NUMBER 13-20-00325-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE K2 WASTE SOLUTIONS, LLC D/B/A LT'S GARBAGE SERVICE AND LARRY RAY RAMIREZ

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

Relators K2 Waste Solutions, LLC d/b/a LT's Garbage Service (K2) and Larry Ray Ramirez filed a petition for writ of mandamus contending that the respondent abused his discretion, leaving relators without an adequate appellate remedy, by denying a motion to transfer venue. We will deny the requested relief.[1]

[1] *See* TEX. R. APP. P. 52.8(d) ("When denying [mandamus] relief, the court may hand down an opinion but is not required to do so.").

I. BACKGROUND

The underlying cause is a personal injury lawsuit arising from a February 2018 auto accident in Harris County. In April 2018, real parties in interest Sueann and Jose Cazares sued relators in the 270th District Court of Harris County, contending that Ramirez, while in the course and scope of his employment with K2, negligently failed to yield the right of way and thereby caused the collision. The petition alleged that venue was proper in Harris County because "all or a substantial part of the events or omissions giving rise to this lawsuit occurred in this county." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1). Relators answered the suit without contesting the alleged venue facts and participated in discovery. The Cazareses later filed five amended petitions making the same venue allegations. According to an agreed docket control order entered on January 16, 2019, discovery was scheduled to end on May 3, 2019, and trial was set for June 3, 2019. On June 27, 2019, an order was issued resetting trial for the week of March 2, 2020.

On October 15, 2019, the Cazareses filed a "Notice of Nonsuit Without Prejudice" in the 270th District Court. Subsequently that same day, the Cazareses re-filed their suit in Nueces County Court at Law No. 1, claiming in their petition that venue is proper in Nueces County as to both defendants because K2 "maintains its Principle [sic] Office" there. *See id.* § 15.002(a)(3). Ramirez and K2 each filed motions to transfer venue back to Harris County, or in the alternative, to dismiss. After a hearing, the trial court denied the motions and this original proceeding followed.

II. Discussion

A. Mandamus

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). Similarly, a trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d at 712.

To determine whether an appellate remedy would be inadequate so as to justify mandamus review, we balance the benefits of mandamus review against the detriments. *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). Permissive venue determinations generally are not reviewable by mandamus because there is an adequate appellate remedy. *See In re Masonite Corp.*, 997 S.W.2d at 197; *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 441 (Tex. 1996) (orig. proceeding); *In re Lowe's Home Centers, L.L.C.*, 531 S.W.3d 861, 874 (Tex. App.—Corpus Christi–Edinburg 2017, orig. proceeding). Nevertheless, mandamus review of a permissive venue determination may be appropriate in "extraordinary circumstances." *In re Team Rocket,*

L.P., 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (stating that, in a venue case, extraordinary relief can be warranted when a trial court subjects taxpayers, defendants, and all of the state's district courts to meaningless proceedings and trials); *In re Masonite Corp.*, 997 S.W.2d at 197 (finding extraordinary circumstances existed where the "trial court improperly applied the venue statute and issued a ruling that permits a plaintiff to abuse the legal system"); *Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (orig. proceeding) (per curiam) (concluding that mandamus was an appropriate remedy for the trial court's failure to follow applicable venue procedure in ruling on a motion to transfer venue without providing advance notice); *Lowe's Home Centers*, 531 S.W.3d at 875–76 (finding mandamus relief proper to correct trial court's denial of motion to transfer because (1) the case "involves an impairment of [the defendant's] procedural rights"; (2) "the issue of venue following a nonsuit is likely to recur"; and (3) the trial court's failure to grant the motion to dismiss or transfer "will result in an irreversible waste of resources").

B. Venue

Generally, venue is proper in: (1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; (2) the county of defendant's residence at the time the cause of action accrued, if the defendant is a natural person; (3) the county of the defendant's principal office in Texas, if the defendant is not a natural person; or (4) if none of the preceding three rules apply, the county in which the plaintiff resided at the time of the accrual of the cause of action. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a). When venue is proper in multiple counties, a plaintiff is given the first choice of venue in the filing of a lawsuit. *In re Team Rocket, L.P.*, 256 S.W.3d at 259; *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999) (orig. proceeding); *Wilson v. Tex.*

Parks & Wildlife Dep't, 886 S.W.2d 259, 260 (Tex. 1994). The defendant may challenge the plaintiff's venue selection by a motion to transfer, and the court "shall transfer an action to another county of proper venue if . . . the county in which the action is pending is not a proper county." TEX. CIV. PRAC. & REM. CODE ANN. § 15.063(1); *see* TEX. R. CIV. P. 87.

C. Analysis

Relators concede that the Cazareses had an absolute right to take a nonsuit in their Harris County case. *See* TEX. R. CIV. P. 162 ("At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a nonsuit, which shall be entered in the minutes."); *In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 324 (Tex. 2009) (orig. proceeding) ("The plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief."). They further acknowledge that both Harris County and Nueces County are "proper" venues for the Cazareses's claims pursuant to the statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a). They argue, however, that the Cazareses's initial filing of suit in Harris County "fixed" venue for their claims in that county and that, by denying the motions to transfer or dismiss, the Nueces County court improperly gave the Cazareses the "second choice" of venue. *See In re Masonite Corp.*, 997 S.W.2d at 197–98 (noting that a plaintiff has "the first choice, but not the second, of a proper venue"). Relators argue that the ruling encourages forum shopping and that, if the Cazareses have an "absolute right to nonsuit and refile even though they have fixed suit in Harris County, nothing could stop them from filing in each of Texas's 254 counties until they find a favorable venue."

Relators also argue that their motions to transfer or dismiss should have been granted on grounds of dominant jurisdiction. Under that doctrine, when venue is proper in more than one county, "[t]he court in which suit is first filed generally acquires dominant jurisdiction to the exclusion of other courts if venue is proper in the county in which suit was first filed." *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005).

We disagree that the trial court clearly abused its discretion by denying the motions to transfer or dismiss in this case. First, dominant jurisdiction does not apply because there was no suit "pending" in Harris County at the time the Nueces County suit was filed. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292 (Tex. 2016) (orig. proceeding) (noting that the issue of dominant jurisdiction arises only "[w]hen an inherent interrelation of the subject matter exists in two *pending* lawsuits" (emphasis added)). Thus, even assuming the two suits raise identical issues, the doctrine of dominant jurisdiction does not render the trial court's decision erroneous in this case.

Second, the cases establishing that a plaintiff has "first choice, but not the second, of proper venue" concern only situations in which the first court has already made a formal determination that the initial venue was proper. In *Team Rocket*, the Texas Supreme Court explained:

> Once a ruling is made on the merits, as in a summary judgment, that decision becomes final as to that issue and cannot be vitiated by nonsuiting and refiling the case. *See Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam) ("A nonsuit sought after [a partial summary judgment] results in a dismissal with prejudice as to the issues pronounced in favor of the defendant."). This concept is rooted in the long-standing and fundamental judicial doctrines of res judicata and collateral estoppel, which "promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation" of matters that have already been decided or could have been litigated in a prior suit. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994); *accord Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). Just

> as a decision on the merits cannot be circumvented by nonsuiting and refiling the case, a final determination fixing venue in a particular county must likewise be protected from relitigation. *Cf. Wichita Falls & S. R.R. Co. v. McDonald*, 174 S.W.2d 951, 952–53 (Tex. 1943) ("[A] ruling on a plea of privilege is treated as final in so far as it disposes of the issue as to the venue of the case . . . . [A]n interlocutory order of court overruling a plea of privilege shall become final in so far as the venue question is concerned, within the same time and under the same circumstances that a judgment on the merits of the case would become final.").

In re Team Rocket, L.P., 256 S.W.3d at 259.

Similarly, in *Lowe's Home Centers*, the plaintiffs filed their wrongful death and personal injury suit in Starr County. 531 S.W.3d at 865. The defendants moved to transfer venue to Cameron County, but the trial court denied the motion. *Id.* Later, discovery revealed that "the plaintiffs' venue pleadings and affidavit [attached to the plaintiffs' response to the motion to transfer] were at best, incorrect, and at worst, fraudulent." *Id*. The plaintiffs then nonsuited the Starr County case and re-filed a substantially similar suit in Hidalgo County. *Id.* The defendants moved to dismiss, or in the alternative, to transfer back to Starr County. *Id.* The trial court denied the motion, and the defendants filed a petition for writ of mandamus challenging the ruling. *Id.* Relying principally on *Team Rocket*, we held that "once the Starr County court made its venue determination, that venue determination could not be overcome by a nonsuit and subsequent refiling in another county." *Id.* at 872 (citing *In re Team Rocket*, 356 S.W.3d at 260; *In re Masonite Corp.*, 997 S.W.2d at 198). We noted that "a venue determination 'irrevocably fixes venue of any suit involving the same subject matter and parties.'" *Id.* at 873 (quoting *Miller v. State & Cty. Mut. Fire Ins. Co.*, 1 S.W.3d 709, 712–13 (Tex. App.—Fort Worth 1999, pet. denied)). Accordingly, the Hidalgo County court abused its discretion in denying the motion to transfer. *Id.* at 874 ("The Starr County court's venue determination was conclusive as to the parties and claims in that suit, and that determination could not be

overcome by a nonsuit and subsequent filing in Hidalgo County.").

Relators ask us to "give legal significance to the [Cazareses'] first choice of venue, as it was proper, and did not have to be 'determined' to be proper since it was not contested." In other words, they argue that no formal venue determination by the Harris County court was necessary to "fix" venue in that county because relators did not dispute the venue facts alleged by the Cazareses in their original suit. But the Texas Supreme Court made clear in *Team Rocket* that the rationale for denying the plaintiff a "second choice" of venue in this situation is based on principles of res judicata and collateral estoppel. *See* 256 S.W.3d at 259 ("Just as a decision on the merits cannot be circumvented by nonsuiting and refiling the case, a final determination fixing venue in a particular county must likewise be protected from relitigation."). Here, the Harris County court was never asked to make any "final determination fixing venue" and did not make any such determination. Thus, there is no concern here that the particular venue issue may be relitigated.

It is true that, when venue fact allegations are not challenged, those allegations must be taken as true. *See* TEX. R. CIV. P. 87(3)(a) ("All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party."). However, the only venue fact pleaded in the Cazareses' Harris County petitions was that "all or a substantial part of the events or omissions giving rise to this lawsuit occurred in this county." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a). The truth of that fact was indeed "fixed" because relators did not deny it. *See* TEX. R. CIV. P. 87(3)(a). But establishment of proper venue in Nueces County would not require relitigation of that fact. *See Peysen v. Dawson*, 974 S.W.2d 377, 380 (Tex. App.—San Antonio 1998, no pet.)

(noting that "the effect of a nonsuit depends upon the effect given the venue facts alleged in the parties' pleadings by the applicable rules of procedure").

Finally, though relators emphasize that significant discovery already took place in the Harris County suit, they do not demonstrate any need for that discovery to be duplicated in the Nueces County suit, and relators offer no other reason for why allowing the second suit to proceed in Nueces County would result in a waste of judicial resources or reduced efficiency. Though relators raise the specter of forum shopping, there is no indication in the record that the Cazareses were engaged in forum shopping in this case.[2]

Where venue is proper in multiple counties and none is mandatory, as here, a plaintiff may select the county in which to file suit. The Cazareses' exercise of their "absolute right" to nonsuit their Harris County case does not deprive them of that choice, and relators direct us to no authority establishing that venue is irrevocably "fixed" in a county merely because a plaintiff files there first and the defendant does not deny the alleged venue facts. Under these circumstances, we cannot say the trial court clearly abused its discretion by denying relators' motions to transfer or dismiss, nor can we say that there are "extraordinary circumstances" which would warrant mandamus review.[3]

III. CONCLUSION

Having fully reviewed relators' petition for writ of mandamus, the record documents provided by relators, and the response filed by the real parties in interest, we conclude

[2] At oral argument, the Cazareses' counsel represented that they sought to transfer venue to Nueces County because trial could be scheduled sooner there.

[3] Relators' argument that this ruling means the Cazareses could take a nonsuit and refile "in each of Texas's 254 counties until they find a favorable venue" is unavailing. The venue statute generally limits proper venue to "the county in which all or a substantial part of the events or omissions giving rise to the claim occurred" or the county of the defendant's residence or principal office. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1)–(3). Relators do not suggest, and the record does not reveal, that any county other than Harris or Nueces would be "proper" for the Cazareses' claims under the statute.

that relators have not shown themselves entitled to the relief sought. Accordingly, the petition for writ of mandamus is DENIED.

DORI CONTRERAS
Chief Justice

Delivered and filed the
12th day of November, 2020.