ORAL ARGUMENT NOT REQUESTED

CASE NO. 05-03-00934-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

LAUREN PERALTA,

Appellant

v.

CHARLES DURHAM,

Appellee

On appeal from the 191st Judicial
District Court of Dallas County, Texas, Cause No. 02-01125-J

APPELLEE'S BRIEF

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ATTORNEY FOR APPELLEE CHARLES DURHAM

February 9, 2004

ORAL ARGUMENT IS NOT REQUESTED

Oral Argument is not requested because the amount at stake in this case is only $1,000, and it would not further the interest of judicial economy to expend additional time arguing the case before the court. Further, it is appellee's position that this matter would not benefit from oral argument because the matter is clearly something the defendant has not met its burden on appeal, and this can be clearly shown by appellee's written brief.

IDENTITY OF PARTIES AND COUNSEL:

The following is a complete list of all parties to the trial court's final judgment, as well as the names and addresses of all trial and appellate counsel.

PARTIES COUNSEL

Plaintiffs/Appellee:

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Defendant/Appellant:

Lauren Peralta

Trial Court Counsel: Kyle A. Miller, Amis & Bell, Brookhollow One, Suite 250, 2301 E. Lamar Blvd., Arlington, TX 76006, 817-649-7847; Fax: 817-640-1943; Direct Dial: 817-649-6827

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES.....Page

TEXAS CONSTITUTION, STATUTES, AND RULES

ISSUES PRESENTED

Appellee has no further Issues to Present to this court other than those presented by Appellant.

STATEMENT OF FACTS

On February 6, 2002, Charles Durham filed suit agains Lauren Peralta claiming that she struck him from the rear on September 16, 2001. (C.R. 6). When serving her with suit, the plaintiff also served several requests for admissions, and these were answered on the 29th of April, 2002. (Supp. C.R. 11). When answering, Peralta Denied that she was not keeping a proper lookout and that she had failed to apply her brakes, that she failed to maintain an assured safe distance from the car in front of her, and that she caused the accident. (Supp. C.R. 11-16).

Although not read into the record at the hearing, it was read into the record at trial—defendant presented her self for deposition on November 15, 2002. (R.R. 3-5). The defendant testified both at trial and deposition that when the wreck occurred, she was turned around in her car looking the other direction. (R.R. 3-5). Despite this, the Appellant, defendant at trial, has not requested the trial record. The case was called to trial on February 11, 2003, and for the first time, the defendant admitted to liability by stipulating to it. (R.R. 4-5). However, Perlalta never supplemented her discovery and thus was still denying that she was not keeping a proper lookout and that she had failed to apply her brakes, that she failed to maintain an assured safe distance from the car in front of her, and that she caused the accident. (Supp. C.R. 11-16)(R.R. 4-5). Thus, at the time of trial, they were still denying that she had failed to keep a lookout and

had not applied her brakes even though those requests were outstanding for over ten months. (R.R. 4-5 & Supp. C.R. 3-18).

On April 25, 2003, the plaintiff filed a Motion to Recover Expenses of Proof, and on May 15, 2003, the court heard and granted the motion for plaintiff. (Supp. C.R. 3 and R.R. 20). The court granted $1000, which was $250 less than requested. (R.R. 19, C.R. 50).

SUMMARY OF THE ARGUMENT

A. This court must presume that there is evidence sufficient in the courts trial record to support its acts, especially since its award of costs under Rule 215 is subject to an abuse of discretion standard and the defendant did not limit the appeal pursuant to Rule 34.6.

When reviewing a trial courts award of costs under Rule215(b) for the failure to admit requests for admissions, the trial courts award is reviewed under an abuse of discretion standard. *Humphreys v. Meadows*, 938 S.W.2d 750, 751 (Tex. App.—Fort Worth 1996, writ denied).

Under the Texas Rules of Appellate Procedure, the court of appeals will presume that ommited portion of the record support the trial courts ruling. Though there is a procedure to limit the record under 34.6(c) by filing a request for the record stating that the appeal will be limited to certain points or issues, ther defendant has not done so. *See* Texas Rule App. Pro. 34.6(c). In this appeal, the reporter's record on file consists of the hearing on the Motion to Recover Expenses of Proof, but none of the

trial record. Because Peralta did not comply with Rule 34.6(c)(1) of the Texas Rules of Appellate Procedure, this court must presume that the omitted portions of the reporter's record support the trial court's judgment and order granting Expense of Proof. *Jaramillo v. The Atchison, Topeka & Santa Fe Ry. Co.*, 986 S.W.2d 701, 702 (Tex.App.-Eastland 1998, no pet.)

B. When the trial court concludes that a party has proven something denied by a request for admission, the court shall grant a motion to recover under under Rule 215.4(b) unless the opposing party to shows a reasonable ground to believe that he might prevail or other good reason, and when no showing is made of that by the opposing party, the party propounding the requests for admission should prevail.

It is clear from the language of Rule 215.4(b)(3), if the party proves a fact that he has previously requested to be admitted, he can file a Motion to Recover reasonable expenses, including attorney fees. The rule then provides, "the court *shall* make the order unless if finds" (1) the request was objectionable under Rule 193, (2) the admission had no substantial importance, (3) the party failing to admit had a reasonable ground to believe that they might prevail on that matter, or (4) ther was other good reason. Tex. R. Civ. Pro. 215.4(b).

There was no objection lodged and the admission has great importance because it dealt with what the defendant was doing and whether there was negligence. (Supp. Ct. R. 11-16). Thus, the defendant needed to show, or there

needs to be some evidence (1) that they reasonably believed that they might prevail on the issue, or (2) that they had some other good reason.

Looking at the clerks supplement record, there was no response filed to the motion. (C.R. 1-61; Supp. C.R. 1-23). Nor did counsel for Defendant/appellant at the hearing state any good faith basis for denying request number 5, even after the court requested him to do so. (R.R. 7). If there was a good faith basis, he did not say what it was, and it is not in the record.

C. When a defendant judicial admits a fact, it does not remove the courts discretion undre Rule 215.4(a) and (b) for its actions prior to that, nor eliminates the Courts authority under 215.4 because that fact has now been judicially proven.

A trial courts award of costs under Rule215(b) for the failure to admit requests for admissions, the trial courts award is reviewed under an abuse of discretion standard. *Humphreys v. Meadows*, 938 S.W.2d 750, 751 (Tex. App.—Fort Worth 1996, writ denied). Then defendant/appellant takes the position that when a party stipulates to something suddenly at trial, it removes the courts authority under Rule 215.4(b). This argument ignores the plain language of Rule 215.4(b) which states "thereafter proves the genuineness of the document or the truth of the matter." Rule 215.4(b). Once the defendant judicially admits liability, the plaintiff has proved liability. "A judicial admission is conclusive upon the party making it, and it relieves the opposing party's burden of proving the admitted fact", and it "bars the admitting party from disputing it." *Mendoza v. Fidelity & Guaranty Ins. Underwriters, Inc.*. 606 S.W.2d 692, 694 (Tex.1980). If the

court wanted to, after a judicial admission, it could not go back and find against the judicial admission, nor could the defendant. Thus, plaintiff had proven the fact because the defendant withdrew his right to dispute it. They could have avoided this by merely supplementing their answers in the ten months that they had an opportunity to do so.

The defendant also has cited the case of *Natuaral Gas Pipeline Co. of Amer. V. Pool*, 30 S.W.3d 639, 652 (Tex.App.—Amarillo 2000, no writ). It argues that the Rule 198 and 215.4(b) are not meant to require a party to admit away a defense. *Id.* at 652. However, in that case there was good reason to deny because to admit the request would have required the responding party to research all the mineral leases on the property themselves.

ARGUMENT AND AUTHORITIES

A. This court must presume that there is evidence sufficient in the courts trial record to support its acts, especially since its award of costs under Rule 215 is subject to an abuse of discretion standard and the defendant did not limit the appeal pursuant to Rule 34.6.

When reviewing a trial courts award of costs under Rule215(b) for the failure to admit requests for admissions, the trial courts award is reviewed under an abuse of discretion standard. *Humphreys v. Meadows*, 938 S.W.2d 750, 751 (Tex. App.—Fort Worth 1996, writ denied). A trial court abuses its discretion when when a trial court acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *Moore v. Sutherland,* 107 S.W.3d 786,

789 (Tex.App.-Texarkana 2003, pet. denied). A trial court will be deemed to have acted arbitrarily and unreasonably if it could have only reached one decision, yet reached a different decision. *Teixeira v. Hall*, 107 S.W.3d 805, 807 (Tex.App.-Texarkana 2003, no pet.).

At the hearing on the motion to assess costs the Plaintiff clearly referred back to the trial court record saying "In her deposition, I'll represent to the court and this was, I believe, primarily read into the record either throu cross-examination or direct in presentation of the trial. Mrs. Peralta admitted that she had been turned around and wasn't looking where she was going when she ran into the client." (R. R. 4-5).

Under the Texas Rules of Appellate Procedure, if a record is not timely requested, the court of appeals will presume that ommited portion of the record supports the trial courts ruling. Though there is a procdure to limit the record under 34.6(c) by filing a request for the record stating that the appeal will be limited to certain points or issues. *See* Texas Rule App. Pro. 34.6(c). In order to minimize the expense and delay associated with the appellate process, an appellant may request a partial reporter's record. Tex.R.App. P. 34.6(c)(1); *Jaramillo v. The Atchison, Topeka & Santa Fe Ry. Co.*, 986 S.W.2d 701, 702 (Tex.App.-Eastland 1998, no pet.). An appellant who requests a partial record must also include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues. Tex.R.App. P. 34.6(c)(1). It is sufficient if the statement of points or issues is filed with, rather than in, an

appellant's request for a partial reporter's record. *Schafer v. Conner,* 813 S.W.2d 154, 155 (Tex.1991).

If an appellant complies with Rule 34.6(c)(1), an appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. Tex.R.App. P. 34.6(c)(4); *see Brown v. McGuyer Homebuilders, Inc.,* 58 S.W.3d 172, 175 (Tex.App.-Houston [14th Dist.] 2001, pet. denied), *declined to follow on other grounds, Bennett v. Cochran,* 96 S.W.3d 227, 229- 30 (Tex.2002).

However, when an appellant appeals with a partial reporter's record but does not provide the list of points or issues required by Rule 34.6(c)(1), the presumption arises that the omitted portions support the trial court's findings. *Jaramillo,* 986 S.W.2d at 702; *Richards v. Schion,* 969 S.W.2d 131, 133 (Tex.App.-Houston [1st Dist.] 1998, no pet.).

In this appeal, the reporter's record on file consists of the hearing on the Motion to Recover Expenses of Proof, but none of the trial record. This has been done by the defendant/appellant despite the fact that at the hearing, the trial record was referred by both counsel. (R.R. 4-5, R. R. 6). Further, the clerk's record contains no request for a partial reporter's record from Peralta, the appellant, to the official reporter nor a statement of the points or issues to be presented on appeal. Because Peralta did not comply with Rule 34.6(c)(1) of the Texas Rules of Appellate Procedure, this court must presume that the omitted portions of the reporter's record support the trial court's judgment and order

granting Expense of Proof. *Jaramillo,* 986 S.W.2d at 702; *Richards,* 969 S.W.2d at 133.

B. When the trial court concludes that a party has proven something denied by a request for admission, the court shall grant a motion to recover under under Rule 215.4(b) unless the opposing party to shows a reasonable ground to believe that he might prevail or other good reason, and when no showing is made of that by the opposing party, the party propounding the requests for admission should prevail.

It is obvious by the court's judgment signed on April 25, 2003, that the court had concluded, and the plaintiff had proved that defendant was negligent. Rule 215.4(b) provides:

> 215.4. Failure to Comply With Rule 198.
>
> (b) Expenses on failure to admit.
> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

It is clear from this language, if the party who proves a fact that he has previously requested to be admitted, he is entitled to file a Motion to Recover reasonable expenses, including attorney fees. The rule then provides, "the court *shall* make the order unless if finds" (1) the request was objectionable under Rule

193, (2) the admission had no substantial importance, (3) the party failing to admit had a reasonable ground to believe that they might prevail on that matter, or (4) ther was other good reason. Tex. R. Civ. Pro. 215.4(b).

There was no objection lodged under Rule 193, which requires a written objection to discovery. Tex. R. Civ. Pro. 193.2(a). (Supp. Ct. R. 11-16). The admission has great importance because it dealt with what the defendant was doing and whether there was negligence. (Supp. Ct. R. 11-16). Thus, the defendant needs to show (1) that they reasonably believed that they might prevail on the issue, or (2) that they had some other good reason.

First of all, it is clear that the plaintiff had proven, by the time the court signed the judgment, that defendant was negligent and had failed to keep a proper lookout, failed to make a proper application of the brakes, and failed to maintain an assured safe distance from the car in front of them. (C.R. 48-49). Otherwise, the plaintiff would not have been entitled to a judgment.

Looking at the clerks supplement record, there was no response filed to the motion. (C.R. 1-61; Supp. C.R. 1-23). Nor did counsel for Defendant/appellant at the hearing state any good faith basis for denying request number 5, even after the court requested him to do so. (R.R. 7). If there was a good faith basis, he did not say what it was. His response was to say that the plaintiff had the burden of proof. (R.R. 7). Well, if we take that logic, then Request for Admissions have no function at all. Any party wishing to admit anything into evidence has the burden to presenting it to the court. The question

is rather, was there a reason the defendant thought that they would prevail on failing to keep a proper look out, applying the brakes, etc., when they were looking the other direction while driving down the road. (R.R. 3-5). The court asked Peralta's counsel what it was, and he had nothing to present. Certainly, it is not an abuse of Discretion for Judge Haynes to appropriately require a party to pay costs under these circumstances.

C. When a defendant judicial admits a fact, it does not remove the courts discretion undre Rule 215.4(a) and (b) for its actions prior to that, nor eliminates the Courts authority under 215.4 because that fact has now been judicially proven.

As discussed above, when reviewing a trial courts award of costs under Rule215(b) for the failure to admit requests for admissions, the trial courts award is reviewed under an abuse of discretion standard. *Humphreys v. Meadows*, 938 S.W.2d 750, 751 (Tex. App.—Fort Worth 1996, writ denied). Then defendant/appellant takes the position that when a party stipulates to something suddenly at trial, it removes the courts authority under Rule 215.4(b). The appellant claims that the Court only has the authority when the party is forced to prove the fact. This argument ignores the plain language of Rule 215.4(b) which states "thereafter proves the genuineness of the document or the truth of the matter." Once the defendant judicially admits liability, the plaintiff has proved liability. "A judicial admission is a formal waiver of proof usually found in pleadings or the stipulations of the parties." It "is conclusive upon the party making it, and it relieves the opposing party's burden of proving the admitted

fact", and it "bars the admitting party from disputing it." *Mendoza v. Fidelity & Guaranty Ins. Underwriters, Inc.*. 606 S.W.2d 692, 694 (Tex.1980); Gevinson v. Manhattan Construction Co. of Oklahoma, 449 S.W.2d 458, 467 (Tex.1969). If the court wanted to, after a judicial admission, it could not go back and find against the judicial admission, nor could the defendant. For whatever reason, which the defendant never presented, the Defendant gave up on the defense on the morning of trial. (R.R. 4-8). At that point, the plaintiff proved what had been denied by Defendant on April 29, 2002. The court still had authority to determine whether there was a good faith belief that the defendant might prevail, and the defendant had an opportunity to submit that reason at the hearing. None was presented, (R.R. 4-16) thus the court had the discretion to grant the motion.

The defendant has argued that the trial court has applied death penalty sanction, or that the requests for admissions required the party to admit that they had no defense. Both are untrue. The case was tried on damages, and the jury could have concluded that there was no damages.

Furthermore, the defendant could have, if it chose, avoided all this controversy. On April 29, 2002, it could have properly answered the requests for admissions and admitted what they openly did at trial. Furthermore, appellant could have supplemented its answers and admitted whet they openly did at trial. They could have even amended their answers just prior to trial, or even requested leave to do it during trial, but they did not.

The defendant also has cited the case of *Natuaral Gas Pipeline Co. of Amer. V. Pool*, 30 S.W.3d 639, 652 (Tex.App.—Amarillo 2000, no writ). It argues that the Rule 198 and 215.4(b) are not meant to require a party to admit away a defense. *Id.* at 652. That case clearly involved a complicated mineral interest. *Id.* at 652. They court went on to discuss that party who answer explained that they were limiting their admission to their royalty interest in the claim. *Id.* The court explained that the requests for admission required the appellant to research and determine all the ownership interests in the minerals. *Id.* In other words, the court was showing that in that case, they did not need to go out and research mineral interest claims and that they were only claiming what they believed was their portion of the mineral interest. In short, there was a good faith basis for the denial in the record. Here, there isn't.

PRAYER

For these reasons, Charles Durham, Appellee, requests that this court:

1. Affirm the Trial Courts Order of May 23, 2003.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this above Notice of Appeal has, on this the 9th day of February, 2004, been sent by certified mail set below, as attorney of record for Defendants in the above numbered cause.

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Via Certified Mail

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Ray Brook