Denied 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

MEMORANDUM OPINION

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

In this original proceeding, relators Oscar Dagoberto Flores and Rivas Trucking Specialty, LLC complain of the trial court's July 9, 2019 orders striking the testimony of three of relators' designated experts, striking two counter-affidavits filed pursuant to section 18.001 of the civil practices and remedies code, and granting real party in interest Jose Salsedo leave to amend his petition. Entitlement to mandamus relief requires relators to show both that the trial court has clearly abused its discretion and that relators have no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

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). In that 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 v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding); *see also In re Kan. City S. Indus., Inc.*, 139 S.W.3d 669, 670 (Tex. 2004) (orig. proceeding) ("An appeal is inadequate when it comes too late to correct the court's error without the loss of substantial rights to the complaining party.").

The trial court's ruling on the admissibility of expert testimony is commonly reviewed on direct appeal for an abuse of discretion. *See, e.g.*, *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996) (reviewing trial court's ruling on the admissibility of expert testimony on direct appeal); *see also In re Pilgrim's Pride Corp.*, No. 06-08-00109-CV, 2008 WL 4907589, *2 (Tex. App.—Texarkana Nov. 17, 2008, orig. proceeding) (mem. op.) (denying mandamus relief as to order striking expert testimony because relator had adequate remedy by appeal); *In re Thornton-Johnson*, 65 S.W.3d 137, 139 (Tex. App.—Amarillo 2001, orig. proceeding) (same). This Court recently reaffirmed this principle regarding the review of orders striking section 18.001 counter-affidavits. *See In re Parks*, No. 05-19-00375-CV, 2020 WL 774107, at *2 (Tex. App.—Dallas Feb. 18, 2020, orig. proceeding) (mem. op.) (relator had adequate remedy on appeal for review of order striking section 18.001

counter-affidavit); *see also In re Flores*, 597 S.W.3d 533, 537 (Tex. App.—Houston [1st Dist.] 2020, orig. proceeding) (same). Similarly, a trial court's ruling on whether to grant leave to amend pleadings is generally reviewed on appeal. *See Gunn v. Fuqua*, 397 S.W.3d 358, 377 (Tex. App.—Dallas 2013, pet. denied) (a trial court's ruling whether to allow an amendment to the pleadings will not be disturbed on appeal unless the complaining party clearly shows an abuse of discretion) (citing *Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex. 1980)); *see also European Crossroads' Shopping Ctr., Ltd. v. Criswell*, 910 S.W.2d 45, 53 (Tex. App.—Dallas 1995, writ denied) (reviewing trial court's refusal to consider amended pleading on direct appeal).

Here, relators have not clearly established that the orders complained of have made it impossible for relators to defend the underlying lawsuit or will cause the trial to be a waste of judicial resources. In addition, relators have not shown that the available appellate remedy for review of the rulings will cause relators to suffer "the permanent loss of substantial rights." *See In re Kan. City S. Indus., Inc.*, 139 S.W.3d at 670. In fact, relators provided this Court with essentially no analysis explaining why appeal provides an inadequate remedy here. The only discussion in their petition of the adequate remedy prong of the mandamus standard consisted of the following paragraph at the end of their standard of review:

> As the following argument illustrates, mandamus is appropriate in the instant action because the effect of Respondent's actions is similar to that of a death-penalty sanction. Judge Whitmore, without explanation,

> struck Relators' counter-affidavits, then struck the experts who created them (thereby denying Relators an opportunity to attack causation) along with a qualified accident reconstructionist who establishes there was no accident and no injuries. The result is that Relators can offer the testimony of the driver, Flores, and nothing else, to defend this action. To try this action with these limitations and wait for appellate relief serves no purpose, and this Petition should be granted.

This argument is insufficient for relators to meet their burden of proof on mandamus. But, more importantly, the record does not support it. The order striking these experts is not similar to, nor does it constitute, a death penalty sanction.

A death penalty sanction is one that terminates the presentation of the merits of a party's claims or defense. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 845 (Tex. 1992) (orig. proceeding). This is not a situation like the one that faced this Court in *Edukid* upon which the dissent relies. *In re Edukid, LP*, No. 05-19-01239-CV, 2020 WL 1283924, at *3 (Tex. App.—Dallas Mar. 17, 2020, orig. proceeding) (mem. op.). There, the trial court's order prevented a party from offering an opinion she was entitled to offer under a long-standing rule on an issue she was uniquely qualified to give, that went to the heart of her case. *Id.* That is not the case here. Although relators understandably want these experts to testify because they will bolster relators' theory of the case, their testimony is not relators' entire case and these experts are not uniquely qualified to testify about whether the accident occurred. The drivers, Rivas and Salsedo, and any witnesses to the incident are the most qualified to testify on that issue. The jury may believe Rivas's testimony that the accident did not happen, even without his experts, and Salsedo has no experts

either. The trial court's order does not terminate relators' defense. In fact, the order has trimmed the case to its essence and does not leave relators without an adequate remedy on appeal. Rather, "relators simply face the non-unique burden of having to adjust their trial strategy to accommodate an adverse evidentiary ruling." *In re Flores*, 597 S.W.3d at 537. As a result, "we conclude that relators have not presented a situation involving a 'manifest and urgent necessity,' but rather one involving 'grievances that may be addressed by other remedies.'" *Id.* (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding)).

Based on the record before us, we conclude relators have an adequate remedy on appeal and are not entitled to mandamus relief. *See, e.g.*, *In re Schronk*, No. 10-11-00248-CV, 2011 WL 3850045, at *2–3 (Tex. App.—Waco Aug. 31, 2011, orig. proceeding) (mem. op.) (denying mandamus relief for order striking expert testimony because relator had adequate remedy by appeal); *see also In re SDI Indus., Inc.*, No. 13-09-00128-CV, 2009 WL 781562, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 23, 2009, orig. proceeding) (mem. op.) (per curiam) (same); *In re Pilgrim's Pride Corp.*, 2008 WL 4907589, at *2 (same); *In re Thornton-Johnson*, 65 S.W.3d at 139 (relators had adequate remedy by appeal where relators' other claims or defenses were unaffected by the trial court's order excluding expert testimony). In concluding that relators have an adequate remedy by appeal, we need not address whether the trial court's rulings constitute an abuse of discretion. Accordingly, we deny relators' petition for writ of mandamus. *See* TEX. R. APP. P.

52.8(a) (court must deny petition if the court determines relator is not entitled to the relief sought).

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Whitehill, J., dissenting

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