

Conditionally Granted and Opinion Filed August 12, 2020



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

No. 05-20-00497-CV

**IN RE KENNETH SMITH, ON BEHALF OF DONNA STEVENS SMITH,
Relator**

**Original Proceeding from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-20274**

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Pedersen, III, and Justice Carlyle
Opinion by Justice Pedersen, III

In this original proceeding, relator seeks relief from the trial court's April 23, 2020 discovery order, which denied a motion to compel production of documents pursuant to the stay of discovery found in Texas Civil Practice and Remedies Code section 74.351(s). We requested that the real parties in interest and respondent file their responses, if any, to the petition for writ of mandamus. Real parties in interest LCS SP, LLC, d/b/a Signature Pointe Senior Living Community; Aspect LCS Leasing SP, LLC; and LCS DALLAS OPERATIONS, LLC filed a response, and relator filed a reply. After reviewing the petition, the response, the reply, and the

mandamus record, we conclude relator is entitled to the relief requested. We, therefore, conditionally grant this writ.

I. BACKGROUND

Relator Kenneth Smith's wife, Donna Smith, resided at a skilled nursing facility from September 1, 2019, through November 23, 2019. During her time there, she fell at least seven times and suffered several fractures. Relator sued the nursing home and its owners (real parties in interest) on his wife's behalf for her injuries. Relator alleged that, although the nursing home was aware of Mrs. Smith's underlying medical conditions that made her vulnerable to injuries from falls, the nursing home failed to provide appropriate nursing care and supervision to prevent her injuries.

On March 4, 2020, relator served the first set of discovery requests, which requested production of various nursing home policies and procedures created to comply with state statutes and regulations. Specifically, relator requested:

1. ... all operating policies and procedures required by 40 TEX. ADMIN. CODE § 19.1920 and TEX. HEALTH & SAFETY CODE § 242.404, in effect January 1, 2015 to present.
2. ... all written policies which govern the nursing care and related medical or other services provided, required by 40 TEX. ADMIN. CODE § 19.1922 and TEX. HEALTH & SAFETY CODE § 242.404, in effect January 1, 2015 to present.
3. ... all policies and procedures established and implemented by the governing body, required by 40 TEX. ADMIN. CODE § 19.1902 and TEX. HEALTH & SAFETY CODE § 242.404, in effect January 1, 2015 to present.

4. ... the policy to identify, assess, and develop strategies to control risk of injury to residents and nurses associated with the lifting, transferring, reposition, or moving of a resident required by 40 TEX. ADMIN. CODE § 19.1917(e) and TEX. HEALTH & SAFETY CODE § 242.404, in effect January 1, 2015 to present.

The requested policies and procedures under Texas Administrative Code section 19.1920 are the general operating policies and procedures of the nursing facility, including those concerning admission and admission agreements, resident care services, refunds, transfers and discharges, termination from Medicaid or Medicare participation, receiving and responding to complaints and recommendations, and protection of a resident's property and civil rights. 40 TEX. ADMIN. CODE § 19.1920. The requested resident care policies under Texas Administrative Code section 19.1922 govern nursing care and related medical services provided. 40 ADMIN. § 19.1922. The requested policies and procedures under Texas Administrative Code section 19.1902 are for the nursing care facility's governing body. 40 ADMIN. § 19.1902. Lastly, the requested policy under Texas Administrative Code section 19.1917(e) is the Quality Assessment and Assurance Committee's policy to implement, assess, and develop strategies to control risk of injury to residents and nurses associated with lifting, transferring, repositioning, or moving a resident. 40 ADMIN. § 19.1917(e).

Real parties in interest objected to all four requests on the ground that discovery of the requested information was stayed because relator had not yet served an expert report under Texas Civil Practices and Remedies Code section 74.351(s).

TEX. CIV. PRAC. & REM. CODE § 74.351(s). Real parties further objected on the grounds that the request for “all operating policies and procedures” was vague, ambiguous, and overbroad; that the requests were not limited in time or scope; and that the requests were not reasonably calculated to lead to discovery of admissible evidence.

On April 2, 2020, relator filed a motion to compel discovery responses, arguing that the discovery stay did not apply to policies and procedures that a nursing home must make publicly available under Texas Health and Safety Code section 242.404. TEX. HEALTH & SAFETY CODE § 242.404. On April 23, 2020, the trial court denied relator’s motion to compel and ordered discovery stayed until relator filed an expert report. Thereafter, relator filed this petition for writ of mandamus, challenging the trial court’s April 23, 2020 order denying the motion to compel discovery responses. Although the expert report was due May 12, 2020, we stayed all proceedings in the underlying action, including the May 12, 2020 expert report deadline, pending resolution of this original proceeding.

II. AVAILABILITY OF MANDAMUS REVIEW

To be entitled to the extraordinary relief of a writ of mandamus, relator must show that the trial court clearly abused its discretion and that he has no adequate remedy by appeal. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial judge has no discretion in determining what the law is or in applying the law to the facts. *See Walker v. Packer*, 827 S.W.2d 833,

840 (Tex. 1992) (orig. proceeding). Thus, a clear failure by the court to correctly analyze or apply the law will constitute an abuse of discretion. *Id.* This is true even when the law is unsettled. *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996). As for assessing the adequacy of an appellate remedy, this Court balances the benefits of mandamus review against the detriments. *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding).

A. Clear Abuse of Discretion

i. Section 74.351 Reports and Stay of Discovery

The parties agree that this case involves a health care liability claim. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 851 (Tex. 2005) (health care liability claims include claims alleging inadequate supervision and services to meet nursing home resident’s health care needs and protect her from harm). The Legislature enacted a threshold requirement for health care liability claims: early in the lawsuit, a plaintiff must file an expert report indicating that the health care liability claim has merit. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461 (Tex. 2008) (orig. proceeding). This requirement aims to separate frivolous or premature claims from meritorious claims. *In re Jordan*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding); *see also In re McAllen Med. Ctr., Inc.*, 275 S.W.3d at 461.

The required expert report must provide:

a fair summary of the expert’s opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the

standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

CIV. PRAC. & REM. § 74.351(r)(6). The report is due within 120 days after the filing of the defendant's answer. CIV. PRAC. & REM. § 74.351(a). A claimant's failure to comply with the expert report requirement entitles the health care provider to dismissal of the claim with prejudice, along with attorney's fees and costs. CIV. PRAC. & REM. § 74.351(b).

To minimize litigation costs until the expert report is produced, section 74.351(s) sets strict limits on discovery. *In re Jordan*, 249 S.W.3d at 420. Until a claimant has served an adequate expert report, all discovery is stayed except for "information, including medical or hospital records or other documents or tangible things, related to the patient's health care" through written discovery, depositions on written questions, and discovery from nonparties. CIV. PRAC. & REM. § 74.351(s).¹

¹ Texas Civil Practice and Remedies Code section 74.351(s) states:

Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

- (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;
- (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and
- (3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure. CIV. PRAC. & REM. § 74.351(s).

The statute further provides that the provisions of section 74.351(s) control over any conflicting provisions found in “another law, including a rule of procedure or evidence or court rule.” CIV. PRAC. & REM. § 74.002.

ii. Analysis

Here, relator seeks discovery of various nursing home policies and procedures created to comply with state statutes and regulations. Texas Health and Safety Code section 242.404 mandates that a nursing home’s policies, procedures, and practices for quality of care and quality of life “must be available to each physician, staff member, resident, and resident’s next of kin or guardian and to the public.” HEALTH & SAFETY § 242.404.² Thus, the question before us is whether the discovery stay for health care liability claims under section 74.351(s) applies to nursing home policies and procedures that must be made available to the public under Texas Health and Safety Code section 242.404. *See* CIV. PRAC. & REM. § 74.351(s); HEALTH & SAFETY § 242.404.

The exception to the discovery stay found in section 74.351(s) permits discovery of “information, including medical or hospital records or other documents or tangible things, related to the patient’s health care”; the phrase “other documents

² Texas Health and Safety Code section 242.404 states:

Policies, Procedures, and Practices for Quality of Care and Quality of Life.

(a) Each institution shall comply with the standards adopted under this subchapter and shall develop written operating policies to implement those standards.

(b) The policies and procedures must be available to each physician, staff member, resident, and resident’s next of kin or guardian and to the public. HEALTH & SAFETY § 242.404.

or tangible things” makes clear that the exception covers more than just medical or hospital records. CIV. PRAC. & REM. § 74.351(s). The exception merely requires that such information be “related to” the patient’s health care. *Id.* As there is no dispute that relator’s claims—alleging inadequate supervision and services to meet a nursing home resident’s health care needs and protect her from harm—are health care claims, it logically follows that “training and staffing policies” are “integral components of [the nursing home’s] rendition of health care services.” *Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 850; *see also Baylor All Saints Med. Ctr. v. Martin*, 340 S.W.3d 529, 534 (Tex. App—Fort Worth 2011, no pet.) (noting that discovery of the hospital’s policies and procedures regarding the protection of patients from assault must fall within section 74.351(s)).

Real parties in interest rely on *Simmons v. Texoma Med. Center*, which interpreted section 74.351(s) to preclude “[d]iscovery of issues such as financial information, insurance and indemnity agreements, corporate organization, and even bylaws, *policies, and procedures*” until an expert report is served. *Simmons v. Texoma Med. Ctr.*, 329 S.W.3d 163, 174 (Tex. App.—El Paso 2010, no pet.) (emphasis added). In *Simmons*, the plaintiff sued the hospital after her son with schizophrenia broke through soft restraints while receiving medical care and suffered injuries. *Id.* at 166. Citing a law review article, the El Paso court of appeals construed section 74.351(s) to preclude “[d]iscovery of issues such as financial information, insurance and indemnity agreements, corporate organization, and even

bylaws, *policies, and procedures*” until an expert report is served. *Id.* at 174 (emphasis added). The court of appeals then held that the plaintiff was not entitled to discovery of the hospital’s policies and procedures before the filing of the expert report. *Id.* at 175.

However, the circumstances in this case are distinct from those found in *Simmons*. Unlike the nursing home at issue in this case, hospitals are not required to make their policies and procedures publicly available. *Compare* HEALTH & SAFETY § 242.404 (regarding nursing homes) *with* HEALTH & SAFETY §§ 241.001 *et seq.* (regarding hospitals). Furthermore, because *Simmons* addressed the question of whether the filing of an inadequate expert report would lift the discovery stay, that court was not addressing the germane issue here: what documents fall under the exceptions to the discovery stay. *Simmons*, 329 S.W.3d at 174–75. Lastly, we decline to follow the *Simmons* court’s reliance on a law review article without grappling with the statute’s plain text and purpose. *See id.* at 174.

Instead, we agree with the reasoning found in *Baylor All Saints Medical Center v. Martin*. In *Martin*, plaintiff was sexually assaulted in her hospital room as she recovered from surgery. 340 S.W.3d at 531. She and her husband sued the defendant hospital for negligence. *Id.* In support of their claim, the plaintiffs served an expert report. *Id.* The trial court overruled the defendant’s objections to the sufficiency of the report and denied defendant’s motion to dismiss. *Id.*

After the defendant’s appeal, the Fort Worth court of appeals reversed and remanded, deciding that the expert report was deficient because it did not articulate the standard of care applicable to the hospital to prevent such an assault. *Id.* at 531–34. Rejecting the plaintiffs’ argument that section 74.351(s) does not permit discovery of hospital policies and procedures, the court of appeals concluded that claims regarding assaults of the type suffered by Martin qualified as health care liability claims. *Id.* Thus, “logically, discovery of the hospital’s policies and procedures regarding the protection of patients from assault must be covered by section 74.351(s).” *Id.*

Here, because the requested policies and procedures are relevant to assessing the appropriate standard of care that should have been given to Mrs. Smith, the relator and his respective expert should have been permitted to discover such documents and information under the exception found in section 74.351(s) to determine whether the claim has merit. *See id.*; *see also* CIV. PRAC. & REM. § 74.351(s). Therefore, we conclude that the trial court abused its discretion by barring such discovery; relator has met the first requirement necessary for mandamus relief.

B. Relator Lacks an Adequate Remedy.

It is well settled that mandamus relief is appropriate when the trial court abuses its discretion by *ordering* discovery precluded by section 74.351(s). *See In re Jordan*, 249 S.W.3d at 419–20, 424. However, it is not clear whether the same is true when the trial court *prohibits* discovery that the statute permits.

A relator has no adequate remedy by appeal in the discovery context when the appellate court would not be able to cure the trial court’s discovery error. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding).³ In this case, relator represents that restricting access to the requested policies and procedures would severely hamper his ability to file an adequate expert report. An inadequate expert report would result in dismissal of the lawsuit, and—while relator would be able to appeal from the grant of a motion to dismiss—this Court would be limited in its ability to cure the error because it would only be able to remand for the trial court to consider whether to grant a thirty-day extension to file an adequate report. *See CIV. PRAC. & REM. § 74.351(c)*; *Martin*, 340 S.W.3d at 534 (remanding to the trial court to consider whether to grant thirty-day extension after deciding that expert report was inadequate for failing to articulate appropriate standard of care).

The supreme court has recognized such policies to be “integral components” of a nursing home’s health care services for claims alleging inadequate supervision and care. *Diversicare Gen. Partner, Inc*, 185 S.W.3d at 850. The inability to discover the policies and procedures diminishes relator’s ability to articulate the standard of care through the section 74.351(s) expert report. Because an adequate section

³ “Mandamus relief may be justified to correct discovery order when: (1) the appellate court would not be able to cure the trial court’s discovery error, such as when ... (2) the party’s ability to present a viable claim or defense is severely compromised or vitiated by the erroneous discovery ruling to the extent that it is effectively denied the ability to develop the merits of its case . . . ” *In re Colonial Pipeline Co.*, 968 S.W.2d at 941.

74.351(s) expert report is required to proceed to the merits of the health care claim, the trial court's order—which prohibited discovery of the policies and procedures relating to that health care claim—denied relator's ability to develop the merits of his case. *See In re Colonial Pipeline Co.*, 968 S.W.2d at 941.

Real parties assert that relator will eventually obtain relevant policies and procedures once the discovery stay is lifted. However, relator's case might be dismissed if he is unable to file an adequate expert report. *See CIV. PRAC. & REM. § 74.351(s)*. According to real parties, relator has not shown he would be unable to put together an adequate expert report without the requested documents, but again, the requested policies are “integral components” to the health care claim. *Id.*; *see In re Colonial Pipeline Co.*, 968 S.W.2d at 941; *Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 850. We conclude that relator lacks an adequate appellate remedy; relator has met the second requirement to obtain mandamus relief.

III. CONCLUSION

We conditionally grant relator's petition for writ of mandamus and partially lift the May 7, 2020 stay order. We lift the stay on all proceedings in the underlying action, except for the May 12, 2020 expert report deadline. We vacate the April 23, 2020 order on relator's motion to compel discovery responses. We direct the trial court to issue an order granting production of the requested policies and procedures consistent with this opinion. The stay of the expert report deadline shall be lifted 45 days after our receipt of the trial court's order granting the motion to compel production of the requested policies and procedures.

The writ of mandamus will issue only if the trial court fails to comply.

/Bill Pedersen, III//

BILL PEDERSEN, III
JUSTICE

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