



Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00160-CV

IN RE Steven Marcus and Pamela Denise **PAYNE**

Original Mandamus Proceeding¹

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: July 8, 2020

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Relators, Steven and Pamela Payne, assert the trial court abused its discretion by granting a motion to exclude the testimony of their damages expert. We agree and conditionally grant the petition for writ of mandamus.

BACKGROUND

The Paynes contracted with a general contractor, CK Creations, L.P. (“CKC”), to build a house on the Paynes’ property in Medina County. CKC entered into a subcontract with R.D. Buie Enterprises Inc. d/b/a Buie Lumber Company (“Buie”) to furnish construction goods to be installed by CKC as improvements on the property.

¹ This proceeding arises out of Cause No. 17-08-24367-CV, styled *R.D. Buie Enterprises Inc. dba Buie Lumber Co. v. CK Creations, L.P., et al.*, pending in the 38th Judicial District Court, Medina County, Texas, the Honorable Donna S. Rayes, Jr. presiding.

When CKC did not pay Buie, Buie filed a mechanic's lien in the Medina County real property records and sued CKC and the Paynes. CKC filed a cross-claim against the Paynes alleging they failed to make draw payments under the construction contract. The Paynes filed a cross-claim against CKC and Buie and third-party claims against other individuals and entities.

During discovery, the Paynes designated Robert Powers as both a fact and expert witness. The Paynes anticipated calling Powers as an expert on the defects, deficiencies, and damages asserted by the Paynes and his assessment of the construction at the house. CKC filed a motion to exclude Powers' expert testimony on several grounds, including that (1) he was not qualified and (2) his testimony was not relevant or reliable. The trial court conducted a hearing on the motion. At the end of the hearing, the trial court stated Powers (1) was qualified to render an opinion, and (2) "the methodology exists to allow an expert to render an opinion on whether work has been done in a good and workmanlike manner and whether work has been done in accordance with the plans and specifications that are used by the expert in rendering his opinion." However, the trial court concluded Powers

has not used that methodology in this particular case. I think his opinion is based on a mixture of methodologies. One being a conceptual estimate, another being owner satisfaction. I think he has mixed in his opinion both good and workmanlike manner and what the owner desired. I think that interrelated in his opinion are cost estimates that would be needed to complete portions of the project. And I further find that his cost estimates are a guarantee not to exceed, which is not the methodology called for in rendering the opinion. So I grant the motion to exclude.

On September 13, 2019, the trial court signed an order excluding Powers' testimony and other evidence "with regard to damages." On March 13, 2020, the Paynes filed a petition for writ of mandamus asserting the trial court abused its discretion by excluding Powers as an expert on damages thereby effectively denying them the opportunity to present their claim for a jury determination. CKC filed a response arguing (1) the petition is barred by laches given the Paynes' unexplained six-month delay in filing their petition, (2) the trial court did not abuse its discretion

in striking Powers' testimony, and (3) mandamus relief is improper because the Paynes have an adequate remedy at law. We first address CKC's argument that the Paynes' petition is barred by laches.

LACHES

Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles, including the principle that equity aids the diligent and not those who slumber on their rights. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). To invoke the equitable doctrine of laches, the moving party ordinarily must show (1) unreasonable delay; and (2) a good faith and detrimental change in position because of the delay. *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (orig. proceeding) (per curiam).

Here, the trial signed its order excluding Powers' testimony on September 13, 2019. The Paynes filed their petition for writ of mandamus on March 13, 2020—six months later. We agree the delay was unreasonable. However, CKC must also show a good faith and detrimental change in position because of the delay. CKC first contends it agreed to move the trial date from September 23, 2019 to April 20, 2020, based on the Paynes' attorney's representations during a September 13, 2019 hearing that the Paynes were preparing a petition for writ of mandamus to be filed the next Monday (September 23, 2019). The Paynes never filed that petition. CKC contends that if it had known the Paynes would not file the petition, CKC would not have agreed to move the September 23, 2019 trial setting. Second, CKC contends it suffered substantial harm by not being able to return to work on the now-deteriorating construction project and being deprived of their remaining draws on the contract while still paying their vendors.

CKC does not explain how they were harmed by moving the trial six months except for their unsupported contention that they have suffered harm by not being able to return to work on the project. We conclude CKC has not established that the Paynes' request for mandamus relief

is barred by laches. *See Laibe*, 307 S.W.3d at 318 (concluding real party in interest did not demonstrate “a detrimental change in position between the time the motion for reconsideration was denied in the trial court and the filing of the mandamus petition in the court of appeals”); *see also In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 524 (Tex. 2002) (orig. proceeding) (rejecting argument that unreasonable delay barred mandamus relief, in part because “plaintiffs have failed to show how the delay has prejudiced them in any way”); *Peterson, Goldman & Villani, Inc. v. Ancor Holdings, LP*, 584 S.W.3d 556, 569 (Tex. App.—Fort Worth 2019, pet. denied) (“Appellees offered only speculation about missed opportunities for discovery. This does not suffice to raise a fact issue as to the “extraordinary” circumstances required for laches.”); *In re Jones*, 12-19-00354-CV, 2019 WL 7373848, at *7 (Tex. App.—Tyler Dec. 31, 2019, orig. pet.) (mem. op.) (noting Estate offered no evidence to support its contention that delay “prejudiced the Estate . . . in the conduct of its business”).

Having determined laches does not bar mandamus relief, we turn next to whether the Paynes have shown themselves entitled to such relief.

MANDAMUS STANDARD OF REVIEW

Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion when there is no other adequate remedy at law. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). A trial court has no “discretion” in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (citation omitted).

Appellate courts will not intervene to control incidental trial court rulings when an adequate remedy at law exists. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig.

proceeding); *Walker*, 827 S.W.2d at 840. Therefore, a trial court's ruling on the admissibility of expert testimony is commonly reviewed on direct appeal. *See, e.g., Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996) (reviewing on direct appeal trial court's ruling on admissibility of testimony by plaintiff's only causation expert). However, an appeal is an inadequate remedy if "a party's ability to present a viable claim or defense at trial is either completely vitiated or severely compromised." *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). With respect to this scenario, a "relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources." *Walker*, 827 S.W.2d at 843.

There is no specific definition that captures the essence of what constitutes an adequate appellate remedy. *See Garza*, 544 S.W.3d at 840. The test as to whether there is an adequate appellate remedy is practical and prudential, is not subject to simple categories or bright-line rules, and requires the careful balancing of jurisprudential considerations. *See Prudential*, 148 S.W.3d at 136. The analysis includes "consideration of the degree to which 'important substantive and procedural rights' are subject to impairment or loss." *Id.*

A. Abuse of Discretion

The Paynes assert the trial court abused its discretion because Powers' testimony and evidence show he followed a proper and reliable methodology in determining the cost to repair CKC's alleged defective construction.

Before admitting expert testimony, a trial court must be satisfied that three conditions are met: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the factfinder in deciding the case. *See TEX. R. EVID. 702*. Here, the trial court determined Powers was qualified as an expert and that he

properly described a reliable methodology “to allow an expert to render an opinion on whether work has been done in a good and workmanlike manner and whether work has been done in accordance with the plans and specifications.” However, the court struck his testimony on damages because it concluded Powers failed to follow the described reliable methodology.

At the hearing on the motion to exclude, Powers testified he was asked by the Paynes to determine the condition of the project and provide an estimate to complete the project. When asked to describe what he did with respect to the house, Powers stated he spent sixty to eighty hours at the house, he reviewed the framing of the house, he asked a structural engineer to review the framing of all the beams and everything else to ensure they were adequate, and he brought in other subcontractors to determine the existing conditions and determine what was needed to make any repairs. After this process, he researched the cost of needed materials and prepared an itemized list of “items either performed incorrectly by CKC or not completed to Owner satisfaction.” The cost of the repairs totaled \$311,962. Powers opined the repairs were necessary and the cost of repair was reasonable. He was able to differentiate between his pricing to complete work not done according to the plans and his pricing to repair the work done improperly.

On cross-examination, Powers stated \$1.5 million was reasonable to complete the project. Powers stated that on a normal job, it would be “usual and customary” to obtain three bids for a project. However, in this case he did not do so; instead, he did what he described as “conceptual estimating”:

Conceptual estimating is when you have to go in and you don't have all the answers. . . . So with conceptual you have to assume unknowns because you do not have detailed drawings from the engineers or the architects. All you are dealing with is the basis and then you come in and you try to figure out what it's going to take to fix it. You are wasting people's time to go get three bids on this stuff. These people come in and they do an accurate accounting and then as we go through then we can figure out -- if I was to take over the job we would go through and finalize it with plans and drawings. . . . So, that's why you don't have three bids on everything.

When asked what “unknowns” he had to “assume,” Powers stated that, although he had a copy of the plans for the house, there were items incorrectly built that had to be replaced or repaired. When asked whether “owner satisfaction” was a reliable factor to consider in addressing construction defects, Powers explained “owner satisfaction” included “things not built to plans and specifications.”

Regarding the cost to repair versus the cost to complete the project, early in Powers’ direct examination, the Paynes’ attorney stated, “we are not seeking completion costs at this point in time. We are just dealing with what it is going to take to fix the house . . .” Later the court asked whether Powers was “going to be asked to render an opinion only as to the cost to replace and or repair the work that was not specified, or in addition, is he going to be asked to opine as to the cost of completion?”

Counsel: We are not seeking the cost of the completion. Candidly, Your Honor, when he was out there I said, you know, what would it take to complete. That was a curiosity I had, not something we intend on going forward [with] at this point and time. So we are far afield from what the Robinson Challenge is at this point in time.

The court: I just wanted to make sure I knew what his opinion was going to be on.

Counsel: It’s going to be confined to the [\$311,962].

The court: Okay.

Powers testified his bid was “a guarantee not to exceed.” Powers was not asked to elaborate on what this meant.

At the conclusion of the hearing, the court stated it did not believe Powers used the correct methodology in this case because

- (1) his opinion was based on a mixture of methodologies—a conceptual estimate and owner satisfaction;
- (2) in his opinion, he mixed a good and workmanlike manner of performance with what the Paynes desired;
- (3) cost estimates that would be needed to complete portions of the project were interrelated in his opinion; and

(4) his cost estimates were a guarantee not to exceed, which is not the methodology called for in rendering the opinion.

“An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed.” TEX. R. EVID. 703. “The weakness of facts in support of an expert’s opinion generally go to the weight of the testimony rather than its admissibility.” *Onwuteaka v. Gill*, 908 S.W.2d 276, 283 (Tex. App.—Houston [1st Dist.] 1995, no writ). Also, “[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony.” *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). We conclude the trial court’s concerns about Powers’ opinion on damages are factors for the jury to consider when determining what weight to give his opinions, not the admissibility of the opinions themselves. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 40-41 (Tex. 2007) (holding party’s complaints that opposing expert’s testimony did not consider all relevant facts “go to its weight, not its admissibility.”); *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, 567 S.W.3d 752, 763 (Tex. App.—San Antonio 2018, pet. granted) (“Dr. Grodzin’s failure to take the additional step advocated by Regent Care[—compare summaries prepared by trial counsel with underlying billing records—]goes only to the weight of his opinions, not their admissibility.”). Therefore, the trial abused its discretion by striking Powers’ testimony and other evidence on damages.

B. Adequate Remedy at Law

Although the trial court erred by striking Powers’ testimony and other evidence on damages, the Paynes must also show they lack an adequate remedy at law. They argue that striking their sole expert on damages significantly impairs their ability to present a viable claim at trial; therefore, an appeal is inadequate. CKC counters that the Paynes have an adequate remedy by appeal because their ability to present a viable claim at trial is not impaired based on the Paynes’ designation of both Powers and Beicker Consultants to testify about causation and damages.

The Paynes designated Powers as follows:

If called to testify, Mr. Powers will testify as an expert within the scope of his expertise as a General Contractor of Commercial and Residential homes and regarding his opinions concerning the defects, deficiencies, and damages asserted by Steven Marcus Payne and Pamela Denise Payne and his assessment of the construction at the custom home located at 514 Private Road, Devine, Texas, the subject of this suit. Mr. Powers will also testify as to his observance of the failure to follow the plans and specifications of the custom home. . . .

The Paynes also designated Michael Zezula of Beicker Consultants as follows:

If called to testify, Mr. Zezula will testify as an expert within the scope of his expertise as a Professional Engineer and regarding his opinions concerning the damages asserted by Steven Marcus Payne and Pamela Denise Payne and his assessment of the construction at the custom home located at 514 Private Road, Devine, Texas, the subject of this suit.

Mr. Zezula is an outside retained expert. Discovery is still ongoing, therefore, Mr. Zezula's resume and opinions and the factual basis for his opinions will be supplemented.

According to CKC, Zezula is qualified to testify as a structural engineer on defects when the construction was shut down in 2017 and the Paynes still have the ability to pursue their claims or defenses at trial. CKC asserts that because Powers may still be called as a fact witness and possibly an expert on construction and Zezula is designated as a witness available to testify as to causation, the Paynes have a reasonable opportunity to develop their case. We disagree with CKC's arguments.

The Paynes were required to "establish the effective denial of a reasonable opportunity to develop the merits of [their] case, so that the trial would be a waste of judicial resources." *Walker*, 827 S.W.2d at 843. Generally, this has meant "a denial of discovery going to the heart of a party's case" because that party is then prevented "from developing essential elements" of their claim or defense. *See Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (orig. proceeding). Although Powers as a fact witness and Zezula as an expert witness may present evidence essential to the injury and causation elements of the Paynes' cause of action, the trial court's order prevents

the Paynes from presenting evidence on the element of damages suffered as a result of CKC's alleged defective performance. We, therefore, conclude the Paynes established "the effective denial of a reasonable opportunity to develop the merits of [their] case, so that the trial would be a waste of judicial resources." *Walker*, 827 S.W.2d at 843. Accordingly, they do not have an adequate remedy at law.

CONCLUSION

We conclude the trial court abused its discretion by striking Powers' testimony and other evidence with regard to damages. Therefore, we conditionally grant the petition for writ of mandamus and direct the trial court to vacate its September 13, 2019 "Order Granting Motion to Exclude Expert Witness" no later than fifteen days from the date of this opinion.

Patricia O. Alvarez, Justice