

**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**

MAJORITY OPINION

On November 20, 2019, relator Liberty County Mutual Insurance Company 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 Tanya Garrison, presiding judge of the 157th District Court of Harris County, to set aside her October 7, 2019 order directing Liberty to produce its corporate representative for deposition. We deny the petition.

BACKGROUND

Marcia Forrest was involved a motor vehicle accident with an unidentified driver who fled the scene. Prior to the accident, Liberty issued a policy to Forrest providing uninsured/underinsured motorist coverage (“UIM”). Forrest submitted a claim to Liberty for payment of UIM benefits. After Liberty failed to pay Forrest UIM benefits, Forrest sued Liberty for breach of contract and breach of the duty of good faith and fair dealing. Forrest also sued for a declaratory judgment that her claims for UIM benefits are covered under the policy and the negligence of the other driver caused her damages and the amount of UIM benefits she is entitled to recover from Liberty.

Liberty filed a motion to (1) sever Forrest’s contractual and extra-contractual claims from the underlying car wreck case, arguing that no legally cognizable claim for UIM benefits exists until liability and damages have been judicially determined in a judgment, and (2) abate all discovery related to Forrest’s claims for UIM benefits. On November 29, 2018, the trial court granted Liberty’s motion, severed all contractual and extra-contractual claims into a separate action, and abated all activity concerning those claims. Only the negligence claim was left in the original suit.

In February 2019, Forrest first requested a date to take the deposition of a corporate representative for Liberty on 29 topics. Liberty did not agree to produce a representative for deposition. In April 2019, Liberty filed a stipulation that (1) it had issued a policy to Forrest and Forrest is covered under the policy; (2) the policy was in full force and effect on the date of the accident; (3) the policy provided \$500,000 per person in underinsured motorist coverage to Forrest; and (4) Liberty previously paid \$5,000 in PIP benefits to Forrest. On September 16, 2019, Forrest filed a motion to compel the deposition of Liberty’s corporate representative. On

October 7, 2019, the trial court granted the motion to compel, in part, and ordered the deposition of a corporate representative for Liberty, narrowing the scope of the deposition to the following 13 topics regarding fault for the accident and Forrest's damages:

- Whether Forrest was involved in a motor vehicle collision.
- Who Liberty contends was at fault for the collision and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest was not injured in the collision and the evidence Liberty has to support its contention.
- What injuries Liberty contends that Forrest suffered or sustained in the collision and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest suffered from one or more pre-existing conditions before the collision and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest suffered from one or more pre-existing conditions before the collision that were aggravated by that collision, and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest was involved in other collisions or other incidents before the subject collision that caused physical injuries similar to the ones claimed by Forrest in this lawsuit, and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest was involved in other collisions or other incidents after the subject collision that caused physical injuries similar to the ones claimed by Forrest in this lawsuit, and the evidence Liberty has to support its contention.
- Whether Liberty contends that the negligence of the other driver involved in the collision proximately caused the collision and the evidence Liberty has to support its contention.
- Whether Liberty contends that Forrest's negligence proximately caused the collision and the evidence Liberty has to support its contention.
- Whether Liberty contends that the collision was not severe enough to cause any physical injuries to Forrest and the evidence Liberty has to support its contention.
- Whether Liberty contends that the collision was not severe enough to cause the physical injuries Forrest complains of in this lawsuit, and the evidence Liberty has to support its contention.

- Whether Liberty contends that Forrest has failed in any way to mitigate her damages sustained in the collision and the evidence Liberty has to support its contention.

In this mandamus proceeding, Liberty contends that the trial court abused its discretion by ordering Liberty to produce its corporate representative for deposition and it does not have an adequate remedy by appeal.

STANDARD OF REVIEW

Ordinarily, to be entitled to a writ of mandamus, relators must show that the trial court clearly abused its discretion, and that they lack an adequate remedy by appeal. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (original 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.* Appeal is not an adequate remedy when the appellate court would not be able to cure the trial court’s discovery error on appeal. *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam); *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding).

ANALYSIS

Liberty asserts that the trial court abused its discretion because UIM coverage depends on the liability of the alleged at-fault motorist and Forrest needs to first obtain a judicial determination that the other driver caused the accident.

A trial court generally has discretion to determine the scope of discovery. *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 802 (Tex. 2017) (orig. proceeding). “Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.” *In re Nat’l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) (orig. proceeding) (per curiam) (internal quotation marks and citations omitted). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. Tex. R. Evid. 401. The phrase “relevant to the subject matter” is to be broadly construed. *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (orig. proceeding) (per curiam). Discovery requests must be reasonably tailored to include only matters relevant to the case. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam). A trial court abuses its discretion if it orders discovery that exceeds what

the rules of civil procedure permit. *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, 130–31 (Tex. 2018) (orig. proceeding).

UIM coverage provides payment to the insured of all amounts that the insured is legally entitled to recover as damages from owners or operators of underinsured vehicles because of bodily injury or property damage, not to exceed the limit specified in the insurance policy. *Farmers Tex. Cty. Mut. Ins. Co. v. Okelberry*, 525 S.W.3d 786, 790 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing Tex. Ins. Code Ann. § 1952.106). A negligent party is underinsured when the available proceeds of his liability insurance are insufficient to compensate for the injured party’s actual damages. *Id.* (citing *Stracener v. United Servs. Auto. Ass’n*, 777 S.W.2d 378, 380 (Tex. 1989)).

The scope of relevant discovery in UIM cases differs from other insurance disputes because, unlike most first-party cases in which the terms of the policy alone dictate the outcome, UIM coverage hinges on the liability of the alleged uninsured, at-fault third-party motorist under applicable tort law. *In re Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding). A UIM insurer has no contractual duty to pay benefits until the liability of the other driver and the amount of damages sustained by the insured are determined. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006).

To recover benefits under a UIM policy, a policy beneficiary must show (1) that the insured has UIM coverage; (2) that the other driver negligently caused the accident that resulted in the covered damages; (3) the amount of the insured’s damages; and (4) that the other driver’s insurance coverage is deficient. *Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d at 220; *In re Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d 422, 427 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding).

A stipulation by the insurer that (1) the plaintiff was insured for UIM benefits under its policy; and (2) the underlying accident was a covered occurrence under the policy's provisions narrows the relevant issues in the breach-of-contract suit to those in a "typical car wreck" case—namely, (1) the uninsured/underinsured driver's liability for the underlying accident; (2) the claimed uninsured/underinsured driver's status; and (3) the existence and amount of the plaintiff's damages. *Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d at 220; *Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d at 427.

Liberty contends that any discovery on its defenses and legal theories is not relevant until there has been a judicial determination as to who was at fault and the amount of Forrest's damages, if any. Liberty further asserts that (1) its representative does not have personal knowledge of the accident or Forrest's injuries; and (2) Forrest has equal or better access to relevant information through her own medical records, available police reports, or recollection of events. Therefore, Liberty maintains that Forrest could obtain the information from other, more convenient, less burdensome sources. Liberty relies on this court's prior opinion in *In re Liberty County Mutual Insurance Company* in support of its positions. *See* 557 S.W.3d 851 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

In this court's prior *Liberty* case, the trial court severed the extracontractual claims into a separate action. *Id.* at 854. The plaintiff noticed the deposition of Liberty's corporate representative, and Liberty filed a motion to quash the deposition and a motion for protection. *Id.* The plaintiff filed a motion to compel, and the trial court held a hearing. *Id.* The trial court ordered Liberty to present a designated representative or employee with knowledge of relevant facts to testify on the following: (1) the plaintiff's damages caused by the accident; (2) the facts supporting the legal theories and defenses listed in Liberty's responses to the plaintiff's request for disclosure, including (a) Liberty's limitation of liability, (b) the amount of any

offset or credit to which Liberty claimed it was entitled, (c) the plaintiff's pre-existing, subsequent, and/or intervening injuries and conditions, (d) the amounts of any limitation or reduction Liberty would allege, (e) the plaintiff's failure to mitigate his damages by failing to follow his doctor's instructions or seeking appropriate treatment for his injuries, and (f) how the crash occurred; (3) Liberty's sworn interrogatory answers; (4) Liberty's responses to request for production; (5) Liberty's responses to the request for disclosure; and (6) Liberty's live pleadings on file. *Id.* at 854–55.

We observed that the order was not limited to “the relevant topics of the truck driver's liability and the existence and amount of Plaintiff's damages.” *Id.* at 856. Instead, it improperly included topics related to Liberty's interrogatory answers, responses to request for production, responses to request for disclosure, and live pleadings, without limitation and regardless of whether they pertained to “the truck driver's liability or Plaintiff's damages, and therefore encompass[e]d irrelevant matters.” *Id.*

Furthermore, we noted, as to the relevant topics of the truck driver's liability and the plaintiff's damages, that the plaintiff had already obtained the information. *Id.* In response to the plaintiff's requests for production relating to the car accident and the investigation of the accident, Liberty produced (1) a valuation report for the plaintiff's vehicle prepared by an independent, third-party appraiser and accompanying photos; (2) the police report; (3) the plaintiff's medical records; and (4) the plaintiff's recorded statement. *Id.* at 857. Moreover, nothing in the record indicated that Liberty had any knowledge of how the accident occurred or the plaintiff's damages beyond what the plaintiff already knew or had obtained through discovery. *Id.* Also, the police report identified at least four other drivers and/or passengers, who were involved in the accident and whom the plaintiff could seek to depose. *Id.* Thus, we held that the trial court abused its discretion by compelling

the deposition of Liberty's corporate representative on the topics pertaining "to the relevant subjects of the truck driver's liability or Plaintiff's damages" because the information was already known to the plaintiff, had already been obtained by the plaintiff through discovery, or was obtainable from a source that was more convenient, less burdensome, or less expensive. *Id.* Liberty's reliance on our prior opinion, however, is misplaced.

Here, Liberty's defensive theories include that the other driver did not proximately cause Forrest's damages, thereby placing fault and damages at issue. Each of the 13 court-ordered deposition topics concerns Liberty's defensive theories regarding fault for the accident and Forrest's damages and therefore are relevant to the underlying car wreck case. *See id.* at 856.

Rule 192.3 provides that "[a] person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts." Tex. R. Civ. P. 192.3(c). Rule 199.1(a) permits the deposition of any person or entity without any limitation that the proposed deponent have personal knowledge of the facts. *In re Jinsun LLC*, No. 14-15-00568-CV, 2015 WL 5092176, at *4 (Tex. App.—Houston [14th Dist.] Aug. 27, 2015, orig. proceeding) (mem. op). Forrest was not required to show that a Liberty corporate representative has personal knowledge of any facts relevant to the disputed issues on liability or damages.

Discovery may be limited if it is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive. Tex. R. Civ. P. 192.4(a). The party resisting discovery cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing, but must produce some evidence supporting its request for

a protective order. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding).

In this case, the parties have attached documents to the petition and the response to the petition that were not attached as exhibits to Forrest's motion to compel or Liberty's opposition to the motion to compel or even to Liberty's motion to sever and abate. There is no indication that these documents, which include the policy, the police report, Liberty's objections and answers to Forrest's first set of interrogatories, Liberty's objections and answers to Forrest's first requests for admission, and Liberty's objections and responses to Forrest's first request for production, were filed with the trial court or considered by the trial court when it ruled on Forrest's motion to compel.

In a mandamus proceeding, the appellate court must focus on the record that was before the trial court. *See In re Taylor*, 113 S.W.3d 385, 392 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding). The reviewing court will not consider exhibits that were not part of the trial court record at the time the court heard and ruled on the motion that is the subject of the mandamus proceeding. *See id.* Therefore, we will not consider the policy, the police report, Liberty's objections and answers to Forrest's first set of interrogatories, Liberty's objections and answers to Forrest's first requests for admission, or Liberty's objections and responses to Forrest's first request for production.

This record does not reflect that Liberty produced any evidence that Forrest could obtain the information from other sources that would be more convenient, less burdensome, or less expensive than having its corporate representative deposed. *See In re Garcia*, No. 04-07-00173-CV, 2007 WL 1481897, at *2 (Tex. App.—San Antonio May 23, 2007, orig. proceeding) (mem. op.) (noting that insurance company offered no evidence to substantiate its claim that insured could obtain discovery

sought from less intrusive, less burdensome process); *cf. Jinsun LLC*, 2015 WL 5092176, *5 (holding that trial court abused its discretion by granting motion to quash where real party in interest did not assert in trial court that other sources would be more convenient, less burdensome, or less expensive than taking deposition). Thus, Liberty's conclusory allegations are not sufficient to support its position that taking the deposition of its corporate representative would be unduly burdensome.

Moreover, as addressed above, to recover UM/UIM benefits, Forrest has the burden to prove (1) that she has UIM coverage; (2) that the other driver negligently caused the accident that resulted in the covered damages; (3) the amount of her damages; and (4) that the other driver's insurance coverage is deficient. *See Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d at 220; *Progressive Cty. Mut. Ins. Co.*, 439 S.W.3d at 427. Liberty stipulated that the policy it issued to Forrest provides UIM coverage. However, Liberty did not stipulate that the other driver's negligence caused Forrest's damages, the amount of Forrest's damages, or that the other driver had deficient coverage.

Liberty's defensive theories include that the other driver did not proximately cause Forrest's damages. Liberty is a party to this case and Forrest is entitled to discovery related to her claims and Liberty's defensive theories to her claim regarding fault for the accident and Forrest's damages. *See In re Luna*, No. 13-16-00467-CV, 2016 WL 6576879, at *8 (Tex. App.—Corpus Christi Nov. 7, 2016, orig. proceeding) (mem. op.). On this record, without deposing Liberty's corporate representative, Forrest cannot discover the nature and extent of Liberty's defenses concerning fault and damages.

Based on the record before the trial court when it ruled on the motion to compel, we conclude that the trial court did not abuse its discretion by ordering

Liberty to produce a representative for deposition on the topics of liability and damages in the underlying car accident case.

Liberty has not established that it is entitled to mandamus relief. Accordingly, we deny Liberty's petition for writ of mandamus.

/s/ Jerry Zimmerer
Justice

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