

ORDER AFFIRMED; and Opinion Filed July 29, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00682-CV

SUSAN ANN FISHER, Appellant

V.

**MEDICAL CENTER OF PLANO, ALIREZA ZAFARMAN ATEF, M.D.,
SALMAN WAHEED, M.D., RAY J. DELGADILLO, R.T., ANNE W. HANDLEY, R.N.,
CYNTHIA CARTER, R.N., AND MICHAEL ALLEN, R.T., Appellees**

**On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-01240-2016**

**MEMORANDUM OPINION ON MOTION TO REVIEW ORDER
SUSTAINING CONTESTS TO AFFIDAVIT OF INDIGENCE**

**Before Justices Lang-Miers, Evans, and Stoddart
Opinion by Justice Lang-Miers**

Before the Court is pro se appellant's motion to review the trial court's July 20, 2016 order sustaining the contests to appellant's affidavit of indigence and ordering her to pay the fees and costs on appeal. Appellant filed an affidavit of indigence that this Court referred to the trial court. Contests were timely filed by appellees Medical Center of Plano, Ray J. Delgadillo, R.T., Anne W. Handley R.N., and Cynthia Carter, R.N. and appellees Alireza Zafarman Atef, M.D. and Salman Wheed, M.D. In both contests, appellees requested that the trial court make a finding that this appeal is frivolous. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(a)(2)(A) (West 2002). Following a hearing on the contests, the trial court signed an order sustaining them. In its order, the trial court included a finding that this appeal is frivolous.

Under Texas Civil Practice and Remedies Code section 13.003, the court reporter and clerk are not required to provide a free appellate record unless the appellant files an affidavit of indigence under rule 20.1 of the rules of appellate procedure, the trial court finds that the appeal is not frivolous, and the reporter's record and clerk's record are needed to decide the issues presented by the appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(a)(2)(A),(B).

We review a trial court's determination of whether an appeal is frivolous under an abuse of discretion standard. *See De La Vega v. Taco Cabana, Inc.*, 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.). In determining whether an appeal is frivolous, the trial court may consider whether the appellant has presented a substantial question for appellate review. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(c) (West 2002). A proceeding is frivolous when it lacks an arguable basis either in law or in fact. *See De La Vega.*, 974 S.W.2d at 154. A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Appellees' contests asserted that the appeal is frivolous because the claims asserted by appellant in the underlying appeal have been fully litigated, and they argued that at the hearing. Addressing the frivolousness of the appeal at the hearing, appellant stated only "it is not frivolous." Appellant did not address the ground alleged by appellees in support of a frivolous appeal finding.

For this reason, we conclude appellant failed to carry her burden of showing the appeal is not frivolous, and the trial court did not abuse its discretion in ordering appellant cannot proceed as indigent. *See Sigsbey v. Wolford*, No. 05-98-00075-CV, 2000 WL 688173, at *1 (Tex. App.—Dallas May 17, 2000, pet. denied) (per curiam) (mem. op.) (appellant failed to carry burden challenging frivolousness finding by failing to first present her argument to the trial court). In light of this Court's holding, we need not consider whether appellant met her burden

under Rule 20.1. *See In re T.C.*, 200 S.W.3d 788, 792 (Tex. App.—Fort Worth 2006, no pet.) (trial court’s frivolousness determination under section 13.002(a)(2)(A) has effect of denying indigent appellant the right to a free appellate record of the underlying trial).

We affirm the trial court’s July 20, 2016 order.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

160682NF.P05