Petition for Writ of Mandamus Conditionally Granted and Majority and Dissenting Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00861-CV

IN RE FEDEX GROUND PACKAGE SYSTEM, INC., Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
270th District Court
Harris County, Texas
Trial Court Cause No. 2017-49530

MAJORITY OPINION

Relator FedEx Ground Package System, Inc. filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Dedra Davis, presiding judge of the 270th District Court of Harris County, to vacate her October 28, 2019 orders denying FedEx's motions to quash subpoenas and for protective orders. We conditionally grant the petition

BACKGROUND

Zach Brown sued FedEx for personal injuries sustained in a collision between Brown's motorcycle and a FedEx vehicle. On January 25, 2019, Brown filed a motion to compel attendance of witnesses within FedEx's control. In the motion, Brown stated that his intent was to foreclose "any last-minute, meritless objections to their forthcoming subpoenas." In response, among other arguments, FedEx pointed out that Brown had not issued any trial subpoenas and contended that the motion was premature and Brown was asking the trial court to pre-emptively order FedEx to perform an action which it had not yet refused to do.

During discovery, Brown served a notice of his intent to take FedEx's deposition with a list of 10 topics on which he requested examination. FedEx identified Michael Sear, FedEx's manager of safety programs and response, who lives and works in Pennsylvania, as the witness for the deposition. Sear was deposed in Pittsburgh, Pennsylvania, on August 22, 2019.

The trial court heard Brown's January 25, 2019 motion to compel at an unrecorded pretrial conference on October 21, 2019. Brown asked the trial court to compel FedEx to require either Michael Sear or another unnamed corporate representative to appear at trial and testify in Brown's case-in-chief. According to FedEx, the trial court stated that FedEx was not required to bring Sear but granted the motion to compel the attendance of an unnamed corporate representative at trial. The trial court also stated that Brown should provide FedEx with a list of topics about which Brown intended to question the unnamed corporate representative.

The next day, on October 22, 2019, Brown issued and served two subpoenas on FedEx's general counsel: one to Sear as corporate representative for FedEx and the other to an unnamed corporate representative for FedEx. Each subpoena commanded the witness to appear before the trial court on October 28, 2019, to testify as corporate representative for FedEx on a list of 25 topics, and to attend trial daily until discharged.

On October 24, 2019, FedEx filed two motions to quash each subpoena and for protective orders. FedEx also filed an amended motion to quash the subpoena directed to Sear. On October 28, 2019, the trial court heard FedEx's motions to quash and for protective orders and denied the motions.

Also, on October 28, 2019, after the trial court denied FedEx's motions, FedEx filed a petition for writ of mandamus, asking this court to compel the trial court to set aside its October 28, 2019 order denying FedEx's motions to quash the subpoenas directed to Sear and the unnamed corporate representative. FedEx also requested a stay of all trial court proceedings. The following day, we denied the petition for mandamus, without prejudice to refiling, because FedEx had not provided either a written order or the reporter's record containing the trial court's ruling. *See In re Fed Ex Ground Package Sys., Inc.*, No. 14-19-00853-CV, 2019 WL 5581576, at *1 (Tex. App.—Houston [14th Dist.] Oct. 29, 2019, orig. proceeding) (mem. op.). We also denied the motion to stay. *Id.*

The following day, FedEx refiled its petition and cured the deficiency by providing copies of two orders signed by the trial court (1) denying FedEx's motion to quash the subpoena directed to FedEx's unnamed corporate representative and for a protective order; and (2) denying FedEx's motion to quash the subpoena directed

to Sear and for protective order. That same day, this court issued an order staying all proceedings in the trial court.

On October 30, 2019, Brown filed a motion for dissolution of our temporary stay as moot and to dismiss the petition for mandamus as moot. Brown advised that he had notified the trial court that he was withdrawing the subpoenas and requesting the trial court to vacate its orders denying FedEx's motions to quash.

FedEx responded that its request for relief is not moot because (1) Brown's counsel provided no assurance that he would not re-issue the subpoenas at a later time; and (2) Brown's counsel sent FedEx's counsel an email that morning stating that counsel continued to insist on Sear's attendance at trial and would seek appropriate sanctions if FedEx did not comply. FedEx further asserted the withdrawal of the subpoenas would not affect the underlying dispute because the trial court had denied FedEx's request for protective orders. On October 4, 2019, we denied Brown's motion for dissolution of the stay order.

In this mandamus proceeding, FedEx argues that the trial court abused its discretion by denying FedEx's motions because (1) a witness, who is not individually a party to the suit, cannot be compelled by subpoena to attend trial more than 150 miles from where the witness resides; and (2) there is no rule or statute or other authority by which the trial court can compel a party to produce a corporate representative to testify on 25 topics.

STANDARD OF REVIEW

Ordinarily, to be entitled to a writ of mandamus, the relator must show that the trial court clearly abused its discretion, and that the relator lacks an adequate

remedy by appeal. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302–03 (Tex. 2016) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam).

The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Because this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). In evaluating benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). We also consider whether mandamus will "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments." *Id.* Finally, we consider whether mandamus will spare the litigants and the public "the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Id.*

ANALYSIS

I. This Proceeding is Not Moot

As discussed above, after this court issued the stay order, Brown filed a motion to dissolve the stay, advising that he had withdrawn the two subpoenas and would not reissue them. Brown argued that, in light of his having withdrawn the subpoenas, FedEx's petition must be dismissed as moot and the stay lifted. We denied Brown's motion to dissolve our stay.

In his response to FedEx's mandamus petition, Brown reiterates his argument that FedEx's petition is moot because he withdrew the subpoenas and he has no intention of reissuing the subpoenas when the trial is reset, thereby rendering FedEx's request for relief moot. *See In re Tyson Foods, Inc.*, No. 12-17-00156-CV, 2017 WL 3225051, at *2 (Tex. App.—Tyler July 31, 2017, orig. proceeding) (mem. op.) (holding trial subpoena expired after court of appeals stayed all proceedings in trial court and relator's request for relief from order granting a motion to quash was moot); *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding) ("A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal.").

FedEx responds that its request for relief is not moot because Brown's counsel (1) has given no assurance that the subpoenas will not be reissued; and (2) sent FedEx's counsel an email the same morning that Brown filed the motion to dissolve the stay, stating that counsel continued to insist on Sear's attendance at trial and would seek appropriate sanctions if FedEx did not comply. The email reads as follows:

> We are hereby withdrawing our trial subpoenas issued to Michael Sear as corporate rep for FedEx Ground Package System Inc. and the separate subpoena issued to FedEx Ground Package System Inc. This withdrawal shall have no impact on the Court's prior Order granting our motion to compel witnesses within your clients [sic] control issued on Monday October 21st, 2019.
>
> We expect full compliance therewith and will seek appropriate sanctions to the extent you and your clients continue to ignore the Court's Order in that regard. To date you have failed to confirm Mr. Sear's attendance/unavailability for trial as ordered by the Court and you have failed to identify the individual you intend to make available as our first witness should Mr. Sear have some impediment which prevents him from being in Court.

An appellate court is prohibited from deciding moot controversies. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). This prohibition is rooted in the separation of powers doctrine in the United States and Texas Constitutions that prohibits courts from rendering advisory opinions. *Id.* A case becomes moot if at any stage there ceases to be an actual controversy between the parties. *Id.* Generally, an appeal is moot when the court's action on the merits cannot affect the rights of the parties. *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993).

FedEx argues that this proceeding is not moot because the underlying dispute is still live and is "fully capable of repetition." *See In re Allied Chem. Corp.*, 227 S.W.3d 652, 655 (Tex. 2007). In *Allied Chemical*, the trial court postponed responses to basic discovery in mass-tort cases until shortly before trial. *Id.* at 654. The Supreme Court of Texas had held previously that a trial court could not postpone responses. *Id.* (citing *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (orig. proceeding)). Despite the high court's admonitions that a trial court should

proceed with extreme caution in setting consolidated trials in "immature mass-torts" where no claim has been tried or appealed, the trial court consolidated five cases for an initial trial. *Id.* After the supreme court granted a stay in the case and requested full briefing, the plaintiffs asked the trial court to (1) sever out the property claims, (2) drop one plaintiff from the suit, and eventually (3) withdraw the trial court's consolidation order and proceed to trial on just one plaintiff's claims. *Id.* The trial court granted the plaintiffs' requests and ordered that the claims of only one of the plaintiffs would proceed to trial. *Id.* at 654–55.

The supreme court rejected the argument that the trial court order rendered the mandamus proceeding moot. *Id.* at 655. Among the reasons the court held that the proceeding was not moot was that the plaintiffs refused to give any assurance that they would not seek future consolidated trials inconsistent with prior supreme court precedent. *Id.*

Brown states in his response to the mandamus petition that he would not reissue the withdrawn subpoenas. However, Brown's counsel advised that the "withdrawal shall have no impact on the Court's prior Order granting our motion to compel witnesses within your clients [sic] control issued on Monday October 21st, 2019." Brown's counsel further stated that "[w]e expect full compliance and will seek appropriate sanctions to the extent you and your clients continue to ignore the Court's Order in that regard." Finally, Brown's counsel stated that FedEx had not "confirm[ed] Mr. Sear's attendance/unavailability for trial as ordered by the Court and you have failed to identify the individual you intend to make available as our first witness should Mr. Sear have some impediment which prevents him from being in Court."

Brown's counsel's email is directly contrary to the claim that the withdrawn trial subpoenas will not be reissued at a later trial setting. Under the circumstances in this case, the question of whether Sear or an unnamed corporate representative can be subpoenaed to testify remains an issue to be resolved. Therefore, the issuance of the subpoenas is a situation that is capable of repetition. To hold that that the withdrawal of the subpoenas in the face of Brown's assertions that he seeks to call Sear as his first witness or another corporate representative would allow Brown to manipulate this court's jurisdiction. *See id.* ("The situation that gives rise to this proceeding is thus fully capable of repetition, and if review can be evaded by the modification of orders pending mandamus proceedings, the defendants would be put to the repeated expense of seeking review only to have it denied by last-minute changes in the trial court's orders. An appellate court's jurisdiction cannot be manipulated in this way.")

FedEx also moved for protective orders that "Sear is not required to attend trial" and that no unnamed corporate representative "is required to attend trial." The trial court denied both motions. In its motions for protective orders FedEx requested separate relief from the motions to quash the subpoenas. Therefore, we hold that the requested relief in FedEx's petition for writ of mandamus is not moot and this court has jurisdiction to decide the petition.

II. The Trial Court Abused Its Discretion

A. Michael Sear

In its first issue, FedEx argues that the subpoena to Sear is improper because Brown cannot compel a non-party individual to attend trial when that individual is

not within 150 miles of the courthouse in Harris County. We agree. From having taken Sear's deposition in Pennsylvania, Brown is aware that Sear lives and works there, a location far beyond 150 miles of the Harris County Civil Justice Center in Houston, Texas. A trial court has the authority to require a witness, including a party or an officer of a party, to attend trial if the witness resides within 150 miles of the courthouse of the county in which the suit is pending or if the witness may be found within such distance at the time of trial. *See* Tex. R. Civ. P. 176.3(a); *Dr. Pepper v. Davis*, 745 S.W.2d 470, 471 (Tex. App.—Austin 1988, orig. proceeding) (citing Tex. R. Civ P. 176, 181). That Sear is a FedEx employee does not change the requirement that Sear must live within 150 miles of the Harris County courthouse to be subject to the trial court's subpoena power. *See Dr. Pepper*, 745 S.W.2d at 471 (holding trial court did not have power to authorize issuance of subpoena or otherwise compel any person, including officer of party, to appear as witness at trial if that person resides more than 100 miles from courthouse of county in which suit is pending and outside county of suit.).

Sear does not reside within the geographical limits of the trial court's subpoena authority. In response to FedEx's motion to quash the subpoena directed to Sear and for a protective order, Brown argued that the 150-mile subpoena range does not apply to a company's employee. However, in this proceeding, it appears that Brown has abandoned any argument that Sear is subject to the trial court's subpoena authority. Brown offers no other argument to defend the trial court's order compelling Sear to appear at trial. Nor does Brown identify any authority that would support the trial court's order compelling Sear to attend trial. We conclude that the

trial court abused its discretion by denying the motion to quash the subpoena directed to Sear and for a protective order that Sear is not required to attend trial.

B. Unnamed Corporate Representative

In its second issue, FedEx contends that there is no authority under which the trial court could compel FedEx to produce an unnamed corporate representative to testify at trial about a list of 25 topics.[1] Texas Rule of Civil Procedure 199.2 provides the procedure for noticing oral depositions. Tex. R. Civ. P. 199.2. If a corporation is named as the witness, "the notice must describe with reasonable particularity the matters on which examination is requested." *Id.* 199.2(b)(1). The corporation must "designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify." *Id.*

Rule 199.2(b)(1) is patterned after Federal Rule of Civil Procedure 30(b)(6).[2] *See Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 394–95 (Tex. App.—Fort Worth

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[1] In response to FedEx's motions to quash and for protective orders, Brown argued, in part, that he could properly subpoena witnesses subject to FedEx's control by serving the subpoenas on FedEx's counsel. *See* Tex. R. Civ. P. 199.3, 205.1. Rules 199.3 and 205.1, however, relate to compelling a witness to attend a deposition, not trial. *See* Tex. R. Civ. P. 199.3, 205.1.

[2] Federal Rule of Civil Procedure 30(b)(6) provides:

> ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

1987, orig. proceeding) (recognizing Federal Rule 30(b)(6) as the rule after which Texas Rule 199.2(b)(1) was modeled).[3] We may look to federal authority for guidance when the state law mirrors the federal law.[4] In interpreting Federal Rule 30(b)(6), federal courts hold that Rule 30(b)(6) does not allow a party to subpoena a corporate representative to compel testimony at trial.[5] Following the federal courts'

Fed. R. Civ. P. 30(b)(6).

[3] The court in *Farrar a*ddressed former Texas Rule 201(4), which preceded Texas Rule 199.2(b)(1) and provided:

> When the deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the organization named to designate the person or persons to testify in its behalf, and, if it so desires, the matters on which each person designated will testify, and shall further direct that the person or persons designated by the organization appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

Tex. R. Civ. P. 201(4) (repealed). Former Texas Rule 201(4) and current Texas Rule 199.2(b)(1) are substantively similar.

[4] *Cf. Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 505 (Tex. 2012) (looking to federal law for guidance in situations where Texas Commission on Human Rights Act and Title VII of the Civil Rights Act of 1964 contain similar statutory language); *Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010) ("Because the Texas Public Information Act is modeled on the Freedom of Information Act, federal precedent is persuasive, particularly where the statutory provisions mirror one another."); *In re Weekly Homes, L.P.*, 295 S.W.3d 309, 316–17 (Tex. 2009) (orig. proceeding) (recognizing that state discovery rules are not identical to federal rules, but "are not inconsistent," and "therefore we look to the federal rules for guidance").

[5] *See Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 553 (6th Cir. 2015) (holding that district court did not abuse its discretion by denying plaintiff's request to take new deposition on new topics at trial because Federal Rule 30(b)(6) contemplates depositions during discovery, not at trial, and to allow trial deposition would allow an end-run around failed subpoenas); *Dopson-Troutt v. Novartis Pharm. Corp.*, 295 F.R.D. 536, 539–40 (M.D. Fla. 2013) (holding that plaintiffs could not properly compel trial testimony through Federal Rule 30(b)(6)-type designation); *MC Asset Recovery, LLC v. Castex Energy, Inc.*, No. 4:07-CV-076-Y, 2013 WL 12171724, at *1 (N.D. Tex. Jan. 7, 2013) (addressing argument that trial subpoenas with 64 topics were being used as discovery tool and recognizing that Federal Rule 45 does not expressly authorize party to subpoena

interpretation of Rule 30(b)(6), we conclude that Rule 199.2(b)(1) similarly does not provide for trial subpoenas with designated topics.

The parties followed the procedure for deposing Michael Sear as FedEx's corporate representative in this case. *See* Tex. R. Civ. P. 199.2(b)(1).[6] Brown noticed the deposition of FedEx and provided 10 topics on which he sought testimony. FedEx designated Sear as its corporate representative to testify on those matters at deposition because of Sear's knowledge as FedEx's manager of safety programs and response. Brown did not object to the procedure or the extent or nature of Sear's deposition testimony. Both FedEx and Brown have designated excerpts of Sear's deposition to be played to the jury at trial. We conclude that the trial court abused its discretion by denying FedEx's motion to quash the deposition of the unnamed corporate representative and for protective order.[7]

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corporate representative to testify vicariously at trial in way that Texas Rule 30(b)(6) does for deposition) (quotations and citations omitted); *Hill v. Nat'l R.R. Passenger Corp.*, CIV. A. No. 88-5277, 1989 WL 87621, at *1 (E.D. La. July 28, 1989) (holding that there is no provision allowing use of Federal Rule 30(b)(6)-type designation of areas of inquiry at trial).

[6] Texas Rule 199.2(b)(1) provides the following in relevant part with respect to taking the deposition of an organization:

> If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must--a reasonable time before the deposition--designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

Tex. R. Civ. P. 199.2(b)(1).

[7] FedEx also asserts that the trial court abused its discretion by denying FedEx's motions to quash and for protective orders because Brown failed to take reasonable steps to avoid imposing

III. FedEx Has No Adequate Remedy By Appeal

Having concluded that the trial court abused its discretion, we must determine whether FedEx has shown that it lacks an adequate remedy by appeal. In determining whether a party has an adequate remedy by appeal, the appellate court considers whether mandamus relief would preserve important substantive and procedural rights from impairment or loss. *Prudential Ins. Co. of Am.*, 148 S.W.3d at 136. Unless mandamus relief is granted, FedEx will have lost its right not to designate a corporate representative, who does not live within subpoena range. FedEx also will be forced to designate another corporate representative to testify on 25 specific topics at trial, when the Texas Rules of Civil Procedure do not provide for such trial testimony. These errors cannot be cured on appeal. *Cf. Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding) (explaining that party will not have adequate remedy by appeal when appellate court would not be able to cure trial court's discovery error). Therefore, FedEx has demonstrated that it does not have an adequate remedy by appeal.

CONCLUSION

We hold that this mandamus is not moot, the trial court abused its discretion by denying FedEx's motions to quash the subpoenas of Sear and the unnamed corporate representative and for protective orders, and FedEx does not have an adequate remedy by appeal. Therefore, we conditionally grant FedEx's petition for writ of mandamus and direct the trial court to set aside its October 28, 2019 orders

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an undue burden or expense on FedEx. Because we have held that the trial court abused its discretion for the reasons addressed above, it is not necessary to address this additional argument.

denying FedEx's motions to quash and for protective orders. The writ will issue only if the trial court fails to act in accordance with this opinion. We lift our stay entered on October 29, 2019.

/s/ Ken Wise
Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J., dissenting).