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13-24-00042-CV
THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI, TEXAS
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No. 13-24-00042-CV

FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS
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KATHY S. MILLS
Clerk

In the Thirteenth Court of Appeals
Corpus Christi–Edinburg, Texas

**IN RE SPACE EXPLORATION TECHNOLOGIES CORP.
AND LAUREN KREUGER**

ORIGINAL PROCEEDING FROM CAUSE NO. 2020-DCL-03939
444TH DISTRICT COURT OF CAMERON COUNTY, TEXAS
HON. DAVID A. SANCHEZ, PRESIDING

REAL PARTIES IN INTEREST JOSE RUIZ'S AND HUMBERTO GARCIA'S AMENDED REPLY IN SUPPORT OF MOTION TO ABATE

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

Real Parties in Interest Jose Ruiz and Humberto Garcia ("Real Parties") file this Reply in support of their motion to abate and respectfully show in support:

Contrary to Relators' argument, Real Parties did not "concede" that mandamus is appropriate. In fact, Real Parties have several arguments against the issuance of the mandamus, including that the trial court stated a valid basis for the new trial, as stated in their motion to abate. Relators suggest this Court should move past the lack of specificity in the trial court's order and simply grant mandamus on the merits. But a glaring reason to deny the mandamus petition is that Relators have provided an inadequate record.

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Under similar circumstances, the Texas Supreme Court has denied mandamus relief. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 690 (Tex. 2012). In *United Scaffolding,* the Texas Supreme Court held the trial court insufficiently articulated its reasoning and granted mandamus to require a corrected new trial order, but the Court refused to require rendition on the jury's verdict because United Scaffolding failed to present a complete record of the trial:

> First, as we have discussed, the actual basis for the trial court's order is unclear; if it rests on the greater-weight rationale, then our writ would compel the trial court to elaborate on that reasoning. The trial court's failure to properly state why it granted a new trial does not mandate a conclusion that it did not have a valid reason for doing so. And absent the trial court's having particularized its reason—or reasons—United would be entitled to mandamus directing the trial court to render judgment on the verdict only if it showed no valid basis exists for the new-trial order. It has not done so here—the record United has presented is only a partial one containing Levine's motion for new trial and the exhibits to that motion, such as deposition transcripts, and the transcript of the hearing on the motion for new trial.

Id. at 690 (citing TEX. R. APP. P. 52.7).

Under, Texas Rule of Appellate Procedure 52.7, "Relator must file with the petition . . . (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, ***including any exhibits offered in evidence***, or a statement that no testimony was adduced in connection with the matter complained." TEX. R. APP. P. 52.7(a)(2) (emphasis added). Generally, "[w]ithout a complete picture of what facts were before the trial court and how the court applied the law to those facts in reaching its decision, this Court does not have a basis on which to

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conclude that the trial court abused its discretion." *In re Approximately $61,083.00*, No. 14-13-01059-CV, 2014 WL 866040, at *3 (Tex. App.—Houston [14th Dist.] Mar. 4, 2014, orig. proceeding) (mem. op.).

In reviewing improper jury argument, "[a]ll of the evidence must be closely examined to determine [] the argument's probable effect on a material finding." *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979). Courts conduct "an evaluation of the whole case, which begins with the voir dire and ends with the closing argument." *Id.* Where review of a ground in a new trial order requires consideration of the entire trial, the Court simply cannot evaluate the merits of that new trial ground without the complete trial transcript, including the exhibits. *See In re Tex. Fueling Servs., Inc.,* No. 13-18-00311-CV, 2018 WL 3386356, at *3 (Tex. App.—Corpus Christi–Edinburg July 12, 2018, orig. proceeding) (mem. op.) (holding record was inadequate to review new trial order based on juror misconduct in voir dire where record did not include complete trial transcript and exhibits); *In re Athans*, 458 S.W.3d 675, 679 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (holding record was inadequate to review new trial order on factual sufficiency grounds where relators filed a transcript of the trial but excluded the exhibits offered into evidence); *In re Wyatt Field Serv. Co.*, No. 14-13-00811-CV, 2013 WL 6506749, at *3 (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, no pet.) (mem. op.).

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What appear to be Defendants' trial exhibits are included in the record, but they are not part of an exhibit index certified by the court reporter, nor are they signed and dated by the court reporter. *See* Mandamus Record at 1778-2035. More importantly, Relators have not provided this Court with Real Parties' exhibits, although the trial transcript clearly refers to Real Parties' exhibits offered and admitted at trial. *See, e.g., id.* at 533-34, 591, 597, 600, 633, 645. Thus, this Court does not even have the tools it needs to decide this case. The mandamus petition could and should be denied outright for that reason, and certainly, the record is insufficient to order the trial court to vacate its new trial order and render judgment on the jury verdict. *In re United Scaffolding, Inc*., 377 S.W.3d at 690.

Accordingly, Real Parties do not and have not conceded that mandamus is proper. If the Court is not inclined to abate at this juncture, it should not grant the mandamus petition, but ***should deny*** it for lack of a proper mandamus record. The fact is that once Relators obtain the official exhibit volume, they could refile their petition. An abatement is a clearly a more efficient remedy than dismissal to allow the trial court to issue an amended order, especially since Relators would benefit from the abatement as well. The Court could abate to allow the trial court to issue a new order and allow Relators to supplement their record with the Official Court Reporter's Exhibit Volume at the same time.

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Moreover, Relators' hyper-technical reading of the appellate rules ignores that (1) under Rule 2, the Court can suspend the rules to "expedite a decision" and "order a different procedure," TEX. R. APP. P. 2; and (2) under Rule 52.10(b), the Court can issue "any just relief pending the court's action on the petition" for mandamus. TEX. R. APP. P. 52.10(b). Just as in an appeal, it is preferable to abate to allow a trial judge to amend an order than to grant the extraordinary writ of mandamus against that trial judge. In the interest of efficiency and judicial economy, this Court should either deny the petition outright or abate this proceeding for 30 days to allow the trial court time to craft a revised order, and then proceed as directed in Texas Rule of Appellate Procedure 44.4. *See Meachum v. State*, 273 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding abatement was a more efficient remedy).

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