

2017 WL 4769112

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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Corpus Christi-Edinburg.

IN RE FARMERS TEXAS COUNTY
MUTUAL INSURANCE COMPANY

NUMBER 13-17-00513-CV

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Delivered and filed October 20, 2017.

On Petition for Writ of Mandamus.

Before Justices Rodriguez, Benavides, and Longoria¹

¹ See TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions); *id.* R. 52.8(d) (“When granting relief, the court must hand down an opinion as in any other case,” but when “denying relief, the court may hand down an opinion but is not required to do so.”).

MEMORANDUM OPINION

NORA L. LONGORIA Justice

*1 Real party in interest Luzminda Llasos brought the underlying case against her automobile insurer, relator Farmers Texas County Mutual Insurance Company (Farmers), asserting contractual and extra-contractual claims based on the uninsured/underinsured motorist provisions of her insurance policy. Farmers seeks a writ of mandamus compelling the trial court to: (1) issue a written order granting its motion to sever and abate Llasos's extra-contractual claims and superseding its oral ruling to the contrary; or (2) in the alternative, issue a written order granting or denying the motion to sever and abate. More specifically, by two issues, Farmers contends (1) the trial court abused its discretion by effectively denying its motion to sever and abate, thereby requiring Farmer to prepare for and litigate claims which have not accrued and may be rendered moot by the outcome of the contractual claims; and (2) in the alternative, the trial court abused its discretion by refusing to rule on its motion in a timely

manner, thereby requiring it to prepare for and litigate claims which have not accrued and may be rendered moot by the outcome of the contractual claims. We deny mandamus relief.

I. BACKGROUND

The underlying lawsuit arose from a motor vehicle accident involving plaintiff Llasos and the uninsured driver of another vehicle, Angel Gamboa. Gamboa is not a party to this proceeding. On February 23, 2016, Llasos was traveling westbound on Interstate 2 in Hidalgo County when she began to reduce her speed due to traffic conditions in the lanes ahead of her. Gamboa, who was traveling behind Llasos, failed to control his speed and struck Llasos's vehicle from the rear. Llasos sustained personal injuries and damages as a result of the collision.

On May 12, 2017, Llasos brought suit against her insurer, Farmers, for uninsured motorist benefits pursuant to an automobile insurance policy she had purchased from Farmers. Llasos alleged causes of action for breach of contract, violations of the prompt payment of claims act, and violations of the unfair claim settlement act. See generally TEX. INS. CODE ANN. §§ 541.060, 542.003, 542.058, 542.060 (West, Westlaw through 2017 1st C.S.). She further sought a declaratory judgment that the damages caused by the motor vehicle collision were covered by the insurance policy at issue. Her original petition incorporated written discovery propounded to Farmers consisting of fifteen interrogatories, twenty-six requests for production, and thirty requests for admission.

On June 16, 2017, Farmers filed a motion to sever and abate Llasos's extra-contractual claims from the underlying claim for uninsured motorist benefits. According to relator's motion, Llasos cannot bring an extra-contractual damage claim against Farmers until its contractual liability has been determined, and any separate and distinct causes of action must be severed from the underlying breach of contract case. Farmers argued that severance and abatement were necessary to prevent prejudice and promote judicial economy.

*2 Llasos filed a response and brief in opposition to relator's motion to sever and abate. Llasos contended, inter alia, that severance was not required; prompt payment claims should not be severed from breach of

contract claims; Farmers had made only a “minimal” settlement offer; and Farmers had failed to meet its burden to establish that severance was required.

On September 13, 2017, the trial court held a hearing on the status of the case and on relator's motion to sever and abate. After a non-evidentiary hearing, the trial court took the motion to sever and abate under advisement, ordered the parties to proceed with discovery, and ordered the parties to mediation. With regard to relators' objections to the scope of discovery as inclusive of extra-contractual claims, the trial court instructed the parties to “file a motion and I'll address it either way.” The trial court's rulings were made orally and were not rendered in written format.

This original proceeding ensued. This Court granted temporary relief and requested and received a response to the petition for writ of mandamus from Llasos. See TEX. R. APP. P. 52.4.

II. STANDARD OF REVIEW

Mandamus is an extraordinary remedy. In re H.E.B. Grocery Co., 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. In re Christus Santa Rosa Health Sys., 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. In re H.E.B. Grocery Co., 492 S.W.3d at 302; Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. In re Nationwide Ins. Co. of Am., 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); Ford Motor Co. v. Garcia, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. In re Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

III. SEVERANCE OF CONTRACTUAL AND EXTRA-CONTRACTUAL CLAIMS

In Liberty National Fire Insurance Co. v. Akin, the Texas Supreme Court considered whether the trial court abused its discretion when it denied the insurer's motion to sever a breach of contract claim before proceeding to trial on a bad faith insurance claim. 927 S.W.2d 627, 628 (Tex. 1996) (orig. proceeding). There, the supreme court held that, “in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract,” and therefore a severance may be necessary in some cases involving extra-contractual claims. Id. at 630. Following Akin, numerous intermediate courts of appeals have concluded that mandamus relief is warranted for the refusal to order a severance of contractual claims from bad faith or extra-contractual claims. See, e.g., In re Farmers Tex. Cty. Mut. Ins. Co., 509 S.W.3d 463, 467 (Tex. App.—Austin 2015, orig. proceeding) (conditionally granting mandamus relief and ordering the trial court to abate proceedings and discovery in the extra-contractual action); In re Allstate Cty. Mut. Ins. Co., 447 S.W.3d 497, 498 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (granting mandamus relief and ordering the trial court to abate and sever extra-contractual claims where the insurer did not make an offer to settle the breach of contract claim); In re United Fire Lloyds, 327 S.W.3d 250, 256 (Tex. App.—San Antonio 2010, orig. proceeding) (conditionally granting mandamus relief and ordering the trial court to sever and abate extra-contractual claims); see also In re Geico Advantage Ins. Co., No. 05-16-01249-CV, 2016 WL 7163943, at *1 (Tex. App.—Dallas Dec. 1, 2016, orig. proceeding) (mem. op.); In re Old Am. Cty. Mut. Fire Ins. Co., No. 13-12-00700-CV, 2013 WL 398866, at *1 (Tex. App.—Corpus Christi Jan. 30, 2013, orig. proceeding) (mem. op.). Further, mandamus relief may be warranted when a trial court issues an order compelling discovery related to severed and abated claims arising from uninsured/underinsured motorist insurance coverage. In re Liberty Cty. Mut. Ins. Co., No. 01-17-00363-CV, 2017 WL 4414033, at *1, ___ S.W.3d ___, __ (Tex. App.—Houston [1st Dist.] Oct. 5, 2017, orig. proceeding).

*3 Farmers contends that this case falls within the foregoing parameters and merits extraordinary relief. We disagree. First, the trial court did not deny the motion for severance and abatement, but instead took the motion

under advisement in order for the parties to mediate the case. Farmers has not shown that the trial court's failure to rule at this time constitutes an abuse of discretion. See *In re Tex. Parks & Wildlife Dep't*, 483 S.W.3d 795, 797 (Tex. App.—El Paso 2016, orig. proceeding); *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding); *In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding). Second, based on our review of the trial court's oral rulings,² the trial court has not ordered the parties to proceed with discovery pertaining to extra-contractual claims, but has instead directed the parties to “file a motion” if there are disputes concerning these matters. “Equity generally is not served by issuing an extraordinary writ against a trial court judge on a ground that was never presented in the trial court and that the trial judge thus had no opportunity to address.” *In re Jarvis*, 431 S.W.3d 129, 139 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding). Here, the trial court has neither been presented with motions for protection or to compel discovery with regard to specific discovery requests, nor issued any discovery rulings with regard to such matters. Under the circumstances presented by this record, relator has failed to show entitlement to mandamus relief.

² Mandamus may be based on an oral ruling. See *In re Nabors*, 276 S.W.3d 190, 192 n.3 (Tex. App.—

Houston [14th Dist.] 2009, orig. proceeding); *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding). In order for mandamus review to be appropriate, the ruling must be clear, specific, enforceable, and adequately shown by the record. *In re State ex rel. Munk*, 448 S.W.3d 687, 690 (Tex. App.—Eastland 2014, orig. proceeding); *In re Bledsoe*, 41 S.W.3d at 811; *In re Perritt*, 973 S.W.2d 776, 779 (Tex. App.—Texarkana 1998, orig. proceeding).

IV. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, and the applicable law, is of the opinion that relator has not met its burden to obtain relief. Accordingly, we lift the stay previously imposed in this case. See TEX. R. APP. P. 52.10(b) (“Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided.”). We DENY the petition for writ of mandamus without prejudice.

All Citations

Not Reported in S.W.3d, 2017 WL 4769112