

Conditionally Grant The Writ of Mandamus; Opinion Filed January 4, 2016.



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

No. 05-15-01256-CV

IN RE PROASSURANCE INSURANCE COMPANY, Relator

Original Proceeding from the County Court at Law No. 3

Dallas County, Texas

Trial Court Cause No. CC-11-01461-C

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Bridges, and Justice Stoddart
Opinion by Justice Stoddart

Relator ProAssurance Insurance Company filed a petition for writ of mandamus requesting the Court order the trial judge to vacate her order dated October 5, 2015. We conditionally grant the petition.

The lawsuit underlying this petition for writ of mandamus is a wrongful death case based on claims of medical malpractice. ProAssurance is the defendant's professional liability insurer and is not a party to the case. The petition for writ of mandamus was filed after the trial judge ordered ProAssurance's Chief Claims Officer, a resident of Alabama who has not been involved in the litigation, to appear and show cause "why ProAssurance Insurance Company should not be held in contempt and/or sanctioned for violation of this Court's Special Mediation Order dated May 10, 2011."

BACKGROUND

The trial court has a standing Special Mediation Order that provides in part:

. . . when an insuring or indemnifying entity enjoys the exclusive right to make settlement decisions for a named party, then a representative of such entity with unqualified authority to [sic] a settlement shall be present throughout the mediation.

The lawsuit has been mediated twice. A court-ordered mediation occurred on November 11, 2014, but the case did not settle. A representative from ProAssurance attended the first mediation. The case was then set for trial. After voir dire concluded on September 9, 2015, the parties returned to mediation. Again the case did not settle. ProAssurance sent its director of claims, Laura Eckery, to observe the trial. She also attended the September 9 mediation on behalf of ProAssurance.

The trial judge learned the parties mediated the case on September 9 but failed to settle. Although the judge did not order the second mediation, she believes the September 9 mediation was subject to the requirements of her standing mediation order because “I delayed the entire trial for this. And any mediation I allow to be conducted during trial follows my rules. I do not do faux mediation settlements sessions.” The judge held an impromptu hearing during which she placed Eckery under oath and questioned her about ProAssurance’s organizational structure. Eckery and ProAssurance were not represented by counsel at the hearing. Based on Eckery’s testimony, the trial judge determined, “Darryl Thomas, Chief Claims Officer, is the officer with full and unqualified settlement authority for [ProAssurance].”

After the impromptu hearing, the trial judge instructed plaintiffs’ counsel to file a motion to show cause why ProAssurance should not be held in contempt for disobeying the court’s mediation order. Plaintiffs’ counsel filed the motion, asserting ProAssurance failed to provide a person with settlement authority for the mediation. The motion continued: “Plaintiffs ask that

this Court find ProAssurance in contempt and order just and appropriate sanctions against ProAssurance for their failure to produce a person or persons with ‘unqualified authority to negotiate settlement’ of this case at mediation on September 9, 2015.”

The judge granted the motion and subsequently granted a third amended motion for order to show cause, which is the order that is the subject of this mandamus proceeding. It orders:

Darryl Thomas, Chief Claims Officer of [ProAssurance], shall appear before this Court on Monday, October 19, 2015 at 1:45 PM and show cause as to why [ProAssurance] should not be held in contempt and/or sanctioned for violation of this Court’s Special Mediation Order dated May 10, 2011 that requires, under Rule No. 4 of the Rules for Mediation Pursuant to Court Order in Dallas County Court at Law No. 3, incorporated therein, a representative with “unqualified authority to a settlement” be physically present throughout the mediations in this case.

Thomas, a resident of Alabama, has not been involved in the litigation. He has never resided in Texas and does not own land in Texas. The distance between his residence and Dallas County is in excess of 150 miles.

STANDARD OF REVIEW

To obtain mandamus relief, the relator must show that the trial court clearly abused its discretion and there is no adequate remedy by appeal. *In re Hurley*, 442 S.W.3d 432, 432–33 (Tex. App.—Dallas 2013, orig. proceeding). A trial court has no discretion when determining what the law is or in applying the law to the facts. *In re Winters*, No. 05–08–01486–CV, 2008 WL 5177835, at *2 (Tex. App.—Dallas Dec. 11, 2008, orig. proceeding) (mem. op.) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). “Mandamus relief is proper if a trial court issues an order beyond its jurisdiction.” *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding).

LAW & ANALYSIS

For purposes of this opinion, we will assume without deciding the trial judge had authority to order ProAssurance, a non-party, to attend the mediations. Even so, we conclude the judge lacked jurisdiction to order Thomas, a non-party who did not attend either mediation and who lives outside the trial court's subpoena range, to appear and explain why ProAssurance should not be sanctioned.

A district court lacks power to compel any person, including an officer of a party, to appear as a witness if that person resides more than one hundred fifty miles from the courthouse of the county in which suit is pending and outside the county of suit. *See* TEX. R. CIV. P. 176.3 (“A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served”); *see also Dr. Pepper Co. v. Davis*, 745 S.W.2d 470, 471 (Tex. App.—Austin 1988, no writ).

Because Thomas is a non-party who lives more than one hundred fifty miles from Dallas County, Thomas is beyond the trial court's subpoena power. Thomas is not within the trial court's jurisdiction and the trial judge lacked the power to compel Thomas to appear in her court. *Cf. In re Daley*, 29 S.W.3d 915, 919 (Tex. App.—Beaumont 2000) (non-party who was given settlement authority and voluntarily attended court-ordered mediation subjected himself to the jurisdiction of the trial court in its handling of the administrative and procedural matters concerning the mediation). The trial judge had no extraterritorial power to force Thomas to come to Texas. *See In re Gen. Elec. Co.*, 271 S.W.3d 681, 689 (Tex. 2008) (orig. proceeding) (witnesses in Maine are outside a Texas court's subpoena power); *Dr. Pepper Co.*, 745 S.W.2d at 471 (trial court lacked authority to order the defendant's general counsel, who lived and worked in Dallas, to appear for trial in Austin). The trial judge abused her discretion by ordering Thomas to appear.

The real parties in interest argue that the trial court has inherent power to enforce its mediation powers. Texas courts possess inherent powers that are “separate and distinct” from their jurisdictional powers. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398, 400 (Tex. 1979). Generally, a trial judge has control over only those parties properly before the court. *Haas v. George*, 71 S.W.3d 904, 915 (Tex. App.—Texarkana 2002, no pet.). A court must properly acquire jurisdiction over any person or entity the court seeks to sanction. The real parties in interest do not explain how the trial court can exercise its inherent power against Thomas, who is outside of the court’s jurisdiction, has never participated in any way in either of the mediations in the case, and has not personally interfered with a core function of the trial court.

The trial court’s October 5, 2015 order is void. *See In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605. Accordingly, ProAssurance need not show it did not have an adequate remedy by appeal and mandamus relief is appropriate. *See id.*

DISPOSITION

We conditionally grant the petition for writ of mandamus and order the trial court to vacate its October 5, 2015 order. The trial court is ordered to file a certified copy of its order showing compliance with this opinion with this Court within thirty days of the date of this opinion. Mandamus will issue only if the trial court fails to comply with this opinion and order of this date.

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/Craig Stoddart/

CRAIG STODDART
JUSTICE