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

D I S S E N T I N G O P I N I O N

Properly construed, the question presented is whether the trial court abused its discretion when it ordered FedEx Ground to choose between producing Sear at trial or someone else of its choice at trial. Specifically, FedEx Ground contends that trial courts in Texas cannot "compel the attendance of a corporate witness at trial."[1] FedEx Ground is mistaken. *See Sun v. King Servs., Inc.*, No. G-06-351,

[1] FedEx Ground also contends it "has not agreed to make its corporate representative

2006 WL 2248473, at *2 (S.D. Tex. Aug. 3, 2006) ("[A] corporate representative can be compelled to testify at trial.") (citing no authorities); *see also Ralph v. Exxon Mobil Corp.*, No. G-05-655, 2006 WL 2266258, at *2 (S.D. Tex. Aug. 8, 2006) (citing *Lajaunie v. L & M Bo-Truc Rental, Inc.*, 261 F. Supp. 2d 751, 754 (S.D. Tex. 2003)); *Cont'l Airlines, Inc. v. Am. Airlines, Inc.*, 805 F. Supp. 1392 (S.D. Tex. 1992). *Cf. Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. App.—Houston [14th Dist.] 1987, no writ) (relying on federal decisions where the Texas Rules of Civil Procedure are patterned on the Federal Rules of Civil Procedure). While the majority also cites to federal jurisprudence, at least one federal court in Texas has held that compelling a corporate representative to testify at trial on enumerated topics is permissible, so long as the testimony is "within the scope of what was previously given by Defendants' corporate designee at his Rule 30(b)(6) deposition." *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).

FedEx Ground's complaint on appeal is three-fold:

> (1) a witness who is not individually a party cannot be compelled by subpoena to attend trial more than 150 miles from where he resides; (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 appear at trial to testify on 25 topics; and (3) the trial subpoenas do not provide adequate time for compliance or adequate protection from undue burden and expense.

I would deny FedEx Ground's petition because (1) several of the issues are moot; (2) several of the issues are unripe; (3) several of the issues have been waived; (4) Texas courts are inherently authorized to administer justice (including the prevention of injustice); (5) the trial court acted in accordance with Texas Rule of

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available to testify live at trial, but instead plans to rely on the deposition testimony taken under Rule 199.2(b)(1)."

Civil Procedure 1; and (6) the trial court did not compel a witness to attend more than 150 miles from where he resides.

I. Mootness

Brown argues several of FedEx Ground's alleged errors have become moot, *i.e.*, (1) a trial subpoena to Michael Sear, (2) a trial subpoena to a corporate representative beyond subpoena range, and (3) a trial subpoena including a categorical list of examination topics. Brown has assured us "he will not issue such subpoenas in a reset of the trial in this matter." Misrepresentations in Texas courts carry well-known consequences.[2] Therefore, I cannot presume any Texas lawyer would attempt to gain a tactical advantage anywhere (much less here) by making material misrepresentations to this Court. As a result, the propriety of these three specific categories of Brown's subpoenas is moot and we have no reasonable cause to believe the propriety of these subpoenas will resurface.

II. Ripeness

FedEx Ground's third issue (concerning sufficient time to comply with the trial court's order) is neither ripe nor preserved. "Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction[.]" *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) (citing

[2] *See Poff v. Guzman*, 532 S.W.3d 867, 871 n.3 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("A trial court may have inherent authority to impose death penalty sanctions when a party has committed perjury or fabricated evidence.") (citing *JNS Enter., Inc. v. Dixie Demolition, LLC*, 430 S.W.3d 444, 452-53 (Tex. App.—Austin 2013, no pet.) (noting that a trial court has inherent authority to impose sanctions for a party's deplorable conduct, and that fabricating evidence is the most egregious conduct amounting to a "fraud on the court") (quotation omitted)); *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230, 232-36 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (en banc) (noting that the trial court (1) had implied power to manage controversies before it, (2) did not err by resolving a factual dispute as to whether certain evidence had been fabricated, and (3) did not err by imposing death penalty sanctions); and *Vaughn v. Tex. Emp't Comm'n*, 792 S.W.2d 139, 144 (Tex. App.—Houston [1st Dist.] 1990, no writ) (no abuse of discretion when trial court dismissed a party's causes of action after the party committed perjury during discovery)).

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998)). Therefore, ripeness is "subject to de novo review that a court can raise sua sponte." *Mayhew*, 964 S.W.2d at 928. Even if this issue was ripe and preserved, it is now moot because FedEx Ground has had six additional months to prepare since the trial court's order and would (in my opinion) receive a stay of 30 additional days to cure any potential prejudice. *See generally* Tex. R. Civ. P. 1.

"A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Vill. of Tiki Island v. Premier Tierra Holdings Inc.*, 555 S.W.3d 738, 745 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 683 (Tex. App.—Austin 2004, no pet.) (citing *Patterson*, 971 S.W.2d at 442)). Here, FedEx Ground elected to forego requesting a continuance (which would have foreseeably developed the record); instead, it argued that under these circumstances, the Rules do not require it to produce *anyone* at trial.[3] That decision deprives this Court of subject-matter jurisdiction to consider the question of whether the trial court erred with respect to the time for compliance because FedEx Ground never presented these issues thereto; if a motion for continuance had been granted, there would be no appeal on that issue and if it had been denied, then we would have cause to address it with a properly developed record.[4]

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[3] Specifically, FedEx Ground contends, "If the trial court's ruling is allowed to stand, then parties in any case could serve a trial subpoena on the eve of trial (through service on counsel) that would require an organization or corporation, whose employees may be in another state or another country, to prepare a corporate representative to testify live at trial on an unlimited number of topics. This is not, and should not be, the law in Texas."

[4] *See* 13B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3532.3 (3d ed. 1984) ("adjudication may be postponed until a better factual record is available, '[e]ven though the challenged statute is sure to work the injury alleged'") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 (1979)); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 177 (1987) ("Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation. The demand for specificity,

I therefore reject FedEx Ground's third issue in its entirety because it requires us to presume the trial court addressed an issue we have no cause to believe it addressed. *See Rios v. Tex. Bank*, 948 S.W.2d 30, 33 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing *Union City Body Co. v. Ramirez*, 911 S.W.2d 196, 202 (Tex. App.—San Antonio 1995, orig. proceeding) (holding a party may not lead a trial court into error and then complain about it on appeal)). FedEx Ground had time to file a motion for continuance, but did not do so; therefore, it also failed to preserve error on this ground. *See id.*; *see also Garcia-Ramirez v. State*, No. 05-13-01514-CR, 2014 WL 5477014, at *2 (Tex. App.—Dallas Oct. 30, 2014, pet. ref'd) (mem. op., not designated for publication) ("Having failed to do so [request a continuance], he 'cannot now be heard to complain.'") (quoting *Barnes v. State*, 876 S.W.2d 316, 328 (Tex. Crim. App. 1994) (quoting *Hubbard v. State*, 496 S.W.2d 924, 926 (Tex. Crim. App. 1973))); *Gorham v. Wainwright*, 588 F.2d 178, 180 (5th Cir. 1979) (citing *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978)); and *United States v. James*, 495 F.2d 434, 437 (5th Cir. 1974).

Finally, ripeness considerations require courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Perry v. Del Rio*, 66 S.W.3d 239, 249-50 (Tex. 2001) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Here, the issue is not fit for judicial decision because (1) the properly construed question was presented

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therefore, stems from a judicial desire for better lawmaking."); June F. Entman, *Flawed Activism: The Tennessee Supreme Court's Advisory Opinions on Joint Tort Liability and Summary Judgment*, 24 Mem. St. U. L. Rev. 193, 199 (1994); and Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1002-03 (1924).

neither below nor here; (2) FedEx Ground did not request relief afforded under the Rules; (3) Brown's subpoenas are moot; (4) there is no evidence of hardship to FedEx Ground; and (5) any undue hardship would be rectified via the time that has passed since the trial court's order plus a 30-day stay. This evidence-less and improperly presumed hardship to FedEx Ground is even less compelling when viewed in light of the conduct that created it.

III. Waiver

No fact in the record could lead us to believe the trial court's ruling imposed an undue burden on FedEx Ground. Specifically, there are no facts tending to show FedEx Ground lacks employees it could reasonably produce at trial who have personal knowledge of the relevant subject matters identified through the deposition of its designated corporate representative. Therefore, the merits of FedEx Ground's third issue are not before us. *See Indep. Insulating Glass/Sw., Inc. v. Street*, 722 S.W.2d 798, 802 (Tex. App.—Fort Worth 1987, orig. proceeding) ("Any party who seeks to exclude matters from discovery on grounds that the requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery.").

FedEx Ground also failed to argue to the trial court that the order compelling it to produce a corporate representative to testify on 25 topics was unduly burdensome. To the extent FedEx Ground contends it needed more than one person to testify on these topics or that the trial court's order was otherwise unduly burdensome, we have been presented with no evidence that it sought any relevant relief pertaining to the trial court's rulings before seeking appellate relief, *e.g.*, (1) rehearing concerning the number of corporate representatives it was entitled to produce, (2) rehearing concerning the number of issues it was ordered to prepare,

(3) clarification of the court's order in the event of a latent ambiguity, (4) leave to identify more than one corporate representative, or (5) additional time to prepare. We have also been presented with zero evidence showing the existence (much less details) of such a burden or that said burden was presented to the trial court. Precedent regarding relators' failure to pursue available remedies precludes us from addressing this issue altogether. *See Indep. Insulating Glass/Sw., Inc.*, 722 S.W.2d at 802.

IV. Inherent Authority

Even if we choose to believe these issues are ripe, preserved, and not moot, the majority wrongly relies upon the absence of express permission in the Rules to support its conclusion that the trial court abused its discretion when it ordered FedEx Ground to produce either Sear or someone else of its choice at trial. Absent a compelling reason it could not do so, I believe the inequity of the posture FedEx Ground created is readily apparent and that the trial court had inherent authority to rectify same.

"Corporations can act only through human agents[.]" *Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 808 (Tex. App.—Houston [14th Dist.] 2019, no pet.). During litigation, Brown (who carries the plaintiff's burden at trial) deposed FedEx Ground's designated representative. Brown (seemingly acknowledging the trial court had no jurisdiction to compel Sear's attendance) asked the trial court to compel FedEx Ground to produce a live witness at trial; presumably, the trial court perceived this to be a reasonable request. I have no cause to believe the trial court abused its discretion when it used its inherent authority to administer justice. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) (inherent powers "are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and

integrity").[5]

Texas trial courts have been authorized to reasonably tailor remedies to the circumstances of a case without express authority since the early days of the Republic. *See Teas v. Robinson*, 11 Tex. 774, 777 (1854) ("[I]n cases not provided for by statute, it is within the legal powers of the Court, to devise and authorize such appellate process as may be necessary to enforce its own jurisdiction, and secure the rights of parties interested a hearing and a revision of the judgments in this Court.").[6] Texas trial courts are also inherently authorized to

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[5] *See also id.* ("In addition to the express grants of judicial power to each court, there are other powers which courts may exercise though not expressly authorized or described by constitution or statute. These powers are woven into the fabric of the constitution by virtue of their origin in the common law and the mandate of Tex. Const. Art. II, Sec. 1, of the separation of powers between three co-equal branches. They are categorized as 'implied' and 'inherent' powers, though some courts have also used the terms incidental, correlative and inferred . . . . The courts of this state have long recognized these powers. Their use has continued unchallenged through constitutional revision, express legislative confirmation, as well as the sometimes overbroad statements of our own courts."); *Burttschell v. Sheppard*, 69 S.W.2d 402, 403 (Tex. 1934) ("It has also been said that the inherent powers of courts are those which are essential to their existence and to the due administration of justice.") (citing 15 C. J. 732); *In re Collins*, 242 S.W.3d 837, 847-48 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (quoting *Eichelberger*, 582 S.W.2d at 398); and *id.* (quoting *Hale v. State*, 45 N.E. 199, 200 (Ohio 1896)) ("The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court, or the purpose of its creation fails. Without such power, no other could be exercised.").

[6] *See also Ashford v. Goodwin*, 131 S.W. 535, 538 (Tex. 1910) ("Although, looking to this statute alone, the procedure is meager, yet the district court has authority in such conditions to adopt a rule of procedure, if necessary for its government in the examination of such cases, and to apply to the facts of the case before it any and all rules of procedure which can be made applicable to the issues to be investigated, which are not in conflict with the provisions of any statute or the Constitution.") (citing *Pendley v. Berry*, 65 S.W. 32, 33 (Tex. 1901) (providing a procedural remedy contrary to the relevant language because it was "inconceivable" the authors intended to limit "ample and reasonable rules" in such an unreasonable manner)); *id.* ("It must be

summon witnesses "and compel their attendance upon the court, to the end that justice may be administered."[7] *Burttschell v. Sheppard*, 69 S.W.2d 402, 403 (Tex. 1934) (citing 7 R. C. L. 1033; 15 C. J. 732, s 30; *Hale v. State*, 45 N. E. 199 (Ohio 1896); and *State ex rel. Rudolph v. Ryan*, 38 S.W.2d 717 (Mo. 1931)). This "power to compel attendance of witnesses is one of the most vital necessities to a court in order for it to carry out the purposes for which it is created." *Id.* at 403-04.

Because trial courts (as opposed to parties) have this well-established

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borne in mind that these provisions are not intended to confer or to defeat the right of appeal, but to aid in its exercise, and mere incompleteness of the provisions does not necessitate a denial of the right. The courts are clothed with power, by rule or construction consistent with the express statutory regulations, to help them out so as to perfect and preserve the right.") (citing *Wheeler v. State*, 8 Tex. 228, 230 (1852) (providing an unprovided remedy after concluding it was "manifest that the suing out of a writ of error against the State was not particularly in the contemplation of the Legislature")); *id.* (citing *Teas*, 11 Tex. at 777); *Wheeler*, 8 Tex. at 231 ("There seems no ground why the process should be thus incumbered."); and *Bennett v. Jackson*, 172 S.W.2d 395, 397 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.) ("Reasonable adherence to the established rules by each and all, consistent with a proper exercise of sound judicial discretion, is indispensable to the administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration."). *Cf. In re Easton*, 203 S.W.3d 438, 442 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) ("Inherent power of the courts has existed since the days of the Inns of Court in common law English jurisprudence.") (quoting *Eichelberger*, 582 S.W.2d at 398-99).

[7] *See also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) ("'[I]nherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176, 3 S. Ct. 570, 28 L. Ed. 109."); *Burttschell*, 69 S.W.2d at 403 (quoting *State ex rel. Rudolph v. Ryan*, 38 S.W.2d 717, 730-31 (Mo. 1931) ("Circuit courts have jurisdiction over criminal cases. Section 22, art. 6, Const. They are authorized by the Constitution to try such cases. They cannot do so without witnesses. Authority to compel the attendance or production of witnesses is an element of jurisdiction. It is essential to the existence of said courts and to the due administration of justice. 15 C. J. 732. Without such authority, there is no jurisdiction. In other words, said courts have the inherent power to compel the attendance or production of witnesses. Having such power, they are authorized to issue process, 'according to the principles and usages of law,' for that purpose. *Yeoman v. Younger*, 83 Mo. 424, loc. cit. 429. Furthermore, by statute, declaratory of the common law, 'all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law.' Section 1844, Rev. St. 1929 (Mo. St. Ann. s 1844, p. 2565) . . . .").

authority to compel the production of witnesses, I know of no reason they would lack the authority to order a corporation that "can act only through human agents" (*Arshad*, 580 S.W.3d at 808) to produce the representative(s) of its choice at trial, particularly in cases where (1) the corporation failed to introduce any evidence of undue burden, hardship, or oppression and (2) the trial court presumably perceived a party erecting an unreasonable obstacle to the presentment of the case. *See Smirl v. Globe Labs.*, 188 S.W.2d 676, 678 (Tex. 1945) (the Texas Supreme Court "has always held that where a practice is established by a rule of court it is competent for the court so to adapt its exercise as to prevent any particular oppression and to make it yield to the particular circumstances of the case"); *see also id.* (quoting *Mills v. Bagby*, 4 Tex. 320 (1849)); *id.* (quoting *Stephens v. Herron*, 87 S.W. 326, 328 (Tex. 1905)); and *id.* ("If these rules were established by the court, to secure the dispatch of business, and promote the ends of justice, the court would be competent so to modify them, as to prevent any particular hardship or serious injury.") (quoting *De Leon v. Owen*, 3 Tex. 153, 154 (1848)).

The majority's acceptance of FedEx Ground's argument authorizes parties (and corporations in particular) to replicate this abuse of Texas procedure *ad infinitum*. Under the majority's analysis, corporations can preclude opposing parties from satisfying their burden at trial via live witnesses simply by (1) identifying an out-of-state corporate representative it never intends to produce at trial, (2) refusing to identify one or more corporate representatives with relevant knowledge within the 150-mile radius (or refusing to represent that there is no such person), and (3) refusing to seek a rehearing, a continuance, or any other relief that would create the proper record. I cannot presume our system permits this outcome (especially under these circumstances) and have been pointed to no authority that says otherwise.

V. Texas Rule of Civil Procedure 1

For decades, the Texas Rules of Civil Procedure have sought to create a universal set of guidelines to facilitate justice in Texas courts. *See, e.g.*, *Red River Valley Pub. Co. v. Bridges*, 254 S.W.2d 854, 862 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.) ("The new Rules [of Civil Procedure] were adopted to eliminate, within reason, pure technicalities, not to perpetuate old ones."), *disapproved of on other grounds by Flanigan v. Carswell*, 324 S.W.2d 835 (Tex. 1959).[8] Because these Rules govern procedure, they effectively govern "every step which may be taken from the beginning to the end of a case." *See Brooks v. Tex. Emp'rs Ins. Ass'n*, 358 S.W.2d 412, 414 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.) (citing 72 C.J.S. Practice p. 471, 473). Like the United States Constitution, the Texas Rules of Civil Procedure open with the most fundamental rule. *See Brightwell v. Rabeck*, 430 S.W.2d 252, 257 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) ("The controlling rule is T.R.C.P. 1.") (citing "the discussion under the rule in Vernon's Texas Rules of Civil Procedure").[9] Texas Rule of Civil

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[8] *See also* Order of Approval of the Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196, at ¶ 5 (Tex. Nov. 9, 1998), *printed in* 61 Tex. Bar J. 1140 (Dec. 1998), *as amended* by Order Approving Technical Corrections to the Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98–9224 (Tex. Dec. 31, 1998), *printed in* 62 Tex. Bar J. 115 (Feb. 1999). ("The application of these revised rules in pending cases, as provided by paragraph 3 of this Order, must be subject to Rule 1 of the Rules of Civil Procedure, must be consistent with the purposes of the revised rules to streamline discovery procedures and to reduce costs and delays associated with discovery practice, and must be without undue prejudice to any person on account of the transition from the prior rules.").

[9] *See also id.* ("Generally, the rules are but tools to be used in procedural conduct aimed at the objective of accomplishing justice. They are not ends within themselves, but are means to that end. If their application would effect injustice they are to be disregarded for that is the antithesis of their purpose. They should never be applied to defeat the 'justice and right of the case' which Judge Phillips said in *Gilmore v. O'Neil*, 107 Tex. 18, 173 S.W. 203 (1915), was 'what the law of a case ought to be.'"); *Bennett*, 172 S.W.2d at 397 ("The ultimate purpose of all rules of procedure is to secure to every litigant a fair and impartial adjudication of his rights under established principles of substantive law to the end that justice may be done. Rule 1 of Texas Rules of Civil Procedure. In order to accomplish this objective, certain qualifications, prerogatives and responsibilities are definitely required of, vested in and placed upon the trial

Procedure 1 provides:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.[10]

This need to liberally construe rules governing Texas civil procedure is not new. *See Whitsett v. Whitsett*, 201 S.W.2d 114, 123 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) ("We do not find the rules of the court to place such onerous burden on appellants; however, we do not find any cases directly in point on this subject; but we do find that the new rules are made to prevent extra expense to litigants and are to be liberally construed.") (citing Tex. R. Civ. P. 1 and *Smirl*, 188 S.W.2d at 676); *see also Stone v. Tex. Emp'rs Ins. Ass'n*, 273 S.W.2d 59, 60 (Tex. 1954). Permitting FedEx Ground to designate an out-of-state witness in response to allegations in Texas despite an unwillingness to cause that person (or any other person) under its control to appear in Texas is neither just, fair, expeditious, cost-effective, practical, nor the product of liberal construction; therefore, the majority's issuance of a writ of mandamus improperly ignores the purpose of our shared rules.

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judge, jury, witnesses, and each participant in all the courts. Reasonable adherence to the established rules by each and all, consistent with a proper exercise of sound judicial discretion, is indispensable to the administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration.").

[10] *See also Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 186-87 (Tex. App.—Dallas 1996, no writ) ("Rule 1 of the Texas Rules of Civil Procedure mandates that all rules of civil procedure be given a liberal construction to promote the just, fair, equitable and impartial adjudication of the rights of litigants . . . . The Texas Rules of Civil Procedure have the same force and effect as statutes. The court should liberally construe them to ensure a fair and equitable adjudication of the rights of the litigants without ignoring their plain meaning.") (citing *Methodist Hosps. of Dallas v. Corp. Communicators, Inc.*, 806 S.W.2d 879, 884 (Tex. App.—Dallas 1991, writ denied)).

Finally, I believe the trial court acted in accordance with Texas Rule of Civil Procedure 1 because FedEx Ground's conduct both (1) unreasonably inhibited the "just, fair, equitable and impartial adjudication" of Brown's case and (2) warranted reasonable relief the trial court had inherent authority to fashion. The procedural remedies available to a trial court under these circumstances are naturally not narrow and (depending on the level of ascertained fault) include re-opening of the discovery period, instructions, presumptions, costs, and sanctions. Under the circumstances (particularly without being asked for a continuance), the trial court chose the least severe remedy and simply instructed FedEx Ground to make a choice; FedEx Ground declined and instead sought extraordinary relief. Providing a party with a reasonable choice to remedy an unreasonable posture of its creation is consistent with Texas Rule of Civil Procedure 1, particularly when viewed in light of the express authority bestowed upon trial courts to justly, fairly, equitably, and impartially facilitate justice.

VI. Brown's request to have Sear appear at trial is not before us.

According to FedEx Ground, the trial court ruled FedEx Ground was not required to produce Sear at trial. *See* Tex. R. Civ. P. 176.3(a). Neither FedEx Ground nor Brown has appealed this ruling and it is not before us. Instead, FedEx Ground was ordered to produce Sear *or* someone else of its choosing. I would therefore reject FedEx Ground's first issue because the trial court has not ordered it to produce someone at trial who lives more than 150 miles from the Harris County Courthouse.

Importantly, FedEx Ground does not seek mandamus relief on the ground that the trial court abused its discretion when it fashioned this procedure under these facts. Instead, it argues the trial court lacked the authority to compel it to produce anyone. Because I believe otherwise based on inherent authority and

Texas Rule of Civil Procedure 1, I reject both FedEx Ground's argument and the majority's acceptance thereof.

CONCLUSION

The majority ignores long-standing authorities and the trust Texas has uninterruptedly placed in trial court judges to reasonably exercise their discretion in the administration of justice. Given the court's authority to compel the attendance of witnesses, I cannot conclude it (under these facts) abused its authority by instructing FedEx Ground to produce someone of its choosing at trial. The nature of corporate representatives precluded Brown from controlling who FedEx Ground designated and no known rule authorizes corporations to subvert justice by refusing to produce live witnesses at trial where there is no undue burden or oppression (an issue that is not before us because FedEx Ground failed to address it below). I therefore dissent from the conditional granting of this mandamus.

/s/ Megan Hassan

Meagan Hassan
Justice

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