IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2007 Session

DANIEL E. LONG v. ANDREA ELISE MILLER, ET AL.

Appeal from the Circuit Court for Anderson County
No. A4LA0285 Donald R. Elledge, Judge

No. E2006-02237-COA-R3-CV - FILED SEPTEMBER 21, 2007

This is a breach of contract action filed by Daniel E. Long against R & M Builders, Inc. ("R & M"), the successful bidder on a governmental project to demolish and rebuild the plaintiff's house. The plaintiff claims that R & M performed its services in an unworkmanlike manner and that the company failed to complete several of the contractual requirements. R & M filed a motion to dismiss asserting that the parties had agreed to binding arbitration. The trial court denied the motion and the case proceeded to trial. The jury found that R & M had breached the contract and awarded the plaintiff damages of $15,000. R & M appeals, claiming the trial court erred when it refused to order the parties to arbitration. It also asserts that the trial court erred in excluding certain evidence. The plaintiff argues that this appeal is frivolous. We affirm the judgment of the trial court and conclude that R & M's appeal is frivolous. We remand this case to the trial court with instructions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

C. Patrick Sexton, Oneida, Tennessee, for the appellant, R & M Builders, Inc.

Brandon K. Fisher and Dail R. Cantrell, Clinton, Tennessee, for the appellee, Daniel E. Long.

OPINION

I.

This is a construction lawsuit involving the demolition and rebuilding of the plaintiff's home in Norris. The plaintiff sued Andrea Elise Miller and Richard Miller, individually and doing business as R & M Builders, and R & M. In his complaint, the plaintiff stated that he

entered into a contract with the defendants to "do substantial work on the Plaintiff's home, which was being renovated by the Tennessee Housing Development Agency." The contract price for the project was $46,000. According to the plaintiff,

> [t]he Defendants were provided an extensive set of plans and details which covered the renovations.
>
> The Plaintiffs [sic] would aver that the Defendants breached the contract by failing to comply with the terms that were set forth in the written agreements. The Plaintiff would further show . . . that the Defendants have refused to finish the project despite numerous attempts at getting the Defendant [sic] to do so.
>
> The Plaintiff would further show that the Defendants have breached the Tennessee Consumer Protection Act.
>
> The Plaintiff would further aver that as a result of the breach [by] the Defendants, he has suffered damages, including the cost that it is going to take to finish the work; the cost that it is going to take to repair the substandard work; the time that he has been out for the project not being completed; and the attorney's fees and legal costs that he has had to expend to complete the work. The Plaintiff would further aver that all of this conduct is the fault of the Defendants, and none is the fault of the Plaintiff.

The plaintiff sought compensatory damages in the amount of $100,000, as well as attorney fees pursuant to the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 (Supp. 2006), *et seq*. ("the TCPA").

The defendants answered the complaint and admitted the contract between the plaintiff and the corporate entity, R & M,[1] but denied that there had been any breach of the contract or violation of the TCPA.

R & M filed a motion to dismiss claiming that, pursuant to the policies and procedures of the Tennessee Housing Development Agency ("the Development Agency"), the plaintiff was required to file a grievance with the Development Agency which would then attempt to mediate and resolve the dispute. If mediation was unsuccessful, then any remaining claims were to be arbitrated in accordance with the current construction industry arbitration rules of the American

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1 As noted, in addition to suing R & M Builders, Inc., the plaintiff sued Andrea Elise Miller and Richard Miller individually and dba R & M Builders. The individual defendants filed a motion to dismiss claiming the only proper defendant was the corporation. The motion to dismiss was denied and the issue of whether the Millers should be held individually liable proceeded to trial. The jury found in favor of the Millers on this particular issue. Accordingly, the claims against the individual defendants were dismissed following the jury's verdict. The dismissal of the claims against the individual defendants is not an issue on appeal. We have omitted summarizing the trial testimony of Andrea Elise Miller and any other testimony pertaining to whether the Millers could be held liable in their individual capacities. For the remainder of this opinion, any references to "R & M" refers solely to the corporate entity.

Arbitration Association. R & M maintained that due to the mandatory arbitration clause, the plaintiff did not have standing to proceed with this lawsuit and should be required to comply with the terms of the arbitration agreement.

The grievance procedure contained in the contract between the plaintiff and R & M provides as follows:

> **Grievance Procedure**
>
> Disputes between the HOMEOWNER, Grantee and CONTRACTOR may arise from time to time during the life of the rehabilitation project. In those instances where a mutually satisfactory agreement cannot be reached between the parties, the grievance procedure should be followed. . . .
>
> Issues relating to complaints about the performance of the rehabilitation contract should proceed in the following manner:
>
> All claims or disputes between the HOMEOWNER and CONTRACTOR arising out of or related to the work shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association then obtaining, unless the parties mutually agree otherwise. The HOMEOWNER and CONTRACTOR shall submit all disputes or claims, regardless of the extent of the work's progress to (name of arbitrator) unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to this Remodeling and Construction Agreement, and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator shall be final, and judgement may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. . . .

(Bold print and capitalization in original).

Following a hearing, the trial court entered an order denying R & M's motion. The order offers no explanation as to why the motion was denied. This Court has not been provided with a transcript from that hearing, so we are unable to ascertain why the trial court did not order the parties to arbitration.

The case proceeded to a jury trial in August 2006. The plaintiff testified that his primary employment was as a biology teacher at various local high schools. The plaintiff is diabetic "with just about every complication you can get with diabetes" including vision and hearing problems, as well as heart and lung problems.

The plaintiff's house was originally built in 1933, but, by 2003, the house was considered substandard. After R & M successfully bid on the project, the plaintiff's existing house was demolished and a new house was built. The plaintiff testified to numerous problems with the new house:

> The kickboards under one of the cabinets [were] not there. The cabinet drawers won't open and close. The stove has caught fire three times, and I'm afraid to use the oven. I've had to call the fire department twice for – lights went out and there was a smell of something cooking. And things just kept piling on.
>
> * * *
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> The cabinets don't work properly . . . [and] the drawers don't close all the way. The doors don't latch. Some of them do, but some of them don't. The refrigerator is not the refrigerator that was called for [in the contract]. . . . The stove was supposed to have . . . a clock. It doesn't. I've had three fires with the burner. One of them was so hot that it melted copper off of a copper-bottom stainless steel pan. . . . So I have one burner that I can cook on.

The plaintiff described the driveway as a "ramp with a few rocks in it." When the project was complete, there was broken glass and concrete "everywhere" and the plaintiff removed two one-gallon buckets of broken grass from the yard. According to the plaintiff, the foundation on the porch is cracked and the porch sags in the middle. The plaintiff also described a drainage problem and the accumulation of water in the crawl space under the house. The toilet installed in the house is not a handicap toilet and grab bars were not installed. The bathroom sink has separated from the wall, and the kitchen door fell off.

The plaintiff called Chad Carmichael as a witness. Carmichael owns Carmichael Custom Homes and is a general contractor licensed by the State of Tennessee. Carmichael inspected the plaintiff's house at the request of the plaintiff's attorneys. When Carmichael arrived at the plaintiff's house, he had to park his car in a neighbor's driveway because there was no driveway access to the plaintiff's house. There was some gravel on the plaintiff's property, but no driveway. Carmichael estimated that it would cost approximately $3,500 to put a driveway on the plaintiff's property, which estimate included the cost of removing a tree stump. Carmichael also noticed there was no "positive drain flow" and "when it rains, the water has nowhere to flow except directly up against the house or in the crawl space." Repairing the drainage flow problem would require the plaintiff to bring in a lot of dirt and have proper landscaping done. Other problems Carmichael noticed were: 1) the stove was improperly wired and new wiring would be required to fix the problems; 2) there were problems with the electrical system on the front porch; 3) the door into the crawl space did not operate properly; 4) a lot of construction debris was left in the plaintiff's yard; 5) there were no shelves in the laundry room; 6) the painting of the interior of the house "wasn't done very nicely" and the kitchen and bathroom were painted with flat paint, as opposed to semi-gloss paint, and flat paint is extremely porous and "helps the

growth of mold"; 7) the tub did not drain properly, taking 20 to 30 minutes to drain; 8) the water lines were not wrapped with insulation; 9) the faucets were not Delta or an equivalent brand, as required by the contract; 10) a handicap toilet was not installed and neither were grab bars, and in order to install the grab bars properly, the walls likely would have to be torn out; and 11) the porch was sinking. Carmichael concluded that it would cost the plaintiff $27,810 to complete all of these repairs to his house.

After the plaintiff rested, the defendants called Sam Kidd as their first witness. The plaintiff objected to the witness's testimony, claiming the sequestration rule had been violated. A voir dire examination was conducted outside the presence of the jury to enable the trial court to determine whether Kidd's testimony should be allowed. Kidd testified that he had lunch with the Millers and their attorney. Kidd then testified, in part, as follows:

> THE COURT: Did anyone, while you were with Mr. Miller, or anyone else with Mr. and Mrs. Miller and [their attorney] Mr. Sexton, talk to you about what witnesses had testified to today?
>
> THE WITNESS: I don't remember, to be honest with you. Basically, we talked about the contract, the work write-up. And as far as I know, that's it. I couldn't swear. I'm not going to say a hundred percent that we didn't.
>
> * * *
>
> THE COURT: Did Mr. Miller or Mr. Sexton talk to you about Chad Carmichael talking about his looking at this home that's the subject of this litigation?
>
> THE WITNESS: Yes, he did.
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> THE COURT: He did talk to you about that?
>
> THE WITNESS: Yes, he did. . . . They told me about what he had said – about his testimony about the size of the wiring on the stove.

In light of Mr. Kidd's admission that the Millers and/or their attorney talked to him about Carmichael's trial testimony, the trial court concluded that Mr. Kidd's testimony was "spoiled" and he should not be allowed to testify.

The next witness was Mr. Miller, the principal of R & M.[2] This business started out as a sole proprietorship known as R & M Builders before it was incorporated in 2000 or 2001, which was several years before the work was commenced on the plaintiff's house. The renovations to the plaintiff's house were part of a low-income State of Tennessee grant project. Depending upon the year, construction work on low-income grant homes comprised anywhere from 60% to

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[2] Mr. Miller was called as a witness during the plaintiff's case in chief and then again for the defense. We have combined Mr. Miller's testimony on these two occasions in our summary.

95% of R & M's total business. The company is required to submit a bid on the grant projects. Mr. Miller explained that typically 10 to 15 contractors will bid on these projects. The contractors know what their responsibilities will be on a particular project before they make a bid. With regard to the plaintiff's property, R & M was the successful bidder and there was a list of specifications to be completed on the property.

The contract on the plaintiff's house called for the existing home to be demolished and removed, and a new house constructed. The contract required, *inter alia*: 1) a 12-foot driveway; 2) a 32-inch pressure treated crawl door with frame and hardware; 3) topsoil to be placed on the property; 4) the yard to be seeded and straw placed down; 5) closet shelves put in all of the closets and the laundry room; 6) the inside of the house to be painted with three coats of semi-gloss paint; 7) installation of a PVC water line; 8) installation of Delta faucets; 9) installation of an American Standard or equivalent handicap toilet; 10) securing 24-inch grab bars to the wall studding; 11) installation of cabinets in the kitchen; 12) securing the porch posts in concrete; and 13) installation of storm doors on each of the doors.

Mr. Miller testified that he was aware of all of the above requirements when R & M bid $46,000 on the project. Mr. Miller acknowledged that the requirements of the contract were to be completed within 90 days and that the work was to be done in a workmanlike manner. After the work on the plaintiff's house was completed, there was to be a final inspection which had to be passed before R & M would be paid. There was a final inspection on the plaintiff's house, the inspection was satisfactorily completed, and R & M was thereafter paid. Mr. Miller testified that after the project was completed, he returned to the plaintiff's house 3 times to make repairs. The last time he returned to the plaintiff's house was in April 2004. The lawsuit was filed about a month later.

Mr. Miller testified that the electrical system in the plaintiff's house was up to code and passed inspection by the building inspector. With regard to the driveway, Mr. Miller stated "we encountered some soft soil, so when you do that, you dig it out until you hit solid ground, and then you backfill with gravel." Mr. Miller noticed no problems with the wiring in the kitchen and believes the problem the plaintiff is experiencing is from a defect in the stove. When Mr. Miller completed the work on the plaintiff's house, all of the cabinet doors and drawers were working properly. Mr. Miller testified that the toilet was handicap accessible and the shower came equipped with a plastic bar. Mr. Miller was questioned in some detail about other requirements in the contract and he testified that the house as completed was in compliance with the contractual requirements and specifications. Mr. Miller stated that several change orders had been approved by the City of Norris which altered the original contract somewhat, including the elimination of grab bars in the shower. Mr. Miller added that he first learned of many of the plaintiff's complaints when the plaintiff's deposition was taken in this case.

When the defense completed its case, the jury was excused for the day. Prior to the jury leaving, the trial court informed the members that, the next morning, they would hear closing arguments followed by the court's instructions.

The next morning, defense counsel sought to have the proof reopened, asserting that at 8 o'clock that very morning, he obtained from the City of Norris several of the change orders

mentioned by Miller in his testimony. Defense counsel sought to question Mr. Miller about the various change orders. When asked why he had not obtained this information at any time during the discovery process or during the two years that the case was pending, counsel stated he only became aware of their existence after court adjourned the previous day. The trial court denied the request to reopen the proof.

The jury returned a verdict against R & M in the amount of $15,000. The jury also found there had been no violation of the TCPA.

II.

R & M appeals and raised three issues, which we take verbatim from its brief:

> 1. Whether the Trial Court erred by dismissing the Defendant['s] Motion to Dismiss based on the contractual grievance and arbitration procedure[.]
>
> 2. Whether the Trial Court abused its discretion by excluding the Defendant['s] witness under Tennessee Rule of Evidence 615 when other means were available[.]
>
> 3. Whether the Trial Court should have allowed the Defendant[] to offer additional evidence to the Jury prior to closing arguments[.]

The plaintiff asserts, as a separate issue, that the appeal from the trial court's denial of R & M's motion is not timely and that its appeal should be dismissed for this reason. As to the evidentiary issues, the plaintiff maintains that the trial court did not abuse its discretion. The plaintiff asserts that this appeal is frivolous and that he should be awarded damages pursuant to the frivolous appeal statute, T.C.A. § 27-1-122 (2000).

III.

Our standard of review as to whether the trial court erred when it refused to order arbitration is set forth in ***Rosenberg v. BlueCross BlueShield of Tennessee, Inc.***, 219 S.W.3d 892 (Tenn. Ct. App. 2006):

> As a general rule, a court's enforcement of an arbitration provision is reviewed *de novo*. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 497 (6th Cir. 2004). A trial court's order on a motion to compel arbitration addresses itself primarily to the application of contract law. We review such an order with no presumption of correctness on appeal. *See Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 356 (Tenn. Ct. App. 2001); *see also Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). . . .

Id. at 903-04.

With regard to R & M's evidentiary issues, the decision whether to admit or exclude evidence is within the trial court's sound discretion. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 442 (Tenn. 1992). As set forth by this Court in ***Massachusetts Mut. Life Ins. Co. v. Jefferson***, 104 S.W.3d 13 (Tenn. Ct. App. 2002):

> The "abuse of discretion" standard of review calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court has "abused its discretion" when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d at 698; *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Wilder v. Wilder*, 66 S.W.3d 892, 895 (Tenn. Ct. App. 2001); *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001).

Massachusetts Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d at 35.

IV.

The plaintiff correctly argues that R & M's appeal from the trial court's denial of its motion is not timely. In relevant part, T.C.A. § 29-5-319 (2000) provides that:

> (a) An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under § 29-5-303;
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> * * *
>
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

We confronted essentially the same issue in ***Mitchell v. Owens***, 185 S.W.3d 837 (Tenn. Ct. App. 2005). In ***Mitchell***, the plaintiff requested that all of the various claims be arbitrated pursuant to an arbitration agreement between the parties. The defendants filed a motion seeking to stay the plaintiff's request for arbitration; they claimed that the trial court should assume jurisdiction over the entire controversy. The trial court granted the defendants' motion and refused to order arbitration. The appeal from the order refusing to compel arbitration was not made within 30 days. A trial ensued and after a judgment was entered, an appeal was then taken. On appeal, the plaintiff claimed that the trial court erred when it refused to order the parties to arbitrate their claims pursuant to their agreement. We held that the plaintiff's appeal from the trial court's order with respect to his request for arbitration was not timely. We stated:

> The [defendants'] Motion argued that there was no agreement to arbitrate because the arbitration provision in the contract was invalid under § 29-5-302(a). The Court's Order granting that Motion was immediately appealable by [the plaintiff] as an appeal as of right under § 29-5-319.
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> [The plaintiff] failed to assert this right. The appeal granted by § 29-5-319 "shall be taken in the manner and to the same extent as from orders or judgments in a civil action." Tenn. Code Ann. § 29-5-319(b). Under Tenn. R. App. P 4(a), an appeal as of right to the Court of Appeals must be filed within 30 days after the date of entry of the judgment appealed from. Therefore, [the plaintiff] had until January 6, 2003 to file his notice of appeal. [The plaintiff] did not make any such filing by that date. . . .
>
> Most courts have held that when the right to immediately appeal the issue of arbitration is available, failure to immediately appeal

> constitutes waiver of that issue if the opposing party was prejudiced. *Cargill Ferrous Int'l v. SEA PHOENIX MV*, 325 F.3d 695, 700 (5th Cir. 2003) (holding that failure to immediately appeal pursuant to 9 U.S.C. § 16, although not dispositive, can constitute waiver if "participation in litigation prejudiced the other party"); *accord*, *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489-90 (10th Cir. 1994); *Transamerica Corp. v. Nat'l Union Fire Ins. Co.*, 45 F.3d 437, Nos. 93-55490, 93-55498, 1994 WL 712173, at *1-2 (9th Cir. 1994); *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, *AFL-CIO*, 37 F.3d 1302, 1303 & n.3 (8th Cir. 1994); *Cotton v. Slone*, 4 F.3d 176, 179-80 (2d Cir. 1993); *Palm Harbor Homes, Inc. v. Crawford*, 689 So.2d 3, 8 (Ala. 1997). *But cf.*, *Colon v. R.K. Grace & Co.*, 358 F.3d 1, (1st Cir. 2003) (refusing to hold a failure to appeal constituted a waiver).

Mitchell, 185 S.W.3d at 839-40 (footnote omitted). This Court in ***Mitchell*** further held that the defendant was prejudiced by the plaintiff's failure to timely appeal the trial court's refusal to compel arbitration. The prejudice arose because of the lapse of time and because the plaintiff spent resources preparing the case for trial through the court system. We observed:

> As the [court in *Cotton v. Slone*, 4 F.3d 176, 179-80 (2d Cir. 1993)] noted, the purpose behind the right to immediately appeal a ruling to deny arbitration would be defeated "if a party could reserve its right to appeal an interlocutory order denying arbitration, allow the substantive lawsuit to run its course (which could take years), and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgment." *Id.* at 180.
>
> Clearly granting [the plaintiff] relief at this juncture, would defeat the purpose of arbitration. "One of the aims of arbitration is to avoid the expense and time involved in litigation. This purpose is not served by compelling arbitration after the litigation is complete." *Stahl v. McGenty*, 486 N.W.2d 157, 159 (Minn. Ct. App. 1992). Section 29-5-319 exists so that the issue of arbitration can be appealed and resolved before litigation begins. *Id*. (interpreting Minn. Stat. Ann. § 572.26, Minnesota's version of Tenn. Code Ann. § 29-5-319, which is based on the same Uniform Arbitration Act and uses identical language).

Mitchell, 185 S.W.3d at 840 (footnote omitted). Consistent with our unequivocal holding in ***Mitchell***, we conclude that R & M waived its right to appeal the trial court's refusal to order arbitration by failing to pursue an appeal within 30 days after entry of the trial court's order denying R & M's motion. Therefore, we need not decide whether the arbitration provision was enforceable. Accordingly, we affirm the trial court on this issue.

The next two issues surround the trial court's exclusion of evidence, specifically: (1) the exclusion of Kidd's testimony due to a violation of the sequestration rule, Tenn. R. Evid. 615; and (2) exclusion of additional proof discovered for the first time after the close of the defendants' case in chief but prior to closing arguments to the jury.

Tenn. R. Evid. 615 provides as follows:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

A trial court has "broad discretion . . . in determining whether to exclude a witness suspected of violating Tenn. R. Evid. 615 . . . ." ***Johnson v. Johnson***, No. M2000-00358-COA-R3-CV, 2001 WL 980737, at *9 (Tenn. Ct. App. M.S., filed August 28, 2001) (citing ***State ex rel. Commissioner v. Williams***, 828 S.W.2d 397, 401-402 (Tenn. Ct. App. 1991)).

Although not mentioned by either party in their briefs, we must also discuss Tenn. R. Evid. 103 which provides as follows:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * *
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

In ***Thompson v. City of LaVergne***, No. M2003-02924-COA-R3-CV, 2005 WL 3076887 (Tenn. Ct. App. M.S., filed November 16, 2005), *perm. app. denied April 24, 2006*, we discussed the critical importance of an offer of proof:

> An erroneous exclusion of evidence requires reversal only if the evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). Reviewing courts cannot make this determination without knowing what the excluded evidence would have been. *Stacker v. Louisville & N. R.R. Co.*, 106 Tenn. 450, 452, 61 S.W. 766 (1901); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); *State v. Pendergrass*, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). Accordingly, the party challenging the exclusion of evidence must make an offer of proof to enable the reviewing court to determine whether the trial court's exclusion of proffered evidence was reversible error. Tenn. R. Evid. 103(a)(2); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn. 1986); *Harwell v. Walton*, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991). Appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); *Shepherd v. Perkins Builders*, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).
>
> As stated, an offer of proof must contain the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, by stipulating to the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence. Neil P. Cohen, et al. *Tennessee Law of Evidence* § 103.4, at 20 (3d ed. 1995). Since we are unable to determine the substance of . . . [the excluded] testimony and whether that testimony would have affected the outcome of the trial, the failure of the defendant to make an offer of proof constitutes a waiver of the right to challenge the exclusion of this testimony. *Hatton v. CSX Transportation, Inc.*, 2004 Tenn. App. LEXIS 412, Tenn. App. No. E2003-01831-COA-R3-CV, 2004 WL 1459391 (Tenn. Ct. App. June 29, 2004).

Thompson, 2005 WL 3076887, at *9. *See also* ***Simpson v. Simpson***, No. E2005-01725-COA-R3-CV, 2006 WL 1735134 (Tenn. Ct. App. E.S., filed June 26, 2006, *no appl. perm. appeal filed*).

Returning to the present case, the record on appeal does not contain an offer of proof with respect to Kidd's excluded testimony or the evidence that would have been presented had the motion to reopen been granted. We have no way of knowing the substance of Kidd's testimony, nor do we know what evidence would have been submitted had the trial court allowed R & M to

reopen the proof. Without this crucial information, we cannot ascertain whether the trial court abused its discretion; we must, therefore, affirm the trial court's evidentiary rulings.

The final issue is the plaintiff's claim that this appeal is frivolous pursuant to T.C.A. § 27-1-122 (2000). In ***Johnson v. Wilson***, No. E2005-00523-COA-R3-CV, 2005 WL 2860182 (Tenn. Ct. App. E.S., filed October 31, 2005), *no appl. perm. appeal filed*, we discussed the frivolous appeal statute, stating:

> Tenn. Code Ann. § 27-1-122 (2000) provides as follows:
>
> > When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.
>
> ***Id***. This statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122). An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success. ***Bursack v. Wilson***, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998); ***Indus. Dev. Bd. v. Hancock***, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995).

Johnson, 2005 WL 2860182, at *4-5.

R & M appealed three issues. The first issue was untimely and waived, and, therefore, had no reasonable chance of success. The second and third issues were waived because R & M failed to make any offers of proof. These last two issues, like the first, had no reasonable chance of success. Therefore, we find that this appeal is frivolous. *See* ***Linn v. Howard***, No. E2006-00024- COA-R3-CV, 2007 WL 208442 (Tenn. Ct. App. E.S., filed January 26, 2007), *no appl. perm. appeal filed*, (finding an appeal frivolous when no transcript or statement of the evidence was filed).

V.

The judgment of the trial court is affirmed, and this cause is remanded to the trial court for (1) enforcement of its judgment; (2) a determination as to the damages due pursuant to the provisions of T.C.A. § 27-1-122 (2000); and (3) collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, R & M Builders, Inc.

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CHARLES D. SUSANO, JR., JUDGE