Opinion issued July 21, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00817-CV

IN RE TT-FOUNTAINS OF TOMBALL, LTD., INCORRECTLY NAMED AS MBS FOUNTAINS OF TOMBALL, LTD. D/B/A/ FOUNTAINS OF TOMBALL, AND HENRY S. MILLER REALTY MANAGEMENT, L.L.C., Relators

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Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

This original mandamus proceeding arises from a personal-injury suit filed by real-party-in-interest, Laurie Mejia-Rosa, against relators, TT-Fountains of Tomball, Ltd. and Henry S. Miller Realty Management, L.L.C.[1] Relators

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[1] The underlying case is *Laurie Mejia-Rosa v. John Moore Services, Inc., MBS Fountains of Tomball, Ltd. d/b/a Fountains of Tomball, and Henry S. Miller*

challenge the trial court's September 15, 2015 order, denying Relators' motion to withdraw deemed admissions.

We conditionally grant Relators' petition for writ of mandamus.

Background

Laurie Mejia-Rosa was a resident of the Fountains of Tomball Apartment complex. The complex was owned by TT-Fountains Tomball, Ltd. and managed by Henry S. Miller Realty Management, L.L.C. On December 19, 2013, Mejia-Rosa was walking her dog through the parking lot of the apartment complex when she was hit by a van driven by K. Madden, an employee of John Moore Services, Inc.

On January 9, 2014, Mejia-Rosa sued, TT-Fountains and Henry S. Miller Realty, ("Relators") claiming that they were negligent for failing to install proper signage and speed bumps in the parking lot.[2] Mejia-Rosa also sued John Moore Services for negligence, alleging that it was vicariously liable for the conduct of its

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Realty Management, L.L.C., cause number 2014-00998, pending in the 215th District Court of Harris County, Texas, The Hon. Elaine Palmer presiding.

[2] TT-Fountains of Tomball, Ltd. asserted in the trial court that it was incorrectly named in Mejia-Rosa's petition as MBS Fountains of Tomball, Ltd. d/b/a Fountains of Tomball.

employee.[3] Mejia-Rosa claimed that being hit by the van caused her to suffer "serious injuries from which she will never recover."

Relators were each served with Mejia-Rosa's original petition at the end of January 2014. Along with the petition, Relators were served with "Plaintiff's First set of Interrogatories, Requests for Production, Requests for Admission and Requests for Disclosure." On February 20, 2014, Relators filed a joint answer.[4] Relators generally denied "each and every, all and singular, the material allegations contained in Plaintiff's Original Petition filed herein, and demands strict proof hereof . . . ."

Over the course of the next several months, Mejia-Rosa amended her petition to add a claim for gross negligence against the defendants and responded to written discovery propounded by both Relators and John Moore Services. In addition, John Moore Services responded to written discovery propounded by Mejia-Rosa. During this time period, Relators did not respond to the written discovery served on them along with Mejia-Rosa's original petition.

The trial court's docket control order, signed February 24, 2014, required Relators to designate their expert witnesses by October 20, 2014. It provided that the "[expert] designation must include the information listed in Rule [of Civil

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[3] The trial court later granted John Moore Services's motion for summary judgment.

[4] Relators, TT-Fountains and Henry S. Miller Realty, are represented by the same law firm and are aligned in this case.

Procedure] 194.2(f)[.]" *See* TEX. R. CIV. P. 194.2(f) (setting out requirements for response to request for disclosures with respect to testifying expert witness).

The parties entered into a Rule 11 agreement, extending the deadline for Relators' designation of experts until January 5, 2015. *See* TEX. R. CIV. P. 11. On January 5, Relators filed their responses to the requests for disclosure. In the responses, Relators designated their expert witnesses pursuant to Rule 194.2(f), as required by the docket control order. Among its experts, Relators designated Dan Price to opine that "there is no applicable standard which would require any changes to the parking lot area where the incident made the basis of this occurred as it relates to the prevention of auto-pedestrian accidents."

Four months later, on May 4, 2015, C. Becerra, a legal assistant for the firm representing Mejia-Rosa, sent an email to Relators' counsel. Becerra stated, "I've only been able to locate your responses to request for disclosure in this matter. Have you served your objections and responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions that were served with the original petition?" That same day, Relators' counsel responded, "We have no record of having been served with the discovery requests. If you email them to me in [W]ord format I will take care of it." Becerra sent the discovery request to Relators' counsel.

Two days later, on May 6, 2015, Relators served Mejia-Rosa with their responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions. Recognizing that, under Rule of Civil Procedure 198.2, their failure to respond timely to Mejia-Rosa's requests for admission resulted in the admissions being deemed admitted, Relators filed a "Motion to Withdraw and Amend Deemed Admissions" on May 12, 2015. *See* TEX. R. CIV. P. 198.2(a), (c) (providing that defendant served with request for admissions before its answer is due has 50 days to respond to the request and failure to respond timely results in deemed admission). Mejia-Rosa filed an opposition to the motion. Following a hearing, the trial denied Relators' motion to withdraw on May 15, 2015.

On May 28, 2015, Relators filed an amended motion to withdraw the deemed admissions. Mejia-Rosa filed an opposition to the motion, and the trial court denied the motion on June 8.

Relators filed their second amended motion to withdraw and amend deemed admissions on August 25, 2015. In their second amended motion, Relators asserted that their failure to respond timely to the requests for admission was neither intentional nor the result of conscious indifference. Relators acknowledged that Mejia-Rosa's discovery requests, including the requests for admission, were served with the original petition. Relators, however, averred that they had been unaware that they had been served with the discovery requests along with the

original petition. In support of their motion, Relators offered the affidavit of Larry Foster, their corporate representative. In his affidavit, Foster testified as follows:

> 4. In January 2014, the Fountains of Tomball Defendants were served with a copy of Plaintiff's Original Petition, which I forwarded to the insurer for the Fountains of Tomball Defendants. The Fountains of Tomball Defendants were also served with Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure to Defendant John Moore Services, Inc. At the time, I did not realize that the paperwork in my file also included Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure to the Fountains of Tomball Defendants. Instead, I mistakenly believed that the Fountains of Tomball Defendants had only been served with Plaintiff's First Set of Interrogatories, Requests for Disclosure to Defendant John Moore Services, Inc. Accordingly, although I forwarded a copy of Plaintiff's Original Petition to the insurer for the Fountains of Tomball Defendants, I inadvertently did not forward Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure which were directed to the Fountains of Tomball Defendants because I did not realize until May 2015 that these discovery requests were included in the materials which were served on the Fountains of Tomball Defendants in January 2014.
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> 5. The failure to provide either the insurer or the attorneys for the Fountains of Tomball Defendants with a copy of Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure to the Fountains of Tomball Defendants was not intentional or the result of conscious indifference, but rather was an accident and/or mistake on my behalf for the reasons set forth above.

Relators also offered the affidavit of their attorney, Spencer Edwards, who testified as follows:

> 3. Although the Fountains of Tomball Defendants were apparently served with Plaintiff s First Set of Interrogatories, Requests for

Production, Requests for Admissions, and Requests for Disclosure when they were served with citation and Plaintiff's Original Petition, these discovery requests were not provided to my firm because they were mistakenly not forwarded to the insurer for the Fountains of Tomball Defendants as set forth in the affidavit of Larry Foster . . . .

4. On May 4, 2015, I received an email from Ms. C[.] Becerra, a legal assistant employed by the plaintiff's attorney in this case, asking if my firm had served the plaintiff with responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions to the Fountains of Tomball Defendants. . . .

5. After receiving Ms. Becerra's email dated May 4, 2015, I confirmed that my file materials in this case did not include any written discovery requests served on the Fountains of Tomball Defendants by the plaintiff in this case. Accordingly, I informed Ms. Becerra that I did not have a copy of the discovery requests and requested that a copy be sent to me. . . .

6. Ms. Becerra emailed me a copy of the written discovery requests on May 4, 2015, and I served the plaintiff with the Fountains of Tomball Defendants' Answers to Plaintiff's First Set of Interrogatories, Responses to Plaintiff's Requests for Production, and Responses to Plaintiff's Requests for Admissions on May 6, 2015.

7. . . . Mr. Foster . . . did not realize until May 2015 that the discovery requests which were directed to the Fountains of Tomball Defendants were included in the materials served on the Fountains of Tomball Defendants along with citation and Plaintiffs Original Petition.

8. The accidental failure to timely respond to Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions to the Fountains of Tomball Defendants was discovered by counsel for the Fountains of Tomball Defendants on May 4, 2015.

9. The accidental failure to timely respond to Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions to the Fountains of Tomball Defendants was remedied on May 6, 2015.

In addition, Relators offered the May 4, 2015 email exchange between Becerra and Edwards that was referenced in Edwards's affidavit. In addition, Relators offered their May 6, 2015 responses to Mejia-Rosa's discovery, including their responses to Mejia-Rosa's requests for admission.

Relators further offered the citations served on them with the original petition. The citations each indicated, "Attached is a copy of Plaintiff's Original Petition." The citations do not mention that discovery requests were also served on Relators along with the original petition. In the motion to withdraw admissions, Relators asserted that this showed that they had not been made aware of the discovery requests when they were served with the petition.

Relators also pointed out that, in the citation served on TT-Fountains Fountains, the process server had filled out, by hand, the officer's return portion of the citation after effectuating service of process. The process server had indicated that he had served "Plaintiff's Original Petition . . . with accompanying Plaintiff's 1st set of Interrogatories, Request for Production, Request for Admissions [sic] and Request for Disclosures." The citation with the completed officer's return had then been filed with the trial court clerk. Relators emphasized that, although the officer's return was on file with the trial court clerk, they did not have the completed officer's return in their possession, and the portion of the citation served on them indicated only that they had been served with the original petition.

Relators further argued that Mejia-Rosa would not be unduly prejudiced by a withdrawal of Relators' deemed admissions.

Mejia-Rosa filed an opposition to Relators' second amended motion to withdraw, expressly incorporating her responses to Relators' two earlier motions. Mejia-Rosa pointed out that Relators acknowledged that they had been served with her discovery requests in January 2014 along with her original petition; however, Relators also claimed that they had been unaware that they had been served with the discovery requests. Mejia-Rosa was skeptical of Relators' claim that they had not known of the discovery requests until May 4, 2015—when Becerra emailed Relators' counsel inquiring whether Relators had responded to the discovery. Mejia-Rosa asserted that Relators had not shown that their failure to respond to the requests for admission, for 15 months, had not been the result of "their conscious disregard or lack of due diligence." Mejia-Rosa claimed that Relators had not demonstrated "good cause" to permit withdrawal of the deemed admissions.

Mejia-Rosa averred that Relators were "on notice" that discovery had been served on their co-defendant, and she pointed out that Relators were aware that Mejia-Rosa had responded to the discovery served on her. Mejia-Rosa asserted this should have prompted Relators to inquire whether discovery had also been sent to them. She acknowledged that Relators were not required to inquire whether

they had also been served with discovery, but she averred it would have been prudent for Relators to have made that inquiry.

Mejia-Rosa also pointed out that the process servers' affidavits of service—indicating that discovery had been served on Relators with the original petition—were filed with the trial court by the process servers. Mejia-Rosa asserted, "Even a cursory review of the file on this case would alert Defendants to the fact that discovery was served with Plaintiff's Original Petition on both of their clients."

In addition, Mejia-Rosa questioned the truthfulness of Relators' claim that, before May 4, 2015, they had been unaware that they were served with the discovery requests. Mejia-Rosa pointed out that the requests for disclosure she had served on Relators were contained in the same document as her other written discovery requests, including the requests for admission. Mejia-Rosa asserted, "[Relators'] contention that they were unaware of [her] discovery requests is belied by the fact that counsel for [Relators] served [Mejia-Rosa] with [Relators'] responses to [Mejia-Rosa's] Requests for Disclosure on January 5, 2015," without answering Mejia-Rosa's other discovery requests. In other words, Mejia-Rosa questioned how Relators knew to answer the requests for disclosure when they claimed to be unaware of being served with Mejia-Rosa's other discovery requests.

Mejia-Rosa also asserted that she would be unduly prejudiced if the motion to withdraw was granted. Mejia-Rosa claimed that she had relied on Relators'

failure to respond to her discovery requests. She averred that she "[had] performed discovery relying on the deemed admission. Specifically, [she] could have completed further depositions, and retained an expert to opine explicitly with regard to [Relators'] liability in this matter." Mejia-Rosa further asserted that allowing Relators to withdraw their deemed admissions would unduly prejudice her because it would result in a delay of the trial for which she was ready to proceed.

Following a hearing, the trial court signed an order on September 15, 2015, denying Relators' second motion to withdraw and amend the deemed admissions.[5] Relators filed the instant mandamus proceeding, asserting that the trial court abused its discretion in denying their second motion to withdraw and amend the deemed admissions.[6]

Standard of Review

Mandamus is an extraordinary remedy, available only when the relator can show both that (1) the trial court clearly abused its discretion, and (2) there is no

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[5] Relators' mandamus petition indicates that a hearing was conducted on their original motion to withdraw the deemed admissions and another hearing was conducted on the second amended motion. The reporter's records from these hearings were not included in the mandamus record; however, Relators' counsel filed a statement with this Court verifying that no testimony was adduced at either hearing. *See* TEX. R. APP. P. 52.7(a) (providing that relator must file with petition "a properly authenticated transcript of any relevant testimony from any underlying proceeding . . . or a statement that no testimony was adduced in connection with the matter complained").

[6] On our request, Mejia-Rosa filed a response to the mandamus petition. In addition, we granted Relators' motion for temporary relief, staying trial.

adequate remedy by way of appeal. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). A clear abuse of discretion occurs when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker*, 827 S.W.2d at 839 (internal quotation marks and citation omitted).

The resolution of factual matters is committed to the sound discretion of the trial court, and we may not substitute our judgment for that of the trial court. *Id.* A trial court has no discretion in determining what the law is or in applying the law to the particular facts. *Id.* at 840. A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Id.*

In determining whether an appeal is an adequate remedy, we balance the benefits and detriments of mandamus review. *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 464 (Tex. 2008). This balance is heavily circumstantial. *Id.* A party establishes that no adequate appellate remedy exists by showing it is in real danger of losing its substantial rights. *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding); *Walker*, 827 S.W.2d at 842.

The Supreme Court of Texas has held that "[w]hen a trial court imposes discovery sanctions which have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering

default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 920 (Tex. 1991) (orig. proceeding). If such a sanctions order is not immediately appealable, it will be reviewable by petition for writ of mandamus. *Id.*

Deemed Admissions

A. Legal Principles

Rule of Civil Procedure 198 entitles a litigant to serve requests for admissions on another party. TEX. R. CIV. P. 198.1. A defendant served with requests for admission before its answer is due must "respond [within] 50 days after service of the request." TEX. R. CIV. P. 198.2(a). If a response to requests for admissions "is not timely served, the request is considered admitted without the necessity of a court order." TEX. R. CIV. P. 198.2(c). Any matter admitted or deemed admitted is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. TEX. R. CIV. P. 198.3; *see Boulet v. State*, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

To obtain permission to withdraw deemed admissions, a party must show (1) good cause, (2) that the other party will not be unduly prejudiced, and (3) that the presentation of the merits of the lawsuit will be served by the withdrawal. TEX. R. CIV. P. 198.3; *see Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (holding

that standard for withdrawal of deemed admissions—good cause and no undue prejudice—is same as standard for allowing late summary judgment response) (citing *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687–88 (Tex. 2002)). "Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Wheeler*, 157 S.W.3d at 442 (citing *Carpenter*, 98 S.W.3d at 687–88; *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996)). "Undue prejudice depends on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Id.* at 443 (citing *Carpenter*, 98 S.W.3d at 687; *Stelly*, 927 S.W.2d at 622). The party seeking withdrawal of the deemed admissions has the burden to establish good cause. *Boulet*, 189 S.W.3d at 836 (citing *Webb v. Ray*, 944 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

"A different standard applies when the deemed admissions are merit-preclusive." *In re Sewell*, 472 S.W.3d 449, 456 (Tex. App.—Texarkana, orig. proceeding). "Requests for admission are intended to simplify trials by 'addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents . . . .'" *Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 665 (Tex. App.—San Antonio 2014, pet. denied) (quoting *Wheeler*, 157 S.W.3d at 443). "They are not intended to require a defendant to admit the validity

of a plaintiff's claims or concede his defenses." *Id.* (citing *Marino v. King*, 355 S.W.3d 629, 632 (Tex. 2011)). Requests for admission are also not intended to be used as "traps for the unwary." *Id.* (citing *Stelly*, 927 S.W.2d at 622); *see also Marino*, 355 S.W.3d at 632 (explaining "requests for admission should be used as 'a tool, not a trapdoor'") (quoting *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 610 (Tex. 2008)). "By denying a motion to withdraw merit preclusive admissions, the trial court effectively enters a case-ending discovery sanction." *Sewell*, 472 S.W.3d at 455–56 (citing *Marino*, 355 S.W.3d at 632).

In *Wheeler v. Green*, the Supreme Court of Texas determined that, when deemed admissions are used in an attempt to "preclude [the] presentation of the merits of a case," due-process concerns are implicated. *Wheeler*, 157 S.W.3d at 443. "[W]hen due process concerns are raised by deemed admissions which act as a merit-preclusive sanction, the trial court must follow the guiding rules and principles established by *Wheeler*." *Time Warner*, 441 S.W.3d at 665. The *Wheeler* court determined that, when requests for admission are merit preclusive, thereby raising due process concerns, the trial court is required to allow their withdrawal unless the party requesting withdrawal acted with "flagrant bad faith or callous disregard of the rules." *Wheeler*, 157 S.W.3d at 443–44. That is, "when the deemed admissions are merit-preclusive, good cause exists [to permit

withdrawal] absent bad faith or callous disregard of the rules by the party seeking the withdrawal." *Sewell*, 472 S.W.3d at 456 (citing *Marino*, 355 S.W.3d at 634).

Ordinarily, the burden of showing good cause lies with the party seeking withdrawal of deemed admissions. *Sewell*, 472 S.W.3d at 456; *Time Warner*, 441 S.W.3d at 666 (citing *Boulet*, 189 S.W.3d at 836). But, when the requests for admission are merit preclusive, the party opposing the withdrawal of the admissions has the burden to show that the party seeking the withdrawal acted with bad faith or callous disregard for the rules. *See Time Warner*, 441 S.W.3d at 666 (citing *Marino*, 355 S.W.3d at 634); *see also Medina v. Raven*, No. 01–14–00881–CV, 2016 WL 1388949, at *9 (Tex. App.—Houston [1st Dist.] Apr. 7, 2016, no pet.) ("Because the deeming of those admissions operated as merit-precluding sanctions, Raven had the burden . . . to demonstrate that—assuming the plaintiffs' responses were untimely—that untimeliness was the result of flagrant bad faith or callous disregard for the rules."). When no showing of bad faith or callous disregard for the rules is made, "it is presumed that presentation of the merits would be served by allowing withdrawal of the deemed admissions." *Sewell*, 472 S.W.3d at 456 (citing *Marino*, 355 S.W.3d at 634). Finally, to permit withdrawal, the evidence must also show that the opposing party will not be unduly prejudiced by the withdrawal of the merit-preclusive admissions. *See Medina*, 2016 WL 1388949, at *10; *Sewell*, 472 S.W.3d at 458–59.

B. Analysis for Merit-Preclusive Deemed Admissions

1. *Flagrant bad faith or callous disregard for the rules*

Mejia-Rosa served 23 requests for admission on Relators to which Relators failed to respond timely, thereby resulting in the requests being deemed admitted. Of these 23 requests, we agree with Relators that eight of the deemed admissions are merit preclusive. Specifically, the following deemed admissions preclude litigation of Relators' liability and defenses by absolving Mejia-Rosa of her burden of proof, by invalidating any defense by Relators of contributory negligence, and by determining ultimate issues of fact necessary to establish Relators' liability or defenses:

> 7. Admit you were negligent in the events leading to Plaintiff's injuries.
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> 8. Admit you were grossly negligent in the events leading to Plaintiff's injuries.
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> 9. Admit you should have constructed speed bumps at the Fountains of Tomball.
>
> 10. Admit there were prior complaints of speeding by tenants in the complex.
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> 11. Admit Plaintiff was not contributorily negligent in the events leading to her injuries.
>
> 12 Admit you have no basis to claim Plaintiff was contributorily negligent in the events leading to her injuries.

. . . .

> 15. Admit that the Plaintiff did not suffer from any relevant pre-existing condition(s) before the occurrence in question.

. . . .

> 23. Admit that Defendant's actions proximately caused the injuries sustained by Plaintiff on the date in question based on the occurrence made the basis of this lawsuit.

Because these deemed admissions were merit-preclusive, thereby raising due-process concerns, the trial court was required to follow the guiding rules and principles established by *Wheeler*. *See Time Warner*, 441 S.W.3d at 665. Pursuant to *Wheeler*, Mejia-Rosa was required to offer evidence establishing that Relators acted with flagrant bad faith or callous disregard of the rules when Relators untimely answered the requests. *See id.* at 666. We agree with Relators that Mejia-Rosa did not present such evidence.

To recap, Relators offered the affidavit of their corporate representative, Larry Foster, to support their motion to withdraw deemed admissions. He testified that he had not realized Relators had been served with written discovery, directed at Relators, when Relators were served with Mejia-Rosa's original petition. Foster explained that, when served with the original petition, Relators had also been served a copy of written discovery directed at co-defendant John Moore Services. Foster testified,

> At the time, I did not realize that the paperwork in my file also included Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure to the Fountains of Tomball Defendants. Instead, I mistakenly believed that the Fountains of Tomball Defendants had only been served with Plaintiff's First Set of Interrogatories, Requests for Disclosure to Defendant John Moore Services, Inc.

Foster further indicated that, because he mistakenly believed that Relators had been served only with discovery directed at a co-defendant, he forwarded only the original petition to Relators' insurance company. Foster averred,

> I inadvertently did not forward Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admissions, and Requests for Disclosure which were directed to the Fountains of Tomball Defendants because I did not realize until May 2015 that these discovery requests were included in the materials which were served on the Fountains of Tomball Defendants in January 2014

Relators also pointed to the citation served with the original petition. The citation indicated that Relators were served only with Mejia-Rosa's original petition; no mention was made of written discovery. Relators asserted that the citation reinforced Foster's belief that Relators had been served only with the original petition.

Relators also offered the affidavit of their attorney, Spencer Edward. He testified that the written discovery requests "were not provided to my firm because they were mistakenly not forwarded to the insurer for the Fountains of Tomball Defendants as set forth in the affidavit of Larry Foster." Edwards testified that he had been unaware of the discovery requests until May 4, 2015, when he received

an email from legal assistant C. Becerra, inquiring whether Relators had responded to Mejia-Rosa's discovery requests. Edwards averred that, after receiving the email, he checked his files and found that they did not contain any discovery requests from Mejia-Rosa. Edwards stated that Becerra emailed Mejia-Rosa's discovery requests to him that same day, and he "served [Mejia-Rosa] with the Fountains of Tomball Defendants' Answers to Plaintiff's First Set of Interrogatories, Responses to Plaintiff's Requests for Production, and Responses to Plaintiff's Requests for Admissions on May 6, 2015."

Edwards testified that "Mr. Foster did not realize until May 2015 that the discovery requests which were directed to the Fountains of Tomball Defendants were included in the materials served on the Fountains of Tomball Defendants along with citation and Plaintiffs Original Petition." Edwards also testified, "The accidental failure to timely respond to [Mejia-Rosa's discovery requests] was discovered by counsel for the Fountains of Tomball Defendants on May 4, 2015."

Relators also offered the email exchange between Becerra and Edwards from May 4, 2015. Becerra had emailed Relators' counsel, inquiring, "I've only been able to locate your responses to request for disclosure in this matter. Have you served your objections and responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions that were served with the original petition?" Edwards responded, "We have no record of having been served

with the discovery requests. If you email them to me in [W]ord format I will take care of it."

In her opposition, Mejia-Rosa challenged Relators' assertion that their failure to timely respond to the requests for admission had been an "accident," which, Relators claimed, had resulted from their lack of knowledge that they had been served with written discovery when they were served with the original petition. Mejia-Rosa asserted, "Defendants' contention that they were unaware of Plaintiff's discovery requests is belied by the fact that counsel for Defendants served Plaintiff with Defendants' responses to Plaintiff's Requests for Disclosure on January 5, 2015." Mejia-Rosa pointed out that "Plaintiff's Request for Disclosures was included in the same document as Plaintiff's other written discovery requests."

In her response to Relators' mandamus petition, Mejia-Rosa elaborated further on this point:

> Not only were Plaintiff's requests for disclosure filed with Plaintiff's original petition and other initial discovery, but Plaintiff's requests for disclosure were in the exact same document as the rest of Plaintiff's initial discovery. For example, the document was titled "Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admission and Requests for Disclosure." Page 5 contained Plaintiff's interrogatories [], pages 6–9 contained Plaintiff's requests for production [], pages 10–11 contained Plaintiff's requests for admission [], and finally, page 12 24 contained Plaintiff's request for disclosures []—the disclosures Relators responded to in January of 2015.

> It is hard to imagine how Relators could have responded to Plaintiff's requests for disclosure but somehow were not aware of Plaintiff's requests for admission when both requests were in the same document. If Relators knew about Plaintiff's initial discovery in time to respond to Plaintiff's requests for disclosure on January 5, 2015, it was not reasonable for Relators to wait to respond to Plaintiff's requests for admission until May 6, 2015. This fact alone establishes that Relators callously disregarded Plaintiff's initial discovery.
>
> (Record citations omitted.)

Relevant to Mejia-Rosa's argument, Relators, in their motion to withdraw, pointed out that "[they] served Plaintiff with Responses to Requests for Disclosure on January 5, 2015, in accordance with a Rule 11 Agreement regarding the deadline for the Fountains of Tomball Defendants to designate expert witnesses." The mandamus record shows that the trial court's docket control order required Relators to file their expert designations by October 20, 2014. The order also required that "[t]he designation must include the information listed in Rule 194.2(f)." Rule 194.2, entitled "Content," defines the types of information subject to a request for disclosure, and specifically outlines the substance and content of the requests. *See* TEX. R. CIV. P. 194.2. Sub-section (f) of Rule 194.2, cited in the trial court's docket control order, provides that a party may request disclosure of a testifying expert's identity, the subject matter on which the expert will testify, a summary of the expert's mental impressions and opinions, and, if the expert is retained by the responding party, the data that the expert reviewed in anticipation of his testimony, and the expert's current resume and bibliography. *Id.* 194.2(f).

As noted by Relators, the parties entered into a rule 11 agreement, extending Relators' deadline to designate their experts, until January 5, 2015. On January 5, 2015, Relators served Mejia-Rosa with their responses to the requests for disclosure. In the response, Relators designated their expert witnesses in accordance with Rule 194.2(f), as required by the docket control order. Relators identified Dan Price as an expert who would opine "that there is no applicable standard which would require any changes to the parking lot area where the incident made the basis of this suit occurred as it relates to the prevention of auto-pedestrian accidents." Relators also attached Price's curriculum vitae as required by Rule 194.2(f). *See id.*

When viewed in the context of the record, we disagree with Mejia-Rosa that Relators' request-for-disclosure responses were sufficient to controvert Foster's and Edward's affidavits in which they each testified that Relators were unaware of the requests for admission until May 4, 2015. The disclosure responses were filed on January 5, 2015, the same date that the parties had agreed Relators' expert designations would be due. Pursuant to the docket control order, the expert designations were required to comply with Rule 194.2(f). Relators' designation of its experts, contained in its disclosure responses, complied with Rule 192.4(f). *See id.*

We note that Rule 194.2 governs the content of requests for disclosure. *See id.* 194.2. The rule includes subsections (a) through (l), and covers the disclosure of information beyond information regarding expert witnesses. *See id.* We are aware that Mejia-Rosa's requests for disclosure, served on Relators, requested information contained in all subsections of Rule 194.2, not just the expert witness information contained in subsection (f). However, Mejia-Rosa's requests for disclosure served on Relators omitted certain specific phrases found in subsections (c), (j), and (k) of Rule 194.2. *See id.* 194.2(c), (j), (k). Relators' January 5, 2015 responses, however, included these phrases, indicating that Relators' had responded to the requests utilizing Rule 194.2 and not the requests for disclosure served on them by Mejia-Rosa. Other than Relators' responses to the requests for disclosure, Mejia-Rosa pointed to no other evidence to controvert the affidavit testimony of Foster and Edwards, indicating that Relators had no actual knowledge, until May 4, 2015, that they had been served with requests for admission.

In her response to Relators' mandamus petition, Mejia-Rosa also asserts that Relators should not be allowed to withdraw the deemed admissions because they had "constructive knowledge" of the discovery requests. Mejia-Rosa opposed the withdrawal in the trial court by pointing out that she had answered Relators' discovery. Mejia-Rosa also pointed out that Relators acknowledged that they were

aware of the written discovery propounded on John Moore Services by Mejia-Rosa. In her opposition, Mejia-Rosa further averred,

> At no point throughout the course of this litigation has counsel for Defendants inquired as to the status of discovery which, while not required, would certainly have been prudent considering that counsel for Defendants had been served with all of Plaintiff's responses to their own discovery requests, Plaintiff's responses to Defendant John Moore Services, Inc.'s *and* John Moore Services, Inc.'s responses to Plaintiff's discovery throughout 2014.

Mejia-Rosa also claimed,

> Defendants were on notice that Plaintiff had propounded discovery requests to the other defendants joined in the litigation as early as receiving Plaintiff's Original Petition. . . . At the very least, this should have provided Defendants with notice that Plaintiff was actively pursuing her claims and participating in the discovery process. Even with this knowledge, it is apparent counsel for Defendants did not inquire as to the receipt of any discovery requests.

In addition, Mejia-Rosa relied on the process servers' affidavits of service filed with the trial court, indicating that Relators had been served Mejia-Rosa's written discovery along with the original petition. Mejia-Rosa averred,

> Affidavits of service indicating that discovery was served on Defendants TT-Fountains of Tomball d/b/a Fountains of Tomball and Henry S. Miller Realty Management, LLC have been on file with this Court since February 3, 2014 and February 19, 2014, respectively. . . . Even a cursory review of the file on this case would alert Defendants to the fact that discovery was served with Plaintiff's Original Petition on both of their clients.

Mejia-Rosa also points out that Relators did not respond to the requests for over a year after they were due. She indicates that, given the length of time and the

other parties' participation in discovery, Relators should have realized that something was awry and inquired about the discovery. In her response in this Court, Mejia-Rosa asserts, "[A]t some point discovery abuse or neglect crosses the line from an honest mistake into callous disregard . . . ." The correctness of this assertion aside, Relators in this case offered Foster's and Edward's affidavit testimony indicating that Relators were unaware that they had been served with discovery. Mejia-Rosa offered no evidence to successfully controvert this testimony. An equally reasonable inference that could be made in this case is that Relators thought Mejia-Rosa had been remiss in failing to serve them with discovery and had hoped to take advantage of that failure. Indeed, the mandamus record indicates that Relators had filed a no-evidence motion for summary judgment against Mejia-Rosa shortly before Relators realized that they had been served with discovery.

In addition to pointing out that Relators were 15 months late in responding to the requests, Mejia-Rosa also asserts it was significant that Relators were represented by counsel throughout the proceedings. She contrasts this case to *Wheeler* and *Marino*, cases in which the supreme court determined that there was no evidence of bad faith or callous disregard for the rules and held that the deemed admissions should have been withdrawn. *See Marino*, 355 S.W.3d at 630; *Wheeler*, 157 S.W.3d at 443–44. In those cases, the tardy parties were only one or

two days late in responding to the requests and were acting pro se when they failed to timely respond. *See Marino*, 355 S.W.3d at 634; *Wheeler*, 157 S.W.3d at 441. The minimal tardiness and the parties' pro se status were facts relied on by the *Marino* and *Wheeler* courts in holding that the trial courts had erred in denying the requests to withdraw deemed admissions. *See Marino*, 355 S.W.3d at 633–34; *Wheeler*, 157 S.W.3d at 444.

In *Wheeler*, the court recognized that pro se litigants are not exempt from the rules of procedure, "[b]ut when a rule itself turns on an actor's state of mind (as these do here), application may require a different result when the actor is not a lawyer." *Wheeler*, 157 S.W.3d at 444. In other words, a pro se litigant may not understand the rules of procedure and, as a result, may not respond timely to discovery. *See id.* Under such circumstances, the litigant's pro se status is important in determining whether a failure to respond timely was the result of a mistake or a result of bad faith or callous disregard for the rules. *See id.*

Here, Relators did not claim that they failed to timely respond because they misunderstood the rules of procedure; rather, Relators asserted they did not respond because they did not know that they had been served with discovery. In *Wheeler* and *Marino*, the parties did not make such claims. To the contrary, the parties in those cases, being fully aware that discovery had been served, responded to the discovery but failed to do so timely because, as pro se litigants, they

misunderstood the rules of civil procedure. *See Marino*, 355 S.W.3d at 633; *Wheeler*, 157 S.W.3d at 441–42. Thus, while consideration of the parties' pro se status was important to determining state of mind in those cases, whether Relators were represented by counsel is not significant here. As Mejia-Rosa acknowledged in her opposition, Relators had no duty to inquire about discovery that they did not believe had been served. Moreover, while the length of time that a response is tardy may factor into whether a party acts with the requisite state of mind sufficient to deny his motion to withdraw when he is aware of being served with discovery, Mejia-Rosa failed to show how it is a factor when a party is unaware that he has been served.

Even assuming that Relators acted imprudently by not inquiring whether they had been served with discovery or by failing to check the trial court's file for the affidavits of service, we disagree that such inaction constitutes evidence of flagrant bad faith or callous disregard for the rules. At most, the evidence shows that Relators lacked care in reviewing the documents accompanying the original petition and suggests that it may have been more pragmatic for Relators to have inquired whether Mejia-Rosa had sent written discovery to them. However, a lack of care, simple bad judgment, or a mistaken belief that no discovery had been served does not rise to the level of bad faith or callous disregard for the rules. *See Armstrong v. Collin Cnty. Bail Bond Bd.*, 233 S.W.3d 57, 63 (Tex. App.—Dallas

2007, no pet.) ("Bad faith is not simply bad judgment or negligence, but the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose."); *see also Rodriguez v. Kapilivsky*, No. 13–11–00796–CV, 2012 WL 7849308, at *2 (Tex. App.—Corpus Christi Dec. 13, 2012, no pet) (mem. op.) (concluding that no evidence was presented that appellant's tardy response was intentional or result of conscious indifference, bad faith, or a callous disregard for the rules when counsel averred in his affidavit that he had misfiled the requests for admission, failed to calendar them, and first learned of requests when he received motion for summary judgment relying on request); *In re Reagan*, No. 09–07–00113–CV, 2007 WL 1087148, at *1 (Tex. App.—Beaumont Apr. 12, 2007, orig. proceeding) (mem. op.) (granting mandamus relief and holding that relator entitled to have deemed admissions stricken—even though party knew he had been served with requests one year earlier—because there was no showing of conscious failure to respond when his attorney stated in her affidavit that "each time she examined the petition, she failed to notice the requests for admissions were there"); *Smith v. Nguyen*, 855 S.W.2d 263, 267 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (concluding that party had not acted with callous disregard for the discovery rules when party's attorney failed to timely designate expert witnesses as a result of his failure to check trial court's file for amended docket control order setting new deadlines).

Rather, a determination of bad faith or callous disregard for the rules has been reserved for cases in which the evidence shows that a party is mindful of pending deadlines and nonetheless either consciously or flagrantly fails to comply with the rules. *See, e.g.*, *In re Adams*, No. 05–15–00536–CV, 2015 WL 2195091, at *1 (Tex. App.—Dallas May 8, 2015, orig. proceeding) (mem. op.) (holding that "trial court could have reasonably concluded that relator's repeated failure to respond in a timely fashion to the requests for admission was intentional or the result of conscious indifference" after relator had twice failed to respond timely to requests); *Soto v. Gen. Foam & Plastics Corp.*, 458 S.W.3d 78, 83 (Tex. App.—El Paso 2014, no pet.) (holding evidence showed that litigant acted with bad faith and callous disregard of the rules sufficient to support decision that deemed admissions should not be withdrawn because litigant had refused his attorney's requests to respond to discovery and had refused to respond even when faced with sanctions by trial court); *Bernstein v. Adams*, No. 01–12–00703–CV, 2013 WL 4680396, at *4 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.) (mem. op.) (affirming summary judgment based on deemed admissions when appellants never at any point attempted to respond to requests for admissions or summary-judgment motion and knowingly failed to appear at hearing, which indicated "conscious[ ] indifferen[ce] to the deadlines and consequences [they] imposed"). Such evidence is absent here.

We conclude that there is no evidence in the mandamus record to establish that Relators acted with flagrant bad faith or callous disregard of the rules when they failed to timely respond to Mejia-Rosa's requests for admission. *See Wheeler*, 157 S.W.3d at 443. Thus, the trial court could not have found that Mejia-Rosa met her burden on this point. *See Medina*, 2016 WL 1388949, at *9. Next, we determine whether sufficient evidence was presented for the trial court to have determined that Mejia-Rosa would suffer undue prejudice if withdrawal of the merit-preclusive admissions was permitted. *See Time Warner*, 441 S.W.3d at 666 (citing *Marino*, 355 S.W.3d at 634); *see also Wheeler*, 157 S.W.3d at 444 (holding that deemed admissions raised due-process concerns but also considering undue prejudice).

2. Undue Prejudice

"Undue prejudice depends on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Wheeler*, 157 S.W.3d at 443. In the trial court, Mejia-Rosa asserted that she would be unduly prejudiced if withdrawal of the admissions were permitted because trial had already been delayed several times during the 15 months that Relators had not responded to her written discovery. Mejia-Rosa argued that granting a withdrawal of the deemed admissions would further delay trial because it would necessitate her conducting further discovery. She asserted

that she would also need time to retain an expert witness to support her claims against Relators.

The docket control order indicates that trial was originally set for January 19, 2015. The Rule 11 agreement, giving Relators an extension to file their expert designations, also indicated that trial "[would] be continued until at least March or April [2015]." Attached to her response filed in this Court, Mejia-Rosa has provided a printout of the trial court's docket, showing that trial was re-set until June 29, 2015. At the time the trial court denied Relators' motion to withdraw the deemed admissions on September 15, 2015, it appears that trial had again been re-set until February 8, 2016.[7] *See In re M-I L.L.C.*, No. 14–1045, 2016 WL 2981342, at *3 (Tex. Sup. Ct. May 20, 2016) ("In determining whether a trial court abused its discretion, a reviewing court is generally bound by the record before the trial court at the time its decision was made."). Thus, when the trial court denied Relators' motion to withdraw the deemed admissions on September 15, 2015, nearly five months remained until trial, giving Mejia-Rosa ample time to conduct additional discovery and retain expert witnesses without the necessity of delaying

[7] Although her objections do not appear to have been made on the record provided in this Court, Mejia-Rosa indicates that she opposed the June 29, 2015 continuance and the February 8, 2016 continuance, asserting that she had informed the trial court that she was ready to go to trial.

trial.[8] *See In re Kellogg-Brown & Root, Inc*., 45 S.W.3d 772, 776 (Tex. App.—Tyler 2001, orig. proceeding) (holding opposing party "would not be unduly prejudiced by the amendment of the deemed admissions" because "requests for admission were delivered eight weeks prior to trial," providing opposing party time "[to] assess the responses and to take any appropriate action" before trial); *Emp'rs. Ins. of Wausau v. Halton*, 792 S.W.2d 462, 467 (Tex. App.—Dallas 1990, writ denied) (determining there was a lack of prejudice when opposing party had almost one month to conduct additional discovery). When considered in the context of when Mejia-Rosa received Relators' responses to her discovery on May 6, 2015, nearly eight weeks remained until the trial setting of June 29, 2015. This was also sufficient time to conduct discovery and to retain expert witnesses without a trial delay. *See Kellogg-Brown & Root*, 45 S.W.3d at 776; *Halton*, 792 S.W.2d at 467.

In addition, although Mejia-Rosa claimed that she had not conducted discovery or retained an expert witness to establish Relators' liability because she was relying on the deemed admissions, Mejia-Rosa's reliance was not justified.[9]

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[8] When Relators responded to Mejia-Rosa's requests for admission on May 6, 2015, the deadline set in the trial court's docket control order for Mejia-Rosa to conduct discovery and to designate expert witnesses had passed. We note, however, that Mejia-Rosa had requested the trial court in her oppositions to allow her additional time to conduct further discovery and to retain expert witnesses in the event that the motion to withdraw was granted. We presume the trial court will consider Mejia-Rosa's request in light of the disposition of this mandamus proceeding.

[9] Mejia-Rosa's claim of reliance is also undermined by the email sent by the law firm representing her to Relators' attorney on May 4, 2015, inquiring whether Relators had answered Mejia-Rosa's discovery. Had she been relying on the

Relators' answer to the original petition and their responses in the requests for disclosure, served on Mejia-Rosa on January 4, 2015, made clear that Relators disputed Mejia-Rosa's claim against them. Because Relators made clear that they contested liability, Mejia-Rosa's decision not to pursue additional discovery against Relators or to retain an expert witness to address Relators' liability was made at her own risk. *See Sewell*, 472 S.W.3d at 458 (concluding that opposing parties not unduly prejudiced by withdrawal of deemed admissions when, knowing liability was contested, they decided not to conduct additional depositions); *Thompson v. Woodruff*, 232 S.W.3d 316, 322 (Tex. App.—Beaumont 2007, no pet.) (determining no undue prejudice, considering that defendant propounding deemed admissions "could not have been misled into thinking" that plaintiff was admitting that defendant was not negligent when that proposition was inconsistent with the plaintiff's pleadings).

Moreover, Mejia-Rosa was not justified in relying on the admissions in deciding not to develop her case because the requests were not proper requests for admission. *See Time Warner*, 441 S.W.3d at 668–69. The primary purpose of requests for admissions is "'to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove.'" *Stelly*, 927 S.W.2d at 622 (quoting *Sanders v. Harder*, 227 S.W.2d 206, 208 (Tex.

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deemed admissions, Mejia-Rosa's attorneys would have known that the requests had not been answered.

1950)); *accord Marino*, 355 S.W.3d at 632. Requests for admission are useful when "addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents." *Wheeler*, 157 S.W.3d at 443. "They were 'never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense.'" *Time Warner*, 441 S.W.3d at 668 (quoting *Stelly*, 927 S.W.2d at 622). "Therefore, requests for admission are improper and ineffective when used to establish controverted issues that constitute the fundamental legal issues in a case." *Id*.; *see also Medina*, 2016 WL 1388949, at *9 (concluding that opposing party's "requests for admissions of 'no liability' fall outside the intended scope of requests for admissions").

In this case, Mejia-Rosa sought admissions from Relators, indicating that their negligence proximately caused her injuries and that Mejia-Rosa was not contributorily negligent. Such requests, involving controverted legal issues, were improper and outside the scope of proper requests for admission.[10] *See Medina*, 2016 WL 1388949, at *9; *Time Warner*, 441 S.W.3d at 669. "When the party requesting admissions knew or should have known that the admissions were improper in this regard, that party cannot be said to have relied on the admissions in deciding not to otherwise develop evidence." *Time Warner*, 441 S.W.3d at 668–

[10] A number of the non-merit preclusive admissions, discussed *infra*, also exceeded the scope of "addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents." *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005).

69. For this reason, even if "that party may be prejudiced by the withdrawal of the admissions during the trial, that prejudice is not 'undue.'" *Id.* at 669. Because her merit-preclusive requests for admission were improper, Mejia-Rosa was not justified in relying on them in deciding to forego developing evidence to support her claims against Relators. *See id.*

4. *Conclusion regarding merit-preclusive admissions*

We conclude that the mandamus record does not contain evidence establishing that Mejia-Rosa would have been unduly prejudiced by the withdrawal of the deemed merit-preclusive admissions. *See Wheeler*, 157 S.W.3d at 443. As previously stated, we also conclude that there was insufficient evidence in the mandamus record to establish that Relators acted with flagrant bad faith or callous disregard of the rules when they failed to timely respond to Mejia-Rosa's requests for admission. *See id.* Under the principles enunciated in *Wheeler*, withdrawal of the merit-preclusive admissions is required. *See id.* Because it did not correctly apply the law to the facts of this case, we hold that the trial court abused its discretion when it denied Relators' second amended motion to withdraw the merit-preclusive requests for admission, numbers 7, 8, 9, 10, 11, 12, 15, and 23. *See Walker*, 827 S.W.2d at 840. Lastly, because the trial court's order denying withdrawal was not accompanied by a simultaneously rendered, final, appealable judgment, Relators have no adequate remedy by appeal with respect to the merit-

preclusive deemed admissions. *See Sewell*, 472 S.W.3d at 462. Accordingly, Relators have shown that they are entitled to mandamus relief with respect to the trial court's denial of their motion to withdraw the merit-preclusive admissions. *See id.*

C. Analysis for Non-Merit Preclusive Admissions

In their mandamus petition, Relators do not assert that all the admissions are merit preclusive. Instead, Relators specify that requests for admission numbers 2, 3, 16, 18, 20, and 21 are not merit-preclusive admissions.[11] These requests for admissions inquire about matters such as whether Relators own and manage the property where the accident occurred, whether Relators posted a flyer at the apartment complex regarding the accident, and whether Mejia-Rosa or the driver who hit her were intoxicated at the time of the accident.

Because they consider these admissions not to be merit preclusive, Relators acknowledge that they had the burden in the trial court to prove all of the requirements of Rule of Civil Procedure 198.3. *See Sewell*, 472 S.W.3d at 455; *see also Stelly*, 927 S.W.2d at 622. For this reason, to be entitled to withdrawal of their non-merit-preclusive admissions, Relators were required to show (1) good

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[11] Relators state that deemed admissions numbers 4, 5, 6, 13, 14, 19, and 22 "are not in controversy." These requests for admissions ask about matters such as whether venue and jurisdiction are proper in the trial court, whether Mejia-Rosa's accident was reported, whether Relators prepared an accident report, and whether Relators have insurance coverage. Relators also stated that request number one, which asks whether Relators were properly named, "is not really controversial."

cause, (2) that Mejia-Rosa would not be unduly prejudiced, and (3) that the presentation of the merits of the lawsuit will be served by the withdrawal. *See* TEX. R. CIV. P. 198.3; *Sewell*, 472 S.W.3d at 455. In their mandamus petition, Relators assert that, because they met this burden, they have shown that the trial court abused its discretion by denying their motion to withdraw the non-merit-preclusive admissions. We agree.

In the context of non-merit-preclusive admissions, "good cause" for withdrawal is established by showing that the failure involved was an accident or mistake, not intentional or the result of conscious indifference. *Wheeler*, 157 S.W.3d at 442. "Even a slight excuse will suffice, especially when delay or prejudice to the opposing party will not result." *Boulet*, 189 S.W.3d at 836 (quoting *Spiecker v. Petroff*, 971 S.W.2d 536, 538 (Tex. App.—Dallas 1997, no writ)).

Here, as discussed, the mandamus record shows that Mejia-Rosa will not suffer undue prejudice if the admissions are withdrawn. And, as also discussed, Relators offered affidavit testimony, explaining that they had not realized that they had been served with Mejia-Rosa's discovery requests due to the manner in which the discovery requests were served with the original petition. Relators also offered the citation served with the petition, incorrectly indicating to Relators that the original petition was the only document being served on them. In addition,

Relators offered the May 2015 email exchange between the law firms representing the parties, indicating that Relators' attorneys had been unaware of the discovery requests.

Also as discussed, Relators had no duty to inquire whether they had been served discovery. There is an equally likely inference that Relators may have believed that Mejia-Rosa had failed to conduct discovery and had hoped to take advantage of that failure by obtaining a no-evidence summary judgment against her. In addition, Relators may not have checked the trial court's file to view the process server's affidavit of service because there was no reason to suspect an inconsistency between the citation served on them—which indicated only service of the original petition—and the process server's affidavit filed with the trial court, which indicated Relators had been served with discovery. Thus, we conclude that Relators' offered evidence to show that their failure to timely respond to the discovery was an accident or mistake and was not intentional or the result of conscious indifference; Mejia-Rosa offered no evidence sufficient to controvert this. *See Rodriguez v.* 2012 WL 7849308, at *2.

"Furthermore, the supreme court has explained that 'presentation of the merits will suffer (1) if the requesting party cannot prepare for trial, and also (2) if the requestor can prepare but the case is decided on deemed (but perhaps untrue) facts anyway.'" *Boulet*, 189 S.W.3d at 836 (quoting *Wheeler*, 157 S.W.3d at 443

n.2) Here, Relators assert that additional discovery is needed regarding the non-merit-preclusive admissions, some of which contain statements regarding issues that may be relevant to Relators' liability and defense. Mejia-Rosa has also indicated that further discovery is needed between her and Relators regarding liability. Thus, presentation of the merits will be served if withdrawal of the non-merit preclusive admissions are permitted.

Under this mandamus record, we conclude that Relators have shown that they satisfied their burden to obtain withdrawal of the non-merit-preclusive admissions. *See* TEX. R. CIV. P. 198.3. Thus, the trial court abused its discretion when it failed to grant Relators' second amended motion to withdraw because it did not correctly apply the law to the facts of this case. *See Walker*, 827 S.W.2d at 840.

In addition to showing that the trial court abused its discretion, Relators are not entitled to mandamus relief unless they also show that they have no adequate remedy on appeal with regard to the trial court's error in denying the motion to withdraw the non-merit-preclusive admissions. *See Walker*, 827 S.W.2d at 840. Orders relating to discovery matters can generally be corrected on appeal, typically precluding mandamus relief. *See Sewell*, 472 S.W.3d at 455 (citing *In re Rozelle*, 229 S.W.3d 757, 761 (Tex. App.—San Antonio 2007, orig. proceeding). "For this reason, a party seeking mandamus review of a trial court's discovery order must

also show that an ordinary appeal is an inadequate remedy." *Id.* (citing *Walker*, 827 S.W.2d at 841–42; *Rozelle*, 229 S.W.3d at 761). "[B]ecause non-merit-preclusive requests do not involve due process considerations, a trial court's order relating to discovery, which is 'merely incidental to the normal trial process,' may be corrected on appeal, and mandamus is not available." *Id.* at 456–57 (quoting *Rozelle*, 229 S.W.3d at 761). But we are also mindful that the Supreme Court of Texas has held that review of significant rulings in exceptional cases may be essential to (1) preserve a relator's substantive or procedural rights from impairment or loss; (2) allow appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in an appeal from a final judgment; and (3) prevent the waste of public and private resources invested into proceedings that would eventually be reversed. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

"[W]hether an appellate remedy is 'adequate' so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules." *Id.* at 137. Here, the mandamus record shows that Relators were entitled to withdrawal of the non-merit-preclusive admissions. After withdrawal, discovery of issues related to the truth or falsity of the deemed admissions will no longer be foreclosed. In other words, the withdrawal of the admissions would warrant further discovery related to the

matters contained in the admissions because, at that point, they will no longer be deemed admitted.

"Remedy by appeal is . . . not adequate where the trial court's discovery order disallows discovery that cannot be made a part of the appellate record, thereby denying the reviewing court the ability to evaluate the effect of the trial court's error." *In re Hinterlong*, 109 S.W.3d 611, 620 (Tex. App.—Fort Worth 2003, orig. proceeding) (citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *Walker*, 827 S.W.2d at 843–44). Here, remedy by appeal is not adequate. The trial court's order denies Relators' ability to conduct discovery regarding the truth or falsity of the deemed admission. As a result, such discovery will never be part of the appellate record, thus preventing a review of the effect of the trial court's error of denying the motion to withdraw. *See id.* at 633 (citing *Colonial Pipeline*, 968 S.W.2d at 941). Because Relators have no adequate remedy on appeal, and the trial court abused its discretion in denying withdrawal, we hold that mandamus relief is appropriate with regard to the non-merit preclusive admissions. *See Walker*, 827 S.W.2d at 840.

Conclusion

We conditionally grant Relators' mandamus petition. We direct the trial court to withdraw its September 15, 2015 order denying Relators' second amended motion to withdraw and amend the deemed admissions. We further direct the trial

court to sign an order granting Relator' second amended motion to withdraw and amend. The writ will issue only if the trial court does not comply.[12]

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Massengale.

[12] We lift our stay of trial imposed by our January 11, 2016 order.