NUMBER 13-16-00203-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE GLEN ROY ELPS

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Garza
Memorandum Opinion Per Curiam[1]

Relator, Glen Roy Elps, filed a petition for writ of mandamus in the above cause on April 7, 2016. Through this original proceeding, Elps seeks to compel the trial court to vacate an order rendered on March 8, 2016 denying his motion for reconsideration of an order rendered on May 7, 2015 denying Elps's motion to compel discovery. Pursuant to Texas Rule of Appellate Procedure 52, this Court requested that the real parties file a response to the petition for writ of mandamus. *See* TEX. R. APP. P. 52.4, 52.8. Down

[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case."); TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions).

Time-South Texas, L.L.C. ("South Texas") filed a response to the petition for writ of mandamus and Elps filed a reply to South Texas's response. Elps has further filed a motion to strike South Texas's response, South Texas has filed a response to the motion to strike, and Elps has filed a reply thereto. Down Time Aviation, L.L.C., Down Time Services, Inc., Down Time Enterprises, L.L.C., and Douglas Williams have also filed a response to the petition for writ of mandamus, and Elps has filed a reply to that response. *See id.* R. 52.5.

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court abused its discretion and that there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). The relator has the burden of establishing both prerequisites to mandamus relief, and this burden is a heavy one. *In re CSX Corp*., 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding). A trial court abuses its discretion if it reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding); *Walker*, 827 S.W.2d at 840. A party lacks an adequate remedy by appeal with regard to an order denying discovery when: (1) the appellate court would not be able to cure the trial court's error on appeal; (2) the party's ability to present a viable claim or defense is vitiated or severely compromised; or (3) the missing discovery cannot be made a part of the appellate record. *In re Ford Motor Co*., 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding).

The scope of discovery is generally within the trial court's discretion. *In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam); *In re CSX Corp*., 124 S.W.3d at 152. Parties may seek discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action . . . ." TEX. R. CIV. P. 192.3(a). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. *See* TEX. R. EVID. 401. "Parties are 'entitled to full, fair discovery' and to have their cases decided on the merits." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009) (quoting *Able Supply Co. v. Moye*, 898 S.W.2d 766, 773 (Tex. 1995) (orig. proceeding)). However, a party's discovery requests must show a reasonable expectation of obtaining information that will aid in the resolution of the dispute. *In re CSX Corp*., 124 S.W.3d at 152.

We first address Elps's motion to strike the response filed by South Texas. Elps seeks to strike South Texas's response to the petition for writ of mandamus on grounds that it includes some evidence that was not before the trial court at the time it made its decision. We grant Elps's motion to strike in part and deny it in part. We grant the motion to strike insofar as our decision in this case is based on the record that was before the trial court at the time it made its rulings. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding); *Sabine Off Shore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (orig. proceeding); *In re Taylor*, 113 S.W.3d 385, 392 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding). We deny the motion to strike to the extent that it addresses an affidavit prepared by counsel for South Texas to support factual statements in the response to the petition for writ of mandamus regarding a

hearing on the discovery matters at issue in this original proceeding and discovery responses provided by South Texas. *See* TEX. R. APP. P. 52.3(j),(k), 52.4, 52.7, 52.10. In this regard, we note that South Texas's response to the petition for writ of mandamus included important and material documents and information which were not included in the petition for writ of mandamus. *See id.* R. 52.3, 52.4, 52.10.

The Court, having examined and fully considered the petition for writ of mandamus, the responses, the reply, and the applicable law, is of the opinion that Elps has not met his burden to obtain extraordinary relief. The trial court has great latitude in controlling discovery, and based on the record presented, the trial court has not abused its discretion by acting unreasonably or arbitrarily. *See In re Colonial Pipeline Co*., 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding). Accordingly, the petition for writ of mandamus is denied.

PER CURIAM

Delivered and filed the
28th day of April, 2016.