Affirmed and Memorandum Opinion filed June 13, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00798-CV

LAURA DUKE AND JACK DUKE, Appellants

V.

JACK IN THE BOX EASTERN DIVISION, L.P., Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 13-CV-0838

M E M O R A N D U M O P I N I O N

This is a premises-liability negligence case in which a customer and her husband brought suit against a Jack in the Box restaurant for injuries sustained in a slip and fall and for loss of consortium. The trial court, based on the jury's verdict, rendered judgment against the customer and her husband. The customer and her husband appeal with three issues. We affirm.

I. Background

On December 22, 2011, while appellant Laura Duke was a customer in the Jack in the Box in Galveston, Texas, she slipped and fell in front of the door to the women's restroom. The incident was captured on the security camera video.

The Dukes brought suit against appellee Jack in the Box Eastern Division, L.P. Laura alleged she slipped on water on the floor outside the women's restroom, causing her to break her hip. Laura argues Jack in the Box was negligent for failing to properly inspect for dangerous hazards and to clean or promptly mark to alert patrons of a dangerous situation, in violation of its obligations as a premises owner to business invitees. Appellant Jack Duke brought derivative claims for loss of consortium.

It is undisputed that Laura fell in the hallway immediately in front of the women's restroom at the Jack in the Box restaurant. She fell as she was opening the door to the women's restroom. The incident was captured on a security camera video. Immediately before the incident, a Jack in the Box maintenance employee, Mariano Gaitan Rodriguez, walked down the restroom hallway. A customer alerted the restaurant that Laura had fallen. Immediately after the incident, the restaurant manager, Eusebio Cedillo, and a restaurant cook, Jorge Sagastume Martinez, were present in the restroom hallway with Laura. Cedillo helped Laura up and to the restroom door.

Prior to trial, appellants took oral depositions of Gaitan, Cedillo, and Sagastume. None of the three former employees reported seeing any water or other hazardous conditions in the location where Laura fell.

A jury trial commenced on April 27, 2015. In appellants' opening statement, their counsel suggested that Gaitan, Cedillo, and Sagastume made

admissions that would be heard by the jury if they "stick to" their deposition testimony.

Laura testified that she did not look at the floor as she walked down the hallway to the restroom and did not look at the floor as she approached the entrance to the women's restroom. After falling, Laura did not observe any water on the floor. She did not recall touching water with her hands while on the floor immediately after the fall. She never saw any hazard or unsafe conditions on the floor in the area where she fell. Laura testified she "mopped it up with my pants."

Appellants called Gaitan, Cedillo, and Sagastume to testify as witnesses in their case-in-chief. None of the three former employees reported seeing any water or other hazardous conditions in the area of the incident. Each testified that they saw no water, mud, or other debris at the location in which the incident occurred.

When appellants' counsel began to question Cedillo about potentially inconsistent testimony, Cedillo told appellants' counsel that any inconsistencies were because appellants' counsel was asking hypothetical questions and the questions went "round and round until I gave you that answer." Cedillo stated that appellants' counsel "went round in circles and found different ways to ask the same questions." Cedillo repeated during cross-examination by appellee that appellants' counsel "kept going round and round and round until he got what he was looking for." Appellants did not object to Cedillo's testimony; thus it was admitted. Instead, appellants' counsel sought to impeach Cedillo by reading Cedillo's oral deposition transcript to the jury or go through the oral deposition of Cedillo with the witness "line by line." Appellants' counsel complained, "this position that [Cedillo] has taken is specious, self-serving and ridiculous and can be demonstrably rebuked." The trial court denied the request.

In closing arguments, both appellants' counsel and counsel for appellee commented upon the evidence admitted at trial. Appellants' counsel did not lodge any objections during closing argument. The jury found that Jack in the Box was not negligent. The trial court entered a final judgment on July 6, 2015.

On August 4, 2015, appellants timely filed a motion for new trial arguing Jack in the Box's counsel committed reversible error by "(1) engaging in incurable jury argument and by (2) improper witness influencing involving witnesses Cedillo and Gaitan." Appellants also argued that witnesses Cedillo and Gaitan violated "the Rule" while awaiting their turn to testify. On September 4, 2015, appellants filed their "Brief in Support of Plaintiffs' Motion for New Trial," attaching transcripts of pretrial and post-trial depositions. The brief addressed only the claim of improper jury argument. Appellee's filed a response to the motion for new trial. An oral hearing was held on September 9, 2015. Appellee objected to appellants' brief in support as being untimely. The trial court denied appellants' motion for new trial on September 10, 2015. Appellants timely filed this appeal.

II. Analysis

In three related issues, appellants assert that the trial court erroneously denied their motion for new trial. Appellants primarily allege improper jury argument by appellee's trial counsel, asserting he made personal attacks on appellants' counsel that created incurable, reversible, and harmful error. Appellants also contend that a new trial was warranted because the trial court erred by excluding from evidence the pretrial deposition testimony of a testifying witness. Finally, appellants assert that post-trial deposition testimony demonstrating false statements by a trial witness warranted a new trial.

A. Standard of review

We review a trial court's denial of a motion for new trial for an abuse of discretion. *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006) (per curiam). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

B. Incurable jury argument

In their first issue, appellants maintain that the trial court erred in denying their motion for new trial because appellee's counsel made incurable jury arguments. Specifically, appellants argue:

> The jury argument and repeated comments made by Jack in the Box's counsel, consisting of unsupported accusations of "tricking" "unsophisticated" witnesses into giving the "bad" testimony that would prove inconsistent with their trial testimony was prejudicial and incurable and requires a new trial.

Control over counsel during closing argument is within the sound discretion of the trial court and will not be disturbed without a clear showing of abuse of that discretion. *Mandril v. Kasishke*, 620 S.W.2d 238, 247 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). A jury argument is "incurable" when it is so prejudicial or inflammatory that an instruction to disregard cannot eliminate the harm. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968); *Clark v. Bres*, 217 S.W.3d 501, 509 (Tex. App.—Houston [14th Dist.] 2006, pet denied). "There are only rare instances of incurable harm from improper argument." *Id*. (citing *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979)); *accord Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008).

"Incurable jury argument encompasses appeals to racial prejudice; unsupported charges of perjury; unsupported, extreme, and personal attacks on

opposing parties and witnesses; or baseless allegations of witness tampering." *Metro. Transit Auth. v. McChristian*, 449 S.W.3d 846, 855 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Penalver*, 256 S.W.3d at 681); *see also Katy Springs & Mfg., Inc. v. Favalora*, 476 S.W.3d 579, 609 (Tex. App.—Houston [14th Dist.] 2015, no pet.). For instance, a jury argument comparing the defendant's nursing home's conduct to medical experimentation on the elderly in Nazi Germany was incurable. *Penalver*, 256 S.W.3d at 681-82. A jury argument stating that the plaintiff, a naturalized United States citizen born in India, had committed "judicial terrorism" was incurable when coupled with an unsupported reference to "cultural issues" in the case. *Showbiz Multimedia, LLC v. Mountain States Mortg. Ctrs., Inc.*, 303 S.W.3d 769, 771-72 (Tex. App.—Houston [1st Dist.] 2009, no pet.). On the other hand, a jury argument making a reference to opposing counsel and asking "What kind of snake oil is he selling you" was not incurable. *McChristian*, 449 S.W.3d at 855-56. Additionally, a jury argument comparing the defendants in a negligence case to onlookers who did nothing during the savage beating of a slave was not incurable. *4Front Engineered Solutions, Inc. v. Rosales*, 512 S.W.3d 357, 390-91 (Tex. App.—Corpus Christi 2015), *rev'd on other grounds*, 505 S.W.3d 905 (Tex. 2016).

A complaint of incurable argument may be asserted and preserved in a motion for new trial, even without a complaint and ruling during the trial. *Phillips*, *v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009).[1] To show an argument is incurable appellants must prove: (1) an improper argument was made; (2) that was not invited or provoked; (3) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial; and (4) that by its nature,

[1] "Appellate complaints of improper jury argument must ordinarily be preserved by timely objection and request for an instruction that the jury disregard the improper remark." *Phillips*, 288 S.W.3d at 883.

degree, and extent, constituted reversibly harmful error based on an examination of the entire record to determine the argument's probable effect on a material finding. *Clark*, 217 S.W.3d at 509. We will consider factors such as whether the argument was repeated or abandoned and whether there was cumulative error. *Id*.

To obtain a reversal on the basis of incurable jury argument, appellants "must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence." *Reese*, 584 S.W.2d at 840 (no reversal on appeal unless error complained of probably caused rendition of improper judgment); *see also Phillips*, 288 S.W.3d at 883 (no reversal unless alleged argument was so extreme that "juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument"). We examine the entire record to determine the argument's "probable effect on a material finding." *Reese*, 584 S.W.2d at 840.

Here, appellants argue that comments made by appellee's counsel were incurable and that no objection was required during the trial. Specifically, appellants assert that appellee's counsel attacked their counsel, accusing him of asking a witnesses a "trick" question. Appellants' characterization of opposing counsel as lodging "relentless personal attacks on Dukes' counsel" is misleading.

Opening Statement

Appellants complain that "[j]ust minutes into his opening statement, Jack in the Box's counsel accused the Dukes' counsel of playing 'lawyer tricks.' " When read in the context of describing Gaitan's testimony, it is clear that appellants' counsel was neither referenced nor "attacked." These tasks were performed by a dedicated maintenance person, Mariano Gaitan. He was there seven days a week,

each morning, every day cleaning this restaurant to make sure that the floors were clean and dry. He did it on that day just as he did on every other day.

> He had, in fact, just finished cleaning the men's restroom. And he specifically walked down this restroom hallway mere minutes before Mrs. Duke lost her balance and fell.
>
> Now, of course, some like to play lawyer tricks. If there was a hazard, you were responsible for seeing it, obviously. The question is if there was a hazard. And you will hear Mr. Gaitan say from this witness stand, "Yes. If there was a hazard, it was my job to clean it up. But on that day there was no hazard. There was no water. There was no mud. I didn't walk over a hazard. That never happened."

Nothing about this generalized reference in opening statement constitutes an incurable argument. It does not involve appeals to racial prejudice, extreme or personal attacks on opposing counsel, unsupported charges of perjury, or inflammatory epithets. As such, it does not rise to the level of an incurable argument.

Examination and Impeachment of Cedillo

Next, appellants claim that "Jack in the Box's counsel again sought to undermine the significance of the inconsistencies [between a witnesses deposition and trial testimony] by once again attacking the Dukes' counsel, accusing him of asking a ' trick question.' " Contrary to appellants' contention, the record does not demonstrate an attack on appellants' counsel. While appellants' counsel was attempting to impeach Cedillo's trial testimony with Cedillo's pretrial deposition, the following exchange occurred:

> A. (WITNESS) I answered "No" to the question because I didn't see any – any spills or anything on there, anything that they would have missed [appellants' counsel] May I approach again?
>
> THE COURT: Yes.
>
> Q. (APPELLANTS' COUNSEL) Mr. Cedillo, do you remember - -

man, I just had you read this. What did you say? "No. I didn't recognize that someone should have been posted"?

A. (WITNESS) Yes. That's exactly what was said at the time.

Q. (APPELLANTS' COUNSEL) Okay. Now that you've looked at the video, do you recognize that someone should have been posted?

A. (WITNESS) No, sir.

Q. (APPELLANTS' COUNSEL) Do you remember testifying right below that - -

Q. (APPELLANTS' COUNSEL) Do you recognize them now? Do you remember saying, "Yes. Now that you point them out, yes"?

A. (WITNESS) I don't remember. You may have it there, but I don't remember.

Q. (APPELLANTS' COUNSEL) To put it in context, you first said, "No, I don't recognize that someone should have been posted." Question: "Do you recognize them now?" "Them" being the failures. Okay?

A. (WITNESS) Okay.

Q. (APPELLANTS' COUNSEL) What was your answer?

> [APPELLEE'S COUNSEL]: Objection. I object to the question. Vague and ambiguous in that the witness has already testified he saw no failures. How can he recognize failures that he doesn't believe occurred? It's a trick question.

THE COURT: Response? I think it's not a trick question. It's impeachment. Is that what we're trying to do here?

[APPELLANTS' COUNSEL]: I'm trying to get over this tricky lawyer, tricky question stuff that [appellee's counsel] keeps using against me.

THE COURT: Just -- is that what we're trying to do here?

[APPELLANTS' COUNSEL]: It is, sir.

THE COURT: Okay. Overruled.

Appellee's counsel lodged an objection complaining about the question presented, asserting it was a "trick question." There was no "attack" directed at appellants' counsel. In response to the objection, however, appellants' counsel interjected,

"I'm trying to get over this tricky lawyer, tricky question stuff that [appellee's counsel] keeps using against me." Appellants' counsel interjects this "tricky lawyer" phrase a second time while attempting to impeach Cedillo:

> Q: (APPELLANTS' COUNSEL) Do I really have to walk you through the two pages that this was covering?
>
> A. (WITNESS) I remember something about a hypothetical situation that we discussed at that time. I don't know if it was before that or after that.
>
> Q: (APPELLANTS' COUNSEL) Then let's do this: If you're going to accuse me of being a tricky lawyer with trick questions, now you're accusing me of running you through on hypotheticals and stuff, let's just walk the Jury through exactly what the questions were. Okay?

Contrary to appellants' assertion, appellee's counsel does not attack appellants' counsel by calling him a "tricky lawyer." This phrase was suggested by appellants' counsel on two occasions while attempting to impeach Cedillo. Consequently, such commentary is not incurable jury argument.

Closing Argument

Appellants complain that appellee's jury argument went beyond hyperbole and was instead misleading and constituted incurable jury argument. To the extent appellants complain of appellee's counsel referring to Gaitan and Sagastume as "unsophisticated" individuals, this was a reasonable inference drawn from the evidence. Gaitan (a maintenance worker) and Sagastume (a cook), both testified through interpreters as to what they saw and what they remembered. These witnesses had no experience with the legal process. The jury observed their demeanor and heard their testimony as well as appellants' attempt to impeach their testimony. Appellee's statement in this regard was not inconsistent with the evidence before the jury.

To the extent appellants complain that appellee's counsel accused appellants' counsel of calling Gaitan, Sagastume, and Cedillo "liars," this was in direct response to appellants' attack on the credibility of these individuals in appellants' closing argument. Appellants argued Cedillo testified to things that "didn't happen" and "[h]e's making it up." Appellants' counsel also argued that he and his co-counsel had to put up excerpts from all three witnesses depositions "to try to get them to tell us the truth." Appellants argued that when Gaitan moved a wet floor sign 2 to 4 inches, he was "sneaking out to try to . . . I think you can use the fact that they did it as evidence of their credibility and their believability in this case." Appellants further attacked Cedillo's credibility, claiming to the jury, "you wouldn't have known the truth. You wouldn't have known that he was fabricating it." Appellants counsel concluded his closing argument by commenting "for these witnesses to get up here and take advantage of her [Laura], not through me folks. I'm sorry." Although appellants' counsel may not have use the term liars, appellants' jury argument lodged clear attacks on the veracity of the witnesses.[2] Given these facts, appellee's counsel's reference to appellants' counsel's calling the witnesses "liars," emanated from appellants' counsel jury argument. As such, appellee's jury argument in this regard was not incurable.

Finally, appellants' complaint of appellee's counsel's reference to witnesses being "spun around" is not incurable jury argument. Rather, it is taken directly from the evidence. Cedillo testified that appellants' counsel spun him "round and round" as an explanation for his alleged inconsistent testimony.

In sum, none of the arguments made by appellee's counsel involve appeals to racial prejudice, extreme or personal attacks on opposing counsel, unsupported

[2] In appellants' reply brief, they summarize the argument and reference that the witness "lied at trial" and to the witnesses' "fabricated testimony."

charges of perjury, or inflammatory epithets. The alleged improprieties do not rise to the level of incurable argument. *See Favalora*, 476 S.W.3d at 609.

As set forth above, none of the arguments made were incurable. To the extent that any of the alleged arguments could be considered improper, appellants waived this argument by failing to make proper objections and to request curative instructions, thus waiving any alleged errors. *See Phillips*, 288 S.W.3d at 883; *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Jones v. Rep. Waste Servs. of Tex. Ltd.*, 236 S.W.3d 390, 402 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Accordingly, appellants did not sustain their burden to prove appellee's counsel made incurable jury argument. Additionally, appellants waived any alleged error of improper argument by failing to make proper objections and to request curative instructions. Under these circumstances, the trial court did not abuse its discretion in denying appellants' motion for new trial based on incurable jury argument. Accordingly, we overrule appellants' first issue.

C. Exclusion of evidence at trial

In their second issue, appellants assert that the trial court erred in denying their motion for new trial because the trial court should have granted appellants' request to present as evidence two to three pages of Cedillo's pretrial oral deposition testimony to rebut accusations made by Cedillo and defense counsel during trial. The trial court ruled this was improper impeachment.[3] Thereafter, on

[3] During direct examination of Cedillo, appellants' counsel requested to read two to three pages of Cedillo's oral deposition in the record. The trial court advised appellants' counsel that he could ask the witness questions from the deposition and depending on the witness' answer, "you're going to approach him and something to the effect of, 'Do you remember ever saying something completely different than this,' and giving him a chance to look at his deposition to see where he might have said something completely different than this."

redirect, the trial court advised appellants' counsel he would not allow another examination of Cedillo on a deposition question-by-question basis.[4] In their brief, appellants argues as follows:

> The trial court lost the chance to ameliorate the prejudice, if possible, when it erred in denying the Dukes' request to present the witness' deposition testimony in its entirety in order to rebut the accusations that the Dukes' counsel had confused and tricked him into giving "bad testimony" during his deposition.

While the reviewing court may be able to discern from the record the nature of the evidence and the propriety of the trial court's ruling, "without an offer of proof, we can never determine whether the exclusion of evidence was harmful." *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 334-35 (Tex. App.—Dallas 2008, no pet.) (citing *Fletcher v. Minn. Min. & Mfg. Co.*, 57 S.W.3d 602, 608 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)). Thus, to challenge the exclusion of evidence by the trial court on appeal, the complaining party must preserve the evidence in the record. *See id*. at 335; Tex. R. Evid. 103(a), (b). An offer of proof preserves error for appeal if: (1) it is made before the court, the court reporter, and opposing counsel, outside the presence of the jury; (2) it is preserved in the reporter's record; and (3) it is made before the charge is read to the jury. *Fletcher*, 57 S.W.3d at 607; *see Carlile v. RLS Legal Solutions, Inc.*, 138 S.W.3d 403, 411 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also* Tex. R. App. P. 33.1(a). Then, appellants must prove: (1) the trial court erroneously excluded the evidence, (2) the excluded evidence was controlling on a material issue and was not cumulative of other evidence, and (3) the error probably caused the rendition of an

[4] The trial court opined that Cedillo was answering the questions presented by both plaintiffs' counsel and defense counsel in a manner to get each "off his back." The trial court noted, "the one thing that is clear that we do get out of this witness is he's not credible." Thus, the trial court explained, "in terms of going over the deposition all over, we're going to get the same . . . results again."

improper judgment. Tex. R. App. P. 44.1(a); *Coterill- Jenkins v. Tex. Med. Ass'n Health Care Liab. Claim Trust*, 383 S.W.3d 581, 593 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

Here, the issue of whether the trial court correctly ruled on the admissibility of Cedillo's deposition testimony is not properly before us because appellants failed to preserve the issue for our review. *See* Tex. R. App. P. 33.1(a). During examination of Cedillo, the trial court ruled Cedillo's pretrial oral deposition testimony inadmissible. Appellants failed to make an offer of proof of Cedillo's deposition at that time, or at any other time during the evidentiary portion of the trial. *See* Tex. R. Evid. 103(c) (time period for making an offer of proof ends with the reading of the charge to the jury). If a party fails to do this, error is not preserved, and the complaint is waived. *See Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 494 (Tex. App.—Fort Worth 1999, pet. denied); *see also Fletcher*, 57 S.W.3d at 608 (stating rationales underlying timeframe to submit offer of proof and preserve error).

"When no offer of proof is made before the trial court, the party must introduce the excluded testimony into the record by a formal bill of exception." *See Bobbora*, 255 S.W.3d at 335 (citing *Sw. Country Enters., Inc.*, 991 S.W.2d at 494–95). A formal bill of exception must be presented to the trial court for its approval, and, if the parties agree to the contents of the bill, the trial court must sign the bill and file it with the trial court clerk. *Id*. (citing *Bryan v. Watumull*, 230 S.W.3d 503, 516 (Tex. App.—Dallas 2007, pet. denied)); *see also* Tex. R. App. P. 33.2(c). "In a civil case, a formal bill of exception must be filed no later than 30 days after the filing party's notice of appeal is filed." Tex. R. App. P. 33.2(e)(1).

Although appellants attached to their brief in support of motion for new trial the pretrial deposition of Cedillo, neither appellants' motion for new trial nor brief

in support attacks the trial court's evidentiary rulings on this issue. *See Malone v. Foster*, 956 S.W.2d 573, 577 (Tex. App.—Dallas 1997) (holding deposition on file with trial court as part of a motion for summary judgment not sufficient to make proper bill of exception), *aff'd*, 977 S.W.2d 562 (Tex. 1998). Further, appellants' post-trial filings did not argue the requisite elements to present a formal bill of exceptions. *See* Tex. R. App. P. 33.2(c). In the absence of a bill of exceptions or offer of proof, this court has no basis for reviewing a contention that the trial court committed reversible error in excluding evidence. *See Carlile*, 138 S.W.3d at 411. Appellants' complaint as to the exclusion of Cedillo's pretrial oral deposition is waived. We overrule appellants' second issue.

D. Exclusion of evidence post-judgment

In their third issue, appellants assert the trial court erred in denying their motion for new trial based upon statements made in Cedillo's post-judgment oral deposition. Specifically, appellants argue:

> The trial court erred in denying the Dukes' motion for new trial where a critical Jack in the Box witness admitted in his post-trial deposition that he had "made up" part of his trial testimony and that the attacks on opposing counsel were groundless.

Appellants assert the trial court permitted Cedillo's post-trial deposition to examine the reasons for Cedillo contradicting his pretrial deposition testimony during his trial testimony. In his post-trial deposition, Cedillo acknowledged some of his trial testimony was inconsistent but, like at trial, in his post-trial deposition Cedillo testified that appellants' counsel was leading him "around and around" in circles until he got the testimony he wanted. Cedillo repeatedly stated, "[T]hat's how I felt at the time of trial and that's how I feel now." Cedillo's post-trial testimony is duplicative of that which Cedillo testified to during trial. The trial

court did not err in denying the motion for new trial based on cumulative testimony.

Appellants further argue that Cedillo admitted in his post-trial deposition that he had "made up" part of his trial testimony. To the extent Cedillo admitted not remembering and making up testimony in his post-trial deposition, the testimony is redundant to Cedillo's admissions at trial wherein he conceded that some of his testimony was inaccurate and "made up." The trial court did not err in finding such impeachment evidence, the purpose of which is to discredit the credibility of the witness, does not justify the granting of a new trial.

In sum, the trial court did not abuse its discretion in denying appellants' motion for new trial based on Cedillo's post-judgment deposition. We overrule appellants' third issue.

III. Conclusion

Having overruled appellants' issues, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.