NO. 12-17-00113-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ALYSSA BETH BROWDER, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW***
DERRICK JACE PEEL, APPELLEE	***§***	***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Alyssa Beth Browder appeals from a take nothing judgment rendered after a jury trial in her personal injury suit against Derrick Jace Peel. In her sole issue, Browder complains of the trial court's ruling on the admissibility of certain evidence. We affirm.

BACKGROUND

Browder sued Peel alleging that she sustained personal injuries and property damage when Peel's vehicle struck Browder's vehicle from behind. The jury determined that both parties' negligence proximately caused the accident, attributing fifty-one percent of the negligence to Browder and forty-nine percent to Peel. The trial court rendered a take nothing judgment. Browder appeals.

DEPOSITION TESTIMONY

In her sole issue, Browder asserts that the trial court erred in failing to admit Peel's deposition testimony. Citing Rule of Evidence 107, the rule of optional completeness, she argues that she should have been allowed to offer into evidence Peel's entire deposition because the defense offered excerpts from the deposition. She further argues that when a party fails to appear at trial but does appear for a deposition, after the court rules on objections, all fairness dictates that his deposition should be admitted.

Applicable Law

The admission or exclusion of evidence is a matter within the sound discretion of the trial court. ***City of Brownsville v. Alvarado***, 897 S.W.2d 750, 753 (Tex. 1995). Rule of Evidence 107 provides in pertinent part that, if a party introduces part of a recorded statement, an adverse party may inquire into any other part on the same subject. TEX. R. EVID. 107. It further provides that an adverse party may introduce any other recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. ***Id***. Rule 107 is designed to guard against the possibility of confusion, distortion, or false impression that could be created when only a portion of evidence is introduced. ***Crosby v. Minyard Food Stores, Inc.*** 122 S.W.3d 899, 903 (Tex. App.−Dallas 2003, no pet.).

When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time. TEX. R. CIV. P. 270. It is within the sound discretion of the court to allow a party to reopen his case after having rested. ***Smart v. Mo.-Kan.-Tex. R.R. Co.***, 560 S.W.2d 216, 217 (Tex. Civ. App.−Tyler 1977, writ ref'd n.r.e.). There must be a showing of diligence on the part of the moving party in making such a request. ***Id***. In determining whether to grant a motion to reopen, the trial court also considers if the proffered evidence is decisive, reception of such evidence will cause undue delay, and granting the motion will cause an injustice. ***Karam v. Brown***, 407 S.W.3d 464, 472-73 (Tex. App.−El Paso 2013, no pet.).

Analysis

Peel did not attend the trial. Browder did not call Peel to testify either live or by deposition. During presentation of evidence for the defense, Peel's counsel read part of Peel's deposition testimony, including the part where he described the accident. Counsel announced "that concludes the reading of Jace Peel's deposition for defendant." The court inquired of Browder's counsel, "your cross-examination of Mr. Peel's deposition?" Counsel responded, "No, [y]our Honor." Defendant rested and both sides closed. They discussed the charge and adjourned for the day.

The following morning, they completed their charge conference and Browder's counsel raised the issue of admission of the proposed exhibits. He said that he "did offer all of the depositions." He further argued that, since defense counsel read from Peel's deposition, "for optional completeness," he suggested that deposition should be in the record. He added that, "for

appeal purposes," Peel's complete deposition should be in the record. Counsel also explained that he was surprised that Peel did not appear at trial. In response to defense counsel's assertion that the deposition contains inadmissible testimony, Browder's counsel stated:

> So, Judge, if we've got objections in the deposition, then perhaps the Court should take a look at those objections and say, No, that's not admissible evidence and then it's out, but I'm not proposing we send it back to the jury that complete deposition at this point, but I would love to have it in the record and I really thought we had it in the record because I thought we preadmitted our exhibits because we made that part of our exhibit list.

The record shows that six months before the trial, counsel for Peel designated deposition excerpts he intended to use. By the time the trial began, and certainly by the time counsel read the excerpts into the record at trial, Browder knew Peel would not testify in person. Browder declined to cross-examine Peel by use of deposition excerpts. Browder's failure to show that she could not have attempted to present Peel's deposition testimony during the trial amounts to a failure to show diligence. *See* ***Word v. U.S. Coffee & Tea Co.***, 324 S.W.2d 258, 262 (Tex. Civ. App.−Amarillo 1959, writ ref'd n.r.e.). Admitting the additional evidence after both sides had rested and closed is not necessary to the due administration of justice. *See* ***Smart***, 560 S.W.2d at 218.

Furthermore, Browder has not specified which parts of the deposition she wanted to rely on. Instead, she requested admittance of the entire deposition. To have her case reopened, it was incumbent upon Browder to specify the parts of the deposition she contends are necessary to the due administration of justice. *See* TEX. R. EVID. 270. Additionally, under Rule 107, the party seeking to complete the matter must show that the remainder being offered is on the same subject and is necessary to fully understand or explain the matter. ***Crosby***, 122 S.W.3d at 903. Browder did not explain how the entire remainder of the deposition is necessary to the jury's full understanding of the accident. *See* TEX. R. EVID. 107. Browder has not shown that the proffered evidence would help the jury understand the part offered by Peel. ***Id***. Neither has Browder shown that the proffered portion would cure any confusion, distortion, or false impression. *See* ***Crosby***, 122 S.W.3d at 903. Finally, Browder has not shown that the proffered evidence is decisive. ***Karam***, 407 S.W.3d at 472.

Accordingly, Browder did not meet the requirements to show that the additional evidence was necessary to the due administration of justice or for obtaining admittance of Peel's deposition pursuant to the rule of optional completeness. Therefore, the trial court did not abuse its discretion in not allowing Browder to reopen her case after resting or in refusing to admit Peel's deposition. ***Alvarado***, 897 S.W.2d at 753; ***Smart***, 560 S.W.2d at 217. We overrule Browder's sole issue.

DISPOSITION

Because Browder presented no trial court error, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered November 22, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

NOVEMBER 22, 2017

NO. 12-17-00113-CV

ALYSSA BETH BROWDER,
Appellant
V.
DERRICK JACE PEEL,
Appellee

Appeal from the County Court at Law
of Van Zandt County, Texas (Tr.Ct.No. CV04959)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **ALYSSA BETH BROWDER**, for which execution may issue, and that this decision be certified to the court below for observance.

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