NO. 12-17-00122-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	*§*	
HEATHER ESTERS,	*§*	***ORIGINAL PROCEEDING***
RELATOR	*§*	

MEMORANDUM OPINION

Heather Esters seeks mandamus relief from the trial court's order granting Melinda Warner's motion for new trial.[1] In two issues, she contends that the trial court abused its discretion by granting the new trial, and that she has no adequate remedy at law. We deny the petition.

BACKGROUND

Esters and Warner were involved in a motor vehicle collision in February 2014. Warner sued Esters, alleging that she was injured as a result of the collision. She sought past and future damages for expenses, pain and suffering, mental anguish, and physical impairment. The jury found Esters was negligent and awarded Warner $5,000 for past physical pain and mental anguish, $5,000 for past physical impairment, and $23,206.46 for past medical expenses. The jury did not award any future damages.

Esters filed a motion for judgment on the verdict, and Warner filed a motion for new trial. Warner alleged that the failure of the jury to award future damages was contrary to the overwhelming weight and preponderance of the evidence. Following a hearing, the trial court granted Warner's motion for new trial. This original proceeding followed.

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[1] The respondent is the Honorable J. Clay Gossett, Judge of the 4th Judicial District Court, Rusk County, Texas. The underlying proceeding is trial court cause number 2015-215, styled ***Melinda Warner v. Heather Esters***.

AVAILABILITY OF MANDAMUS

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court does not abuse its discretion in granting a new trial as long as its stated reason (1) is a reason for which a new trial is legally appropriate, and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case. ***In re United Scaffolding, Inc.***, 377 S.W.3d 685, 687-88 (Tex. 2012) (orig. proceeding). To rule on a party's request for a new trial that is based on factual insufficiency of the evidence, the trial court must consider and weigh all of the trial evidence and determine whether the challenged fact finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See* ***Maritime Overseas Corp. v. Ellis***, 971 S.W.2d 402, 406-07 (Tex. 1998).

An appellate court may review the merits of a new trial order in a mandamus proceeding. ***In re Toyota Motor Sales, U.S.A., Inc.***, 407 SW.3d 746, 759 (Tex. 2013) (orig. proceeding). If a trial court abuses its discretion in granting a motion for new trial, there is no adequate remedy by appeal. ***In re Columbia Medical Ctr. of Las Colinas, Subsidiary, L.P.***, 290 S.W.3d 204, 210 (Tex. 2009) (orig. proceeding).

SUFFICIENCY OF RECORD

We first address Warner's argument that Esters's petition should be dismissed for failure to provide a complete record.

Applicable Law

A relator bears the burden of demonstrating her entitlement to mandamus relief. *See* ***In re Ford Motor Co.***, 165 S.W.3d 315, 317 (Tex. 2005) (per curiam) (orig. proceeding); ***Walker v. Packer***, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding). This burden includes providing the appellate court with a record sufficient to make the requisite showing. *See* ***Walker***, 827 S.W.2d at 837.

Under Texas Rule of Appellate Procedure 52.7, a relator must file with her mandamus petition a certified or sworn copy of every document material to her claim for relief that was filed in the underlying proceedings and a properly authenticated transcript of any relevant testimony from any underlying proceeding. TEX. R. APP. P. 52.7. A court reporter must attend

court sessions and make a full record of the proceedings unless excused by agreement of the parties. TEX. R. APP. P. 13.1. The reporter's record on appeal should consist of the court reporter's transcription of the proceedings from trial. TEX. R. APP. P. 34.6(a)(1). If the court reporter is not transcribing the testimony presented by video deposition, the appellant has a duty to object at trial. *See* ***In re Estate of Arrendell***, 213 S.W.3d 496, 502 (Tex. App.—Texarkana 2006, no pet.); ***Taveau v. Brenden***, 174 S.W.3d 873, 877 (Tex. App.—Eastland 2005, pet. denied). The failure to object waives any complaint about the court reporter's failure to transcribe the testimony and generally waives complaints regarding factual sufficiency of the evidence. *See* ***Arrendell***, 213 S.W.3d at 502; ***Taveau***, 213 S.W.3d at 877; ***Wal-Mart Stores, Inc. v. McKenzie***, 22 S.W.3d 566, 571 (Tex. App.—Eastland 2000, pet. denied).

Analysis

In this case, Esters contends that the evidence is sufficient to support the jury's verdict and the trial court abused its discretion by granting a new trial. Her position is based, in part, on the testimony of two of Warner's witnesses, Dr. Ritesh Prasad and Dr. Charles Gordon, who testified by videotaped deposition. Esters included the videos in her mandamus record; however, neither videotape was offered as an exhibit at trial nor does a written transcript of the testimony appear in the record. Neither party objected to the court reporter's failure to transcribe the deposition testimony as it played before the jury. The reporter's record indicates that Dr. Prasad's deposition "stopped at one point" and the court heard objections during a bench conference. It is also unclear whether Dr. Gordon's deposition was played in full or in part. Consequently, even if we were to review the tapes, we could not discern from the record before us which portions of the tapes were played for the jury. As a result, we do not have a complete record of the testimony presented at trial.

When reviewing the trial court's ruling granting a motion for new trial, we must consider *all* of the trial evidence. *See* ***Toyota***, 407 S.W.3d at 758; ***In re Athans***, 458 S.W.3d 675, 677 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding). Accordingly, though a record containing less than all of the trial evidence may be sufficient to establish entitlement to mandamus relief on certain issues, such a record is not sufficient to show that the trial court abused its discretion in concluding the trial evidence is factually insufficient to support one or more jury findings. *See* ***Maritime Seas Corp.***, 971 S.W.2d at 406-07; ***Athans***, 458 S.W.3d at 679 n.4. An appellate court "cannot make a sound decision based on an incomplete picture." ***In***

re Le, 335 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding). In the final analysis, an appellate court cannot and will not find an abuse of discretion based on an incomplete record. ***Id***. at 814. Thus, because the record does not contain all of the trial evidence, Esters has failed to establish her entitlement to mandamus relief. *See* ***Athans***, 458 S.W.3d at 679.

CONCLUSION

Because Esters has not shown she is entitled to mandamus relief, we ***deny*** Esters's petition for writ of mandamus. The ***stay*** granted on April 20, 2017, is ***lifted***.

BRIAN HOYLE
Justice

Opinion delivered June 21, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 21, 2017

NO. 12-17-00122-CV

HEATHER ESTERS,
Relator
V.

HON. J. CLAY GOSSETT,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Heather Esters, who is the relator in Cause No. 2015-215, pending on the docket of the 4th Judicial District Court of Rusk County, Texas. Said petition for writ of mandamus having been filed herein on April 14, 2017, and the same having been duly considered, because it is the opinion of this Court that a writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **DENIED**.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J, and Neeley, J.