

Petition Denied and Memorandum Opinion filed March 15, 2016.



In The

Fourteenth Court of Appeals

NO. 14-16-00030-CV

CITY OF HOUSTON, Appellant

V.

SHAYN A. PROLER, Appellee

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2013-14540**

MEMORANDUM OPINION

Appellant City of Houston petitions this court to allow a permissive interlocutory appeal of the trial court's December 28, 2015 amended order denying the City's motion to exclude evidence at trial based on res judicata and collateral estoppel. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (West Supp. 2015). We deny the petition.

BACKGROUND

Shayn Proler was a captain with the Houston Fire Department who led a fire

suppression crew. *City of Houston v. Proler*, 437 S.W.3d 529, 530–31 (Tex. 2014). In 2004, another firefighter complained that Proler would not enter a burning apartment building. *Id.* at 531. Proler disputed the allegation. *Id.* The Fire Department reassigned Proler to the firefighter-training academy. *Id.* Proler objected to the reassignment and eventually the Fire Department transferred Proler back to the fire-suppression crew, conditioned on periodic evaluations. *Id.*

In March 2006, Proler was unable to put on his firefighting gear when he arrived at a house fire. *Id.* He was unable to take orders, and he had difficulty walking. *Id.* Someone escorted him to the house next door and sat him on a bucket. *Id.* He went to a hospital and was diagnosed with global transient amnesia. *Id.* The assistant chief assigned Proler to the training academy. *Id.* The City requested a follow-up medical evaluation from one of Proler’s doctors who noted an episode of global transient amnesia, but approved Proler’s return to work. *Id.*

Proler filed an administrative grievance seeking reassignment to a fire-suppression unit. *Id.* In the administrative appeal, a hearing examiner sided with Proler, and the Fire Department reassigned Proler to the fire-suppression unit. *Id.* The City appealed the decision to the trial court, alleging jurisdiction under the Declaratory Judgments Act and Chapter 143 of the Local Government Code. *Id.* Proler counterclaimed for disability discrimination under federal and state law. *Id.*

The trial court concluded that it did not have jurisdiction over the City’s administrative appeal, granted Proler’s plea to the jurisdiction, and conducted a jury trial on Proler’s disability claim. *Id.* The jury found that the City had discriminated against Proler in reassigning him to the training academy after the March 2006 incident, but the jury awarded no damages. *Id.* The trial court rendered a judgment in favor of Proler, enjoining the City from further acts of

discrimination and awarding Proler attorney's fees and costs. *Id.*

A divided panel of this court reversed the order granting Proler's plea to the jurisdiction as to the City's (1) claim that the hearing examiner exceeded his jurisdiction by awarding overtime compensation; and (2) request for declaratory-judgment relief. *Id.* The panel also reversed an award of attorney's fees to Proler under the Declaratory Judgments Act, reasoning that the fee award may have been based on the trial court's conclusion that it lacked jurisdiction over the City's appeal of the hearing examiner's decision. *Id.*

On discretionary review in the Supreme Court of Texas, Proler did not argue that he, in fact, suffered from a disability, but instead argued that he was perceived as suffering from a disability. *Id.* at 534. The Supreme Court of Texas held there was no evidence from which a reasonable and fair-minded jury could find that the City perceived that Proler was suffering from a mental impairment that substantially limited a major life activity. *Id.* at 534.

Proler did not challenge the portion of this court's judgment (1) reversing the trial court's order dismissing the City's claim to the extent the City claimed the hearing examiner exceeded his jurisdiction by awarding overtime compensation and requested declaratory relief relative to this claim; or (2) reversing the trial court's award of attorney's fees to Proler related to the City's declaratory-judgment action. *Id.* at 531–32, 536. Those portions of this court's judgment remained in effect. *Id.* at 532, 536. The Supreme Court of Texas remanded the case to the trial court for further proceedings on the City's claim. *Id.* at 536. The high court also reversed this court's judgment to the extent that the panel affirmed the trial court's judgment granting injunctive relief and attorney's fees on Proler's disability discrimination claims, and rendered a take-nothing judgment on those claims. *Id.*

Proler then filed the current case in the trial court, alleging that, during the litigation, the City became aware that he had been treated for clinical depression since his teens and that he had difficulty awakening and, therefore, failed to give timely notice that he would be reporting to work late. Five years after “his original problem,” Proler had difficulty in responding to an emergency call regarding a traffic accident on a freeway. Proler appeared to be asleep on the fire truck even with a loud siren sounding. Proler also appeared to be unconscious at the scene and could not be aroused; he remained in that condition until the truck returned to the station. A firefighter from another station heard about the incident and filed a complaint against Proler.

During the investigation, a fire district chief demanded that Proler provide an account of the incident even though Proler could not do so. Proler gave an account using details from another similar run. After a hearing required by law, the City terminated Proler’s employment. Proler filed a grievance, which the hearing examiner dismissed on procedural grounds without reaching the merits. Proler filed suit in the trial court asserting claims based on the termination of his employment.

The City filed a motion to exclude evidence and, in the alternative, a motion for permissive interlocutory appeal and stay. The City sought to bar “at trial any mention, argument, questions, testimony, exhibits and/or evidence” regarding Proler’s claims for disability discrimination under Chapter 21 of the Texas Labor Code because res judicata and collateral estoppel bar his claims as a result of the Supreme Court of Texas’s holding in *Proler*. The City pointed out that the “vast majority” of the medical records identified as exhibits in this case are the same medical records offered into evidence in Proler’s prior suit. Proler responded that his prior lawsuit and the present lawsuit are not the same because the first suit

related to his transfer from his fire-suppression unit assignment, while this suit relates to his termination from employment. In response to the City's alternative request for permission to appeal the interlocutory order denying the City's motion to exclude evidence, Proler stated that he believed the controlling questions of law had been determined, but because "[i]nterpretations by federal and Texas courts of the laws on disability discrimination in employment have been varied and inconsistent, an appeal of the judgment could result in a plenary retrial of this case."

The trial court signed the following amended order denying the City's motion to exclude and granting the motion to permit an interlocutory appeal:

The Defendant City of Houston's motion to exclude evidence and, in the alternative, to permit an interlocutory appeal is **DENIED IN PART** and **GRANTED IN PART**. The prior Order signed by this Court on September 14, 2015 is amended as follows: It is,

ORDERED that the motion to exclude evidence is **DENIED**.

ORDERED that an interlocutory appeal from this Order be permitted pursuant to Rule 168 of the Texas Rules of Civil Procedure on the following issue of law:

After claims of disability discrimination in employment have been determined as sufficiently supported by the evidence, may the evidence previously adjudged and the related proceedings be presented to support claims subsequently arising under the amendments of the applicable law?

The Court concludes and finds that notwithstanding the similarity of the claims presented in this and a previous lawsuit between the same parties, evidence in the prior lawsuit, *City of Houston v. Proler*, 437 S.W.3d 529 (Tex. 2014); Cause No. 2007-30944, *City of Houston v. Proler*; In the 234th District Court of Harris County, Texas, is not precluded in this case by the affirmative defenses of res judicata and collateral estoppel.

The Court further finds that an immediate appeal on this issue

may material [sic] advance the ultimate termination of litigation by determining the nature and scope of permissible evidence to be presented to the jury.

After this court granted an extension, the City filed its petition for permissive interlocutory appeal.

ANALYSIS

Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). An order denying a motion to exclude evidence at trial is an interlocutory order. The City seeks permission to pursue an appeal of the trial court's order under Texas Civil Practice and Remedies Code section 51.04(d), which provides as follows:

(d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:

(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d). The trial court's permission must be stated in the interlocutory order to be appealed. *See* Tex. R. Civ. P. 168. In its statement of permission as to an interlocutory appeal under section 51.014(d), a trial court must (1) identify the controlling question of law as to which there is a substantial ground for difference of opinion; and (2) state why an immediate appeal may materially advance the ultimate termination of the litigation. Tex. R. Civ. P. 168; *Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 543–44 (Tex. App.—Houston [14th Dist.] 2015, no pet.). When the trial court has permitted the

appeal from an interlocutory order that would not otherwise be appealable, the party seeking to appeal must petition the court of appeals for permission to appeal. Tex. R. App. P. 28.3(a).

Section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it. *De La Torre v. AAG Properties, Inc.*, No. 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet. h.) (mem. op.). The trial court first must make a substantive ruling on the controlling legal question as to which there is a substantial ground for difference of opinion. *See id.* The trial court identified the issue to be addressed in the permissive appeal as follows:

After claims of disability discrimination in employment have been determined as insufficiently supported by the evidence, may the evidence previously adjudged and the related proceedings be presented to support claims subsequently arising under the amendments of the applicable law?¹

The record does not reflect that the trial court ruled on this issue.

In its December 28, 2015 order, the trial court denied the City’s motion to exclude evidence and ruled that the affirmative defenses of res judicata and collateral estoppel do not preclude the admission into evidence in the trial of this suit of evidence used in the prior lawsuit. The trial court did not rule that any of this evidence was admissible at trial in this suit; rather, the trial court determined that the City’s objections to the evidence based on res judicata and collateral estoppel lacked merit. Thus, the trial court did not rule on the issue of whether, “the evidence previously adjudged and the related proceedings [may] be presented

¹ The trial court did not expressly state in its order that this issue (or any other issue) is a controlling question of law as to which there is a substantial ground for difference of opinion. Nonetheless, we presume for the sake of argument that the trial court sufficiently identified this issue as the purported controlling question of law on which there is a substantial ground for difference of opinion.

to support claims subsequently arising under the amendments of the applicable law.”

Because the record does not show that the trial court ruled on the purported controlling question of law identified by the trial court, we cannot grant the City’s petition for permissive interlocutory appeal.² *See De La Torre*, 2015 WL 9308881, at *1. Accordingly, we deny the City’s petition for permissive interlocutory appeal.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.

² The City states the issue for interlocutory appeal includes the three following “[s]ubsidiary issues”: (1) whether the evidence is barred by res judicata and/or collateral estoppel; (2) whether evidence presented in the prior case shows Proler not to have a disability; (3) whether there is sufficient evidence to support Proler’s burden to prove his disability, and, if so, whether that claimed disability is covered by Chapter 21 of the Texas Labor Code. Presuming for the sake of argument that these three issues properly could be considered subsidiary issues subsumed by the purported controlling question of law identified by the trial court, at most, that would mean that the trial court ruled on the first subsidiary issue, but, even in that event, the trial court still would not have ruled on the entire purported controlling question of law the trial court identified.