Opinion issued July 21, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00550-CV

NOVA CASUALTY COMPANY AS SUBROGEE OF DERMALOGICA, INC., Appellant

V.

SOVEREIGN PARKING & TRANSPORTATION SERVICES, INC., Appellee

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1036244

MEMORANDUM OPINION

This appeal arises from a directed verdict and judgment granted in a subrogation suit for negligence. Appellant Nova Casualty Company asserts that the trial court improperly converted a pretrial hearing into an actual trial and denied a

motion to present witnesses telephonically. Appellee Sovereign Parking & Transportation Services claims that this appeal is groundless, and it argues that this court should not only affirm but also award sanctions in the form of costs and attorney's fees.

Because the record does not support Nova Casualty's contentions, we affirm the trial court's judgment. Exercising our discretion, we decline to award sanctions.

Background

Nova Casualty asserts that a vehicle owned by its insured, Dermalogica, Inc., was damaged by an employee of Sovereign Parking. Nova Casualty filed suit as Dermalogica's assignee to recover the amount it paid for the damage to the vehicle.

Nova Casualty filed an agreed motion for continuance and to obtain a preferential trial setting. The trial court granted this motion and preferentially set trial for March 9, 2015. On March 5, Sovereign Parking submitted a motion in limine that contained extensive reference to the anticipated jury trial.

On March 9, 2015, the preferentially set trial date, counsel for both parties appeared before the trial court. The appellate record does not show any written pretrial motions set to be decided, nor were there any oral pretrial motions. The following exchange occurred on the record:

Nova Casualty: Judge, we're ready to proceed to trial today.

Court: Shall you call your first witness?

Nova Casualty: Yes, I shall. I would like to call my first witness, but my corporate rep is in California and unable to appear.

Court: At a preferential—an agreed preferential setting of this case?

Nova Casualty: That's correct, judge. . . . And my fact witness, Ms. Lauri Botchi Evans, is outside of subpoena range. She's at least 170 miles from Houston.

Court: She doesn't wish to come to our fair city?

Nova Casualty: She's refused to come today. We're only able to offer her testimony by affidavit, which is not adequate.

Court: Of course, [counsel for Sovereign Parking] could not cross-examine that affidavit. So next?

Nova Casualty: So at this time plaintiff rests.

Sovereign Parking subsequently moved for a directed verdict, which was granted. On Nova Casualty's motion, the court issued findings of fact and conclusions at law. The findings stated that Nova Casualty "had designated no experts on damages . . . called no witnesses . . . offered no exhibits" and that because no evidence supported liability or damages, the court issued a directed verdict.

Nova Casualty filed a motion for new trial. The motion asserted:

> On March 9, 2015, a pretrial hearing was scheduled for the above-captioned cause. At this time, the Court was to schedule a trial date and time for later in the week, between March 10, 2015 and March 13, 2015. The Court announced that the trial was now a trial [*sic*], despite Movant's counsel's objection that no witnesses could testify, at such short notice. The Court overruled this objection. Movant's counsel then requested that the Court allow telephonic testimony be permitted at that time, but the Court again denied this request.

The motion was not supported by any record excerpts to support these assertions. Instead, Nova Casualty attached an affidavit sworn by its counsel—though not the person who appeared and announced ready for trial on March 9. The affidavit stated:

> My name is Barata R. Hollis. I am at least 18 years of age and of sound mind. I am personally acquainted with the facts alleged herein.
>
> The above-captioned case was scheduled for a Pre-Trial Hearing on March 9, 2015, at 2 pm. Parties were requested to bring in Exhibits and Jury Instructions for consideration by Judge Roberta Lloyd. At this time, Judge Lloyd was to schedule a trial date and time for later in the week, between March 10, 2015 and March 13, 2015.
>
> Defense counsel and Plaintiff's counsel were present. At this time, Defense counsel waived his right to jury trial.
>
> Judge Lloyd announced that the pre-trial was now a trial, despite Plaintiff's counsel's objection that no witnesses could testify at such short notice. Judge Lloyd overruled this objection. Plaintiff's counsel then requested that the Court allow telephonic witness testimony be permitted. Again, Judge Lloyd denied this request. Plaintiff's counsel then requested that the Court allow telephonic

> witness testimony be permitted. Again, Judge Lloyd denied this request. Plaintiff's counsel then requested that the Court grant a trial continuance, in order to enable in-person witness testimony. Judge Lloyd denied this request also.

On appeal, Nova Casualty elaborated its contention that the March 9 setting was only to be a pretrial hearing date, when the parties would "bring in Exhibits and Jury Instructions for consideration."[*] Sovereign Parking's waiver of its jury demand accelerated the proceedings, leading the court to begin the bench trial immediately.

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[*] In an attempt to support this contention, Nova Casualty submitted as an exhibit to its reply brief a copy of "Court Procedures for Harris County Civil Court at Law No. Four." With respect to trial settings, the document stated:

> **NON-JURY -** Attorneys and parties must appear ready for trial at 9:00 a.m. on the date set in the Trial order. All non-jury trials will be heard on that day.
>
> **JURY -** Jury trials are set for a one (1) week docket. The Court shall notify each party of their specific trial date via telephone. Each party must provide a current telephone number to the Court. If you are not notified by the Court that you are being called to trial by Wednesday of the week before the scheduled trial week, you will NOT be called to trial and your case will be re-set on a future docket. All motions in limine and proposed jury charges must be filed with the Court by 5:00 p.m. on the Thursday immediately preceding the trial week. Please file these with the clerks on the 5th floor and tell the clerks the date of your trial week.

The motion for new trial was overruled by operation of law. *See* TEX. R. CIV. P. 329b. Nova Casualty Company appealed.

Analysis

I. Review of trial court ruling

On appeal, Nova Casualty claims that the March 9 hearing was intended to be a pretrial meeting rather than a trial, and that the court improperly denied counsel's request to present telephonic witness testimony as well as a motion for continuance. Nova Casualty asserts that these actions should be reversed for abuse of discretion.

The abuse of discretion standard applies when a trial court acts on a matter committed to its discretion. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court abuses its discretion when it acts in "an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Id.* When reviewing an alleged abuse of discretion, this court cannot substitute its own judgment for that of the lower court. *Id.*

The grant or denial of a motion for continuance is within the trial court's sound discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). The Texas Rules of Civil Procedure state that no "continuance shall be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law." TEX. R. CIV. P. 251. The trial court's action will not be disturbed unless

the record shows a clear abuse of discretion. *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984).

A trial judge may order witness testimony through electronic means including satellite transmission, closed-circuit television transmission, or any other method of two-way electronic communication, but only if the witness has been deposed prior to the commencement of trial and the parties agree to allow that means of testimony. TEX. CIV. PRAC. & REM. CODE § 30.012; *see IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App.—Fort Worth 2005, no pet.).

In this case, the record does not show any abuse of discretion. Instead of moving for a continuance or for permission to present a witness by telephone, the reporter's record shows that Nova Casualty's counsel announced ready for trial, then proceeded to explain why witnesses were unavailable before resting. The record contains no timely request, objection, or motion to either continue the ongoing proceedings or present any witnesses. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a). Furthermore, there is nothing in the record that shows that opposing counsel agreed to electronic testimony or that the witness had been deposed prior to trial, both of which are statutory requisites before witness testimony may be conducted electronically. *See* TEX. CIV. PRAC. & REM. CODE § 30.012; *IAC, Ltd.*, 160 S.W.3d at 203.

Rather than relying upon reference to a timely objection or motion as shown by the appellate record, Nova Casualty instead relies upon its counsel's affidavit, which asserted that motions for continuance and to permit telephonic testimony had been made and were denied. Nova Casualty does not suggest that the appellate record was in error in its failure to reflect these alleged motions. Nor has Nova Casualty attempted to supplement or correct the record in this regard. *See* TEX. R. APP. P. 34.5(c)–(d), 34.6(d)–(e).

The record does not reflect that the affiant, who was Nova Casualty's counsel of record, made an appearance when the case was called to trial. The affidavit conflicts with the reporter's record of the trial, to the extent that the record reflects no motion for continuance, no motion to permit witnesses to testify by telephone, and no other objections. The trial judge did not grant the motion for new trial. It can be inferred from this that the trial judge, who was present at the initial hearing, did not accept the affidavit as true. This court must "defer to the trial court's determinations on credibility when considering evidence concerning a motion for new trial." *Holland v. Lovelace*, 352 S.W.3d 777, 783 (Tex. App.—Dallas 2011, pet. denied); *see Shull v. United Parcel Service*, 4 S.W.3d 46, 51 (Tex. App.—San Antonio 1999, pet. denied). We defer to the trial court's implied findings as to the affidavit's credibility. *See Shull*, 4 S.W.3d at 51.

Accordingly, Nova Casualty has neither preserved any complaint nor shown any abuse of discretion on review. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a); *Villegas*, 711 S.W.2d at 626; *IAC, Ltd.*, 160 S.W.3d at 203. We overrule Nova Casualty's sole issue.

II. Sanctions for frivolous appeal

Sovereign Parking asserts that this appeal is groundless, brought in bad faith, and reflects a gross misstatement of the record. It claims that this justifies an award of sanctions, including costs and attorney's fees for the appeal. Sovereign Parking filed an affidavit that stated its appellate attorney's experience, his normal hourly rate, the amount of time billed, and a description of the work undertaken.

Sovereign Parking requested sanctions under Rule 52.11, which allows sanctions for "grossly misstating or omitting an obviously important and material fact" in an original proceeding. TEX. R. APP. P. 52.11. Because this is a direct appeal rather than an original proceeding, the correct rule is Rule 45, which provides damages for frivolous appeals in civil cases. *See* TEX. R. APP. P. 45. That rule allows this court, after notice and a reasonable opportunity to respond, to award "just damages" to the prevailing party in a frivolous civil appeal. *Id.*

In applying Rule 45, this court exercises prudence and careful deliberation. *See Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). This court looks to the record from the viewpoint of the advocate to

decide whether there were reasonable grounds to believe the case could be reversed. *Id.* The decision to award damages is a matter within this court's discretion, and Rule 45 does not mandate damages in every case in which an appeal is frivolous. *Riggins v. Hill*, 461 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

An appellant's failure to file a sufficient record does not, alone, render his appeal frivolous. *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778, 783 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Bad faith also is not dispositive to deciding whether an appeal is frivolous, though it may be relevant to determine the amount of sanctions. *Smith*, 51 S.W.3d at 381. While Rule 45 does not provide a specific method for determining the amount of "just damages," courts have awarded damages based on proof of expenditures incurred by the appellee as a result of the frivolous appeal. *Riggins*, 461 S.W.3d at 584.

Nova Casualty did not preserve error or file a sufficient record to render judgment on its claims, but this alone does not render its appeal frivolous. *See Mallios*, 237 S.W.3d at 783. Nova Casualty provided case authorities to support its argument in its brief, and it claimed legitimate potential grounds for relief in its assertions of abuse of discretion. *See Smith*, 51 S.W.3d at 381. We conclude that the advocate in this case could have reasonable grounds to believe the case could be reversed. *See id.* While we have rejected Nova Casualty's claims on appeal

regarding the trial court's ruling, we nevertheless exercise our discretion and conclude that damages are not mandated in this case. *See* TEX. R. APP. P. 45; *Riggins*, 461 S.W.3d at 583.

We deny Sovereign Parking's motion for sanctions.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.