

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00340-CV

IN RE BNSF RAILWAY COMPANY

Original Proceeding

MEMORANDUM OPINION

The mandamus petition filed by BNSF Railway Company seeks to compel the trial court to vacate a protective order and to require a non-party health care provider to release original specimens to the relator. Relator asserts that the prohibitive cost for defense experts to travel to the hospital makes it unduly burdensome for relator to perform the testing that is necessary to prepare its defense. No record from the trial court was brought forward on this point. Citing *In re Univ. of Tex. Health Ctr. at Tyler*, relator argues that the trial court abused its discretion by restricting the manner in which relator may obtain medical specimens that are relevant to its primary defense of the case. *See* 198 S.W.3d 392, 397 (Tex. App.—Texarkana 2006, orig. proceeding). In that case, the

non-party hospital failed to show that the trial court abused its discretion by ordering tests that could not be performed under the hospital's existing policy. *Id.* at 399. Here, the trial court permitted discovery under a protective order and it is the party seeking the discovery who bears the burden of establishing an abuse of discretion by the trial court.

Mandamus will issue only to correct a clear abuse of discretion when that abuse cannot be remedied by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). After reviewing the petition and limited mandamus record before us, we conclude that the relator failed to establish an abuse of discretion by the trial court. Accordingly, we deny the petition for writ of mandamus.

PETITION DENIED.

PER CURIAM

Opinion Delivered July 14, 2011

Before Gaultney, Kreger, and Horton, JJ.