

**Petition for Writ of Mandamus Conditionally Granted in Part and Denied in Part
and Memorandum Opinion filed April 27, 2010.**



In The

Fourteenth Court of Appeals

NO. 14-09-00876-CV

**IN RE LIBERTY MUTUAL FIRE INSURANCE COMPANY AND THOMAS G.
HABBEN, Relators**

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

MEMORANDUM OPINION

Relators, Liberty Mutual Fire Insurance Company and Thomas G. Habben (collectively “Liberty Mutual”) filed a petition for writ of mandamus , asking this Court to compel the Honorable R.K. Sandill, presiding judge of the 127th District Court of Harris County, to set aside the portion of his October 12, 2009 order in which he granted, in part, the motion to compel depositions and motion to compel discovery responses, directing Liberty Mutual to respond to written discovery on all extra-contractual causes of action. *See* Tex. Gov’t Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P.

52. Liberty Mutual further requests that we compel the trial court to grant its plea in abatement. We conditionally grant the petition in part and deny it in part.

BACKGROUND

On January 17, 2009, a residential fire took the lives of Mary and Wayne Hurt, who owned the home. Real party in interest, Nathan Hurt, as Independent Administrator of the Estate of Mary Ann Hurt and the Estate of R. Wayne Hurt (“Hurt”), filed a claim with the insurer, Liberty Mutual, for the destruction of the home and its contents. The policy provides up to \$1,000,000 for the dwelling and \$600,000 for its contents. On March 27, 2009, Liberty Mutual issued payment on the undisputed portion of the claim pertaining to the dwelling’s actual cash value in the amount of \$397,978, which is the cost to repair the dwelling (\$565,745.06) less the deductible (\$10,000) and less depreciation that the Estates may recover when repairs are complete (\$160,820.16). Hurt contended that it was a total loss and demanded the policy limits. On April 2, 2009, Liberty Mutual invoked the appraisal clause found in the policy.

On April 13, 2009, Hurt requested a 30-day extension to designate an appraiser to represent his interests. On April 15, 2009, Liberty Mutual agreed to the requested extension. Hurt, however, did not designate an appraiser within the extended time.

On May 27, 2009, Hurt filed suit against Liberty Mutual, alleging that it had wrongfully denied Hurt’s claims for property repairs and underpaid some of the claims by not providing full coverage and by underestimating damages. Hurt brought claims for violations of the Texas Insurance Code, breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices Act (“DTPA”), and fraud. Also, by letter dated May 27, 2009, Hurt’s counsel sent Liberty Mutual notice of representation and demand for payment of \$1,606,762 pursuant to the Texas Insurance Code and the DTPA. Hurt further stated that he would not participate in the appraisal.

On June 26, 2009, Liberty filed a verified plea in abatement, asserting that Hurt had not provided either timely or adequate pre-suit notification in accordance with the Texas Insurance Code and the DTPA and, subject to the plea in abatement, its motion to compel appraisal, motion to compel arbitration, original answer, verified denials, affirmative defenses, and special exceptions. On August 3, 2009, Liberty Mutual filed a second motion to compel appraisal, and set it for a hearing on September 11, 2009. On August 6, 2009, Hurt served notices for the depositions of Thomas Habben and a Liberty Mutual corporate representative and requests for documents. On August 10, 2009, Liberty Mutual moved to quash the deposition notices and requests for documents, arguing that the case should be abated (1) for failure to comply with policy's appraisal provision, and (2) for failure to provide the notice required under the Texas Insurance Code and the DTPA. On August 21, 2009, Hurt filed a motion to compel the depositions and the discovery responses, and a motion to continue the September 11, 2009 hearing. Hurt argued that Liberty Mutual's breach of the policy negated any ability to rely on the provisions of the same policy and its own dilatory conduct waived any right to invoke the appraisal process.

On August 28, 2009, the trial court heard the motions to compel discovery and depositions. On September 10, 2009, Hurt filed a response to the motion to compel appraisal. In addition to reiterating previously raised arguments, Hurt asserted that discovery was necessary to the determination of whether Liberty Mutual had waived any right to appraisal. On September 10, 2009, the trial court granted Hurt's motion to compel depositions and motion to compel discovery responses, directing that Liberty Mutual respond to written discovery and provide possible deposition dates within 20 days of the date of the order. In that same order, the trial court also granted Liberty Mutual's motion to compel appraisal, and ordered completion of the appraisal process no later than October 16, 2009.

On September 17, 2009, Liberty Mutual filed a motion for reconsideration, or in the alternative, clarification of the September 10 order. Liberty Mutual asserted that the case was still subject to the automatic stay because of improper and inadequate notice under the Texas Insurance Code and the DTPA, and that appraisal is a condition precedent to bringing suit.

On September 28, 2009, Liberty Mutual filed an expedited motion for protection and to stay discovery pending a ruling on its motion to reconsider. On October 5, 2009, Hurt filed a motion for contempt against Liberty Mutual pursuant to Rules 215.2 and 215.3 of the Texas Rules of Civil Procedure, contending that Liberty Mutual had failed to comply with the September 10, 2009 order by failing to respond to discovery requests and provide possible deposition dates within 20 days of that order.

On October 7, 2009, the trial court denied Liberty Mutual's motion for reconsideration.¹ On October 8, 2009, Liberty Mutual filed a motion to stay all activity in the case, until 10 days after a ruling on the petition for writ of mandamus that it intended to file.

On October 12, 2009, the trial court signed an amended order on Hurt's motion to compel discovery, granting in part Hurt's motions to compel depositions and compel discovery responses, and directing that Liberty Mutual respond to written discovery regarding all extra-contractual causes of action and provide possible deposition dates by October 16, 2009. The trial court further granted the motion to compel appraisal, requiring completion of the appraisal process no later than October 16, 2009. On October 15, 2009, Liberty Mutual wrote the trial court advising it of the status of the appraisal, specifically that the appraisers could not meet until after October 16, and the parties

¹ The trial court did not abate the case despite Liberty Mutual's requests for abatement.

could not meet the October 16, 2009 deadline. Thereafter, Liberty Mutual filed this petition for writ of mandamus.

STANDARD OF REVIEW

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court clearly abused its discretion and there is no adequate remedy by appeal. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). In reviewing whether appeal is an adequate remedy, we consider whether the benefits of mandamus review outweigh the detriments. *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding).

APPRAISAL PROCESS

Liberty Mutual contends that the trial court erred in denying its motion to abate the case pending the completion of the appraisal process because, under the insurance policy, appraisal is a condition precedent to bringing suit. On March 30, 2010, the appraisal umpire informed the parties of her decision with regard to the appraisal. Therefore, in light of the completion of the appraisal process, Liberty Mutual's request for relief is moot.

NOTICE PURSUANT TO THE DTPA AND INSURANCE CODE

Liberty Mutual contends that the trial court erred in denying the plea in abatement because the Insurance Code and the DTPA require abatement. Liberty Mutual argues

that Hurt's causes of action are abated for 60 days after he has given proper notice pursuant to the Texas Insurance Code and the DTPA.²

Under the DTPA, a plaintiff must give written notice to the defendant at least 60 days before filing suit. Tex. Bus. & Com. Code Ann. § 17.505(a) (Vernon 2002). A defendant who does not receive written notice before being sued may file a plea in abatement not later than the 30th day after filing an original answer. *Id.* § 17.505(c). Abatement is mandatory if, after hearing, the trial court finds that a party entitled to notice did not receive it. *Id.* § 17.505(d). Unless the plaintiff controverts the plea by filing an affidavit before the 11th day after the filing of the plea, the abatement is automatic beginning on the 11th day after the plea is filed, provided the plea in abatement is verified and alleges that the defendant did not receive the required written notice. *Id.* An abatement continues until the 60th day after that written notice is served in compliance with subsection (a). *Id.* § 17.505(e). The purpose of the 60-day notice requirement is to “discourage litigation and encourage settlements of consumer complaints.” *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992) (quoting *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985)).

² At the time Liberty Mutual filed its petition for writ of mandamus, there was no specific written order or a record of an oral ruling in the mandamus record denying its plea in abatement for failure to provide the required notice under the Insurance Code and the DTPA. However, at a hearing on November 13, 2009, the trial court stated with regard to its ruling on Liberty Mutual's plea in abatement:

I thought I ruled on that by allowing you to move forward, but if I need to explicitly rule on it, someone wants to give me an order, I will sign it. My intention was the fact that I allowed things to go forward meant that I ruled on it.

Apparently, the trial court did not sign a written order regarding the sufficiency of Hurt's notice under the Insurance Code and the DTPA at the November 13, 2009 hearing. However, an oral ruling is sufficient if it is shown in the reporter's record. *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding); *In re Vernor*, 94 S.W.3d 201, 206 n.8 (Tex. App.—Austin 2002, orig. proceeding). We conclude that the above statement by the trial court is sufficient to show that the trial court denied Liberty Mutual's plea in abatement.

Similarly, under the Texas Insurance Code, “[a] person seeking damages in an action against another person under this subchapter must provide written notice to the other person not later than the 61st day before the date the action is filed.” Tex. Ins. Code Ann. § 541.154(a) (Vernon 2009). A person who does not receive presuit notice may file a plea in abatement not later than the 30th day after the date the person files an original answer. *Id.* § 541.155(a). The court shall abate the action if, after a hearing, the court finds that the person is entitled to an abatement because the claimant did not provide the required notice. *Id.* § 541.155(b). Abatement of the action is automatic, beginning on the 11th day after the date the plea in abatement is filed, if the plea is verified, alleges that the defendant did not receive the required notice, and is not controverted. *Id.* § 541.155(c). The abatement continues until the 60th day after the date the requisite notice is provided. *Id.* § 541,155(d).

Hurt’s notice letter is dated May 27, 2009—the same day he filed suit against Liberty Mutual. On June 16, 2009, Liberty Mutual filed its verified plea in abatement, averring that Hurt did not provide timely and adequate notice under the Insurance Code and the DTPA. Hurt did not file a verified response to the plea in abatement.

A DTPA notice letter must advise the defendant in reasonable detail of (1) the consumer’s specific complaint, and (2) the amount of economic damages, damages for mental anguish, and expenses, including attorney’s fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. Tex. Bus. & Com. Code Ann. § 17.505(a). Similarly, the Texas Insurance Code requires that the notice must advise the other person of (1) the specific complaint, and (2) the amount of actual damages and expenses, including attorney’s fees reasonably incurred in asserting the claim against the other person. Tex. Ins. Code Ann. § 541.154(b).

Hurt’s two-page notice letter states, in relevant part:

While our investigation is still undergoing [sic], it appears that Liberty Mutual Fire Insurance Company (“Liberty Mutual”) is in violation of the Texas Insurance Code Section 541.01 et seq. (Unfair Competition and Practices) and Texas Business and Commerce Code Section 17.46 et seq. (Texas Deceptive Trade Practices-Consumer Protection Act), and that you have breached the terms of the insurance contract of insurance [sic] with our client’s decedents, Mary Ann and R. Wayne Hurt. Adjusters employed by your company appear to have violated the Texas Insurance Code with respect to their own acts and omissions in the handling of the Hurt Estates’ claims. Because of these violations of law, Mr. Hurt, as Independent Administrator of the Estate of Mary Ann Hurt and of the Estate of R. Wayne Hurt[,] has sustained and continues to sustain significant damages, including but not limited to property damage, diminution of property value, mental anguish, attorney fees and other consequential damages.

Hurt’s notice letter further states the amount of damage to the property and its contents is for the policy limits and makes demand for \$1,205,075.10, i.e., the difference between Liberty Mutual’s alleged underpayment and the policy limits. Hurt also demands attorney’s fees in the amount of \$401,687.68.

In *Richardson v. Foster & Sear, L.L.P.*, the Fort Worth Court of Appeals explained that the notice letter in that case was sufficient:

Richardson’s March 5 letter, while not a model of clarity and eloquence, states in enough detail for this court—knowing nothing of his claims and allegations except what he asserted in his letter—to grasp the basis of his complaints against Foster & Sear, namely, that after agreeing to represent his interests in whatever claims his deceased father had for asbestos exposure, they settled those claims without his permission and refused to divulge his share of the settlement proceeds. As for damages, Richardson specifically states that he seeks \$50,000 in settlement of his claim that Foster & Sear deprived him of \$89,800 in settlement proceeds and his associated mental anguish. He further states that \$250,000 “would be considered fair and reasonable” compensation for his claims for “negligence, professional negligence, misrepresentation, breach of warranty, breach of fiduciary duty, breach of contract,” and his DTPA

claims and associated mental anguish. He also asserts that Foster & Sear failed to advise him “of the limitations on representation of the client, i.e., that attorney’s undertaking the case did not extend to representing the client, survivor, [and] beneficiary,” for which Richardson seeks \$200,000. He summarized his claims with a demand for “[a] total of \$500,000 for all combined legal injuries sustained, that constituted Deceptive Trade Practices.”

257 S.W.3d 782, 786 (Tex. App.—Fort Worth 2008, no pet.) (footnote omitted).

Hurt’s notice letter falls short of the notice letter in *Richardson*, which, “while not a model of clarity,” gave sufficient notice the claims alleged. *See id.* Hurt’s letter merely alleges that Liberty Mutual is in violation of the Insurance Code and the DTPA, that it breached the terms of the insurance contract, Liberty Mutual’s adjusters have violated the Insurance Code by their own acts and omissions, and Hurt has sustained and continues to sustain damages, including property damage, diminution of property value, mental anguish, attorney’s fees, and other consequential damages. Hurt does not provide specific factual allegations supporting his causes of actions for Insurance Code and DTPA violations by Liberty Mutual and its adjusters. Hurt also does not specify the damages sustained due to Liberty Mutual’s actions. Finally, Hurt does not specify the amount of damages for mental anguish. Thus, Hurt’s letter does not state “in enough detail for this court—knowing nothing of his claims and allegations except what he asserted in his letter—to grasp the basis of his complaints against” Liberty Mutual. *See id.*; *see also Boone v. Safeco Insurance Company*, No. H-09-1613, 2009 WL 3063320, at *3 (S.D. Tex. Sept. 22, 2009) (holding notice letter was insufficient under Insurance Code because it contained no factual information about cause of action, but merely “parroted the Texas Insurance Code violations”).³

³ The letter in *Boone* alleged that the defendants were liable for misrepresenting and/or failing to discuss pertinent facts or policy provisions relating to coverage as an issue; failing to acknowledge with reasonable promptness, pertinent communications with respect to the claim arising under its policy;

We hold that Hurt’s notice letter does not provide the requisite notice under the Insurance Code and the DTPA. Therefore, the trial court abused its discretion by not granting Liberty Mutual’s plea in abatement. *See Am. Online, Inc. v. Williams*, 958 S.W.2d 268, 271 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Hines*, 843 S.W.2d at 469) (“When a plaintiff fails to give a statutory notice that is a prerequisite to filing suit and a defendant’s timely request for an abatement is denied, that defendant is entitled to seek review of the court’s denial by mandamus.”); *In re Hodge*, No. 09-05-399-CV, 2006 WL 137428, at *2 (Tex. App.—Beaumont Jan. 19, 2006, orig. proceeding) (mem. op.) (granting mandamus relief and holding trial court abused discretion by denying plea in abatement where plaintiff failed to provide requisite notice under DTPA). Moreover, Liberty Mutual does not have an adequate remedy by appeal and is entitled to mandamus relief. *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding) (explaining that appellate remedy is inadequate, justifying mandamus relief, when parties stand to lose their substantial rights); *Hines*, 843 S.W.2d at 468 (stating that, if trial court denies timely plea in abatement by DTPA defendant complaining of plaintiff’s failure to give required notice, defendant is entitled to seek mandamus relief); *Williams*, 958 S.W.2d at 271 (same as *Hines*); *In re Hodge*, 2006 WL 137428, at *2 (granting mandamus relief as to trial court’s denial of plea in abatement where plaintiff failed to provide requisite notice under DTPA).

failing to adopt reasonable standards for prompt investigation of the claim arising under its policy; not attempting in good faith to effectuate prompt, fair and equitable settlement of the claim submitted in which liability had become reasonably clear; failing to provide promptly to a policyholder a reasonable explanation of the basis in the insurance policy, in relation to the facts or applicable law for denial of the claim or for the offer of a compromise settlement; failing to affirm or deny coverage of a claim to a policyholder within a reasonable time after proof of loss statements had been completed; and refusing to pay the claims without conducting a reasonable investigation. *See Boone*, 2009 WL 3063320, at *3.

CONCLUSION

We hold the trial court abused its discretion by denying Liberty Mutual's plea in abatement because Hurt's notice is not sufficient under the Texas Insurance Code and the DTPA. Accordingly, we conditionally grant the petition for writ of mandamus in part and direct the trial court to grant Liberty Mutual's plea in abatement. The petition is denied in part as moot with respect to the trial court's failure to abate the case pending completion of the appraisal process. The writ will issue only if the trial court fails to act in accordance with this opinion. We lift the stay issued on October 16, 2009.⁴

/s/ John S. Anderson
 Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Frost.

⁴ Alleging that Liberty Mutual's petition for writ of mandamus is groundless, Hurt requests attorney's fees as appellate sanctions under Rule 52.11 of the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 52.11. In light of our granting Liberty Mutual mandamus relief with respect to the trial court's failure to grant the plea in abatement, it is not necessary to address Hurt's request for appellate sanctions.