

**Petition for Writ of Mandamus Denied and Majority and Dissenting Opinions
filed July 7, 2020.**



In The
Fourteenth Court of Appeals

NO. 14-19-00932-CV

IN RE LIBERTY COUNTY MUTUAL INSURANCE COMPANY, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
157th District Court
Harris County, Texas
Trial Court Cause No. 2018-47131**

DISSENTING OPINION

This case falls within the scope of this court’s 2018 precedent in *In re Liberty County Mutual Insurance Company* (“*Liberty Mutual I*”).¹ In keeping with horizontal stare decisis, this court should adhere to *Liberty Mutual I* and grant

¹ 557 S.W.3d 851 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

mandamus relief. Because the court instead denies mandamus relief, I respectfully dissent.

The Scope of Relevant Discovery Under this Court's Binding Precedent

The scope of relevant discovery in uninsured-motorist cases differs from the scope of relevant discovery in other insurance disputes.² Unlike coverage in most first-party insurance cases, in which the terms of the insurance policy alone dictate the outcome, uninsured-motorist coverage hinges on the liability of the uninsured third-party motorist alleged to be at-fault.³ Consequently, the insurer's contractual obligation to pay benefits under the policy does not arise until liability and damages are determined.⁴ To recover benefits, a policy beneficiary must show (1) the insured has uninsured-motorist coverage, (2) the uninsured motorist negligently caused the accident that resulted in the covered damages, (3) the amount of the insured's damages, and (4) the uninsured motorist's coverage is absent or deficient.⁵ The law provides that a claimant for uninsured-motorist benefits presents no claim until the trial court resolves these issues.⁶

In both *Liberty Mutual I* and in today's case, the trial court severed the extracontractual claims against Liberty Mutual into a separate lawsuit.⁷ In both *Liberty Mutual I* and today's case, Liberty Mutual stipulated to the following key

² *See id.* at 855.

³ *See id.* at 855–56.

⁴ *See id.* at 856.

⁵ *See id.*

⁶ *See id.*

⁷ *See id.* at 854.

facts: (1) Liberty Mutual issued the policy at issue to the plaintiff; (2) the policy stood in full force and effect on the date of the accident; and (3) the policy provided the stated amount of uninsured-motorist coverage to the plaintiff. The stipulation in today's case narrows the relevant issues to those of a typical car wreck case: (1) the unidentified driver's liability for the underlying automobile accident, and (2) the existence and amount of real-party-in-interest Marcia Forrest's damages.⁸

In *Liberty Mutual I*, Liberty Mutual already had produced some discovery to the plaintiff. In today's case, although Forrest attaches Liberty Mutual's discovery responses to her appendix in this original proceeding, the record reflects that these documents were not before the trial court when the respondent judge made the challenged ruling. Under a fundamental rule of appellate law, this court is to review the merits of the trial court's ruling based solely on the record before the trial court when the trial court made the ruling.⁹ Conceptually, in reviewing the trial court's decision, this court parachutes into the trial court's place at the moment the trial court ruled. Under this standard, in adjudicating this mandamus proceeding, we may not consider documents not before the trial court.¹⁰

Though the record before the respondent trial judge in today's case did not reflect any discovery that Liberty Mutual had produced and the *Liberty Mutual I* court relied in part on the discovery that Liberty Mutual had produced, *Liberty*

⁸ See *id.* at 856.

⁹ See *Perry Homes v. Cull*, 258 S.W.3d 580, 596 n.89 (Tex. 2008); *Axelson v. McIlhany*, 798 S.W.2d 550, 556 n.9 (Tex. 1990) (orig. proceeding); *In re Methodist Primary Care Group*, 553 S.W.3d 709, 720 n.2 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

¹⁰ See *Perry Homes*, 258 S.W.3d at 596 n.89; *Axelson*, 798 S.W.2d at 556 n.9; *In re Methodist Primary Care Group*, 553 S.W.3d at 720 n.2.

Mutual I still governs today's case because the *Liberty Mutual I* court stated as follows:

[T]he information sought through the deposition already has been obtained by Plaintiff *or may be obtained from other sources with less burden and expense*. Though some of the topics listed in the Deposition Order may pertain to the relevant topics of the truck driver's liability or Plaintiff's damages, *[Liberty Mutual] was not involved in the car accident at issue. [Liberty Mutual's] employees would not have any direct or personal knowledge of the accident*. Any knowledge that *[Liberty Mutual's] employees have of the accident or Plaintiff's damages would have been obtained through discovery in this action or its investigation of the accident, if any*.

...

Accordingly, even as to the topics listed in the Deposition Order that do pertain to the relevant subjects of the truck driver's liability or Plaintiff's damages, the Order is an abuse of discretion because the information sought through the deposition is already known by Plaintiff, has already been obtained by Plaintiff through discovery, *or is obtainable from some other source that is more convenient, less burdensome, or less expensive*.¹¹

This court should apply *Liberty Mutual I* and grant the mandamus relief Liberty Mutual seeks.

The Majority's Attempt to Distinguish Liberty Mutual I

The majority attempts to distinguish *Liberty Mutual I* by pointing to the *Liberty Mutual I* court's discussion of the discovery Liberty Mutual already had produced and noting that in today's case, the record before the trial court does not

¹¹ *In re Liberty Cnty. Mut. Ins. Co.*, 557 S.W.3d at 856, 857 (italics added).

reflect the discovery, if any, Liberty Mutual produced.¹² The majority does not take into account that the *Liberty Mutual I* court relied on the following propositions:

- (1) Liberty Mutual was not involved in the car accident at issue;
- (2) Liberty Mutual's employees would not have any direct or personal knowledge of the accident; and
- (3) The plaintiff in the case either (a) already knew the information sought through the deposition, (b) already had obtained it through discovery, or (c) could obtain it from a more convenient, less burdensome, or less expensive source.¹³

Even presuming that the *Liberty Mutual I* plaintiff had in hand more discovery from Liberty Mutual than Forrest has in hand in today's case, the *Liberty Mutual I* court also relied on the plaintiff's personal knowledge of the accident and injuries, as well as the proposition that the plaintiff had access to the information sought through the deposition from a more convenient, less burdensome, or less expensive source.¹⁴ The majority relies on Liberty Mutual's failure to produce evidence that Forrest could obtain the information from other sources that would be more convenient, less burdensome, or less expensive than having Liberty Mutual's corporate representative deposed; yet, the *Liberty Mutual I* court did not rely on any such evidence in granting Liberty Mutual's request for mandamus relief in that

¹² See *ante* at 10–13.

¹³ See *In re Liberty Cnty. Mut. Ins. Co.*, 557 S.W.3d at 856, 857.

¹⁴ See *id.* at 856–57.

case.¹⁵ The majority's ostensible distinction affords no basis for departing from this court's binding precedent in *Liberty Mutual I*.

The Importance of Adhering to Horizontal Stare Decisis

Litigants rely on this court's opinions in propounding and responding to discovery. When the court fails to follow its own decisions, the court fails to meet the public's and the parties' legitimate expectations. Today's case exemplifies the troubling effects of reaching opposite conclusions reviewing the same discovery issue. The disparate outcomes in these back-to-back uninsured-motorist coverage cases must make it especially vexing for Liberty Mutual who today experiences firsthand the loss of predictability in the law that comes with the majority's failure to follow the rule this court applied to Liberty Mutual just two years ago in ruling on the same point.¹⁶

Principles of horizontal stare decisis demand that this court adhere to the holding in *Liberty Mutual I*. Doing so would foster reliance on this court's decisions and promote the consistent development of the law governing today's dispute. By departing from binding precedent, the majority creates ambiguity in our jurisprudence. The resulting lack of uniformity in the court's decisions on this point will make it harder for trial courts and litigants to know what the law is or how to apply it in this type of discovery dispute. The conflict also will make discovery more time-consuming and more expensive for litigants because when the law is unclear,

¹⁵ *See id.* at 856–58.

¹⁶ *See id.*

it takes longer and costs more to resolve disputes. And, the uncertainty in the law will hinder the discovery process.

For all of these reasons, the majority should follow this court's binding precedent in *Liberty Mutual I* and grant Liberty Mutual's request for mandamus relief.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Zimmerer. (Zimmerer, J., majority).