AFFIRMED and Opinion Filed June 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01258-CV

CATHERINE ROSSI, APPELLANT
v.
CAE INC. AND CAE SIMUFLITE, INC., APPELLEE

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-02898

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Partida-Kipness

Catherine Rossi sued CAE Inc. (CAE) and CAE Simuflite, Inc. (Simuflite) for wrongful termination for her refusal to commit a crime by allegedly falsifying a material fact on a pilot training record. The trial court dismissed Rossi's claims against CAE and held a jury trial on her remaining claim against Simuflite. The jury found for Simuflite, and the trial court entered a take-nothing judgment. In five issues, Rossi complains of errors in the jury charge, exclusion of evidence at trial, denial of discovery, and the granting of CAE's motion for summary judgment. Rossi contends the judgment should be reversed and the case remanded for a new trial and further discovery related to CAMI. We affirm the trial court's judgment.

BACKGROUND

Simuflite operates a flight training center in Dallas, Texas that uses full-motion flight simulators to train and certify pilots. CAE is a Canadian holding company that owns Simuflite. Rossi is a licensed pilot who was employed as an instructor by Simuflite.

In October 2015, Michael Krickl went to Simuflite for training. Krickl was a charter aircraft pilot for Corporate Aircraft Management, Inc. (CAMI). CAMI sent Krickl to Simuflite for training to upgrade from second-in-command to a pilot-in-command rating and to obtain his Airline Transport Pilot certificate. Rossi was Krickl's instructor.

CAMI provided the training curriculum, which involved two days of ground school, two simulator sessions, and a practice flight test before taking a final flight test. CAMI's curriculum allowed Krickl to take the final flight test without completing all of the scheduled training hours, referred to as a "reduction in training," if he successfully completed all of the required training events and an instructor recommended the final flight test. Rogers Patton Warren, Simuflite's Training Manager at the time, testified that CAMI had asked Simuflite to consider Krickl for a reduction in training when CAMI made Krickl's training reservation. Warren also testified that the CAMI curriculum automatically qualified Krickl for a reduction in training if he successfully completed the two simulator sessions.

Richard Lee Cave, Jr., Simuflite's Local Head of Training, also testified that no separate approval was required for a reduction in training.

After conducting Krickl's first two simulator sessions, Rossi certified on October 8, 2015, that Krickl had completed ground and flight training. Simuflite's check airman, Barrie Springer, conducted Krickl's final flight test on October 9, 2015, which Krickl passed.

Simuflite used a "Reduction in Training" form (RIT form) to document reductions in training. Cave testified that the form is internal to Simuflite. Although the form indicated that it would be forwarded to the "TCPM," referring to the FAA's Training Center Program Manager, Cave testified that the form was not sent to the TCPM when training was conducted for an air carrier, such as CAMI. According to Cave, the TCPM manages only flight school certifications, not air carrier certifications.

Warren testified that Simuflite's records department notified him after Krickl's training that the RIT form was incomplete. After reviewing Krickl's records, Warren determined that Rossi had certified Krickl's training complete but had not filled out the RIT form. Warren called Rossi to his office on October 14, 2015, to fill out the form, but Rossi refused. According to Rossi, it was illegal to fill out the form after training, and Warren yelled at her when she refused to do so. Warren contacted CAMI to confirm approval of Krickl's reduction in training and

completed the RIT, writing in Rossi's name as the instructor recommending the reduction and signing for Krickl, with his consent.

Rossi testified that she would have filled out the form if it had been presented before Krickl's flight test. Cave also testified that Rossi told him as part of his investigation into the incident that she had recommended Krickl for a reduction in training because he passed all of the required training. In a written report submitted to Cave, Springer said that he asked Rossi for the RIT form when she recommended Krickl for the final flight test. According to Springer, Rossi "did not know what [he] was talking about." Springer explained the importance of the form, and Rossi said that "she would take care of it." Springer learned on November 17, 2015, that Rossi did not complete the RIT form. Cave investigated the incident and found no training or regulatory violations.

Throughout Rossi's employment with CAE, she often levied complaints about her work schedule, working conditions, and colleagues, and she experienced conflict with her training managers. Instructors also lodged complaints about Rossi. Amy Edwards, Simuflite's Global HR Director, testified that she investigated complaints filed by Rossi concerning her working conditions and colleagues. The first was Rossi's complaint that Warren yelled at her over the Krickl RIT form. Edwards stated that Rossi had "a very disturbing pattern of complaints that were creating a team that wasn't working well," characterizing the complaints as "constant" and "unfounded." Edwards and Cave met with Rossi on March 9, 2016, to discuss her

complaints. Edwards testified that she prepared to either issue a written warning or terminate Rossi, depending on the course of the meeting. When Rossi responded defensively, Edwards decided to terminate Rossi's employment. Edwards testified that the issue with the RIT form was an internal process issue that did not factor into the decision.

Rossi filed suit on March 9, 2017, against CAE, Warren, and co-worker Ralph Turner for defamation, tortious interference, and wrongful termination under the *Sabine Pilot* doctrine. Rossi specifically alleged that Warren asked her to "falsify records for the training of a pilot" and that her employment was terminated "because she refused to commit a crime by falsifying documents."

CAE filed a motion for summary judgment seeking dismissal of Rossi's claims on the grounds that it was not her employer. The trial court granted CAE's motion and dismissed Rossi's claims against CAE. Rossi nonsuited Warren and Turner, dismissed her defamation and tortious interference claims, and joined Simuflite.

In her second amended petition, Rossi alleged that Simuflite wrongfully terminated her employment under the *Sabine Pilot* doctrine when she "refused to commit a crime by participation in providing or concealing of false information to the FAA." A jury trial was held on July 16, 2018, on this one remaining claim. The jury found that Rossi was not terminated for the sole reason that she refused to

perform an illegal act, the trial court entered final judgment, and this appeal followed.

ANALYSIS

Rossi brings five issues on appeal. We will address each in turn.

A. Charge Error

In her first and fourth issues, Rossi contends the trial court erred by not instructing the jury that altering or falsifying a pilot training record is a federal crime and by not including a question on mental anguish.

When an appellant challenges an instruction or definition as legally incorrect, we review the instruction or definition de novo. *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 221 (Tex. 2010). If the charge is legally correct, the trial court has broad discretion regarding the submission of questions, definitions, and instructions. *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648, 673 (Tex. App.—Dallas 2018, pet. dism'd by agr.); *see also Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012) ("We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review.") (citation omitted). We reverse a judgment for charge error only if the error was harmful, meaning the error "probably caused the rendition of an improper verdict." *Thota*, 366 S.W.3d at 687.

A trial court must submit "instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277; *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997). A proper instruction assists the jury,

accurately states the law, and has support in the pleadings and evidence. *Crump*, 330 S.W.3d at 221. A trial court must submit questions raised by the written pleadings and the evidence. TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). "A question is immaterial when it should not have been submitted, it calls for a finding beyond the province of the jury, such as a question of law, or when it was properly submitted but has been rendered immaterial by other findings." *Southeastern Pipe Line Co., Inc. v. Tiachacek*, 997 S.W.2d 166, 172 (Tex. 1999); *Billy Smith Enters., Inc. v Hutchison Const., Inc.*, 261 S.W.3d 370, 374 (Tex. App.—Austin 2008, pet. dism'd).

1) Denial of instruction regarding 49 U.S.C. § 46310

In her first issue, Rossi contends the charge should have included an instruction that altering or falsifying a pilot training record is a federal crime under 49 U.S.C. § 46310. According to Rossi, the trial court misinterpreted the federal statute at issue, thus rendering a legally incorrect jury charge. Here, the trial court instructed the jury:

> Do you find from a preponderance of the evidence that Catherine Rossi was discharged for the sole reason that she refused to perform an illegal act that would subject her to criminal liability?
>
> As used in this question, "sole reason" requires that Catherine Rossi's discharge from CAE SimuFlite, Inc. was for no reason other than her refusal to perform an illegal act.
>
> As used in this question, an "illegal act" means any of the following:

1. a. Knowingly and willfully falsifying, concealing, or covering up by any trick, scheme, or device a material fact to the Federal Aviation Administration. [18 U.S.C. § 1001(a)]

   b. Making any materially false, fictitious or fraudulent statement or representation to the Federal Aviation Administration. [18 U.S.C. § 1001(a)]

   c. Making or using any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry to the Federal Aviation Administration. [18 U.S.C. § 1001(a)].

2. Associating with a criminal venture and engaging in affirmative conduct to aid the venture. [18 U.S.C. § 2(a)]

3. Intentionally altering, making, completing, executing, or authenticating any writing so that it purports to be the act of another who did not authorize that act. [Tex. Penal Code § 32.21(a)(l)(A)(i)]

4. Having a legal duty to prevent the commission of a criminal offense, acting with intent to promote or assist its commission, and failing to make a reasonable effort to prevent the commission of the offense. [Tex. Penal Code§ 7.02].

Rossi pleaded her wrongful termination claim under the *Sabine Pilot* doctrine. Under this doctrine, employers are prohibited from "the discharge of an employee for the sole reason that the employee refused to perform an illegal act." *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). Rossi alleged only one purportedly illegal act that Simulflite required her to perform: completing Krickl's RIT form *after* his final flight test. According to Rossi, the form must be completed before the final flight test, and completing it afterward was illegal under federal

statutes and FAA regulations that criminalize falsifying pilot training records. Rossi cites 49 U.S.C. § 46310 as the basis for this claim. She contends the jury charge should have included an instruction regarding section 46310.

Section 46310(a) imposes a general criminal penalty on "[a]n air carrier or an officer, agent, or employee of an air carrier" for "(1) failing to make a report or keep a record under this part; (2) falsifying, mutilating, or altering a report or record under this part; or (3) filing a false report or record under this part." 49 U.S.C. § 46310(a). Section 46310(b) imposes an increased penalty for "intentionally falsifying or concealing a material fact, or inducing reliance on a false statement of material fact, in a report or record under section 44701(a) or (b) or any of sections 44702-44716 of this title." 49 U.S.C. § 46310(b).

Rossi submitted two proposed jury charges based on section 46310. Rossi's first charge submitted Question 1 as "Was Catherine Rossi discharged for the sole reason that she refused to perform an illegal act?" and defined "illegal act" as "a violation of any of the following criminal statutes:" The proposed charge then set out the cited statutes verbatim, including section 46310, three Texas Penal Code provisions, 18 U.S.C. § 2, and 18 U.S.C. § 1001, which imposes criminal penalties for knowing and willfully making materially false statements in any matter within the federal government's jurisdiction. *See* 18 U.S.C. § 1001(a). Rossi's proposed charge included the complete text of 49 U.S.C. §§ 46310(a),(b) as follows:

> **(a) General criminal penalty.**--An air carrier or an officer, agent, or employee of an air carrier shall be fined under title 18 for intentionally—
>
> **(1)** failing to make a report or keep a record under this part;
>
> **(2)** falsifying, mutilating, or altering a report or record under this part; or
>
> **(3)** filing a false report or record under this part.
>
> **(b) Safety regulation criminal penalty.**--An air carrier or an officer, agent, or employee of an air carrier shall be fined under title 18, imprisoned for not more than 5 years, or both, for intentionally falsifying or concealing a material fact, or inducing reliance on a false statement of material fact, in a report or record under section 44701(a) or (b) or any of sections 44702-44716 of this title.
>
> [49 U.S.C. § 46310]

Rossi claims she emailed the trial court a second proposed instruction after it denied her first instruction and asked the parties to submit a joint proposed jury charge. Rossi's second charge—appearing in the record attached to her motion for new trial—"reduced" her section 46310 citation to:

> **[49 U.S.C. § 46310]**
>
> A. [Plaintiff] Intentionally falsifying or concealing a material fact, or inducing reliance on a false statement of material fact, in a pilot training record.
>
> [Defendant] Intentionally falsifying or concealing a material fact, or inducing reliance on a false statement of material fact, in a report or record under Part A, Title 49 of the United States Code.

Rossi's second charge did not define "pilot training record." The trial court determined there was no evidence of intentionally falsifying or concealing a material fact from a report or record as required under section 46310. Accordingly, the trial court refused to include Rossi's requested instruction.

Rossi argues on appeal that the trial court's charge did not correctly interpret "under this part" as stated in section 46310. According to Rossi, the RIT form falls under section 46310's reference to reports or records "under this part," and the trial court interpreted section 46310 too narrowly. Rossi also contends that she presented evidence that section 46310 applied to her claims. We disagree.

As previously noted, section 46310 prohibits "[a]n air carrier or an officer, agent, or employee of an air carrier" from "falsifying a report or . . . record under this part." 49 U.S.C. § 46310(a). Yet, the record does not reflect that Rossi refused to complete the RIT form because it contained false information or concealed a material fact. *See* 49 U.S.C. § 46310. Rather, Rossi objected only to the timing of Warren's request that she complete Krickl's RIT form. Indeed, Rossi testified that she would have completed the form if it had been presented before Krickl's flight test. And Springer's report indicated that Rossi was aware that the form was needed for the flight test, and that "she would take care of it."

Additionally, there is no evidence that the RIT form falls under section 46310's reference to reports or records "under this part." Rossi argues that the RIT form falls under section 46310 predecessor statute as a record "prescribed or

approved" by the FAA. However, this language is not included in the current statute, and the record contains no evidence that the RIT form is "prescribed and approved" by the FAA.

Indeed, the record reflects that the RIT form was internal to Simuflite and primarily used for tracking the training of flight instructors, as opposed to charter air carriers, such as CAMI. Specifically, Warren testified the RIT form is a "local form" that "does not go to the FAA." He explained that the form is only considered a pilot training record for instructor training. Consequently, as Cave pointed out, the form indicated it would be forwarded to the FAA TCPM upon completion. Cave and former FAA inspector and TCPM Craig Robert Sutila testified the TCPM manages only flight school certifications. Thus, the form would only be sent to the FAA's TCPM for flight instructor training, not for air carrier pilot training. Sutila further testified that he had never received such a form during his time as a TCPM, the form was not required by the FAA, and was not among the records the FAA would review when auditing an air carrier's pilot training records.

Rossi implies that the RIT form could become a part of CAMI's pilot training records if CAMI delegated its recordkeeping duties to Simuflite. However, CAMI's curriculum expressly stated that CAMI retained the duty to maintain Krickl's training records, as required by 14 C.F.R. § 135.63. Section 135.63 requires only that air carriers document "[t]he date of the completion of the initial phase and each recurrent phase of the training required. . . .: 14 C.F.R. § 135.63(a)(4)(x). Sutila

also confirmed that CAMI was required to maintain its own pilot training records. Consequently, the trial court did not abuse its discretion by excluding Rossi's requested section 46310 charge because there is no evidence the RIT form was a report or record that an air carrier is required to make or keep.

Regardless, we will not reverse a judgment for a charge error unless that error was harmful because it "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a); *Thota*, 366 S.W.3d at 687. "If the charge resolves the controlling issues raised by the pleadings and any evidence in a feasible manner that does not confuse the jury, no error occurs." *Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 351 (Tex. App.—Austin 2002, pet. denied); *see also Daugherty v. Highland Capital Mgmt., L.P.*, No. 05-14-01215-CV, 2016 WL 4446158, at *13 (Tex. App.—Dallas Aug. 22, 2016, no pet.).

The trial court's charge closely tracked Rossi's pleaded claim against Simuflite. *See* TEX. R. CIV. P. 278 ("The court shall submit the questions . . , which are raised by the written pleadings and the evidence."). Specifically, Rossi alleged in her second amended petition that Simuflite asked her "to participate in providing or concealing of false information to the Federal Aviation Administration (FAA)" and that her employment was terminated because she "refused to commit a crime by participation in providing or concealing of false information to the FAA." Rossi cited federal and state statutes supporting her claim. Borrowing directly from Rossi's allegations, the trial court's jury charge specifically defined an "illegal act"

as "concealing a material fact" or "[m]aking any materially false . . . statement or representation to the Federal Aviation Administration." The trial court's jury charge also cites and summarizes the same statutes cited in Rossi's second amended petition, except for section 46310.

Consequently, any error in refusing to submit a jury charge referring to section 46310 was harmless because the charge given encompassed Rossi's pleaded claims and the evidence was sufficient to support the jury's finding that Rossi's employment was not terminated solely because she refused to commit an illegal act. We overrule Rossi's first issue.

2) Mental anguish question

In her fourth issue, Rossi contends the trial court abused its discretion by excluding testimony from her forensic psychologist that Rossi's symptoms were "consistent" with someone who had been wrongfully terminated and denying her proposed jury charge question on mental anguish damages. Having overruled Rossi's first issue, we need not address this issue because any alleged charge error in the damages question was harmless. *See Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 784 (Tex. App.—Dallas 2005, pet. denied) ("In the absence of liability, the issue of damages becomes immaterial.").

B. Exclusion of Other Bad Acts

In her second issue, Rossi contends the trial court erred by excluding evidence of other allegedly illegal acts performed by Simuflite and by striking her

supplemental interrogatory responses. According to Rossi, these other acts and supplemental responses supported her broader claim that Simuflite demanded that she falsify pilot training records beyond the Krickl RIT form.

A trial court's rulings in admitting or excluding evidence are reviewed under an abuse of discretion standard. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011); *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). "[W]e will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment." *Id.*; TEX. R. APP. P. 44.1.

1) Other criminal conduct

Rossi argues the trial court improperly excluded evidence of Simuflite's "other criminal conduct." Specifically, Rossi made an offer of proof during trial in which she sought to admit evidence of three complaints she had allegedly lodged with Simuflite's management before her termination: (1) other instructors had passed a pilot she trained and "flagged" who was later involved in a fatal plane crash; (2) Simuflite had terminated an instructor for refusing to pass an allegedly unqualified pilot; and (3) Simuflite overscheduling its instructors. Rossi argues these complaints support her wrongful termination claim, which is broader than simply her refusal to complete the Krickl RIT form. We disagree.

Consistent with the *Sabine Pilot* doctrine, Rossi alleged in her second amended petition that her employment was terminated solely because she refused to "participate in providing or concealing false information to the [FAA]." *See Sabine Pilot*, 687 S.W.2d at 735. Rossi does not explain, and the record is silent, as to how evidence of the three complaints relates to her allegation that Simuflite demanded her participation in any alleged crime arising from these complaints. Indeed, Rossi does not identify the crime allegedly implicated by any of the three complaints she sought to admit. To the extent that Rossi complains Simuflite terminated her employment in retaliation for her complaints, such a claim does not fall within the *Sabine Pilot* doctrine. *See Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 333 (Tex. 2006) (holding a whistleblower "does not fall within the *Sabine Pilot* exception [because] he neither did nor was asked to do anything criminal").

2) Supplemental interrogatory responses

Eleven days before the end of the discovery period, Rossi amended her petition and served supplemental interrogatory responses that included these three complaints. Rossi's previous responses had only referenced her refusal to complete the Krickl RIT form. Simuflite moved to strike Rossi's amended petition.

When responding to a request for written discovery, a party has a duty to "make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made." TEX. R. CIV. P. 193.1. If a party learns its response was or has become incomplete or incorrect, it

must amend or supplement "reasonably promptly" after it discovers the necessity for such a response. TEX. R. CIV. P. 193.5. A party who fails to supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed unless the court finds good cause for the failure or the failure will not unfairly surprise or prejudice the other parties. TEX. R. CIV. P. 193.6.

At the hearing on Simuflite's motion to strike, the trial court asked what new information Rossi learned to warrant her supplemental responses. Counsel for Rossi confirmed that the supplemental allegations were not based on newly discovered evidence. Rather, they were not included in Rossi's original interrogatory responses "because it was not necessary" until Simuflite's defensive "framing" of the case made it so. According to Rossi, Simuflite had framed her claim as arising solely from her refusal to complete the Krickl RIT form, but her claims were broader, encompassing the three complaints previously mentioned. The record reflects however, that Rossi admitted during an April 25, 2018 deposition that her claim against Simuflite arose solely from the Krickl RIT form. Simuflite's counsel asked, "Your claim is based entirely on the request to fill out the reduction in training form for Michael Krickl, right?" Rossi responded, "Right." Rossi argues that her deposition errata sheet submitted on May 23, 2018, corrected her deposition responses to encompass Simuflite's other alleged criminal acts. However, this errata sheet did not alter Rossi's admission that her claim was based entirely on the Krickl

RIT form. The trial court denied Simuflite's motion but struck Rossi's supplemental responses.

Based on the record before us, the trial court did not abuse its discretion in excluding evidence of other bad acts and denying Rossi's request to supplement her interrogatory responses. Accordingly, we overrule Rossi's second issue.

C. Discovery and Testimony Related to Simuflite and CAMI's Relationship

In her third issue, Rossi contends that the trial court abused its discretion by denying additional discovery directed to Simuflite's relationship with CAMI. Rossi sought to discover evidence regarding the contractual relationship between these entities to determine whether Simuflite was retaining pilot training records on behalf of CAMI. Rossi also contends that the trial court abused its discretion by excluding Krickl's testimony regarding the custodian of his pilot training records. Rossi argues that evidence showing that CAMI delegated recordkeeping duties to Simuflite would bring the RIT form under statutory provisions governing an air carrier's duty to maintain training records, thus imposing on Simuflite the same statutory burden to avoid fraudulently misrepresenting a pilot's training imposed on CAMI.

The scope of discovery largely rests within the discretion of the trial court. *In re VERP Inv., LLC*, 457 S.W.3d 255, 260 (Tex. App.—Dallas 2015, no pet.) (orig. proceeding). For that reason, in considering whether a trial court has clearly abused its discretion with regard to a discovery order, the reviewing court may not substitute

its judgment for the judgment of the trial court. *Id*. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Id*. "If the trial court abuses its discretion in a discovery ruling, the complaining party must still show harm on appeal to obtain a reversal." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009). Likewise, a trial court's rulings in admitting or excluding evidence are reviewable under an abuse of discretion standard, *Guerra*, 348 S.W.3d at 235, and will not be reversed unless the error probably caused the rendition of an improper judgment. *Malone*, 972 S.W.2d at 43.

Rossi sought discovery of the agreement between CAMI and Simuflite via request for production and a motion for issuance of letters rogatory to depose CAMI's out-of-state corporate representative. Simuflite objected to Rossi's discovery request, and Rossi filed a motion to compel. In her motion to compel, Rossi argued that she needed the agreement between CAMI and Simuflite to determine the "parameters of the training, the pricing, as to whether the extra training day was an added cost, [Simuflite]'s agreement as to how it would train [CAMI]'s pilots and its obligations for training [CAMI]'s pilots." On appeal, however, Rossi argues, "The agreement between CAMI and [Simuflite] is likely to have obligations related to the transmission and storage of pilot training records between themselves and with the FAA." According to Rossi, the agreement is key to determining which

entity was responsible for maintaining the record of Krickl's training. The trial court denied Rossi's request.

Rossi's motion for issuance of letters rogatory was heard on June 13, 2018, two days before the end of the discovery period. The trial court noted the impossibility of completing the deposition before the end of the discovery period, and Rossi did not provide adequate justification for the delay in her request. Thus, the trial court denied Rossi's motion. Rossi argues the deposition was necessary to obtain the information sought by the discovery request the trial court previously denied.

At trial, Rossi sought to admit Krickl's deposition testimony in which he was asked whether he would go to Simuflite or CAMI to obtain his training records. Simuflite objected to Krickl's response as irrelevant and unfairly prejudicial. The trial court sustained Simuflite's objection. According to Rossi, Krickl's testimony would have supported her contention that Simuflite may have been responsible for maintaining pilot training records for air carriers, such as CAMI. When combined with the RIT form's notation that it would be sent to the FAA TCPM, it could have influenced the jury to find that falsifying or altering the form was a crime.

The record reflects, however, that CAMI's own training curriculum answered the question of whether CAMI delegated recordkeeping responsibilities, stating, "Corporate Aircraft Management; Inc. will keep all training records required by 14 CFR Part 135.63." Additionally, Cave and Sutila testified that FAA regulations

prevent an air carrier, such as CAMI, from delegating its recordkeeping functions to a training center, such as Simuflite. Indeed, Part 135 of the FAA's regulations, which governs air carriers, expressly states that "[e]ach certificate holder shall keep at its principal business office or at other places approved by the Administrator" pilot training records, among other required records. 14 C.F.R. § 135.63(a). Rossi has not identified any evidence in the record that Simuflite was approved by the FAA to retain CAMI's pilot training records. *See Pratt v. State*, 907 S.W.2d 38, 47 (Tex. App.—Dallas 1995, writ denied) ("It is not the duty of the court of appeals to make an independent search of the statement of facts."). Moreover, as previously discussed, there is no evidence that the RIT form was a report or record under section 46310. Thus, assuming without deciding that the trial court abused its discretion by denying the additional discovery and excluding Krickl's testimony, the error was harmless. *See Castillo*, 279 S.W.3d at 667; *Malone*, 972 S.W.2d at 43. Accordingly, we overrule Rossi's third issue.

D. CAE's Summary Judgment

In her final issue, Rossi complains that the trial court erroneously granted CAE's motion for summary judgment and dismissed her claim against CAE. Rossi initially brought her wrongful termination claim against only CAE, later amending her petition to include both Simuflite and CAE. Rossi contends the trial court erred in granting CAE's motion for summary judgment because the evidence showed CAE was Rossi's employer and participated in her dismissal. We disagree.

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); *see* TEX. R. CIV. P. 166a(b), (c).

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When a party moves for summary judgment under both rules 166a(c) and 166a(i), we will first review the trial court's judgment under the standards of rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the appellant failed to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether the appellee's summary judgment proof satisfied the less stringent rule 166a(c) burden. *Id*. When, as here, a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

To prevail on a claim under the *Sabine Pilot* doctrine, the plaintiff must prove an employer-employee relationship between herself and the defendant. *See Sabine Pilot*, 687 S.W.2d at 735; *see also Ed Rachal Found.*, 207 S.W.3d at 332 ("*Sabine Pilot* protects employees who are asked to commit a crime."). The defining characteristic of the employer-employee relationship is the right to control. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 132 (Tex. 2018). "The attributes of an employer include the right to hire and fire, the obligation to pay wages and withhold taxes, the furnishing of tools, and most of all the power to control the details of the worker's performance." *Painter v. Sandridge Energy, Inc.*, 511 S.W.3d 713, 724 (Tex. App.—El Paso 2015, pet. denied); *see also Tex. Instruments, Inc. v. Udell*, No. 05-14-01042-CV, 2016 WL 4485573, at *6 (Tex. App.—Dallas Aug. 25, 2016,

pet. denied) (citing *Sandridge Energy* favorably). Whether one party exercised actual control over another is generally a fact question for a jury, unless the material underlying facts are not in dispute and can give rise to only one reasonable conclusion. *Udell*, 2016 WL 4485573, at *6.

CAE moved for traditional and no-evidence summary judgment on the grounds that it was not Rossi's employer. CAE offered evidence that it did not employ Rossi, but was merely a holding company that owned Simuflite. Specifically, CAE offered declarations regarding its status as a publically traded Canadian corporation with ownership interests in several companies that placed it four levels above Simuflite in the corporate hierarchy. CAE also offered evidence that all employment decisions related to Rossi's employment with Simuflite were made by Simuflite, Simuflite had exclusive control of Rossi's work, Simuflite paid Rossi's wages, and CAE did not participate in the decision to terminate Rossi's employment. CAE also offered Rossi's W2, Rossi's resume, and Texas Workforce Commission unemployment benefits reports, all listing Simuflite as Rossi's employer.

Rossi argued that CAE operated Simuflite "as a single, integrated enterprise" and offered evidence that CAE advertises itself as a single brand, which includes Simuflite. Rossi alleged that CAE's "name is noted in employee profiles for pilot instructors at CAE Simuflite," and CAE's financial statements include Simuflite data and represent CAE and its subsidiaries as a joint company. However, Rossi did

not offer evidence in support of these allegations. Rossi did offer evidence that CAE offered an employee stock purchase plan to its employees, and that Rossi participated in the plan. Rossi also noted that CAE's corporate representative testified that Simuflite used CAE flight simulators and software. Finally, Rossi offered Simuflite's Texas franchise tax report to show that Simuflite and CAE shared the same corporate mailing address.

However, evidence of "centralized control, mutual purposes, and shared finances" is insufficient to hold one corporation liable for another's obligations. *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008). Likewise, the "blending of activities," 100 percent ownership, and commonality of officers and directors is not sufficient to establish that an alter ego relationship exists. *See Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 376 (Tex. 1984); *3-D Elec. Co., Inc. v. Barnett Const. Co.*, 706 S.W.2d 135, 139 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). Additionally, "a parent company's offering a stock option plan to a subsidiary's employees is acceptable under IRS regulations and is not evidence of abnormal control over the subsidiary." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). Thus, Rossi's summary judgment evidence of a joint enterprise is insufficient to raise a genuine issue of material fact as to CAE's control of Simuflite's employees.

On appeal, Rossi cites other evidence presented at trial. This evidence includes financial statements and Cave's testimony that he met with the Global Head

of Training and the Manager of Regulatory affairs when investigating the Krickl RIT form issue. Rossi offers no explanation as to how this evidence shows CAE's control over her employment. However, we can consider only the material on file with the trial court as of the time the summary judgment was granted. *Brookshire v. Longhorn Chevrolet Co.*, 788 S.W.2d 209, 213 (Tex. App.—Fort Worth 1990, no writ); *Wai Ling Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at *2 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.) (evidence attached to non-movant's motion for new trial filed after summary judgment granted not considered by trial or appellate courts). Regardless, the record contains other testimony establishing that the individuals Cave met with also worked for Simuflite, not CAE.

Because Rossi presented no additional evidence to show CAE was her employer, CAE was entitled to summary judgment. Accordingly, we overrule Rossi's fifth issue.

CONCLUSION

Having overruled all of Rossi's issues, it is unnecessary to consider appellees' conditional cross-points. We affirm the trial court's judgment.

/s/ Robbie Partida-Kipness
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CATHERINE ROSSI, Appellant No. 05-18-01258-CV V. CAE INC. AND CAE SIMUFLITE, INC., Appellee	On Appeal from the 14th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-02898. Opinion delivered by Justice Partida-Kipness. Justices Bridges and Molberg participating.

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

Judgment entered this 2nd day of June, 2020.