

Affirm in part; Reverse and Remand in part; Opinion Filed August 28, 2012.

**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-11-00193-CV

MICHAEL MILLER, Appellant

V.

**KARL CARTER AND CLIFFORD CARTER, INDIVIDUALLY AND D/B/A CLIFFORD
CARTER CONSTRUCTION, Appellees**

**On Appeal from the 101st District Court
Dallas County, Texas
Trial Court Cause No. 09-03832-E**

MEMORANDUM OPINION

Before Justices Morris, Moseley, and Lang-Miers
Opinion By Justice Moseley

Appellant Michael Miller appeals from an adverse judgment entered following a bench trial. Appellee Karl Carter sued Miller for conversion of a bulldozer, and Miller brought a breach of contract claim against appellee Clifford Carter. The trial court entered judgment in favor of the Carters on both claims and awarded damages. Miller appealed. In his original appellate brief, Miller argued five issues: the trial court erred by (1) not entering findings of fact and conclusions of law;¹ (2) allowing witnesses who were not timely identified to testify; (3) finding Miller liable for

¹ After this case was submitted, we sustained this issue and ordered the trial court to enter findings of fact and conclusions of law. The trial court did so. We then granted appellant's motion to submit additional briefing.

conversion of the bulldozer and calculating damages; (4) failing to find Clifford Cater, d/b/a Clifford Carter Construction, breached his contract with Miller; and (5) failing to award Miller attorney's fees against Clifford² in the breach of contract action. Additionally, Miller argues three additional issues in his supplemental briefing: (1) the trial court's late-filed findings of fact and conclusions of law are not sufficient to overcome a presumption of harmful error caused by the trial court's initial failure to file findings and conclusions; (2) the evidence was insufficient to support numerous findings of fact entered by the trial court; and (3) the trial court abused its discretion by failing to correctly apply the law. We will refer to these three issues as Miller's sixth, seventh, and eighth issues, respectively.

The background and facts of the case are well-known to the parties; thus, we do not recite them here in detail. Because all dispositive issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.2(a), 47.4. We reverse the trial court's judgment on Miller's breach of contract claim and remand that claim for further proceedings consistent with this opinion. In all other respects, we affirm the trial court's judgment.

Miller and Clifford contracted for Clifford to do some paving work on Miller's property in exchange for \$30,000. As agreed, Miller paid Clifford \$10,000 to start the job and Clifford began working. Clifford brought a Komatsu bulldozer (which he leased from Karl) to the property to assist him with the project.

Clifford failed to complete the project. On May 21, 2008, approximately four months after work began and approximately two months after Clifford ceased working, Miller sent a letter to Clifford declaring a default of the contract and terminating the contract. His letter also stated, "There

² Because Karl Carter and Clifford Carter have the same last name, we will refer to them as Karl and Clifford.

must be a mutual settlement as to advanced costs given Carter Construction before certain tools and equipment can be released from” the property. The bulldozer was one of the pieces of equipment on the property. Karl subsequently went to the property to show proof of ownership and obtain the bulldozer. Miller was not at the property when Karl arrived and Karl spoke to Miller on the telephone. Miller refused to return the bulldozer.

In mid-June 2008, two of Clifford’s employees, Nathaniel Roseburrow and Anthony Jones, attempted to retrieve the bulldozer from the property. Seeing two people attempt to take the bulldozer, Miller’s employee, Juan Serna, called the police who stopped Roseburrow and Jones from taking the bulldozer. Approximately one week later, the bulldozer disappeared from Miller’s property. Miller claimed the bulldozer was stolen. The trial court noted Miller’s claim is “a claim that this Court finds was not credible.”

The trial court concluded Karl owned the bulldozer and had the right to possess it, Miller had no legal claim to retain possession of the bulldozer as security for his desired refund of \$10,000, Miller “exercised dominion and control over the bulldozer to the exclusion of [Karl’s] legal rights,” Miller did not establish a good faith refusal to returning the bulldozer, Miller converted the bulldozer, and the alleged theft of the bulldozer was not an intervening cause of the conversion.

A. Belated Findings of Fact and Conclusions of Law

Although Miller requested that we order the trial court to enter findings of fact and conclusions of law (which we did), in his sixth issue, Miller now argues “the trial court’s dilatory filings” of findings of fact and conclusions of law did not overcome a presumption of harmful error. Under Texas law, harm is not presumed.

When a trial court enters belated findings, “the only issue that arises is whether the appellant was harmed.” *In re E.A.C.*, 162 S.W.3d 438, 443 (Tex. App.—Dallas 2005, no pet.); *see also*

Morrison v. Morrison, 713 S.W.2d 377, 380-81 (Tex. App.—Dallas 1986, writ dismissed). The harm can take two forms: (1) the party is unable to request additional findings, or (2) the party was prevented from properly presenting his appeal. *In re E.A.C.*, 162 S.W.3d at 443; *Morrison*, 713 S.W.2d at 381. Miller fails to show he was harmed. After the trial court entered findings of fact and conclusions of law, Miller requested additional and amended findings of fact and conclusions of law—the trial court denied that request. Additionally, although Miller’s supplemental brief summarily states he was prevented from properly presenting his case on appeal, he fails to explain how the trial court’s delay caused his inability to present his case. We overrule Miller’s sixth issue.

B. Undisclosed Witnesses

In his second issue on appeal, Miller argues the trial court erred by permitting Roseburrow and Jones to testify because they were not timely disclosed as witnesses. A party may not offer the testimony of a person who was not timely identified unless the trial court finds there was good cause for the failure to timely identify the person or the failure to identify the witness will not cause unfair surprise or prejudice to the other party. *See* TEX. R. CIV. P. 193.6(a). The party seeking to call the witness has the burden to establish good cause or lack of unfair surprise or prejudice; if the party cannot do so, the evidence must be excluded. *See Oscar Luis Lopez v. La Madeleine of Tex., Inc.*, 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no petition). We review the trial court’s decision to allow the witnesses to testify for an abuse of discretion. *See PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 718 (Tex. App.—Dallas 2011, petition filed). If the testimony was admitted in error, we reverse “only if the error probably though not necessarily resulted in [the rendition of] an improper judgment.” *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 481 (Tex. App.—Dallas 2011, petition filed) (quoting *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004)).

The trial court heard counsel's arguments on Miller's motion to strike Roseburrow and Jones from the Carters' witness list. The Carters conceded they lacked good cause for failing to timely respond to Miller's Requests for Disclosures. However, the Carters argued the trial court should permit the witnesses to testify because their names were mentioned in depositions and in the Carters' supplemental interrogatory responses served a week before trial. Neither the relevant deposition testimony nor the interrogatory responses are part of the record (and the transcript from the hearing on the motion to strike does not indicate they were offered to the trial court). Without finding lack of unfair surprise or prejudice, the trial court allowed the witnesses to testify because they appeared for trial and it was a bench trial—the trial court noted “I will consider whether I should give any weight to their testimony.”

Having reviewed the record, we conclude the Carters failed to show lack of unfair surprise or prejudice. *See* TEX. R. CIV. P. 193.6(b). Their claims that the witnesses were disclosed in depositions or in late-served interrogatories are without support. Thus, the trial court erred by permitting Roseburrow and Jones to testify.

However, Roseburrow's and Jones' testimony was cumulative of other testimony, and therefore harmless. *See Armstrong*, 145 S.W.3d at 144. Roseburrow testified about the type of work he did on the property, the approximate number of days he worked at the property, weather problems he encountered while doing the work, and the unsuccessful attempt to retrieve the bulldozer. Jones also testified about their unsuccessful attempt to pick-up the bulldozer. Juan Serna, one of Miller's witnesses, also testified about Roseburrow and Jones coming to the property and unsuccessfully attempting to retrieve the bulldozer. Additionally, Clifford testified about Roseburrow's work on Miller's property, the approximate number of days Roseburrow worked at the property, and weather

problems encountered while doing the work. Substantively, Roseburrow's and Jones' testimony was cumulative and, therefore, the error was harmless. *See id.* We overrule Miller's second issue.

C. Conversion

In his third issue, Miller argues the trial court erred when it found him liable for converting the bulldozer and when it calculated damages. Miller's third issue includes three arguments: (1) the Carters failed to satisfy the elements of conversion, specifically the evidence did not show Karl was entitled to possess the bulldozer or Miller exercised dominion and control over the bulldozer in an unlawful manner to the exclusion of Karl; (2) the affirmative defense of good-faith refusal to return the bulldozer applied to Miller; and (3) the affirmative defense of a superceding act of an unknown criminal applied to Miller. Miller reasserts these arguments in his seventh issue.

In his brief, Miller acknowledges he sent the May 2008 letter stating he was going to hold the equipment left on his property until the parties "reached a mutual settlement regarding the \$10,000.00 cash." However, he argues Karl did not have a right to possess the bulldozer because he leased the bulldozer to Clifford. Additionally, Miller asserts he did not exercise dominion and control over the bulldozer to Karl's exclusion because Miller was not present when Karl went to the property to show Karl's ownership of the bulldozer or when Roseburrow and Jones attempted to take the bulldozer and were stopped by the police.

Karl testified he went to Miller's property on or about May 1, 2008. Because Miller was not present, he spoke to Miller on the phone. Karl testified:

I talked to Mr. Miller on the phone and said, "Sir, do you have my Komatsu dozer model D39-1 and serial number 96161?"

He said, "Yes, I got it."

I said, "Sir, it's mine."

He said, "I don't give a damn whose it is. You are not getting it back."

I said: "Why, sir?"

He said: "There is a lien on it."

I said: “Sir, you cannot put a lien on my property.”

He said: “Watch me.”

I said, “I want to get my dozer back.”

And he told me I’m shit out of luck.

To establish a claim for conversion, a plaintiff must prove: (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff’s rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366 (Tex. App.—Dallas 2009, pet. denied).

Miller asserts Karl did not meet the first and second factors of conversion. As to the first, it is uncontested that Karl owned the bulldozer and Karl leased the bulldozer to Clifford. By showing ownership of the bulldozer, Karl satisfied the first element of the conversion cause of action. *See generally id.*; *Burns v. Rochon*, 190 S.W.3d 263, 268-69 (Tex. App.—Houston [1st Dist.] 2010, no pet.). As to the second, third, and fourth elements, Karl’s testimony about the parties’ telephone conversation and the May 2008 letter independently show Miller exercised control over the bulldozer to the exclusion of its rightful owner. The telephone conversation also showed Karl demanded return of his property and Miller refused.

1. Qualified Good Faith Refusal

Miller next argues his refusal to return the dozer was a qualified good faith refusal. Miller claims the May 2008 letter stating he was retaining the equipment (which included the bulldozer) until the parties reached a “settlement regarding the \$10,000.00 cash” was made in good faith and Serna’s refusal to allow Roseburrow and Jones to remove the bulldozer (by calling the police) also was in good faith because Serna thought the men were stealing the bulldozer.

Qualified refusal is a defense to conversation. *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.). “Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, and which are imposed in good faith, and in recognition of the rights of plaintiff, it will not serve as a sufficient basis for an action for conversion. Whether a conversion defendant acted in good faith and upon reasonable grounds under the circumstances is a question for the jury.”³ *Id.* (quoting *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex. App.—Austin 2004, no pet.)) (internal quotations and citations omitted). The trial court found, “There is no evidence that Mr. Miller had a good faith question concerning the right of Mr. Karl Carter or his agents to reclaim possession of the bulldozer.” On appeal, Miller concedes that whether a refusal was made in good faith is a fact question, but does not point to any evidence in the record to refute the trial court’s conclusion. The evidence shows Karl asserted his ownership to the bulldozer and Miller refused to return it even though he lacked grounds to keep it. We conclude the evidence was sufficient to support the trial court’s conclusion that Miller did not establish a good faith refusal. *See generally Burns*, 190 S.W.3d at 269-70.

2. Superseding Cause

³ Because this case was tried to the bench, the judge, not a jury, acted as the finder of fact. *See Thornton v. Dobbs*, 355 S.W.3d 312, 315 (Tex. App.—Dallas 2011, no pet.).

Miller also challenges the trial court's failure to find in his favor on his defense that the alleged theft of the bulldozer was a superceding act absolving him from liability for conversion. In its findings of fact, the trial court found, "Michael Miller intentionally committed conversion of the bulldozer by retaining possession of it on May 21, 2008, and by refusing to surrender possession of it when Karl Carter made his demand" Whether Miller converted the bulldozer on May 21, 2008, or when he verbally refused Karl's demand to return it is immaterial to this analysis. Both of those events occurred *before* the bulldozer disappeared.⁴ Therefore, the theft was not a superceding act absolving Miller of liability. *See generally Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006); *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex. 1999).

3. Mitigation of Damages

Finally, Miller argues the trial court erred by not concluding Karl failed to mitigate his damages because Karl did not file an insurance claim for theft of the bulldozer. Even if Karl had filed an insurance claim, any proceeds he would have received would not have mitigated the damages assessed against Miller—such an off-set would have been precluded by the collateral source rule. *See Haygood v. De Escabedo*, 356 S.W.3d 390, 394-95 (Tex. 2012) ("the [collateral source] rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from someone else—a collateral source. Thus, for example, insurance payments to or for a plaintiff are not credited to damages awarded against the defendant."). Thus, the trial court did not err by not crediting the amount Karl would have received from his insurer against the damages awarded for conversion.

We overrule Miller's third and seventh issues.

D. Breach of Contract

⁴ Miller testified his conversation with Karl occurred after the bulldozer was stolen. As the sole judge of a witness's credibility, the trial court was free to believe Karl's testimony (that the conversation occurred about May 1, 2008, before the bulldozer disappeared) instead of Miller's. *See Coldwell Banker Whiteside Assocs. v. Ryan Equity Partners, Ltd.*, 181 S.W.3d 879, 894 (Tex. App.—Dallas 2006, no pet.) (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003)).

In his fourth, fifth, and eighth issues, Miller asserts the trial court erred by concluding Clifford did not breach the parties' contract (fourth and eighth issues) and erred by failing to award attorney's fees for prevailing on his breach of contract claim (fifth issue). The trial court's conclusion of law number nine states: "On the counterclaim of breach of contract filed by Michael Miller against Clifford Carter, Third-Party defendant, the court finds in favor of Clifford Carter, and orders that Michael Miller take nothing against Clifford Carter."

We review the trial court's conclusions of law de novo. See *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Fulgham v. Fischer*, 349 S.W.3d 153, 157-58 (Tex. App.—Dallas 2011, no pet.). We independently evaluate the trial court's conclusions of law to determine whether the trial court correctly drew the legal conclusions from the facts. See *Waler v. Anderson*, 232 S.W.3d 899, 908 (Tex. App.—Dallas 2007, no pet.); see also *BMC Software*, 83 S.W.3d at 794. We will reverse the trial court's judgment only if the conclusions are erroneous as a matter of law. See *Wells Fargo Bank N.W., N.A. v. RPK Capital XVI, L.L.C.*, 360 S.W.3d 691, 699 (Tex. App.—Dallas 2012, no pet.) (citing *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 736 (Tex. App.—Dallas, 2007, pet. denied)).

To prevail on his breach of contract claim, Miller needed to prove: (1) the existence of a valid contract, (2) Miller's performance or tendered performance, (3) Clifford's breach of the contract, and (4) damages as a result of the breach. See *Paragon Gen. Contractors, Inc. v. Larco Const., Inc.*, 227 S.W.3d 876, 882 (Tex. App.—Dallas 2007, no pet.). The trial court found Miller and Clifford entered into a contract pursuant to which Miller agreed to pay a total of \$30,000 to Clifford for some paving work; Miller paid Clifford an installment payment of \$10,000 to start the job, which Clifford did by preparing and clear the land; the work was not completed in the agreed time frame; and in the May 21, 2008, letter, "Michael Miller declared a default of the contract and terminated the contract." **T**

evidence at trial also showed the contract was executed on January 10, 2008, and stated the work would take “approximately 7-10 working days.” Clifford testified that during the two months after executing the contract, he worked for approximately 22 days and did not complete the project.

Because he attacks the legal sufficiency of an adverse finding on an issue on which he bore the burden of proof, Miller must show the evidence establishes, as a matter of law, all vital facts in support of his breach of contract claim. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curium). Miller’s claim that Clifford breached the contract is supported by the trial court’s factual findings that a contract existed, Miller performed by making the first installment payment as the parties agreed, and Clifford did not complete the work in the agreed upon time frame.⁵ Although the trial court did not find Miller sustained damages, doing so would have been inconsistent with its conclusion that Clifford did not breach the contract, and Miller testified at trial that he hired another company to complete the work when Clifford failed to do so.

The trial court’s findings of fact, which are supported by the record, do not support its conclusion on this issue. Therefore, we sustain Miller’s fourth and eighth issues and reverse the trial court’s judgment in favor of Clifford on Miller’s breach of contract counterclaim. In light of this reversal, we decline to rule on his fifth issue. We remand the breach of contract claim and request for attorney’s fees to the trial court to determine the amount, if any, of Miller’s damages and the amount, if any, he is entitled to recover for attorney’s fees.

⁵ Clifford was not required to complete the work within the 7-10 working days specified in the contract. The contract does not state time is of the essence and, therefore, we imply a reasonable time for performance. *See CherCo Props., Inc. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 266 (Tex. App.—Fort Worth 1999, no pet.). Reasonableness is determined based on the case’s facts and circumstances. *Id.* Here, Clifford stopped working after two months and Miller waited an additional two months to officially terminate the contract. Failing to complete a project that was supposed to require 7-10 working day in four months does not constitute performance within a reasonable time.

Accordingly, we reverse that portion of the trial court's judgment ordering Miller take nothing against Clifford on Miller's breach of contract claim and remand that portion of the case (including Miller's request for attorney's fees) for further proceedings consistent with this opinion. In all other respects, we affirm the trial court's judgment.

JIM MOSELEY
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

MICHAEL MILLER, Appellant

No. 05-11-00193-CV V.

KARL CARTER AND CLIFFORD CARTER,
INDIVIDUALLY AND D/B/A CLIFFORD
CARTER CONSTRUCTION, Appellees

Appeal from the 101st District Court of Dallas
County, Texas. (Tr.Ct.No. Cause No. 09-
03832-E).

Opinion delivered by Justice Moseley, Justices
Morris and Lang-Miers participating.

In accordance with this Court's opinion of this date, we **REVERSE** that portion of the trial court's judgment finding in appellee's favor on appellant's breach of contract claim and **REMAND** that portion of the case for further proceedings consistent with our opinion. In all other respects, we **AFFIRM** the trial court's judgment.

It is **ORDERED** that appellees Karl Carter and Clifford Carter, Individually and D/B/A Clifford Carter Construction recover their costs of this appeal from appellant Michael Miller.

Judgment entered August 28, 2012.

/Jim Moseley/

JIM MOSELEY
JUSTICE