Ventures*, 429 S.W.3d at 153–54.

Miller relies on this court's opinion in *Allright*, in which we held that the defendant, in failing to file a verified pleading setting forth a defect of parties, waived its complaint that there was no evidence that it operated the parking garage or employed the garage attendant where the plaintiff's car was stolen. 666 S.W.2d at 517. In that case, the plaintiff brought claims for breach of a bailment contract and violations of the Deceptive Trade Practices Act after his car was stolen by a third party from a parking garage owned by Allright. *Id*. at 516. The court held that Allright's complaint was an attack on the pleadings, which required Allright to file a verified pleading setting forth a defect of parties or that it was not liable in the capacity in which it was sued. *Id*. at 517. Here, Ross Stores does not assert a defect of parties and does not challenge the capacity in which it was sued. Ross Stores simply contends that there is no evidence supporting a required element of the jury's negligence finding. *Allright* does not apply to these facts.

Miller also contends that Ross Stores was required to specially except to Miller's "allegedly defective pleadings" in Miller's original petition in which Miller alleged that he and Davenport were employed by Ross Stores. *See* Tex. R. Civ. P. 90 ("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

[1] We also note that in its answer, Ross Stores put Miller on notice that Ross Stores "did not employ [Miller] and/or any co-worker of [Miller] alleged[ly] involved in the incident [and] did not own, possess, or control the premises on the date of the incident." Ross Stores also identified Ross Dress for Less as a potential party in discovery.

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 . . . .”). Special exceptions are appropriate when a plaintiff omits an element of a claim or does not state its claim with sufficient clarity to inform the defendant of the nature of the suit. *Remedy Intelligent Staff, Inc. v. Drake All. Corp.*, No. 14-16-00241-CV, 2017 WL 4440484, at *9 (Tex. App.—Houston [14th Dist.] Oct. 5, 2017, no pet.) (mem. op.) (citing *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (“The purpose of a special exception is to compel clarification of pleadings when the pleadings are not clear or sufficiently specific or fail to plead a cause of action.”)); *see also Shirvanian v. DeFrates*, 161 S.W.3d 102, 112 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (“Texas follows a ‘fair notice’ standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.”). Miller pleaded that Ross Stores was negligent and informed Ross Stores of the nature of the suit and the basic issues of the controversy. Ross Stores was not required to file special exceptions to preserve error on its sufficiency challenge. *See Remedy Intelligent Staff*, 2017 WL 4440484, at *10; *Shirvanian*, 161 S.W.3d at 112.

We overrule Miller’s cross-point and turn to Ross Stores’ sufficiency challenge.

II. Miller did not present evidence that Ross Stores employed the actors or assumed control over their safety.

In its first and second issues, Ross Stores contends that the jury’s negligence finding is not supported by legally sufficient evidence because there is no evidence that Ross Stores (1) had an employment relationship with Miller, Davenport, or

DeCoster, or (2) controlled Ross Dress for Less's safety policies and procedures. We sustain a no-evidence challenge when (a) there is a complete absence of evidence of a vital fact, (b) the trial court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Guerra*, 348 S.W.3d at 228. Evidence is more than a scintilla if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id*. If the evidence does no more than create a mere surmise or suspicion and is so slight as to necessarily make any inference a guess, then it is no evidence. *Id*. We presume that jurors made all inferences in favor of the verdict, but only if reasonable minds could do so. *Id*. Jurors may not simply speculate that a particular inference arises from the evidence. *Id*.

As discussed above, corporations are liable for the negligence of corporate employees acting within the scope of their employment. *Id*. But a corporation generally is not liable for the negligence of someone who is not its employee. *Id*. An exception applies when a parent corporation assumes control over the subsidiary's safety policies. *See Dow Chem. Co.*, 89 S.W.3d at 611.

Miller complains that Ross Stores did not request and the trial court did not submit a threshold fact question "calculated to determine the question of duty," implying that we cannot reach Ross Stores' sufficiency challenge. The trial court submitted the following broad form negligence question: "Was the negligence, if any, of Ross Stores, Inc. a proximate cause of the Occurrence in question?" The jury answered, "Yes." "Occurrence" was defined as "the physical altercation between Rashad Davenport and Joseph Miller on September 22, 2016."

Whether Ross Stores employed the actors involved in this case or otherwise

assumed control over their safety was not an independent ground of recovery—it was an element of Miller's claim against Ross Stores. *See Guerra*, 348 S.W.3d at 228; *see also Dow Chem. Co.*, 89 S.W.3d at 611. When an element of a claim is omitted from the jury charge without objection and no written findings are made by the trial court, then the omitted element is deemed to have been found by the trial court in such a manner as to support the judgment. *Guerra*, 348 S.W.3d at 228-29 (citing Tex. R. Civ. P. 279). Here, there was no objection to the charge on the basis that it omitted the element, and the trial court did not make a finding on this element, so there is a deemed finding in support of the judgment. *See id*. at 229. There must be evidence to support a deemed finding as with any other finding. *See id*. Accordingly, we must address whether legally sufficient evidence supports the challenged finding. *See id*. The issue is not waived. *See id*.

To establish liability against Ross Stores, Miller was required to present evidence that the involved parties were either employees of Ross Stores or Ross Stores assumed control over their safety. *See id.* at 228; *see also Dow Chem. Co.*, 89 S.W.3d at 611.

Employment. Miller testified that "all of the employees that worked in the stockroom and at the Ross Store 334 in Houston were all employees of Ross Dress for Less." Miller also conceded that the store where he worked was operated by his "employer, Ross Dress for Less." Another former employee, Sandra Johnson, testified that she worked for "Ross Dress for Less" and Miller was her coworker. Despite this testimony, Miller points to the following evidence that he contends shows the actors were employed by Ross Stores: testimony from a manager for Ross Dress for Less, a human resources policy handbook, a letter to Miller with a Ross Dress for Less letterhead stating, "We at Ross Stores, Incorporated are sorry to hear you were injured at work," and a "Job Data" report.

The manager, Jesus Vargas, testified that he was employed "[f]or Ross Dress for Less, Inc." but he was called to testify as the corporate representative for Ross Stores. He answered the question, "What is the relationship between Ross Stores, Inc. and Ross Dress for Less, Inc.?" by stating, "Ross Stores, Inc. is the parent company. Ross Dress for Less, Inc. is a subsidiary. So, essentially Ross Stores, Incorporated employees are all the employees that work for Ross Stores." Counsel then asked Vargas, "But all of the employees in Texas that work for Ross stores are employed by who?" Vargas responded, "By Ross Dress for Less, Incorporated." This testimony shows the relationship between Ross Stores as the parent corporation and Ross Dress for Less as a subsidiary. It does not support an inference that the people who worked at Store 334 were Ross Stores employees. To the contrary, Vargas affirmatively testified that all Store 334 employees worked for Ross Dress for Less. Taking Vargas's testimony in context, as we must, it is not evidence that any of the employees who worked at Store 334 were employed by Ross Stores. *See Guerra*, 348 S.W.3d at 229.

Excerpts from the "HR Policy Handbook" were admitted as a defense exhibit at trial. The names "Ross Dress for Less" and "dd's Discounts" are printed on the cover. The bottom of each page of the handbook has the following footer: "Ross Stores, Inc. HR Policy Handbook." The "Workplace Anti-Violence" section expressly applies to Ross Stores and its affiliates: "Ross Stores, Inc. *and its affiliated companies* are committed to preventing workplace violence and maintaining a safe work environment." (Emphasis added.) This language indicates that both Ross Stores and its affiliates are "committed to preventing workplace violence," but it does not differentiate who is employed by whom. The excerpts generally refer to "Ross" associates but do not specify whether such associates are employed by Ross Stores, Ross Dress for Less, or another "Ross" entity. This

language does not adequately describe which entity employed the workers involved in this case. *See id*. at 229-30 (references to "SCI" allowed only speculation as to which SCI entity employed workers). Evidence that "Ross" employed the workers is not evidence that they were employed by Ross Stores. *See id*. ("[F]indings based on evidence that allows for no more than speculation—a guess—are based on legally insufficient evidence.").

Turning to the letter, Vargas testified at trial that a letter on "Ross Dress for Less" letterhead was sent to Miller. The letter referenced "[w]hile you recover from your workplace injury" and included the sentence, "We at Ross Stores, Incorporated are sorry to hear you were injured at work." The letter was not admitted into evidence at trial. This testimony shows only that Miller received a letter on Ross Dress for Less letterhead with a statement of sympathy from Ross Stores. The testimony regarding the letter does not reflect which entity employed Miller. Miller similarly contends that the "Job Data" report admitted at trial "only mentions that Miller was hired by 'Ross.'" We cannot infer from that evidence which entity employed Miller. *See id*.

Miller also posits that evidence "all employees of Texas are employed by Ross Dress for Less, Inc. does not preclude those employees from also being employed by Ross Stores, Inc." But Miller was required to present evidence that the actors were employees of Ross Stores as an element of his claim. *See id*. at 228. Merely pointing out that the actors *could have* been employed by both entities is not legally sufficient evidence that Miller was employed by Ross Stores. *See id*.

Considering the totality of the evidence in context, we conclude there is not legally sufficient evidence that the actors involved in this case were employed by Ross Stores. We turn to whether there is legally sufficient evidence that Ross Stores assumed control over the safety of Ross Dress for Less employees.

Control. Ross Stores argues that the evidence does not rise to the level of control required to impose negligence liability on a parent corporation. A plaintiff seeking to establish that a defendant assumed control over the safety of its subsidiary's employees must present evidence of contractual or actual control. *See Dow Chem. Co.*, 89 S.W.3d at 611. Miller does not allege contractual control, so we focus on actual control. *See Vanderbeek v. San Jacinto Methodist Hosp.*, 246 S.W.3d 346, 352 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

To establish actual control, the evidence must establish that the parent corporation undertook a responsibility to ensure the safety of the subsidiary's employees and directly participated in the acts causing the plaintiff's injuries. *Abdel-Fattah*, 948 S.W.2d at 386. The promulgation of safety policies and procedures is not enough. *Dow Chem. Co.*, 89 S.W.3d at 611. As we have noted, the cases that extend liability to a parent corporation for injuries to the employees of its subsidiaries involved incidents in which the parent corporation had engaged in an undertaking that directly promoted the interests of the subsidiary in providing a safe workplace. *Abdel-Fattah*, 948 S.W.2d at 385.

In response to the question, "What entity controls the day-to-day operations of the Ross stores in Texas, particularly Ross Store 334?" Vargas said, "Ross Dress for Less, Incorporated." Vargas also testified that Miller and Davenport were both terminated from their jobs because "[t]here [was] a no tolerance policy [when] it comes to violent acts."

A policy regarding "Workplace Anti-Violence" is printed in the HR Policy Handbook:

> Ross Stores, Inc. and its affiliated companies are committed to preventing workplace violence and maintaining a safe working environment. The Company has adopted the following guidelines to deal with intimidation, harassment, or other threats of or actual

> violence that may impact the well-being of our associates. All full-time, part-time, temporary, and active associates are covered under this policy.

Prohibited conduct described in the handbook includes "[a]ny threat or act of violence occurring on Company premises."[2]

The handbook also includes Ross Stores' zero tolerance policy for workplace violence:

> Ross Stores, Inc. has zero tolerance for workplace violence and takes reports of threats of violence, incidents of actual violence, and suspicious individuals or activities extremely seriously and will investigate all such reports. . . . Anyone found to be responsible for threats of or actual violence or other conduct that is in violation of these guidelines will be subject to prompt disciplinary action up to and including permanent separation from the Company.

Vargas testified that Davenport and Miller were terminated from their jobs because of this "zero tolerance policy." Ross Stores also set up a hotline discussed in the handbook and urged associates to report "any serious dispute or concerning situation either by calling the [hotline] or bringing the situation to the attention of their manager before the situation escalates."

Here, the evidence presented by Miller—the HR Policy Handbook, the testimony that Davenport and Miller were fired because of Ross Stores' zero tolerance policy, and the associate hotline—does not show actual control. This evidence demonstrates nothing more than the promulgation of safety policies. Ross Dress for Less complied with the "zero tolerance policy" in firing Davenport and Miller, but there is no evidence that Ross Dress for Less was obligated to follow

[2] "Company" is not defined in the excerpts of the handbook admitted at trial. Miller contends that "Company" refers to Ross Stores because only "Ross" is referenced in the handbook. As mentioned, we cannot infer that a general reference to "Ross" means Ross Stores. *See Guerra*, 348 S.W.3d at 229-30.

the policy.

Miller did not present evidence of control required to impose negligence liability on Ross Stores. Absent a showing of direct participation by Ross Stores in the circumstances precipitating Miller's injuries, there is no basis for concluding that Ross Stores was required to protect Miller from the injuries that occurred at Store 334. *See Abdel-Fattah*, 948 S.W.2d at 385-86 (holding parent corporation could not be held liable for a subsidiary employee's injuries caused by another subsidiary employee's assault). The evidence does not show that Ross Stores directly participated in the acts that caused Miller's injuries. *See id*.

We conclude there is legally insufficient evidence that Ross Stores assumed control over the safety of Ross Dress for Less employees. We sustain Ross Stores' sufficiency challenge.

Conclusion

We conclude that Ross Stores was not required to raise a misidentification defense or file special exceptions in the trial court to bring a sufficiency challenge on appeal and the jury's negligence finding is not supported by legally sufficient evidence. We reverse the judgment of the trial court and render judgment that Miller take nothing by way of his claims against Ross Stores.

/s/ Frances Bourliot
Justice

Panel consists of Justices Christopher, Bourliot, and Hassan.