

Petition for Writ of Mandamus Denied and Memorandum Opinion filed April 27, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00904-CV

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**IN RE CAPITOL COUNTY MUTUAL FIRE INSURANCE COMPANY, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS**

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**MEMORANDUM OPINION**

Relator Capitol County Mutual Fire Insurance Company has filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, Capitol County asks this court to compel the Honorable Mike Miller, presiding judge of the 11th District Court of Harris County, to set aside his September 14, 2009 order in which he directs that (1) parties may not opt out of the previous standing pretrial order for the purpose of appraisal, unless the parties agree to opt out of the order and participate in the appraisal process, and (2) a motion to compel appraisal may not be set for a hearing until after the parties have completed informal discovery and attended mediation pursuant to the standing pretrial order.

Real party in interest Linda Washington is an insured under a policy issued by Capitol County. On October 8, 2008, following Hurricane Ike, Washington submitted to Capitol County a claim for damage to her home. Capitol County adjusted the claim and after determining the amount of loss, paid that sum to Washington. Several months later, on April 8, 2009, Linda Washington filed suit against Capitol County, asserting breach of contract and violations of the Texas Insurance Code. After filing its answer on May 8, 2009, Capitol County wrote Washington's counsel, on May 19, 2009, invoking the following appraisal provision in the policy, in relevant part:

**Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the Described Location is located.

The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

The policy further provides that appraisal is a condition precedent to litigation:

**Suit Against Us.** No action can be brought unless the policy provisions have been complied with and the action is started within two years and one day from the time such cause of action accrues.

Washington responded that Capitol County had waived its right to invoke appraisal under the policy, and voiced her opposition to the use of the appraisal process. Recently, this court granted mandamus relief ordering the Honorable Mike Miller to abate a case in the 11th District Court and to enforce a similar appraisal clause in an insurance policy. *See In re Slavonic Mut. Fire Ins. Assoc.*, No. 14-09-01057-CV, —

S.W.3d—, —, 2010 WL 1236333, at \*3–4 (Tex. App.—Houston [14th Dist.] Apr. 1, 2010., orig. proceeding) (holding that the Honorable Mike Miller abused his discretion by denying insurance company’s plea in abatement and motion to compel appraisal).

On May 26, 2009, the trial court signed a Standing Pretrial Order Concerning Residential Hurricane Ike Cases (the “Standing Order”). In the order, the trial court explains that all residential Hurricane Ike cases filed in Harris County district courts were transferred to the 11th District Court as a Special Docket pursuant to Local Rule 3.2.3(c) of the Civil Trial Division of Harris County.<sup>1</sup> The Standing Order applies to “all lawsuits filed in the District Courts of Harris County, Texas in which any policyholder (the ‘Plaintiff’) asserts a claim arising from damage to residential property caused by Hurricane Ike, against an insurance carrier who issues insurance policies for residential property (the ‘carrier’).” In the Standing Order, the court directs that, within 100 days after the carrier makes an appearance in the lawsuit, or the date of the order, whichever is later, the parties are to agree on a mediator and mediation date. In the Standing Order, the court further directs that within 60 days of the carrier’s original answer or the date of the order, whichever occurs later, the parties will use their best efforts to exchange information and documentation pertaining to the residence, to the extent it exists. Finally, “[i]t is the intent of this Order that if a party elects to participate in mediation or any other provisions of this Order, or elects to opt out, such actions alone will not affect any parties’ statutory or contractual rights.”

On September 14, 2009, acting sua sponte, Judge Miller signed an “Order Regarding Appraisal Requests” (“Appraisal Order”), which reads in its entirety as follows:

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<sup>1</sup> See Harris County (Tex.) Civ. Dist. Ct. Loc. R. 3.2.3(c).

A party in a case subject to the Standing Pre-Trial Order Concerning Residential Ike Cases may not opt out of that Order for the purpose of or as response to a request for appraisal, unless all parties in that case agree to opt out of the Order and to participate in the appraisal process. No motion to compel appraisal will be set for hearing until after the parties have completed informal discovery and mediation pursuant to the Standing Pre-Trial Order.

Capitol County did not move to set aside the Appraisal Order or voice any objection to this order in the trial court.

On October 5, 2009, Capitol County filed a motion to compel appraisal and abate litigation pending completion of the appraisal process; however, Capitol County has never attempted to set this motion for hearing. Capitol County has filed a petition for writ of mandamus in this court, asking that we compel the trial court to vacate the Appraisal Order because, in light of Washington's refusal to participate in the appraisal process, Capitol County is prohibited by that order from setting its motion to compel appraisal for a hearing and enforcing its right to invoke the appraisal process prior to completion of discovery and mediation under the Standing Order. Capitol County argues that the trial court, by its Appraisal Order, effectively has rewritten the appraisal provision of the policy to require discovery and mediation as a condition precedent to appraisal.

To be entitled to the extraordinary relief of a writ of mandamus, the relator generally 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). Capitol County has not presented the arguments that it makes in this mandamus proceeding to the trial court for its consideration. Capitol County has not voiced any objection to the Appraisal Order in the trial court and has not asked the trial court to set aside the Appraisal Order as applied to Capitol County. Equity is

generally 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 Texas Best Staff Leasing, Inc.*, Nos. 01-08-00296-CV & 01-08-00418-CV, 2008 WL 4531028, at \*5 (Tex. App.—Houston [1st Dist.] Oct. 9, 2008, orig. proceeding [mand. filed]) (mem. op.). Mandamus relief generally requires a predicate request for an action and a refusal of that request. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990). However, the requirement that there be a predicate request and adverse ruling is excused when such a request would have been futile and the trial court’s refusal little more than a formality. *See In re Texas Best Staff Leasing, Inc.*, 2008 WL 4531028, at \*5. To determine whether a request would have been futile, appellate courts examine whether the request would have added anything for the trial court’s consideration. *See id.*

Capitol County claims there was no “effective way” for it to challenge the Appraisal Order. Capitol County notes that, under the terms of the Appraisal Order, Capitol County is precluded from securing a hearing on its motion to compel appraisal prior to completion of discovery and mediation under the Standing Order. However, in this mandamus proceeding, Capitol County does not argue that the trial court abused its discretion by refusing to compel Washington to participate in the appraisal process; rather, Capitol County argues that the trial court abused its discretion by issuing the Appraisal Order. Nothing in the Appraisal Order states that the trial court refuses to set for hearing or consider objections, motions to modify, or motions to set aside regarding the Appraisal Order.

Nothing in the record indicates that the trial court would have refused to consider and rule on challenges to the Appraisal Order. If Capitol County had raised its complaint to the trial court that its contractual rights were being violated by the Appraisal Order, the trial court could have modified the Appraisal Order to satisfy Capitol County’s concerns.

Voicing the complaint that the Appraisal Order violates Capitol County's contract rights would have added something for the trial court's consideration. Capitol County has not shown that it would have been futile for it to have raised its objections to the Appraisal Order in the trial court. *See In re Texas Best Staff Leasing, Inc.*, 2008 WL 4531028, at \*5–6.

Capitol County did not present its complaints or otherwise give the trial court an opportunity to correct the alleged deficiencies in the Appraisal Order, and Capitol County has not shown that doing so would have been futile. Accordingly, Capitol County failed to satisfy the requirement of a predicate request and refusal by the trial court, and it is not entitled to the mandamus relief requested in its petition. *See Axelson, Inc.*, 798 S.W.2d at 556 (holding that mandamus relief was not available because trial court had not refused to grant the relief requested by relators); *In re Texas Best Staff Leasing, Inc.*, 2008 WL 4531028, at \*5–6 (holding that mandamus relief was not available as to relief relators had not requested from the trial court); *In re Kenefick*, No. 14-08-00203-CV, 2008 WL 3833842, at \*6 (Tex. App.—Houston [14th Dist.] Aug. 19, 2008, orig. proceeding) (mem. op.) (holding that relator was not entitled to mandamus relief regarding alleged lack of specificity in trial court's order because relator did not show that he presented this complaint to the trial court and that the trial court refused to correct the alleged defects in the order); *see also In re Brown*, 277 S.W.3d 474, 483 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (plurality op.) (stating that mandamus relief was properly denied due to failure to satisfy predicate-request requirement).

For the reasons stated above, Capitol County has not established its entitlement to the extraordinary relief of a writ of mandamus. Accordingly, Capital County's petition for writ of mandamus is denied.<sup>2</sup>

PER CURIAM

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

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<sup>2</sup> Though some of the arguments in Washington's amended motion to dismiss Capitol County's petition for mandamus correspond to the analysis in this opinion, a failure to satisfy the predicate-request requirement results in denial rather than dismissal of the mandamus petition. Therefore, we deny Washington's motion to dismiss.