



Flores v. Volcanic Gardens Management Co.

2001 | Cited 0 times | Court of Appeals of Texas | July 26, 2001

OPINION

Appellant Eddie Flores ("Flores") appeals from a directed verdict in favor of Appellees Volcanic Gardens Management Co., Inc. d/b/a Wet `n' Wild Water World ("Wet `n' Wild "). We affirm.

SUMMARY OF THE EVIDENCE

Flores allegedly injured his right knee on or about July 16, 1989, on a ride at Wet `n' Wild Water World in El Paso County, Texas. From that injury, three different suits have been filed since 1989, including the suit from which this appeal now arises. In the first suit, Flores filed an action for personal injury against Wet `n' Wild, from which a mandamus proceeding arose in this Court, *Volcanic Gardens Management Co., Inc. v. Paxson*, 847 S.W.2d 343 (Tex.App.--El Paso 1993, orig. proceeding). Flores voluntarily dismissed that suit. In the second suit, Volcanic Gardens Management Co., Inc. (d/b/a Wet `n' Wild) filed suit against Flores for fraud and conspiracy in claiming personal injury resulting from a ride at Wet `n' Wild Water World. That suit resulted in a summary judgment for Flores upon the agreement of the parties that (1) Flores dismiss his counterclaims against Wet `n' Wild, and (2) that Wet `n' Wild waive the statute of limitations to enable Flores to re-file his suit against Wet `n' Wild. The judgment was affirmed by this Court.

On behalf of Flores, attorney David Escobar filed the third suit which gave rise to this appeal on February 20, 1998. Wet `n' Wild sought disclosure of Flores's experts on February 1, 2000 and sent it to both Glen Sutherland and David Escobar at their common address, since Glen Sutherland had signed off on Flores's motion for partial summary judgment on September 2, 1998. Wet `n' Wild received "Plaintiff's First Supplemental Potential Witness and Expert List" stating the names of fact witnesses and potential testifying experts with summaries of their expected testimony on April 20, 2000. On May 3, 2000, Wet `n' Wild finally received Flores's response to the request to disclose his expert witnesses. The response did not specify the expert witnesses and instead referred Wet `n' Wild to "Plaintiff's potential witness list."

The trial court granted Flores's motion for continuance and reset the trial from January 24, 2000 to May 22, 2000. At the pretrial conference on April 26, 2000, the trial court limited the trial to premises liability. However, Flores filed his first amended petition alleging six additional causes of action. Wet `n' Wild filed special exceptions to the added causes of action since it now had no time to prepare its defense due to Flores's late response to Wet `n' Wild's discovery request and nearly last-minute filing of the amended petition. The trial court granted the exception and implicitly overruled Flores's



Flores v. Volcanic Gardens Management Co.

2001 | Cited 0 times | Court of Appeals of Texas | July 26, 2001

request for a continuance on the day of the trial. Specifically, the trial court stated:

The Court has reviewed the Court's file and it appears that the attorney of record in this case is Mr. Escobar, and it appears that Mr. Sutherland is also been active in the case, and the Court finds that the Request for Disclosures were faxed to both attorneys, and that the responses were late. And because the responses are late, the Court is going to grant the special exceptions. And because there is no time left to replead any of these matters, the Court is going to strike any pleadings containing new defenses or causes of action that were not timely responded to by the -- from response to the properly served Request for Disclosure.

During trial, Flores then tried to introduce the depositions of his experts, whom he had not disclosed in a timely manner during discovery. Wet `n' Wild objected to the admission of the depositions into evidence because Flores had not timely disclosed his experts, and the trial court sustained the objections. Flores moved for a mistrial based on improper imposition of sudden death sanctions, which the trial court denied. Wet `n' Wild then moved for a directed verdict which was granted by the trial court.

DISCUSSION

Flores addresses his first three issues in one argument contending that "death penalty" sanctions were improperly imposed by the trial court when the depositions of his experts were excluded at trial. The trial court has the discretion to admit or exclude evidence. See *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). Absent abuse of discretion by the trial court, we will not overturn the trial court's decision. See *Green v. Texas Dep't of Protective and Regulatory Services*, 25 S.W.3d 213, 218 (Tex.App.--El Paso 2000, no pet.). A trial court abuses discretion when it acts without regard to any guiding rules or principles. See *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

At trial, Flores attempted to offer depositions of his medical experts and an engineering expert. Wet `n' Wild objected to the evidence based on Flores's failure to make a timely response to the discovery request to disclose experts. The trial court sustained the objections. Flores then moved for a mistrial, protesting that the trial court's ruling was a sudden death sanction and that Wet `n' Wild had notice of Flores's experts from the discovery in the prior related cases. Again, Wet `n' Wild responded that Flores had failed to comply with the discovery rules, and the trial court overruled the motion for mistrial.

A party may obtain disclosure from another party of the information on testifying experts, including any materials that were provided to, reviewed by, or prepared by the expert in anticipation of the testimony. See Tex.R.Civ.P. 194.1, 194.2(f), and 195.1. The party served with the discovery request under Tex.R.Civ.P. 194.2(f) must provide a written response within the later of thirty days after service of the request or, for a plaintiff, ninety days before the end of the discovery period. See



Flores v. Volcanic Gardens Management Co.

2001 | Cited 0 times | Court of Appeals of Texas | July 26, 2001

Tex.R.Civ.P. 194.3(b), 195.2. A party must amend or supplement its discovery responses reasonably prompt. Tex.R.Civ.P. 193.5(a) and (b). An amendment or supplement to the discovery response made less than thirty days before trial is presumed to be not reasonably prompt. See Tex.R.Civ.P. 193.5(b). Tex.R.Civ.P. 193.6(a) provides that a party who fails to timely make, amend, or supplement a discovery response may not introduce into evidence the material or information that was not disclosed, unless the trial court finds that there was good cause for the failure or the other party would not be unfairly surprised or prejudiced. The party seeking to introduce the evidence has the burden to prove the exception. See Tex.R.Civ.P. 193.6(b). The court may grant a continuance to allow further discovery. See Tex.R.Civ.P. 193.6(c).

Wet 'n' Wild requested disclosure of materials and information, including testifying experts, under Tex.R.Civ.P. 194.2 from Flores on February 1, 2000. The request was addressed to both David Escobar and Glen Sutherland at their common address and fax number. Flores filed a response to the discovery request on May 3, 2000, which did not specifically designate any testifying experts or provide their information, only referring to "potential expert witnesses [sic] list already furnished." The document dated April 20, 2000 and entitled "Plaintiff's First Supplemental Potential Witness and Expert List," states the names of fact witnesses and potential testifying experts with summaries of their expected testimony. The trial began on May 22, 2000.

Even if the substance of Flores's April 20, 2000 response complied with Tex.R.Civ.P. 194.2, it was not timely. Since the response was not timely, the trial court could exclude the depositions of Flores's experts and did not abuse discretion in doing so. We overrule Flores's first three issues.

Turning to the fourth issue, Tex.R.App.P. 38.1(h) requires that a brief contain a clear and concise argument supported by citations to authorities and the record. Failure to cite authority in support of a point of error on appeal waives the complaint. See *Brooks v. Housing Auth. of the City of El Paso*, 926 S.W.2d 316, 323 (Tex.App.--El Paso 1996, no writ). Flores has provided no clear arguments or cites authority in support of his arguments. We overrule his fourth issue.

Finally, the trial court has the discretion to deny or grant a motion for continuance, and we will not reverse the trial court unless the trial court clearly abused discretion. See *Green*, 25 S.W.3d at 218. If a motion to continue does not comply with the rules, the reviewing court will presume that the trial court did not abuse discretion in denying the motion. See Tex.R.Civ.P. 251 and 252; *Garcia v. T.E.I.A.*, 622 S.W.2d 626, 630 (Tex.App.--Amarillo 1981, writ ref'd n.r.e.). We have held that the trial court does not abuse discretion in refusing an oral request for a continuance. See *Green*, 25 S.W.3d at 217-18. The record in this appeal shows that Flores made an oral request for a continuance at trial, just before the voir dire began. The trial court did not specifically deny the request, and the trial continued. We deem the trial court implicitly overruled Flores's request. See Tex.R.App.P. 33.1(a)(2)(A). The trial court did not abuse discretion in denying Flores's request. We overrule Flores's fifth issue.



Flores v. Volcanic Gardens Management Co.

2001 | Cited 0 times | Court of Appeals of Texas | July 26, 2001

The judgment of the trial court is affirmed.

(Do Not Publish)

