NUMBER 13-17-00584-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE MCALLEN ANESTHESIA CONSULTANTS, P.A.

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Contreras and Hinojosa
Memorandum Opinion by Justice Contreras[1]

Relator McAllen Anesthesia Consultants, P.A. filed a petition for writ of mandamus in the above cause on October 17, 2017. Through this original proceeding, relator seeks a writ of mandamus compelling the trial court to "vacate [its] order on Plaintiffs' Emergency Discovery Motion . . . and to issue an order quashing . . . all requests for production, subpoenas, deposition notices, and all other discovery which has been served, filed or

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

propounded in this case" pursuant to that order.[2] *See* TEX. R. CIV. P. 176, 191, 192, 196, 199, 205. The underlying proceeding is a health care liability suit and relator contends that this discovery violates section 74.351(s) of the Texas Civil Practice and Remedies Code because an expert report has not yet been filed in this case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (West, Westlaw through 2017 1st C.S.). Based on binding precedent from the Texas Supreme Court, we are constrained to hold that the trial court's order constitutes an abuse of discretion. *See In re Jorden*, 249 S.W.3d 416, 420–21 (Tex. 2008) (orig. proceeding). Accordingly, we conditionally grant the writ of mandamus as stated herein.

I. BACKGROUND

Plaintiff and real party in interest Jose David Sanchez, individually and as guardian of the person and estate of Arleena Mancha Sanchez and as next friend of XXXXX XXXX XXXXX,[3] a minor, brought suit against Roger Sims, CRNA, a nurse anesthetist, for negligence, gross negligence, and malice. Sanchez alleged that Arleena was admitted to Doctors Hospital at Renaissance for the induction of labor while pregnant. Sims performed labor epidurals and spinal anesthesia on Arleena during her cesarean section. During the surgery, Arleena suffered anoxic encephalopathy which left her with catastrophic, permanent brain damage.

On October 10, 2017, Sanchez filed an emergency discovery motion. According to the motion, Sims was the medical professional who provided Arleena's anesthesia

[2] This original proceeding arises from trial court cause number C-3007-17-G in the 370th Judicial District Court of Hidalgo County, Texas, and the Honorable Noe Gonzalez is the respondent. *See* TEX. R. APP. P. 52.2.

[3] Relator utilizes this pseudonym to refer to the minor child, and we do likewise. *See generally* TEX. R. APP. P. 9.8.

during the surgery; on "information and belief," relator was Sims's employer at the time; and Edgar Armando Rodriguez, M.D. was the doctor providing treatment to Arleena. Sanchez alleged that Sims was actively and deliberately evading service of process and his "wrongful actions in avoiding service have greatly hindered Plaintiffs' ability to move forward with discovery and fully develop exactly what happened to Arleena, and determine what party or parties bear legal responsibility." Sanchez alleged that "the impediments imposed by Chapter 74 make this motion mandatory:"

> In particular, it is absolutely vital that Plaintiffs obtain immediately the depositions and written document production of the witnesses identified below in order to properly, diligently and most importantly timely investigate[] the role of the hospital, and other associated health care providers before the statute of limitations potentially bars any of the Plaintiffs' legal rights and remedies. The statute of limitations on personal injury claims, including medical malpractice, is rapidly upcoming and may conceivably be argued to bar some or all claims of the Plaintiffs.
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> As the court is aware, Texas law, particularly Chapter 74 of the Texas Civil Practice and Remedies Code places significant factual and expert hurdles for medical malpractice plaintiffs, including strict deadlines—which if not met, can result in the dismissal of a plaintiff's lawsuit.
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> Adding to the emergency, is the fact that Plaintiff[s] will have to expend *additional time and effort to comprehensively prepare the presentation of their claims* and the *timely* filing of suit even after the requested discovery is obtained. As the court is aware, Plaintiff[s] must not only gather facts about Arleena's medical case, but must also:
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> 1) seek out proper expert witnesses;
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> 2) have the case reviewed and opined on by the experts; and
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> 3) have prepared and submit written expert reports as to the fault of those who are responsible for this incomprehensible misfortune.
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> In order to serve justice, and follow the strictures of Texas' medical malpractice law, Plaintiffs seek the invocation of the broad powers granted to the Court to compel necessary discovery.

Sanchez asserted that he had exhausted all other avenues to properly investigate the incident. He asserted that he had obtained the hospital's records, which were "grossly insufficient," and an investigator had spoken to Sims who "adamantly refused to cooperate or provide information" and who stated that his insurance carrier had instructed him not to speak with anyone about the incident. Sanchez alleged that "Sims' current actions can certainly be reasonably interpreted to be a part of a larger conspiracy by Sims, his insurance company, and likely other possible defendants to stonewall and hide facts in order to circumvent justice and this Court's authority."

Sanchez sought discovery under Rule 190.5 of the Texas Rules of Civil Procedure, which allows a court to modify a discovery control plan at any time and requires modification "when the interest of justice requires," and under Rules 205.3, 176.6 and 176.8, which govern discovery from nonparties. *See* TEX. R. CIV. P. 176.6, 176.8, 190.5, 205.3. Sanchez sought to depose: (1) Sims; (2) Dr. Rodriguez; (3) Lawrence Gelman, M.D.; (4) the corporate representative of Doctors Hospital at Renaissance; and (5) relator's corporate representative. Sanchez further sought the production of documents from these specified deponents by way of subpoena duces tecum within fourteen days from service of the request and at least ten days prior to the dates of the requested depositions. Sanchez requested that the trial court: (1) set a hearing in order to hear any motions, objections, or complaints relating to the requests for documents and depositions and subpoenas; (2) grant Sanchez's counsel the right to recess all the subpoenaed depositions so that counsel would have time to review the records being produced by the various respondents and so that the court could hear any objections or motions relating to the requests for records and the deposition notices; (3) order that all subpoenaed

depositions would resume at the date and time designated by Sanchez's counsel after review of the documents produced and rulings from the court on any objections or motions; (4) order the entities and witnesses to appear in the witness presentation order as chronologically described in the motion; (5) order that the plaintiffs' depositions may not be taken before the depositions of these witnesses are completed; and (6) order that the plaintiffs "shall not waive their rights to conduct full depositions of any witnesses, including re-depositions of the witnesses identified in this motion, after sufficient discovery has been conducted in the case."

On October 10, 2017, the trial court granted Sanchez's emergency discovery motion. The order granting the motion recites in relevant part:

> The Court FINDS that an emergency situation and good cause exists requiring this ORDER and expedited action, in the interest of justice.
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> The Court further preliminarily FINDS that the notices, subpoenas and requests for production attached to the Motion as Exhibits 1–13[4] are necessary, reasonable, proper, and well within the scope of discovery for this case.
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> The Court further FINDS that pursuant to Rules 176 et seq. and 205 et seq., parties responding to subpoenas will have until October 30, 2017, the date for compliance with the notices and subpoenas . . . to file with the Court and serve onto Plaintiffs any objections[,] complaints[,] or motions for protections which shall then be heard by the court on an expedited basis, as ordered below;
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> IT IS FURTHER,

[4] The exhibits attached to the emergency discovery motion included: (1) a Rule 205 notice of oral deposition for Dr. Gelman; (2) a Rule 176 subpoena for Dr. Gelman's deposition; (3) a Rule 205 "notice to produce documents or tangible things" to Doctors Hospital; (4) a Rule 176 subpoena for the production of documents to the custodian of records for Doctors Hospital; (5) a Rule 205 notice of oral deposition for the corporate representative of Doctors Hospital; (6) a Rule 176 subpoena for the deposition of the corporate representative of Doctors Hospital; (7) a Rule 205 "notice to produce documents or tangible things" to McAllen Anesthesia; (8) a Rule 176 subpoena for the production of documents and tangible things to the corporate representative for McAllen Anesthesia; (9) a Rule 205 notice of oral deposition to the corporate representative of McAllen Anesthesia; (10) a Rule 176 subpoena for the oral deposition of the corporate representative of McAllen Anesthesia; (11) requests for production to Sims; (12) a Rule 205 notice of oral deposition for Dr. Rodriguez; and (13) a Rule 176 subpoena for Dr. Rodriguez's deposition.

ORDERED, ADJUDGED, AND DECREED that any objections, complaints, or motions for protection which have not been filed within the time limit specified by the foregoing rules shall not be considered and shall be deemed WAIVED;

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this matter is set for hearing on November 7, 2017 at 8:00 a.m. in the 370th Judicial District Court to hear motions, objections[,] or complaints, if any, from any affected responding person, party[,] or entity relating to the requests for documents and depositions and subpoenas attached to the Motion as Exhibits 1–13;

IT IS FURTHER,

ORDERED, ADJUDGED, AND DECREED that the Court shall take up additional motion(s), if any, proffered by the Plaintiffs, including but not limited to any motions for enforcement or sanctions for any noncompliance by any responding party, at the above referenced hearing;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that no deposition of any Plaintiff shall be taken by any responding party until after the completion of the depositions set forth in the Motion, and that any Plaintiffs' depositions that are sought by any responding party shall be taken at a time and place agreed upon by all counsel of record, or upon further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs' counsel shall have the right to begin questioning at each deposition ordered or subject to this order. The depositions subject to this order and set forth in the Motion may also be videotaped;

IT IS FURTHER

ORDERED, ADJUDGED, AND DECREED Plaintiffs shall have the right to recess the depositions of the respondents at any time in order to:

1. Review the documents produced by the respondents and determine if further review or court intervention are necessary;

2. Have heard any objections, complaints and/or motions filed by the respondents; and

3. Have heard any motions Plaintiffs deem necessary to secure enforcement of the various notices and subpoenas.

The depositions of the respondent witnesses shall resume by agreement of the parties or by further order of the Court.

ORDERED, ADJUDGED, AND DECREED that the deposition of Roger Sims shall take place on December 5, 2017 beginning at 9:30 a.m. at the office of Plaintiffs' counsel, 26010 Oak Ridge Drive, Suite 205, The Woodlands, Texas 77380-1117, without the necessity of any additional notice, subject to the right of Plaintiffs' counsel to issue such notice. It is further ordered that Roger Sims shall attend the deposition from day-to-day until completed, unless otherwise agreed by the parties, or further order of the Court.

IT IS FURTHER,

ORDERED, ADJUDGED, AND DECREED that Roger Sims shall respond to Requests for Production, attached to the Motion as Exhibit 11, on an expedited basis and shall provide . . . both responses and required documents and tangible things to the office of Plaintiffs' counsel, in the form dictated by the Texas Rules of Civil Procedure no later than November 6, 2017, subject only to objections, complaints, or motions for protection found by the Court to be meritorious as determined on the above-referenced date for hearing.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that as to all documents items and materials ordered to be produced, the witnesses are specifically ORDERED to categorize, label and Bates stamp.

IT IS FURTHER,

ORDERED, ADJUDGED, AND DECREED that if any documents or materials ordered to be produced are held in electronic form and/or online, the responding party or entity shall produce to Plaintiffs' counsel, by CD, USB or other media or storage device in a format suitable for convenient review by the Plaintiffs, and if encrypted or [password] protected all means necessary including all necessary passwords shall be provided[.]

IT IS FURTHER,

ORDERED, ADJUDGED, AND DECREED all corporate defendants are directed to comply with the provisions of Tex. R. Civ. P. 199.2(b)(1), and such entities shall produce designated corporate witnesses who have the best knowledge of the testimonial categories described in the respective subpoenas and notices relating to the oral depositions of such witness(es);

IT IS FURTHER,

> ORDERED, ADJUDGED, AND DECREED that in connection with the preceding ORDER above, the respective entity shall not produce corporate witnesses whose knowledge is merely collateral, or passing, at best, unless any such deponent is unable to designate a witness with requisite knowledge, and in good faith consistent with the requirement to engage in good faith discovery as specified by Texas discovery rules and the applicable case law.
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> IT IS FURTHER,
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> ORDERED, ADJUDGED, AND DECREED that by conducting the emergency depositions set forth in the Motion, Plaintiffs shall not be deemed to have waived their rights to conduct a full and complete deposition of any witnesses taken pursuant to this Order, including but not limited to the right to take depositions of such witnesses at a later time.

This original proceeding ensued. By one issue, relator contends that the trial court's October 10, 2017 order "unequivocally" violates section 74.351(s) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s). This Court requested and received a response to the petition for writ of mandamus from Sanchez and received a reply to the response from relator. *See* TEX. R. APP. P. 52.2, 52.4, 52.8.

II. MANDAMUS

Mandamus is an extraordinary remedy. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d at 302; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re*

Nationwide Ins. Co. of Am., 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) (orig. proceeding). A trial court clearly abuses its discretion when it compels discovery from a health care provider in circumstances where the health care provider is entitled to first be served with a section 74.351(a) expert report and curriculum vitae. *See In re Jorden*, 249 S.W.3d at 420; *In re Sandate*, No. 05-17-00871-CV, 2017 WL 4684072, at *2, __ S.W.3d __, __ (Tex. App.—Dallas Oct. 19, 2017, orig. proceeding); *In re Lumsden*, 291 S.W.3d 456, 462 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

III. ANALYSIS

Relator contends that the trial court's October 10, 2017 order "unequivocally" violates section 74.351(s) of the Texas Civil Practice and Remedies Code. Relator contends that the order was issued ex parte, without notice to relator, and thus violates relator's due process rights. Relator also contends that the order violates section 74.351(s) because it is a potential defendant in the medical negligence case filed by Sanchez and section 74.351 prohibits presuit depositions of parties and potential parties and prohibits the requests for production at issue here.

This is a health care liability claim relating to the severe personal injuries suffered by Arleena during labor and surgery. In such cases, the Texas Medical Liability Act (Act) imposes a threshold requirement that the plaintiff furnish an expert report indicating that the claim asserted has merit. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 455 (Tex. 2017); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.507 (West, Westlaw through 2017 1st C.S.).[5] To limit the costs of litigation until the expert reports are produced, section 74.351(s) places strict limits on discovery:

> Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:
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> (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;
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> (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and
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> (3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

[5] Section 74.351(a) of the Act provides:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West, Westlaw through 2017 1st C.S). The Legislature's "compelling public purpose" for enacting the Texas Medical Liability Act was to lower the cost of medical malpractice premiums and broaden access to health care. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 709 (Tex. 2014).

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s); *see In re Jorden*, 249 S.W.3d at 420; *In re Lumsden*, 291 S.W.3d at 460.[6] Until an adequate expert report has been served, this section requires all discovery, other than these enumerated exceptions, to be stayed. *Harvey v. Kindred Healthcare Operating, Inc.*, 525 S.W.3d 281, 285 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Further, section 74.351(u) provides that "[n]otwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a)." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(u). The provisions of section 74.351(s) control over any conflicting provisions found in "another law, including a rule of procedure or evidence or court rule." TEX. CIV. PRAC. & REM. CODE ANN. § 74.002 (West, Westlaw through 2017 1st C.S.); *see Harvey*, 525 S.W.3d at 285. Further, section 74.351(s) applies to all discovery in a "health care liability claim" both before and after a lawsuit is filed. *In re Jorden*, 249 S.W.3d at 421–22; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West, Westlaw through 2017 1st C.S.) (defining a "health care liability claim"). This is so because a "health care liability" claim encompasses both filed lawsuits and potential "cause[s] of action." *In re Jorden*, 249 S.W.3d at 421. Consequently, to the extent that presuit discovery is intended to investigate a potential claim against a health care provider, the potential claim is "necessarily" a "health care liability claim" and falls

[6] Rule 192.7 defines "written discovery" as "requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission." TEX. R. CIV. P. 192.7(a). Rule 200 regarding "depositions on written questions" permits a party to "take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions." *Id.* R. 200(a). The notice may include a request for production of documents. *Id.* at R. 200.1(b). And, Rule 205 governs discovery from nonparties and defines a "nonparty" as "a person who is not a party or subject to a party's control." *Id.* R. 205.1. Under Rule 205, a party seeking discovery from a nonparty may obtain, with an appropriate order or subpoena, (a) an oral deposition; (2) a deposition on written questions; (3) a request for production of documents or tangible things served with a notice of deposition on oral examination or written questions; and (4) a request for production of documents and tangible things under this rule. *See id.*

within the parameters of section 74.351(s). *In re Jorden*, 249 S.W.3d at 422; *see In re Sandate*, 2017 WL 4684072, at *2. Further, the nonparty exception in the statute applies to "third parties" to the dispute as opposed to "those directly threatened by it." *In re Jorden*, 249 S.W.3d at 422.

In this case, a lawsuit has already been filed against a health care provider, Sims, and Sanchez now seeks the oral depositions by subpoena of other medical providers who have not been named in that lawsuit as defendants. *See* TEX. R. CIV. P. 205.1(a). Sanchez has further requested that these medical providers respond to his request for the production of documents or tangible things, as served with the notices of oral deposition. *See id.* R. 205.1(c),(d). Sanchez argues that the plaintiffs require the discovery at issue here to "determine what party or parties bear legal responsibility" for Arleena's injuries. As explained above, the Texas Supreme Court decided that section 74.351(s) applies to all discovery in a health care liability claim against a health care provider both before and after such a cause of action is filed as a lawsuit against that health care provider. *Id.*; *see also In re Sandate*, 2017 WL 4684072, at *2. Accordingly, section 74.351 applies to the presuit discovery sought in this case. *See In re Jorden*, 249 S.W.3d at 422; *In re Sandate*, 2017 WL 4684072, at *2. Moreover, while relator is a nonparty to the underlying lawsuit insofar as it has not been named as a defendant in the underlying litigation, the supreme court expressly held that "nonparties" as used in section 74.351(s) means only "third parties" and does not include "those directly threatened" by the dispute. *See In re Jorden*, 249 S.W.3d at 422 (noting that "if everyone qualifies as a 'nonparty' until suit is filed, then the statute places no restriction on presuit discovery whatsoever" which would be "plainly contrary to the statute's purpose"). Therefore, relator

is not a nonparty from whom discovery is allowed under Rule 205. *See id.*; *see also In re Sandate*, 2017 WL 4684072, at *2. And, contrary to Sanchez's argument, Texas Rule of Civil Procedure 176 is not an enumerated exception to section 74.351(s)'s prohibition against pre-expert report discovery. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s).

Sanchez is seeking the deposition of relator's corporate representative and others to determine whether those parties should be joined in the underlying lawsuit for the alleged negligent medical care that Arleena received during her labor and delivery. Under this particular set of facts, where Sanchez is seeking to investigate a health care liability claim against health care providers, even though those providers have not been named in the lawsuit, the requested discovery falls within the protection of section 74.351(s) as explained in *Jorden*. *See In re Jorden*, 249 S.W.3d at 422. Therefore, the trial court abused its discretion in ordering relator's corporate representative to appear for a deposition and provide the documents requested under Rule 205 without first having been served with a section 74.351(a) expert report. *See id.*; *see also In re Sandate*, 2017 WL 4684072, at *4.

We note that Sanchez asserts that this dispute is not ripe for review because the trial court's order contemplates that an objecting party can avoid the requested discovery by filing a motion to quash, or other motion for protection, which would be addressed in the first instance by the trial court. Sanchez argues that other parties to the trial court's order have availed themselves of this allegedly adequate remedy for any objectionable discovery requests. However, requiring these individuals and entities to engage in litigation to protect themselves from discovery runs contrary to the express language of section 74.351 insofar as it limits "all" discovery, save for the enumerated exceptions, and

defeats the purpose of the Act to decrease the cost of health care liability claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s); *see also CHCA Woman's Hosp., L.P. v. Lidji*, 403 S.W.3d 228, 232 (Tex. 2013) (noting that the Legislature's purposes in enacting the Act included reducing excessive frequency and severity of health care liability claims and decreasing the cost of those claims in a manner that will not unduly restrict a claimant's rights). By requiring relator to appear and object to the required discovery, the order fails to comply with the strictures of the Act. In these unusual circumstances, we conclude that a predicate request for relief directed to the trial court is unnecessary. *See In re Perritt,* 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam); *Terrazas v. Ramirez*, 829 S.W.2d 712, 723–25 (Tex. 1991) (orig. proceeding).

Finally, we note that Sanchez asserts that the plaintiffs have withdrawn their notice for the deposition of relator's corporate representative and that Dr. Gelman "is not a target protected from deposition" as defined by the Texas Supreme Court in *Jorden* and the Dallas Court of Appeals in *Sandate*. Sanchez states that he withdrew the notice of deposition for relator's corporate representative two days after this original proceeding was filed; however, in its reply, relator notes that Sanchez served a subpoena on Dr. Gelman on October 24, 2017, after Sanchez allegedly withdrew the plaintiffs' notice of deposition. Sanchez did not withdraw any of the other notices for oral depositions, subpoenas, or other forms of discovery issued pursuant to Rule 176 and Rule 205 as authorized by the trial court's October 10, 2017 order. Here, relator has specifically identified Dr. Gelman as its registered agent and employee. Under these circumstances, we decline to accept Sanchez's suggestion that this original proceeding has been rendered moot. *Cf. In re Lumsden*, 291 S.W.3d at 462 (applying the section 74.351(s)

discovery stay to all health care defendants rather than only those defendants who appealed an allegedly deficient expert report).

We conclude that the trial court abused its discretion in issuing the October 10, 2017 order requiring the oral depositions of relator's representatives and the production of documents under Rules 176 and 205 because the order violated section 74.351(s). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s); *In re Jorden*, 249 S.W.3d at 420–21; *In re Sandate*, 2017 WL 4684072, at *4, __ S.W.3d at __.[7] Having so concluded, we need not address relator's claims regarding due process violations or its arguments regarding the numerous ways that the trial court's order violates the rules of civil procedure. *See* TEX. R. APP. P. 47.1, 47.4. We further determine that relator lacks an adequate remedy by appeal to address the trial court's abuse of discretion in ordering the discovery at issue here. *See In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d at 223; *In re Jorden*, 249 S.W.3d at 420–21; *In re Sandate*, 2017 WL 4684072, at *2, __ S.W.3d at __; *In re Lumsden*, 291 S.W.3d at 462.

In so ruling, we are cognizant that the Act's general prohibition of discovery pending production of an expert report profoundly impacts the ability of health care claimants to properly and adequately investigate their health liability claims, identify the responsible defendants, and file suit within the applicable limitations period. The Act is not intended to "unduly restrict" a claimant's rights. *CHCA Woman's Hosp., L.P.*, 403 S.W.3d at 232; *see* Act of June 2, 2003, 78th Leg., R. S., ch. 204, § 10.11(b)(1)–(3), 2003

[7] We note that section 74.351(s) does not stay written discovery, such as the requests for production propounded to party Sims in Exhibit 11 as referenced in the emergency discovery motion and the trial court's order granting the emergency discovery motion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s). Given that Sims has not appeared in this original proceeding, we need not and do not consider the propriety of the trial court's October 10, 2017 order with respect to the requests for production directed to Sims.

Tex. Gen. Laws 847, 884. Nevertheless, the Act contains no exception to the report requirement or stay of discovery even where a presuit investigation is rendered inadequate because medical records may be inadequate or incomplete or because medical providers fail to cooperate with an investigation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s); *see also In re Raja*, 216 S.W.3d 404, 409 (Tex. App.—Eastland 2006, pet. denied) (rejecting the plaintiff's argument that requiring an expert report without a presuit deposition amounts to a "Hobson's choice" wherein she must "abandon her investigation and not file a claim, or file a claim and be forced to rely upon an insufficient expert report because of the incomplete medical records"); *In re Miller*, 133 S.W.3d 816, 818–19 (Tex. App.—Beaumont 2004, orig. proceeding) (rejecting the argument that requiring an expert report without allowing the deposition of the medical provider requires a plaintiff to make "bricks without straw"). In this case, however, we are constrained by the express terms of the Act, the legislative purposes of the Act, and binding precedent from the Texas Supreme Court[8] to conclude that the discovery at issue in this original proceeding is prohibited by section 74.351(s).

V. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, and the applicable law, is of the opinion that relator has shown itself entitled to the relief sought. Therefore, we LIFT the stay previously imposed in this cause. We

[8] *See, e.g., Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964) ("After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the State having jurisdiction of the particular case, the decision is accepted as binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties.").

conditionally grant the petition for writ of mandamus. A writ will only issue in the event the trial court fails to vacate its October 10, 2017 order on discovery.

DORI CONTRERAS
JUSTICE

Delivered and filed this
18th day of December, 2017.