



Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00219-CV

IN RE Heliodoro V. BOONE

Original Mandamus Proceeding¹

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: July 8, 2020

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

In the underlying medical malpractice suit, the real party in interest, Robert Hall, sued relator, Dr. Heliodoro Boone, and Southwest General Hospital (the “hospital”) alleging negligence and gross negligence while Hall was under Boone’s care at the hospital. In this original proceeding, Boone asserts the trial court abused its discretion by granting Hall’s motion to obtain Boone’s net worth. We agree and conditionally grant relator’s petition for writ of mandamus.

BACKGROUND

In September 2016, Hall was admitted to the hospital for day surgery to repair a hiatal hernia and an umbilical hernia. In his lawsuit, Hall contended, among other allegations, that Boone departed from acceptable standards of care when he treated Hall with two liters of GoLyteLy, a

¹ This proceeding arises out of Cause No. 2018CI20073, styled *Robert Hall v. Dr. Heliodoro V. Boone, et al.*, pending in the 45th Judicial District Court, Bexar County, Texas. The Honorable Mary Lou Alvarez signed the order at issue in this proceeding.

bowel prep/laxative, while Hall was suffering from an ileus caused by the surgical repair of the hernias. With regard to Boone's alleged gross negligence, Hall contended Boone

. . . committed gross negligence when he gave GoLytely, a laxative that is completely contraindicated in the presence of an ileus, to Mr. Robert Hall when Dr. Boone had specific knowledge that an ileus existed through an xray prior to the administration of the laxative. All general surgeons are trained that laxatives should not be given to patients with an ileus. Dr. Boone's actions cannot be rationalized in any manner.

Because Hall sought to recover exemplary damages for Boone's alleged gross negligence, Hall filed a motion seeking evidence of Boone's net worth pursuant to Texas Civil Practice and Remedies Code section 41.0115. Following a hearing, the trial court granted Hall's motion. Thereafter, Boone filed a petition for writ of mandamus and, although given the opportunity to respond, Hall did not file a response.

MANDAMUS STANDARD OF REVIEW

Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion when there is no other adequate remedy at law. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). "A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (citation omitted). Pertaining to the absence of an adequate remedy by appeal, "a party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error." *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding) (quoting *Walker*, 827 S.W.2d at 843). Accordingly, mandamus relief is available if a trial court compels production beyond the permissible bounds of discovery. *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding).

ABUSE OF DISCRETION

“[A]fter notice and a hearing, a trial court may authorize discovery of evidence of a defendant’s net worth if the court finds in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.” TEX. CIV. PRAC. & REM. CODE § 41.0115(a). “Evidence submitted by a party to the court in support of or in opposition to a motion made under this subsection may be in the form of an affidavit or a response to discovery.” *Id.* “When reviewing an order authorizing or denying discovery of net worth evidence under this section, the reviewing court may consider only the evidence submitted by the parties to the trial court in support of or in opposition to the motion described by Subsection (a).” *Id.* § 41.0115(c).

A. Lack of Written Finding

Section 41.0115(a) allows a claimant to pursue net worth discovery *only after the trial court finds in a written order* that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages. *See id.* § 41.0115(a); *see also In re WTG Fuels, Inc.*, 11-19-00390-CV, 2020 WL 205254, at *3 (Tex. App.—Eastland Jan. 13, 2020, orig. proceeding) (mem. op.); *In re Michelin N. Am., Inc.*, No. 05-15-01480-CV, 2016 WL 890970, at *8 (Tex. App.—Dallas Mar. 9, 2016, orig. proceeding) (mem. op.). In its February 12, 2020 order, the trial court did not make a finding that Hall had demonstrated a substantial likelihood of success on the merits of his gross negligence claim. “In the absence of that statutorily required finding, [the trial court] could not exercise discretion to order discovery of [Boone’s] net worth.” *WTG Fuels*, 2020 WL 205254, at *3; *see also In re Kuntz*, 124 S.W.3d 179, 181 (Tex. 2003) (orig. proceeding) (concluding trial court abuses its discretion “when a discovery order conflicts with the Texas Rules of Civil Procedure”). Therefore, the trial court abused its discretion by ordering discovery of Boone’s net worth without first finding that Hall demonstrated a substantial likelihood

of success on the merits of his gross negligence claim. Even if the trial court had made the required finding, we also conclude the trial court abused its discretion by compelling discovery of Boone's net worth.

B. Substantial Likelihood of Success on the Merits

“[E]xemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from . . . gross negligence.” *Id.* § 41.003(a)(3). “The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.” *Id.* § 41.003(b). “‘Clear and convincing’ means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *Id.* § 41.001(2).

“Gross negligence consists of both objective and subjective elements.” *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). Therefore, Hall had to establish, by clear and convincing evidence, that (1) when viewed objectively from Boone's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) Boone had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 41.001(11)).

1. Objective element

“Under the objective component, ‘extreme risk’ is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury.” *Id.* Hall's evidence on the objective element consisted of (1) the report of Hall's expert, Dr. Vadim Sherman; and (2) a product insert to GoLyteLy. Sherman stated in his report that Hall had a distended small

bowel with air fluid levels, “concerning for small bowel obstruction or paralytic ileus.” According to Sherman, the administration of GoLytely is contraindicated for paralytic ileus or small bowel obstruction and Boone “fell below the standard of care when he administered GoLytely,” which “resulted in additional surgery and a complicated post-operative course.” The GoLytely insert states as follows: “GoLYTELY is contraindicated in the following conditions . . . Gastrointestinal (GI) obstruction, ileus, or gastric retention . . .”

The above evidence shows GoLytely is contraindicated for ileus. However, although Sherman’s report may indicate Boone’s administration of GoLytely deviated from a standard of care, Sherman’s report does not mention much less establish by clear and convincing evidence the likelihood of Hall’s serious injury or that Boone’s acts “involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others.” *Waldrip*, 380 S.W.3d at 137; TEX. CIV. PRAC. & REM. CODE § 41.001(11). Therefore, Hall did not establish the objective element of gross negligence.²

2. Conclusion

Hall was required to establish, by clear and convincing evidence, both the objective and subjective elements of his gross negligence claim. Because he did not satisfy his burden to establish the objective element, Hall did not demonstrate a substantial likelihood of success on the merits of his claim for exemplary damages. Therefore, we need not address whether Hall satisfied his burden to establish the subjective element. Accordingly, we conclude the trial court abused its

² Although Hall did not rely on an expert report from a nurse, it appears the trial court may have done so when considering evidence on the objective element. To the extent the trial court relied on the nurse’s expert report, it erred. See TEX. CIV. PRAC. & REM. CODE § 74.401(a) (“In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician . . .”) (emphasis added); see also *Pace v. Sadler*, 966 S.W.2d 685, 690 (Tex. App.—San Antonio 1998, no pet.) (although qualified to render expert opinion on nursing standard of care, nurse was not qualified to medically diagnose heart condition).

discretion by compelling discovery of Boone's net worth. Therefore, we next address whether Boone has an adequate remedy at law.

ADEQUATE REMEDY AT LAW

Discovery that is not authorized by law cannot be "untaken" such that an appellate court is able to cure the error and enforce the statutory scheme after trial. *See In re Jorden*, 249 S.W.3d 416, 419-20 (Tex. 2008) (orig. proceeding) ("If (as relators claim) Texas law prohibits presuit depositions until an expert report is served, those depositions cannot be 'untaken' and thus an appellate court will not be able to cure the error and enforce the statutory scheme after trial."); *see also In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam) (concluding appeal is an inadequate remedy when appellate court would not be able to remedy the trial court's discovery error). Therefore, an order that compels discovery beyond that allowed by law is an abuse of discretion for which mandamus is the proper remedy. *See In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding) (concluding mandamus relief is appropriate when trial court abuses its discretion by ordering discovery prohibited by statute); *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) (orig. proceeding) (per curiam) ("discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy").

Here, the trial court abused its discretion by ordering discovery of Boone's net worth contrary to the requirements of Civil Practice and Remedies Code section 41.0115. "As a result, [Boone] unquestionably may lose substantive and procedural rights if review is postponed." *Jorden*, 249 S.W.3d at 420.

CONCLUSION

We conclude the trial court abused its discretion by compelling discovery of Boone's net worth and that Boone has no adequate remedy at law. Therefore, we conditionally grant the

petition for writ of mandamus and direct the trial court to vacate that portion of its February 12, 2020 “Order Granting Plaintiff’s Motion to Determine Dr. Heliodoro V. Boone’s Net Worth,” no later than fifteen days from the date of this opinion.³

Patricia O. Alvarez, Justice

³ The February 12, 2020 order also granted Hall’s motion to withdraw his motion requesting the hospital’s net worth. That portion of the order is not the subject of this original proceeding and remains intact.