IN THE
TENTH COURT OF APPEALS

No. 10-19-00107-CV

IN RE JASON PAUL MILLER

Original Proceeding

DISSENTING OPINION

I respectfully dissent in part from the majority's denial of Relator Jason Paul Miller's petition for writ of mandamus. I believe that the portion of the trial court's March 8, 2019 Order on Motion to Compel Discovery and for Sanctions prohibiting Jason from further discovery of any kind while this case is pending should be vacated; therefore, I would conditionally grant in part Jason's petition for writ of mandamus.

> The Texas Rules of Civil Procedure authorize trial courts to impose sanctions for discovery abuses. TEX. R. CIV. P. 215.3 (permitting a court to impose appropriate sanctions if the court finds a party is abusing the discovery process in seeking, making, or resisting discovery). A sanctions order is subject to review on appeal from the final judgment, [*id.*], but,

> under certain circumstances, is subject to review before final judgment by writ of mandamus. *See TransAmerican* [*Nat. Gas Corp. v. Powell*], 811 S.W.2d [913,] 920 [(Tex. 1991)]. But mandamus is both an extraordinary remedy and a discretionary one. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004). For mandamus to issue, the relator must show both that the trial court's action was an abuse of discretion and appeal is an inadequate remedy. *Id.* at 135-36.

In re Garza, 544 S.W.3d 836, 840 (Tex. 2018) (per curiam).

"The first requirement for mandamus to issue—an abuse of discretion—is fulfilled where a trial court acts without reference to guiding rules or principles or in an arbitrary or unreasonable manner." *Id.* (citing *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005), and *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989)).

Here, the trial court finds in its March 8, 2019 sanction order:

> On October 5, 2018 the deposition of Jason Paul Miller was noticed to be taken at the time and place designated in the notice . . . . Although the witness appeared for the deposition, he failed to answer most of the deposition questions. Mr. Miller either refused to answer or his answers were evasive.

The trial court has therefore ordered Jason to appear for a second deposition and to fully respond to any questions propounded by Real Party in Interest Heather Lynn Miller during the deposition. The trial court has also prohibited Jason from further discovery of any kind while the underlying case is pending and has ordered Jason to pay expenses of discovery and court costs of $595 and attorney's fees of $2,500.

Under Rule of Civil Procedure 215, a party can be sanctioned for violating deposition procedures. If a party refuses to answer a proper question asked in a

deposition, the trial court can impose sanctions. TEX. R. CIV. P. 215.1(b)(2)(B). A party's evasive or incomplete answer can be treated as a refusal to answer a question. *Id.* R. 215.1(c). But the discovery sanctions that the trial court imposes must be "just." *Id.* R. 215.2(b).

We conduct a two-step inquiry when deciding whether the trial court's sanction order was just. *TransAmerican*, 811 S.W.2d at 917. First, we must determine that a direct relationship exists "between the offensive conduct and the sanction imposed." *Id.* "This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender." *Id.* "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." *Id.*

"Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." *Id.* The legitimate purposes of discovery sanctions are threefold: (1) to secure compliance with discovery rules; (2) to deter other litigants from similar misconduct; and (3) to punish violators. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). Courts must also consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance. *TransAmerican*, 811 S.W.2d at 917. "[T]he record should contain some explanation of the appropriateness of the sanctions imposed." *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883 (Tex. 2003) (per

curiam). "Discovery sanctions that are so severe as to inhibit presentation of the merits of a case should be reserved to address a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *Id.*

Jason argues in part in his petition that the sanctions imposed by the trial court are excessive. As part of this argument, he asserts that the trial court failed to consider lesser sanctions.

Rule 215.2 expressly authorizes sanctions that include "an order disallowing any further discovery of any kind or of a particular kind by the disobedient party." TEX. R. CIV. P. 215.2(b)(1). But "[d]epending on the circumstances, an order excluding essential evidence may constitute a death penalty sanction." *In re M.J.M.*, 406 S.W.3d 292, 297 (Tex. App.—San Antonio 2013, no pet.). Furthermore, "even when a party engages in intentional and blatant discovery abuse, the trial court is still required, at a minimum, to consider less stringent sanctions on the record before imposing death penalty sanctions." *Id.* at 298 (citing *Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004), and *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding)). "[T]he record should contain some explanation of the appropriateness of the sanctions imposed." *Spohn Hosp.*, 104 S.W.3d at 883.

Here, the portion of the trial court's order prohibiting Jason from further discovery of any kind while this case is pending will most likely exclude essential evidence in this case; thus, I believe that that portion of the trial court's order constitutes a death penalty

sanction. *See M.J.M.*, 406 S.W.3d at 297. Yet the record is silent regarding the consideration and effectiveness of less stringent sanctions. I therefore believe that the trial court abused its discretion in prohibiting Jason from further discovery of any kind while this case is pending and thus that the first requirement for mandamus to issue is fulfilled. *See Garza*, 544 S.W.3d at 840.

> The second requirement—appeal is an inadequate remedy—is fulfilled where a party's ability to present a viable claim or defense at trial is either completely vitiated or severely compromised. *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). No specific definition captures the essence of or circumscribes what comprises an "adequate" remedy; the term is "a proxy for the careful balance of jurisprudential considerations," and its meaning "depends heavily on the circumstances presented." *Prudential*, 148 S.W.3d at 136-37. Sanctions that thwart effective appellate review by precluding a decision on the merits are reviewable by mandamus, *Braden v. Downey*, 811 S.W.2d 922, 928-29 (Tex. 1991), as are sanctions that have the effect of adjudicating all or a substantial part of a dispute and for which appeal is realistically an inadequate remedy. *See TransAmerican*, 811 S.W.2d at 919 (holding that an eventual remedy by appeal is inadequate where sanctions have the effect of "adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment"); *see also Walker*, 827 S.W.2d at 843 (stating that mandamus is available to correct interlocutory sanctions orders that preclude a trial on the merits). Appeal is not an adequate remedy where the practically certain effect of the sanctions will be reversal with the attendant waste of resources and time. *See Prudential*, 148 S.W.3d at 136.

Garza, 544 S.W.3d at 840-41.

Remedy by appeal is inadequate when the trial court disallows discovery and the missing discovery cannot be made part of the appellate record. *Tjernagel v. Roberts*, 928 S.W.2d 297, 303 (Tex. App.—Amarillo 1996, no writ) (citing *Chrysler Corp.*, 841 S.W.2d at

849). When this occurs, a reviewing court is unable to evaluate the effect of the trial court's alleged error on the record before it; thus, there is no adequate remedy by appeal, and mandamus is proper. *Id.* (citing *Walker*, 827 S.W.2d at 843-44). Accordingly, I believe that Jason has no adequate remedy by appeal as to the portion of the order prohibiting him from further discovery of any kind while this case is pending and thus that the second requirement for mandamus to issue has been fulfilled.

For these reasons, I would conclude that the portion of the trial court's sanction order prohibiting Jason from further discovery of any kind while this case is pending should be vacated, and I would therefore conditionally grant Jason's petition for writ of mandamus in part. Accordingly, I respectfully dissent in part from the majority's denial of Jason's petition for writ of mandamus.

REX D. DAVIS
Justice

Dissenting opinion delivered and filed July 20, 2020