Reversed and Remanded and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-94-00538-CV

CATHLEEN BROUSSARD (JONES), Appellant

V.

ABC HOME HEALTH SERVICES OF TEXAS, INC., ET AL, Appellees

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 92CV1030

O P I N I O N

This appeal is from a take nothing judgment signed November 8, 1994. Appellant's motion for new trial was overruled by operation of law, and appellant timely perfected this appeal.

On January 4, 1995, appellant filed a motion to reverse the judgment and remand the cause for a new trial because she is unable to obtain a complete statement of facts (now referred to as the reporter's record) through no fault of her own. *See* former TEX. R. APP. P. 50(e) (currently TEX. R. APP. P. 34.6(f)). On January 19, 1995, we ordered the trial

court to conduct a hearing to settle the dispute over the alleged incomplete record. Several extensions of time for conducting the hearing were granted. The trial court conducted several hearings and meetings with counsel to attempt to resolve the problems with the record. Appellant renewed her request that we reverse and remand, and she filed a supplemental motion on July 31, 1995. On August 28, 1995, a hearing record was filed with this court. The trial court filed findings of fact and conclusions of law on December 22, 1995, in which the court determined that a statement of facts proposed by appellees was substantially accurate. The statement of facts was filed on the same date. On February 16, 1996, we ruled that appellant's motion to reverse and remand would be taken with the case.

On June 23, 1997, this court was notified that the corporate appellees had filed for bankruptcy protection. Accordingly, the appeal was automatically stayed.

On May 13, 1997, appellee, ABC Home Health Services, Inc., later known a First American Health Care, Inc., moved to dismiss the appeal, alleging that appellants claims against it were absolutely barred by its bankruptcy discharge. We granted the motion as to the corporate appellees. The bankruptcy discharge had no effect on appellant's claims against Robert Jack Mills, however. By order dated September 24, 1998, we dismissed the appeal as to ABC Home Health Services, Inc., later known as First American Health Care, Inc., and as to ABC Home Health Services of Texas, Inc.

Accordingly, we reinstated the appeal as to appellant's claims against Robert Jack Mills. Appellant then filed her brief on December 10, 1998, in which she complains of the incomplete and inaccurate reporter's record, challenges evidentiary rulings, and attacks the sufficiency of the evidence to support the jury's verdict. On December 28, 1998, appellant filed a supplemental motion to reverse and remand due to the incomplete reporter's record. We have now considered appellant's supplemental motion and reviewed the state of the record in light of appellant's contentions on appeal.

This appeal was perfected before the Texas Rule of Appellate Procedure were amended effective September 1, 1997. Former Rule 50(e) stated:

> Lost or Destroyed Record. When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

Former TEX. R. APP. P. 50(e).

The current version of the rule now provides:

> *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:
>
> (1) if the appellant has timely requested a reporter's record;
>
> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or — if the proceedings were electronically recorded— a significant portion of the recording has been lost or destroyed or is inaudible;
>
> (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
>
> (4) if the parties cannot agree on a complete reporter's record.

TEX. R. APP. P. 34.6(f).

Thus, under the new rule, a "significant" portion of the record, "necessary to the appeal's resolution," must be lost. We conclude that appellant meets the test under both versions of the rule.

There is no dispute that appellant timely requested the record, and that appellant is not at fault. It is also clear that the parties cannot agree on a record. Furthermore, our review of the record reveals that significant portions of the record, which are necessary to the appeal, are incomplete.

This trial commenced on January 10, 1994. Testimony was taken on January 10, 11, 12, 13, 14, 18, and concluded on January 19, 1994. The Official Court Reporter, Paul Porter, who is now deceased, unknowingly suffered from brain cancer during the trial, which impaired his ability to hear and report the testimony, objections, and rulings during trial. On December 31, 1994, the court reporter furnished an affidavit acknowledging that he could not prepare a complete and accurate statement of facts, and he could not certify to the completeness or accuracy of his notes. He stated he had difficulty hearing witnesses during the trial and was unable to maintain the required intensity of concentration. He also developed extreme headaches. After the trial, he was diagnosed with renal cell carcinoma metastasized to the brain. He had the tumor surgically removed, but then developed another cancerous brain tumor. Nonetheless, he continued to attempt to complete the statement of facts. During that process, he became aware of "many significant missing segments, significant gaps and unintelligible entries in [his] notes." He concluded his notes and records were "essentially lost." The trial was not tape recorded, so no tape records are available.

At a hearing on February 20, 1995, Porter testified about his difficulties in taking down the testimony and that there were "significant gaps and unintelligible entries in [his] notes." He acknowledged that he failed to record objections made by appellant's counsel. Porter died over the weekend of August 5-6, 1995, without having completed the statement of facts.

The trial court found that no other court reporter can certify to the accurateness and completeness of a statement of facts based on Porter's notes. Volumes II, III, IV, and V contain corrections to the statement of facts made by Porter. Part of Volume V was completed by another court reporter based on Porter's notes. Despite the original court reporter's acknowledgment of the deficiencies in his reporting due to his illness, the trial court concluded that the five volumes of statement of facts "substantially accurately reflect

what occurred in the trial court, and should adequately preserve Plaintiff's right to appellate review." We disagree. Although a party may not challenge a trial court's conclusions of law for factual sufficiency, we may review the conclusions the trial court draws from the facts to determine their correctness. *See Zieba v. Martin*, 928 S.W.2d 782, 786 n. 3 (Tex. App.—Houston [14th Dist.] 1996, no writ).

Appellant has challenged the sufficiency of the evidence. Texas law provides that when an appellant complains about the legal or factual insufficiency of the evidence, the appellant's burden on appeal cannot be discharged in the absence of a complete or an agreed statement of facts. *See Englander Co. v. Kennedy*, 428 S.W.2d 806, 806 (Tex. 1968) (per curiam); *Waller v. O'Rear*, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).[1] An appellant cannot challenge the factual sufficiency of the evidence to support a finding without bringing forth a complete statement of facts. *See Rowlett v. Colortek, Inc.*, 741 S.W.2d 206, 207-08 (Tex. App.—Dallas 1987, writ denied). Reversal is required when an appellant, wishing to complain of no evidence or insufficient evidence to support a finding, is deprived of a portion of the statement of facts. *See Adams v. Transportation Ins. Co.*, 845 S.W.2d 323, 327 (Tex. App.—Dallas 1992, no writ).

In the absence of a complete, accurate statement of facts, this court has previously granted an appellant's motion to reverse and remand for a new trial. *See Owens-Illinois v. Chatham*, 899 S.W.2d 722, 736 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd) (holding that missing exhibits mandated reversal); *see also Gillen v. Williams Bros. Constr. Co.*, 933 S.W.2d 162, 163-64 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (granting a motion to reverse based on an incomplete statement of facts). This case is similar to *Gillen*, where the court reporter furnished an affidavit stating she was unable to keep up with the pace of the trial and her notes were "sketchy, truncated, have places in

[1] The appellate rules now provide that this court must presume that a partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing points of error. *See* TEX. R. APP. P. 34.6(c)(4). We find this rule inapplicable to the facts of this case.

them where [she] wrote 'gap/gap' so that [she] would know there was an area of many words missing." *Id.* at 163. Because the court reporter could not certify the statement of facts in *Gillen*, we reversed the judgment and remanded the case for a new trial. *See id.* at 164; *see also Hernandez v. JLG, Inc.*, 905 S.W.2d 778, 780 (Tex. App.—San Antonio 1995, no writ) (reversing and remanding because the court reporter's debilitating disease rendered the statement of facts, for all intents and purposes, lost, through no fault of appellant).

Appellant has established her entitlement to a new trial based on her inability to obtain a complete record of the trial through no fault of her own. Accordingly, appellant's motion is granted. The trial court's judgment is reversed, and the cause is remanded for a new trial.

PER CURIAM

Judgment rendered and Opinion filed November 10, 1999.
Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.
Do Not Publish - TEX. R. APP. P. 47.3(b).