

**NO. 12-17-00266-CV**  
**IN THE COURT OF APPEALS**  
**TWELFTH COURT OF APPEALS DISTRICT**  
**TYLER, TEXAS**

*IN RE: ALLSTATE FIRE &* §  
*CASUALTY INSURANCE COMPANY,* § *ORIGINAL PROCEEDING*  
*RELATOR* §

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***MEMORANDUM OPINION***

In this original proceeding, Allstate Fire and Casualty Insurance Company seeks mandamus relief from the trial court’s May 24, 2017 order compelling discovery related to severed and abated claims arising from uninsured/underinsured motorist insurance coverage and July 26 order denying Allstate’s motion for reconsideration.<sup>1</sup> We conditionally grant the writ.

**BACKGROUND**

The underlying suit arises out of a car accident that occurred in January 2015. Margarita Galaz was injured when her vehicle was struck by a vehicle driven by Larry Edward Lowrey. Galaz filed a claim with Lowrey’s insurance provider and subsequently reached a settlement with Lowrey’s insurer.

Galaz was also insured under an automobile insurance policy underwritten by Allstate. The insurance policy provides for uninsured/underinsured motorist coverage. Under this provision, Allstate is obligated to pay compensatory damages, which Galaz is entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. In February 2016, Galaz made an underinsured motorist demand on Allstate. In March, Allstate informed Galaz that her claim did not appear to “pierce

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<sup>1</sup> The respondent is the Honorable Jeff Fletcher, Judge of the 402nd Judicial District Court, Wood County, Texas. The underlying proceeding is trial court cause number 2016-346, styled *Margarita Galaz vs. Allstate Fire and Casualty Insurance Company, Allstate Insurance Company, Allstate Indemnity Company, Allstate Life Insurance Company, Allstate Property and Casualty Insurance Company, Allstate County Mutual Insurance Company, Allstate Corporation and Encompass Insurance Company*.

the threshold for an Underinsured Motorist claim[.]” and that it would not be making any settlement offers at that time.

In May, Galaz sued Allstate, asserting that Lowrey’s negligence caused the accident and that Lowrey was underinsured. She sought payment under the uninsured/underinsured motorist coverage and asserted violations of the Texas Insurance Code based on Allstate’s failure to pay policy benefits. The parties agreed to sever and abate the Insurance Code claims. Thus, the extracontractual claims were severed and abated but the contractual claim proceeded in the underlying case.

Galaz served Allstate with interrogatories, requests for admissions, and requests for production. These requests sought discovery of documents and information regarding Allstate’s basis for its alleged denial of Galaz’s claim for underinsured motorist coverage. Allstate filed objections and responses to the requests contending that the information was protected by the work product and trade secret privileges and was only relevant to the abated claims. On January 18, 2017, Galaz filed a motion to compel discovery responses and a privilege log. On January 26, at a hearing on the motion, the trial court verbally limited discovery to the following topics, which were outlined in a letter from Galaz’s counsel to Allstate’s counsel:

- (1) [T]he contents, terms, and conditions of the insurance policy at issue in the lawsuit;
- (2) Any policy defenses upon which [Allstate] may rely in the trial of this case;
- (3) Any conditions precedent which [Allstate] may allege that [Galaz] failed to comply with;
- (4) [Allstate’s] factual and legal contentions regarding the damages [Galaz] is entitled to receive in this case;
- (5) [Allstate’s] factual and legal contentions regarding [its] liability to [Galaz] in this claim;
- (6) The factual basis for any pre-existing conditions upon which [Allstate] may rely in this case;
- (7) The factual basis for any subsequent or intervening injuries that [Allstate] claims caused the need for any of [Galaz’s] medical care.

The trial court stated, “If there’s privileges you have to assert, those can be used to protect the claims that you are making today before the Court.” The record does not contain a written order on Galaz’s first motion to compel.

On February 7, Allstate produced its privilege log. The log identifies several documents withheld as privileged: (1) a claim history report, (2) assessments for general damages, (3) a casualty dissection sheet, (4) a calendar regarding treatment dates and expenses, (5) expert reports regarding treatment and expenses, and (6) a system evaluation report. Galaz subsequently filed a second motion to compel, in which she alleged that Allstate failed to comply with the trial court's January order. The trial court granted the motion and, in a written order, found that "Allstate did not demonstrate that it reasonably anticipated litigation prior to March 8, 2016 or that the documents listed on its privilege log that were prepared prior to March 8, 2016 were protected work product or trade secrets, or otherwise privileged."<sup>2</sup> The trial court ordered Allstate to produce any documents listed on its privilege log that were prepared before March 8, 2016 that related to valuation of Galaz's claim. On July 26, the trial court denied Allstate's motion to reconsider the second motion to compel. This order requires Allstate to pay Galaz's attorney's fees incurred as a result of the motion for reconsideration. This original proceeding followed.

#### **STANDARD OF REVIEW**

Discovery matters are generally within the trial court's sound discretion, but "mandamus will issue to correct a discovery order if the order constitutes a clear abuse of discretion and there is no adequate remedy by appeal." *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *see Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A clear abuse of discretion occurs when the trial court's decision is so arbitrary and unreasonable that it amounts to clear error. *See Walker*, 827 S.W.2d at 839 (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). Because a trial court has no discretion in determining what the law is, the trial court abuses its discretion if it clearly fails to analyze or apply the law correctly. *See id.* at 840. "To satisfy the clear abuse of discretion standard, the relator must show 'that the trial court could reasonably have reached only one decision.'" *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walker*, 827 S.W.2d at 840). "In determining whether appeal is an adequate remedy, appellate courts consider whether the benefits outweigh the detriments of

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<sup>2</sup> March 8, 2016 is the date of Allstate's letter to Galaz, in which it stated no offers would be made at the time.

mandamus review.” *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding).

#### ABUSE OF DISCRETION

In issue one, Allstate contends that the trial court abused its discretion by granting Galaz’s second motion to compel because her legal entitlement to damages from the underinsured motorist, Lowrey, has not yet been established. Thus, according to Allstate, the discovery ordered by the trial court is irrelevant. Galaz contends that the pertinent question is whether the trial court abused its discretion “by finding that nonprivileged valuations of a UIM claimant’s damages are discoverable when the only issue at bar is the amount of the claimant’s damages.”<sup>3</sup>

A trial court must make an effort to impose reasonable limits on discovery. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding). Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute’s resolution. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (citing *Am. Optical*, 988 S.W.2d at 713). Thus, discovery requests must be reasonably tailored to include only matters relevant to the case. *Id.* Information is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action or defense more or less probable than it would be without such information. *See* TEX. R. EVID. 401.

The scope of relevant discovery in uninsured motorist cases differs from other insurance disputes because, unlike most first-party cases in which the terms of the policy alone dictate the outcome, uninsured motorist coverage hinges on the liability of the alleged uninsured, at-fault third-party motorist, under applicable tort law. *See Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2007) (citing *Henson v. S. Farm Bur. Cas. Ins. Co.*, 17 S.W.3d 652, 654 (Tex. 2000)). Consequently, “the insurer’s contractual obligation to pay benefits does not arise

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<sup>3</sup> Galaz also contends that “[b]ecause the documents at issue were compelled in the order given in open court [o]n January 26, 2017, Allstate has not properly brought the issue of their originally being compelled within the context of this Mandamus proceeding, as it has not challenged the January 26, 2017 original order.” However, the record indicates that the second order to compel required production of documents listed on Allstate’s privilege log, which was not produced until after the January order. It is the written May order, not the verbal January order, that specifically compels the production of the documents withheld by Allstate as privileged.

until liability and damages are determined.” *Id.*; see also *In re United Fire Lloyds*, 327 S.W.3d 250, 255 (Tex. App.—San Antonio 2010, orig. proceeding)

To recover benefits under an uninsured motorist policy, a policy beneficiary must show (1) that the insured has underinsured motorist coverage, (2) that the underinsured motorist negligently caused the accident that resulted in the covered damages, (3) the amount of the insured’s damages, and (4) that the underinsured motorist’s insurance coverage is deficient. See *Brainard*, 216 S.W.3d 809 at 818; *State Farm Mut. Auto Ins. Co. v. Nickerson*, 216 S.W.3d 823, 824 (Tex. 2006); *State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819, 822-23 (Tex. 2006); *Henson*, 17 S.W.3d at 654; *In re Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d 422, 426-27 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding); *In re United Fire Lloyds*, 327 S.W.3d at 255. Accordingly, “a claim for [uninsured motorist] benefits is not presented until the trial court signs a judgment” resolving these issues. *Brainard*, 216 S.W.3d at 818.

An insured must first establish that the insurer is liable on the contract before the insured can recover on extra-contractual causes of action against an insurer for failing to pay or settle an underinsured motorist insurance claim. *In re Liberty Cty. Mut. Ins. Co.*, No. 01-17-00363-CV, 2017 WL 4414033, at \*4 (Tex. App.—Houston [1st Dist.] Oct. 5, 2017, orig. proceeding) (op.). Thus, extra-contractual claims must be severed and abated until the underinsured motorist breach of contract claim is determined. *Id.*; see *In re Allstate Cty. Mut. Ins. Co.*, 447 S.W.3d 497, 502 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding); *In re Progressive*, 439 S.W.3d at 427. The rationale for requiring abatement and severance of these types of claims is that they may be rendered moot by a determination of underlying liability. See *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (“Abatement of the bad faith claims must necessarily accompany severance of those claims from the contract claim. Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial[.]”); *In re United Fire Lloyds*, 327 S.W.3d at 265 (holding that abatement of the insured’s extra-contractual claims was required to “do justice, avoid prejudice, and further convenience[.]”).

Applying this reasoning to the present case, Allstate’s contractual obligations do not ripen until after Galaz has obtained a judgment against Lowrey on liability, damages, and coverage. See *In re Liberty Cty. Mut. Ins. Co.*, 2017 WL 4414033, at \*5. It is undisputed that Galaz was an insured under the Allstate policy and that the underlying accident was a covered

occurrence under the policy's UIM provisions. Accordingly, the remaining issues relate to the underlying accident: (1) Lowrey's liability for the car accident; (2) Lowrey's underinsured status; and (3) the existence and amount of Galaz's damages. It is also undisputed that there has been no judgment or other judicial determination as to any of these issues. Although Galaz seeks information related to Allstate's evaluation and alleged denial of her claim, because she does not yet have a justiciable cause of action against Allstate for underinsured motorist benefits, Allstate owes no contractual or extracontractual UIM duties. *See id.*

Under these circumstances, the requested discovery is irrelevant to any current claims, which are building blocks for an eventual determination of the parties' contractual rights. *See In re Progressive*, 439 S.W.3d at 426-27; *In re United Fire Lloyds*, 327 S.W.3d at 256; *see also In re Liberty Cty. Mut. Ins. Co.*, 2017 WL 4414033, at \*4-5 (stating that plaintiff not entitled to discovery on declaratory judgment claim before a judgment on liability and damages regarding the underlying accident). An insurer is not required to incur litigation expenses on these types of issues because they may be rendered moot by the trial of the underlying accident. *In re United Fire Lloyds* 327 S.W.3d at 256; *see also In re State Farm Mut. Auto. Ins. Co.*, 395 S.W.3d 229, 237 (Tex. App.—El Paso 2012, orig. proceeding); *In re Am. Nat'l Cty. Mut. Ins. Co.*, 384 S.W.3d 429, 437 (Tex. App.—Austin 2012, orig. proceeding). The information Galaz seeks may become relevant, but only if she first obtains a judgment establishing Lowrey's liability for the underlying accident, Lowrey's underinsured status, and the existence and amount of Galaz's damages. *See id.*; *see also Brainard*, 216 S.W.3d at 818. Absent such a judgment, discovery related to whether Allstate owes any contractual or extracontractual UIM duties to Galaz does not show a reasonable expectation of obtaining information that will aid this dispute's resolution. *See In re CSX Corp.*, 124 S.W.3d at 152. Thus, the trial court abused its discretion by granting Galaz's second motion to compel and denying Allstate's motion for reconsideration.<sup>4</sup>

#### **ADEQUATE REMEDY BY APPEAL**

In issue two, Allstate maintains that it lacks an adequate remedy by appeal. We agree.

Insurers have a substantial right not to undergo the expense of conducting discovery on issues that ultimately may be unnecessary because of the result in the underlying tort case.

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<sup>4</sup> Because we so hold, we need not address Allstate's contention that the ordered discovery is also protected from disclosure by the work product or trade secret privileges or Galaz's contentions regarding whether the documents are privileged. *See TEX. R. APP. P. 47.1.*

See *In re Old Am. Cty. Mut. Fire Ins. Co.*, No. 13-11-00412-CV, 2012 WL 506570, at \*5 (Tex. App.—Corpus Christi Feb. 16, 2012, orig. proceeding); see also *United Fire Lloyds*, 327 S.W.3d at 257. Insurers similarly have been held to lack an adequate remedy by appeal when required to respond to discovery for extra-contractual claims that may be rendered moot by the determination of breach of contract claims. See *Allstate*, 447 S.W.3d at 504; *In re Progressive*, 439 S.W.3d at 427–28; see also *In re State Farm*, 395 S.W.3d at 239. If mandamus is not granted, Allstate would be required to prepare for and respond to discovery concerning claims that similarly lack justiciability. See *Millard*, 847 S.W.2d at 675; *In re Trinity Universal Ins. Co.*, 64 S.W.3d 463, 468 (Tex. App.—Amarillo 2001, orig. proceeding). Accordingly, because the trial court’s order compels discovery irrelevant to the underlying case, Allstate necessarily lacks an adequate remedy by appeal. See *In re CSX Corp.*, 124 S.W.3d at 153. (“We have said that where a discovery order compels production of ‘patently irrelevant or duplicative documents’ ... there is no adequate remedy by appeal because the order ‘imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party[.]’”) (quoting *Walker*, 827 S.W.2d at 843).

#### CONCLUSION

For the reasons set forth above, Allstate has satisfied both prerequisites to mandamus. Accordingly, we **conditionally grant** Allstate’s petition for writ of mandamus and direct the trial court to vacate its May 24, 2017 order granting Galaz’s second motion to compel and its July 26 order denying Allstate’s motion for reconsideration and ordering payment of Galaz’s attorney’s fees incurred as a result of Allstate’s motion. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so **within fifteen days of the date of the opinion and order**. The trial court shall furnish this Court, within the time for compliance with this Court’s opinion and order, a certified copy of the order evidencing such compliance. Our stay of August 30, 2017, is **lifted**.

**JAMES T. WORTHEN**  
Chief Justice

Opinion delivered November 8, 2017.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)



**COURT OF APPEALS**  
**TWELFTH COURT OF APPEALS DISTRICT OF TEXAS**

**ORDER**

NOVEMBER 8, 2017

NO. 12-17-00266-CV

**ALLSTATE FIRE & CASUALTY INSURANCE COMPANY,**  
Relator  
V.

**HON. JEFF FLETCHER,**  
Respondent

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**ORIGINAL PROCEEDING**

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ON THIS DAY came to be heard the petition for writ of mandamus filed by Allstate Fire & Casualty Insurance Company; who is the relator in Cause No. DC-2016-346, pending on the docket of the 402nd Judicial District Court of Wood County, Texas. Said petition for writ of mandamus having been filed herein on August 29, 2017, and the same having been duly considered, because it is the opinion of this Court that the petition is meritorious, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, conditionally granted.

And because it is further the opinion of this Court that the trial judge will act promptly and vacate its May 24, 2017 order granting Margarita Galaz's second motion to compel and its July 26 order denying Allstate's motion for reconsideration and ordering payment of Margarita



Galaz's attorney's fees incurred as a result of Allstate's motion, and in its stead, will issue an order evidencing such compliance, the writ will not issue unless the **HONORABLE JEFF FLETCHER**, Judge of the 402nd District Court, fails to comply with this Court's order within fifteen (15) days from the date of this order.

It is further ORDERED that all costs of this proceeding shall be adjudged against the party incurring same.

James T. Worthen, Chief Justice.

*Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.*