DISSENT and Opinion Filed May 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01283-CV

IN RE: BYRON CURTIS COOK, TRADE RARE, L.L.C., JOEL HOCHBERG, UNITY RESOURCES, LLC, MARK THOMAS MERSMAN, AND MARK JOSEPH SOLOMON JR., Relators

On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-04885-2016

DISSENTING OPINION

Before Justices Bridges, Osborne, and Carlyle
Opinion by Justice Bridges

Because I would conclude the trial court did not abuse its discretion in issuing its protective order and relators have not shown they lack an adequate remedy by appeal, I respectfully dissent.

The majority thoroughly explains the underlying facts of this mandamus action; therefore, I include only those facts necessary for my analysis.

The deposition of the non-party lasted more than six hours. While on the telephone with the trial judge during the deposition, counsel for relators made the following statements:

> I would say as a side note, most of this deposition has gone by without a hitch, and the questions we're talking about are [sic] relatively small subset of questions. This was one concern that we addressed at the inception of this deposition. [Counsel for real party] had argued this deposition should never happen because these questions would predominate the deposition. That has not been the case. And as I told [counsel for real party] before we got on the record with you, I don't anticipate that there's more than a few minutes of additional questions on this topic to create the record.

Counsel for relators proceeded to explain why the disputed line of questioning was relevant: questioning related to the non-party's solicitation of investment in entities without meeting his disclosure obligations was relevant to the issue of what duties of disclosure the defendants had in the context alleged by plaintiffs and allegedly occurred in the same timeframe.

Because the record in this case is sealed, I will avoid referring to the materials the parties intended to be confidential where possible and make some references deliberately vague. *See Kartsotis v. Bloch*, 503 S.W.3d 506, 510 (Tex. App.—Dallas 2016, pet. denied). Without going into the specifics of the questioning and the non-party's responses, the sealed record shows that the non-party was questioned about whether he recommended that a party register as a broker or dealer in connection with the sale or purchase of certain properties. The non-party was also questioned about his relationships with various parties over time. The non-party testified he did not "know very many of the details" of the underlying lawsuit and "just [knew] it's going on."

Mandamus is appropriate when the relator demonstrates that the trial court clearly abused its discretion and there is no adequate remedy by appeal. *See In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). On mandamus review of factual issues, a trial court will be held to have abused its discretion only if the relator establishes that the trial court could have reached but one decision, and not the decision it made. *See Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Mandamus review of legal issues is not deferential. A trial court abuses its discretion if it clearly fails to analyze the law correctly or apply the law to the facts of the case. *See In re Cerberus Capital Mgmt.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam).

Here, the questions that were the subject of the underlying protective order represented only "a few minutes of additional questions" in a six-hour deposition, and the non-party was actually questioned about matters counsel for relators said they needed the excluded questions to explore. Further, the non-party knew almost nothing about the underlying lawsuit. Based on this record, I would conclude the trial court did not abuse its discretion in granting the protective order in this case. *See Walker*, 827 S.W.2d at 839 (Tex. 1992).

Further, I would conclude relator has not demonstrated there is no adequate remedy by appeal. The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *See In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Because this

balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). When evaluating the benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). We also consider whether mandamus will "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments." *Id.* Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. *Id.*

The burden is on relators to establish there is no adequate remedy by appeal. *See In re Reece*, 341 S.W.3d at 364. A relator has no adequate remedy by appeal in the discovery context when, among other things, the trial court's discovery order disallows discovery that cannot be made a part of the appellate record, thereby denying the appellate court the ability to evaluate the effect of the trial court's error. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam).

Relators assert that the trial court's protective order prevents them from making the disputed answers and evidence part of any record on appeal, and they therefore lack an adequate remedy by appeal. I would conclude this brief and summary assertion does not establish that appeal is an inadequate remedy. In evaluating an argument regarding a discovery order that disallows discovery that cannot be made a part of the appellate record, "the court must carefully consider all relevant circumstances, such as the claims and defenses asserted, the type of discovery sought, what it is intended to prove, and the presence or lack of other discovery, to determine whether mandamus is appropriate." *Walker*, 827 S.W.2d at 844. Here, relators have not clearly established that other discovery is unavailable to support their claims and defenses. In fact, the record is clear that the questions prohibited by the protective order were only "a few minutes of additional questions" in a six-hour deposition, and relators were able to explore extensively the non-party's relationships with the parties and his familiarity with and participation in the events underlying the case. Under these circumstances, I would conclude relators have not established that they lack an adequate remedy by appeal. Accordingly, I would conclude that relators have failed to establish their entitlement to mandamus relief.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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