

**Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed February 9, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00963-CV**

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**IN RE ALLSTATE COUNTY MUTUAL INSURANCE COMPANY, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS  
239th District Court  
Brazoria County, Texas  
Trial Court Cause No. 87242-CV**

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**MEMORANDUM OPINION**

On November 30, 2016, relator Allstate County Mutual Insurance Company filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Patrick Sebesta, presiding judge of the 239th

District Court of Brazoria County, to abate the real party in interest's extra-contractual claims, pending resolution of the breach of contract claim in the underlying underinsured motorist suit.

### **BACKGROUND**

Allstate issued an automobile insurance policy to real party in interest, Alexa St. Julian. After being involved in an automobile accident with an underinsured driver, St. Julian submitted claims to Allstate for underinsured motorist coverage. Allstate offered to settle St. Julian's claims for \$12,000, but St. Julian rejected the offer. On June 23, 2016, St. Julian sued Allstate, seeking a declaration of coverage and the recovery of underinsured motorist benefits under the policy, and alleging bad faith and statutory violations related to the offer.

St. Julian served Allstate with discovery requests with her original petition, including requests related to her extra-contractual claims, such as inquiring into Allstate's claims handling and evaluation. Allstate objected to some of St. Julian's discovery requests as not yet relevant because the liability of the underinsured driver had not been established.

On August 30, 2016, Allstate filed a motion to sever and abate St. Julian's extra-contractual claims until the issue of coverage was decided. Although St. Julian did not oppose severance of her extra-contractual claims, she objected to abatement of those claims because she (1) wanted to obtain a photocopy of her claims file and conduct depositions of the adjuster(s) who worked on her file; (2) would run the risk of losing witnesses or evidence by waiting for the resolution of the contractual claims; and (3) would have to participate in mediation twice,

instead of one more effective mediation, because it is the common practice in Brazoria County to require the parties to participate in good-faith mediation before going to trial.

The trial court held a hearing on Allstate's motion to sever and abate on September 26, 2016, and signed the order severing St. Julian's extra-contractual claims, but denying abatement of discovery related to those claims on November 23, 2016.

### STANDARD OF REVIEW

Generally, to be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against its detriments. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2005) (orig. proceeding). In evaluating benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *Id.*

## ANALYSIS

In this mandamus proceeding, Allstate contends that the trial court abused its discretion by not abating the extra-contractual claims and it has no adequate remedy by appeal.

Generally, the insured must prevail on her claim for breach of the underinsured motorist policy before she can prevail on her bad faith claims against the insurer. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996) (orig. proceeding); *In re Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d 422, 427 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). When contractual and extra-contractual claims are being pursued simultaneously, “this court repeatedly has held that extra-contractual claims must be severed and abated when the insurer has made a settlement offer on the contract claim.” *In re Allstate Cty. Mut. Ins. Co.*, 352 S.W.3d 277, 278 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding); *see also Akin*, 927 S.W.2d at 630 (recognizing that abatement may be necessary in bad faith cases where the insurer made a settlement offer on the disputed contract claim). “Abatement of the bad faith claim necessarily accompanies severance because the scope of permissible discovery differs in the two types of claims and without abatement the parties will be put to the effort and expense of conducting discovery on claims that may be disposed of in a previous trial.” *In re Progressive Cty. Mut. Ins. Co.*, No. 09-07-00011-CV, 2007 WL 416553, at \*1 (Tex. App.—Beaumont Feb. 8, 2007, orig. proceeding) (mem. op.) (citing *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding)).

St. Julian is simultaneously pursuing both contractual and extra-contractual claims against Allstate, and Allstate made a settlement offer, which St. Julian refused to accept. St. Julian served discovery on Allstate, which included a number of requests related to Allstate's handling of St. Julian's claim that are not relevant to her contractual claim. Therefore, the trial court abused its discretion by failing to abate St. Julian's extra-contractual claims.

We also conclude that Allstate does not have an adequate remedy by appeal because it stands to lose substantial rights by producing discovery on or litigating claims that might be rendered moot and never accrue if St. Julian does not prevail on her breach of contract claims. *See Prudential Ins. Co. of Am.*, 148 S.W.3d at 136; *In re St. Paul Surplus Lines Ins. Co.*, No. 14-12-00443-CV, 2012 WL 2015796, at \*3 (Tex. App.—Houston [14th Dist.] June 1, 2012, orig. proceeding) (mem. op.).

### CONCLUSION

Having concluded that the trial court abused its discretion by not abating St. Julian's extra-contractual claims and Allstate does not have an adequate remedy by appeal, we hold that Allstate has established that it is entitled to mandamus relief. *See St. Paul Surplus Lines Ins. Co.*, 2012 WL 2015796, at \*3 (stating that mandamus is proper where the trial court abused its discretion by not severing and abating extra-contractual claims when the insured also brought a breach of contract claim); *Allstate Cty. Mut. Ins. Co.*, 352 S.W.3d at 278 (granting mandamus relief where trial court failed to sever and abate extra-contractual claims until disposition of the underinsured motorist claims); *Mid-Century Ins. Co. of Tex. v. Lerner*, 901

S.W.2d 749, 753 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (granting mandamus relief where trial court failed to sever and abate extra-contractual claims pending resolution of the breach of contract claim).

Accordingly, we conditionally grant Allstate’s petition for writ of mandamus and direct the trial court to vacate its November 23, 2016 order and conditionally grant Allstate’s motion to abate the extra-contractual claims. The writ will issue only if the trial court fails to act in accordance with this opinion. We also lift our stay order entered on December 2, 2016.

PER CURIAM

Panel consists of Justices Christopher, Jamison, and Wise.