

CONDITIONALLY GRANT; and Opinion Filed June 14, 2018.



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

No. 05-18-00582-CV

**IN RE: TOYOTA MOTOR SALES, U.S.A., INC. AND TOYOTA MOTOR
CORPORATION**

**Original Proceeding from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-15296**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Schenck
Opinion by Justice Schenck

In this mandamus proceeding, relators Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Corporation (collectively, “Toyota”) seek relief from the trial court’s May 4, 2018 discovery order (the “Order”) in this products liability case. After reviewing the parties’ briefs and the mandamus record, we have determined Toyota is entitled to relief from portions of the Order. We therefore conditionally grant the writ in part and deny it in part.

BACKGROUND

In the underlying proceeding, real parties in interest Benjamin and Kristi Reavis, individually and as next friends of their two minor children, allege Toyota defectively designed front seats that are susceptible to failure in rear-impact collisions. The rear-end collision occurred while the Reavises were traveling in their 2002 Lexus ES300. The Reavises claim that upon impact the vehicle’s front seats, which were occupied by Benjamin and Kristi, failed and the

seatbacks collapsed into the back seat and struck their minor children, causing the children to suffer skull fractures and traumatic brain injuries, among other severe and permanent injuries.

After initial discovery was propounded and responded to, the Reavises asked the trial court to overrule Toyota's objections to their discovery requests and order Toyota to supplement their discovery responses. On November 2, 2017, the trial court entered an order (the "November discovery order") overruling various objections of Toyota, defining the scope of discovery, and ordering Toyota to diligently search for and produce documents relating to seatback failures, restraint systems, and vehicle crash-worthiness in rear collisions for the "relevant class of vehicles," defined as 1997–2001 model year U.S.-bound Lexus ES300, 2002–2006 model year U.S.-bound Lexus ES300/ES330, and 2007–2012 model year U.S.-bound Lexus ES350. Toyota filed a petition for writ of mandamus seeking relief from that order. We denied Toyota's request. *See In re Toyota Motor Corp.*, No. 05-17-01293-CV, 2017 WL 5589602 (Tex. App.—Dallas Nov. 21, 2017, orig. proceeding).¹

Thereafter, the Reavises filed a motion to compel, claiming Toyota failed to reasonably search its electronic information systems for documents as required by the November discovery order. The trial court held hearings on the motion on February 5 and March 1, 2018. On March 5, the trial court entered an order requiring Toyota to prepare and tender for deposition one or more corporate representatives to testify about "Toyota Motor Corporation and/or its subsidiaries[']" information systems and requiring the parties to discuss a search protocol and jointly produce a plan for conducting searches for information responsive to the court's November discovery order. Toyota did not seek mandamus relief from that order.

¹ Here, Toyota contends access to its electronically stored information should be limited to driver and right front passenger seats, seatbelts, and rear-end crash-worthiness of the 2002 Lexus ES300. As we have previously denied Toyota's petition concerning the November discovery order, we will not revisit this argument here. *See Toyota Motor*, 2017 WL 5589602, at *1.

Pursuant to the March 5 order, the Reavises deposed Toyota employees concerning the company's electronic information systems. The Reavises were dissatisfied with the information they received and went back to the trial court with another motion to compel seeking further depositions and a protocol governing further discovery, as the parties had failed to develop a joint plan. Following a further hearing on April 27, the trial court signed the Order that is the subject of this mandamus proceeding.² The Order requires Toyota to provide to the Reavises a listing, e.g., a "table of contents," in English that is sufficient to identify the folders and sub-folders within specified databases, and a copy of the index, ledger, bibliography, or other compilation of information from which the papers that are maintained in Toyota's technical library can be identified. The Order also requires Toyota to "identify (by name and geographic location of their principal office) all engineers who have had responsibility (at any time since 1995)" for designing or testing vehicles or seats. The Order further requires Toyota to conduct additional searches in accordance with a protocol that is incorporated into the Order. The protocol provides that the parties will work together in good faith to formulate appropriate search queries, with a presumption that the Reavises' proposed formulation should be used if it is reasonably calculated to lead to the discovery of admissible evidence concerning seat systems and/or restraint systems design, or crash-worthiness. The protocol also provides that Toyota produce documentation showing the search queries that were performed and describe the results generated in such a way as to enable the Reavises to determine whether search modifications should be made. The protocol allows the Reavises to review the responsive documents after Toyota determines whether documents should

² Toyota does not challenge the Order's requirements that Toyota prepare and tender for deposition one or more corporate representatives to testify regarding the information systems, databases, or knowledge repositories utilized by Toyota North American subsidiaries consistent with the court's March 5 order, and to provide the Reavises "[i]nformation regarding the search capabilities of the information systems, databases, or knowledge repositories maintained, possessed or utilized relating to" seven specified databases and "disclose the methodology, protocols, and manner to access (i) the searchable fields, (ii) the applicable query syntax, including any available operators and/or filters and any capabilities regarding 'proximity' searches or 'fuzzy' searches, and (iii) available options for sorting results." Thus, we do not discuss these requirements in this proceeding.

be withheld from production based on a privilege, and allows the parties to seek an order from the trial court expanding or limiting the scope of the searches.

Toyota asked the trial court to reconsider the Order, urging, in part, that the Order is impermissibly overbroad, requires production of irrelevant documents and information, and imposes a vastly disproportionate burden on Toyota. The trial court conducted a hearing on that request on May 14 and promptly denied it. Toyota now seeks relief from the Order in the instant petition for writ of mandamus claiming it improperly allows the Reavises to pursue what amounts to direct access to Toyota's databases in contravention of *In re Weekley Homes*, 295 S.W.3d 309, 317 (Tex. 2005) (orig. proceeding), is overbroad in requiring the production of irrelevant documents and information, and places a disproportionate burden on Toyota. For the reasons set forth below, we do not agree with Toyota's assertion the Order effectively gives the Reavises direct access to its electronic systems, but we do agree with Toyota that the district court did not sufficiently limit the Order to relevant information and did not assure that a proportionate burden was imposed on Toyota.

AVAILABILITY OF MANDAMUS REVIEW

Mandamus is an extraordinary remedy that is available only in limited circumstances. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Mandamus relief is available when the trial court abuses its discretion and there is no adequate remedy by appeal. *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam).

“Generally, the scope of discovery is within the trial court's discretion, but the trial court must make an effort to impose reasonable discovery limits.” *Id.* (quoting *In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam)). An order that compels discovery well outside the bounds of proper discovery is an abuse of discretion. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam).

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist. *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding). An appellate court may not be able to cure a trial court's error, and a party would have no adequate remedy by appeal if it is forced to disclose "patently irrelevant" information or the discovery order imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party. *Walker*, 827 S.W.2d at 842.

DISCUSSION

I. Whether the Order Allows Direct Access to Toyota's Electronic Systems

First, Toyota urges the trial court abused its discretion in effectively giving the Reavises direct access to its electronic databases without establishing Toyota defaulted in its discovery obligations. *See Weekley Homes*, 295 S.W.3d at 317 (as a threshold matter, in order to obtain direct access to a party's electronic storage device, the requesting party must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data). Toyota acknowledges that the Reavises requested that the trial court allow a third-party forensic expert to have direct access to Toyota's electronic information and that the trial court denied that request.³ Toyota nevertheless asserts that in ordering it to provide to the Reavises (1) a table of contents that is sufficient to identify the folders and subfolders of various databases and (2) a copy of the index, ledger, bibliography, or other compilation of information by which the papers that are maintained in Toyota's technical library can be identified, the Order requires it

³ In the March 5 order, the trial court indicated that it was its "expectation that the Plaintiffs will identify searches of the Toyota Information Systems that the Toyota Defendants shall conduct, subject to the oversight of a third-party referee." This third-party oversight was not carried through to the May 4 Order and has not been raised by Toyota in this mandamus proceeding.

to give the Reavises a picture of the entire database, which, in essence, gives them direct access to same. Toyota further urges that the search protocol ordered by the trial court is tantamount to providing direct access to its electronic systems.

Toyota cites no case in support of its position that providing information about its databases and technical library effectively gives the Reavises direct access to its electronic systems, and we have found none. The cases that address direct access involve requiring a party to turn over computer hard drives or electronic storage devices for forensic imaging and examination, not supplying information concerning databases and libraries. See *In re Shipman*, 540 S.W.3d 562, 264 (Tex. 2018); *Weekley Homes*, 295 S.W.3d at 311; *In re VERP Inv., LLC*, 457 S.W.3d 255, 260 (Tex. App.—Dallas 2015, orig. proceeding); *In re Pinnacle Eng'g, Inc.*, 405 S.W.3d 835, 836 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding); *In re Clark*, 345 S.W.3d 209, 211 (Tex. App.—Beaumont 2011, orig. proceeding); *In re Stern*, 321 S.W.3d 828, 844 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding); *In re Harris*, 315 S.W.3d 685, 699 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding).

As to allowing the Reavises to supply search terms and requiring Toyota to turn over the search results to the Reavises, Toyota relies on a Houston Court of Appeals' decision in *In re Master Flo Valve, Inc.*, 485 S.W.3d 207 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding), in which the trial court had ordered the producing party to conduct keyword searches supplied by the trial court. After reviewing the *Weekley Homes* decision, the court of appeals then looked to see if the requesting party established the responding party had defaulted on its obligation to search for and produce documents responsive to the requests for production. *Id.* at 220. To the extent *In re Master Flo Valve* would treat the sharing of the other parties' requested search results as "direct access" under *Weekly Homes*, we respectfully decline to follow its lead. *Weekley Homes* directs that litigants are to cooperate in formulating search requests and in sharing the results—it does not

require discovery default as a condition of that cooperation. *Weekley Homes*, 295 S.W.3d at 321 (parties and their attorneys are to share relevant information concerning electronic systems and storage methodologies so that agreements regarding protocols may be reached or, if not, trial courts have information necessary to craft discovery orders that are not unduly intrusive or overly burdensome). We conclude the Order does not provide the Reavises with direct access to Toyota's electronic systems. Accordingly, we need not determine whether the Reavises satisfied the *Weekley Homes* threshold requirement.

II. Scope of the Order

Next, Toyota urges that the Order is overbroad, mandates the discovery of irrelevant information, and violates the proportionality requirement.

Generally, discovery is permitted into any matter, not privileged, that is relevant to the subject matter and is “reasonably calculated to lead to the discovery of admissible evidence.” TEX. R. CIV. P. 166b(2)(a); *see also Lindsey v. O’Neill*, 689 S.W.2d 400, 402 (Tex. 1985) (orig. proceeding) (per curiam). This broad grant, however, is limited by the legitimate interests of the opposing party to avoid overly broad requests, harassment, or disclosure of privileged information in keeping with the understanding that discovery is a means to an end, rather than an end in itself. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984) (orig. proceeding). Discovery, even of potentially relevant or admissible evidence, may not be used as a fishing expedition. *See K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding). Rather, requests must be “reasonably” tailored to include only matters relevant to the case and must be limited to the relevant time. *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding); *In re Zeller*, 6 S.W.3d 618, 626 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). In a products liability case, discovery should be tied “to the particular products the plaintiffs claim to have used.” *In re Am. Optical Corp.*, 988 S.W.2d 711, 712 (Tex. 1998) (orig.

proceeding). A discovery order is overbroad if it could have been more narrowly tailored to avoid including tenuous information. *See CSX Corp.*, 124 S.W.3d at 153. A discovery order places a disproportionate burden on the producing party if the burden or expense of the discovery outweighs the likely benefit. *See* TEX. R. CIV. P. 192.4; *In re State Farm Lloyds*, 520 S.W.3d 595, 605 (Tex. 2017) (orig. proceeding). If the likely benefit of the requested information is negligible, nonexistent, or merely speculative, the expense attending the request is undue and sufficient to deny the requested discovery. *See State Farm Lloyds*, 520 S.W.3d at 608. In such cases, quantifying or estimating time and expenses would not be critical, as it may be when benefits clearly exist. *Id.*

Toyota urges the trial court abused its discretion in ordering it to identify all folders and subfolders within databases and all papers maintained in Toyota's technical library, because it requires the production of irrelevant information, is overbroad in its reach, and places a disproportionate burden on Toyota. We agree. The Order's mandate that Toyota, one of the largest industrial concerns in the world, provide a table of contents listing *all* folders and subfolders and an index of papers maintained in Toyota's technical library, without limitation, is an abuse of discretion because it is not anchored to the subject matter of the case, nor is it constrained to a reasonable time. *See Sanderson*, 898 S.W.2d at 815; *Zeller*, 6 S.W.3d at 626. As written, the trial court's Order will require Toyota to identify many irrelevant folders, sub-folders and papers, such as folders concerning fuel lines, engines, facilities, maintenance, and employees. The benefit of producing such information is nonexistent. The expense attending the requirement is undue. *See State Farm Lloyds*, 520 S.W.3d at 608.

The Order should have been limited to folders and subfolders and portions of the technical library that contain documents within the scope of the November discovery order. We would abuse our discretion, however, if we modified the discovery request and directed compliance as

modified. *See Master Flo*, 485 S.W.3d at 214. We therefore direct the trial court to vacate the portions of the Order that require Toyota to produce a table of contents identifying the folders and subfolders of the enumerated databases and that require Toyota to produce an index, ledger, bibliography, or other compilation of information by which the papers that are maintained in Toyota's technical library can be identified. Our mandate that the trial court vacate these portions of the Order makes it unnecessary to address Toyota's claim that the Order impermissibly requires it to create and produce documents that are not otherwise in existence in violation of the rules concerning production of documents. TEX. R. APP. P. 47.1.

Toyota further contends the trial court abused its discretion in requiring it to create English language translations for all Japanese documents. The Order's translation requirement does not extend to all documents Toyota produces that may exist in the Japanese language. It is limited to the lists of the folders and subfolders in the specified databases. Our disposition of the Order's requirement that Toyota produce a list of all folders and subfolders makes it unnecessary to address here Toyota's complaint concerning the English translation.⁴ *Id.*

Toyota also claims the trial court abused its discretion in ordering that the Reavises' search queries will presumably be used, without narrowing the relevant class of vehicles or time period. We agree. The Order does not itself define the scope of discovery. It merely qualifies the presumption that the queries supplied by the Reavises will be used for searches concerning seat and restraint systems and rear passenger crash-worthiness. No vehicle class is identified, and no time constraints are included. The search queries should comport with the November discovery

⁴ *But see, In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942 (Tex. 1998); *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989) (op. on reh'g) ("TEX. R. CIV. P. 167(1)(a) deals with the discovery and production of existing documents and tangible things. This rule cannot be used to force a party to make lists or reduce information to tangible form."); *In re Jacobs*, 300 S.W.3d 35, 46-47 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. dism'd]) ("It is well-settled that a party cannot be forced to create documents that do not exist for the sole purpose of complying with a request for production.").

order. We therefore direct the trial court to vacate the second sentence in paragraph 1.b. of the protocol incorporated into the Order.

Next, Toyota claims that the Order is overly broad and burdensome in requiring it to provide to the Reavises the entire result of every search and access to the substantive contents of any responsive documents.⁵ Toyota further urges that even appropriate search queries will yield documents that are not relevant. The Order is not confined to the scope of the November discovery order and thus will generate the production of patently irrelevant information. Discovery should be limited to (1) the number of documents that were responsive to each search and (2) actual production of relevant documents—those that fall within the scope of the November discovery order. We therefore direct the trial court to vacate paragraph 2 of the protocol incorporated into the Order.

Toyota further contends the Order’s requirement that it identify “all engineers who have had responsibility (at any time since 1995) for designing seats” exceeds the bounds of permissible discovery because it is not reasonably limited as to time or scope. We agree this requirement is overbroad and mandates the disclosure of irrelevant information. The Order should be limited to those engineers who worked on designing seats for the class of vehicles specified in the November discovery order. We therefore direct the trial court to vacate the portion of the Order that requires Toyota to identify all engineers who have had any responsibility related to designing or testing vehicles, seats or restraint systems.

III. Whether Toyota has an Adequate Remedy at Law

We conclude the trial court abused its discretion in requiring Toyota to comply with the portions of the Order we hereby direct the court to vacate. We further conclude that we will not

⁵ The protocol provides, in part, that “Toyota shall perform searches, recording and producing to Plaintiffs documentation of both (i) the search queries that were performed and (ii) the results generated from each discrete search (describing the documents in such a way as to enable Plaintiffs, to determine whether, and to what extent, the search should be modified). Plaintiffs can elect to review the substantive contents of the responsive documents, subject to the provisions of Paragraph 3 [allowing Toyota to identify privileged documents].”

be able to cure the trial court's error and Toyota would not have an adequate remedy by appeal because it would be forced to disclose "patently irrelevant" information and the vacated portions of the Order impose a burden on Toyota out of proportion to the benefit, if any, that may obtain to the Reavises. *Walker*, 827 S.W.2d at 842.

CONCLUSION

We conditionally grant Toyota partial mandamus relief. A writ will issue only in the event the trial court fails to vacate the portions of the Order as directed herein within fifteen days of the date of this opinion. Because we assume the trial court will comply with this opinion, we direct our clerk not to issue the writ of mandamus unless information is received that the district court has not so complied. We deny Toyota's petition for writ of mandamus on its argument the Order allows direct access to its electronic systems without a showing it failed in its discovery obligations. We lift the stay issued by this Court on May 21, 2018.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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