DISSENT and Opinion Filed June 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01058-CV

IN RE OSCAR DAGOBERTO FLORES AND RIVAS TRUCKING SPECIALTY, LLC, Relators

Original Proceeding from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-01721

DISSENTING OPINION

Before Justices Whitehill, Partida-Kipness, and Pedersen, III
Dissenting Opinion by Justice Whitehill

Relators have shown that they have no adequate remedy by appeal regarding the striking of three expert witnesses. Accordingly, I dissent in part from the majority opinion.

I. BACKGROUND

This is a personal injury lawsuit arising from an alleged two vehicle accident.

Plaintiff and real party in interest Jose Salsedo sued relators Oscar Dagoberto Flores and his employer Rivas Trucking Specialty, LLC. Salsedo alleges that he and Flores were both driving trucks southbound on Interstate 35, Flores attempted to

pass Salsedo, and Flores collided with Salsedo when he attempted to switch lanes. Relators deny that any collision occurred.

Relators complain of six trial court orders:

- Orders striking the testimony of three designated experts (Ted Marules, Dr. Michael Gorback, and Dr. Paul Strube);
- Orders striking § 18.001 counteraffidavits by Gorback and Strube; and
- An order allowing Salsedo to amend his petition to assert new claims against Rivas Trucking for negligent hiring, training, and supervision.

Marules is an accident reconstructionist. Gorback is a pain management expert. Strube is a chiropractor. Relators intend to offer their testimony to show that the accident did not occur—directly, through Marules's testimony, and indirectly via Gorback's and Strube's testimony about Salsedo's injuries and medical history.

Salsedo challenged the three experts' qualifications and reliability, and the trial court struck all three experts.

Relators' defense in substantial part is that the alleged accident never happened. That defense in turn relies heavily on three expert opinions, for which the real parties in interest have no contrary experts. Thus, relators' unopposed experts could weigh heavily in what might otherwise be a swearing match between the two drivers.

The majority opinion denies mandamus relief on the sole premise that striking the relators' three experts in this scenario does not present such an egregious deprivation of relators' right to a fair trial that they lack an adequate appellate remedy without considering whether the trial court's conduct amounts to a clear abuse of discretion. But, for the reasons stated below, the majority opinion should conclude that relators lack an adequate appellate remedy and address the clear abuse of discretion standard.

II. DISCUSSION

A. When is appeal an inadequate remedy?

The test for whether an appeal is an adequate remedy for trial court error is a flexible, practical, and prudential one that resists categorization and cannot be reduced to rigid rules. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). We must weigh mandamus review's benefits and detriments in each case. *Id*.

Possible benefits include (i) preserving important substantive and procedural rights from impairment or loss, (ii) providing needed and helpful direction to the law that would prove elusive in appeals from final judgments, and (iii) avoiding the utter waste of time and money resulting from the eventual reversal of improperly conducted proceedings. *Id*.

Possible detriments include (i) undue interference with trial court proceedings, (ii) using appellate resources to decide issues that are important neither

in the particular case nor to the law's development, and (iii) making civil litigation lengthier and more expensive. *Id*.

The supreme court has said that appeal is inadequate when the trial court's error vitiates *or severely compromises* a party's ability to present a viable claim or defense at trial, such that the trial would be a waste of judicial resources. *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding).

For example, an erroneous sanction order excluding certain evidence at trial severely compromised the plaintiff's claim because she would have no realistic way to prove over $180,000 of her claimed $320,000 in medical expenses. *In re Garza*, 544 S.W.3d 836, 842–44 (Tex. 2018) (per curiam) (orig. proceeding); *see also In re Edukid, LP*, No. 05-19-01239-CV, 2020 WL 1283924 (Tex. App.—Dallas Mar. 17, 2020, orig. proceeding) (mem. op.) (appeal inadequate in eminent domain case when trial court erroneously struck property owner's valuation testimony).

B. Do the trial court's orders severely compromise relators' defense at trial?

Yes, because Salsedo has no expert witnesses and the trial court struck relators' experts, the trial will be a swearing match between Salsedo and Flores on pivotal issues when it properly shouldn't be.

We recently said that appeal is typically adequate for errors in excluding expert testimony about a particular damages element. *In re Parks*, No. 05-19-00375-CV, 2020 WL 774107, at *2 (Tex. App.—Dallas Feb. 18, 2020, orig. proceeding)

(mem. op.). But the expert testimony in this case goes far beyond some damages elements.

Starting with Marules. Relators deny that the alleged collision occurred, which would completely defeat Salsedo's claims. Marules is a qualified accident reconstructionist who will support their theory. Without him, this fact will be decided solely on the parties' competing testimony. Excluding Marules's testimony rises to the level of significantly compromising relators' defense, just as excluding a property owner's valuation testimony in an eminent domain case significantly compromised the owner's case even though the owner intended to present other damages evidence as well. *See Edukid*, 2020 WL 1283924, at *3.

Next, Dr. Gorback's testimony supports relators' case on a different basis: he concludes from the intensity, location, and nature of Salsedo's pain that his injuries could not have been caused by a sideswipe collision. He further concludes that Salsedo's pain is consistent with arthritis or a degenerative condition rather than a herniated disk from any kind of impact. Again, erroneously excluding expert testimony that challenges an essential element of Salsedo's case—causation—severely compromises relators' defense and should be corrected by mandamus. *See id*.

Finally, Dr. Strube, a chiropractor, would testify that the evidence is inconsistent with the premise that the accident, if it occurred, caused Salsedo any serious injury. He would explain that Salsedo's failure to seek treatment until a

month after his initial consultation undermines his claim of significant injury because soft tissue injuries generally involve the most swelling and pain in the first forty-eight hours. Although Strube's opinions are not as sweeping as Marules's and Gorback's, under the circumstances relators lack an adequate appellate remedy as to Strube's opinions that sever the causal nexus between Salsedo's injuries and the alleged accident.

Most compelling, however, is the trial court's virtually complete deforesting of Flores's defense by striking all three of his experts when their expertise could assist the jury in making an informed decision by offering guidance in these technical areas beyond the understanding of ordinary jurors.

Based on this record, the trial court's ruling goes to the heart of relators' defense and they lack an adequate appellate remedy. Accordingly, we should analyze whether the trial court clearly abused its discretion in eliminating relators' ability to present their defense. Because the majority opinion doesn't do so, I dissent.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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