



NUMBER 13-20-00141-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE MARIO A. DAVILA

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Contreras¹**

Relator Mario A. Davila has filed a petition for writ of mandamus seeking to compel the trial court to vacate its orders denying Davila's request to conduct discovery. The underlying matter is a bill of review proceeding filed by the real party in interest, Easy Way Leisure Corporation d/b/a Easy Way Products Co. (Easy Way), attacking a default judgment rendered in favor of Davila for \$500,000. Easy Way has filed a traditional

¹ See TEX. R. APP. P. 52.8(d) ("When granting relief, the court must hand down an opinion as in any other case," but when "denying relief, the court may hand down an opinion but is not required to do so."); see also *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

motion for summary judgment against Davila contending that it was never served with process. We deny the petition for writ of mandamus.

In 2007, the Texas Supreme Court stated that appellate courts “generally do not review orders refusing to compel discovery.” *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding). However, in cases in which discovery is improperly denied, a party will not have an adequate remedy by appeal: (1) when the appellate court would not be able to cure the trial court’s discovery error, such as when privileged information or trade secrets would be revealed or production of patently irrelevant or duplicative documents imposing a disproportionate burden on the producing party is ordered; (2) where the party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error; and (3) where the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record or the trial court, after proper request, refuses to make it part of the record. See *id.*; *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 843–44 (Tex. 1992) (orig. proceeding).

With regard to a party’s ability to present a viable claim or defense, in *Walker*, the Texas Supreme Court explained that “the relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources.” 827 S.W.2d at 843. Generally, this has meant “a denial of discovery going to the heart of a party’s case” because that party is then prevented “from developing essential elements” of their claim or defense. *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (orig. proceeding); *In re Bertucci*, 590 S.W.3d 113, 118 (Tex. App.—Austin 2019, orig. proceeding). When missing discovery cannot be made

part of the record, the appellate court must carefully consider all relevant circumstances, such as the claims and defenses asserted, the type of discovery sought, what it is intended to prove, and the presence or lack of other discovery, to determine whether mandamus is appropriate. *Walker*, 827 S.W.2d at 843; *In re FEDD Wireless LLC*, 567 S.W.3d 470, 480 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding); *In re GreCon, Inc.*, 542 S.W.3d 774, 787 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 875 (Tex. App.—Corpus Christi—Edinburg 2000, orig. proceeding).

We apply the foregoing principles to determine whether mandamus relief is warranted for the trial court's denial of discovery. See, e.g., *In re Ten Hagen Excavating, Inc.*, 435 S.W.3d 859, 863–64 (Tex. App.—Dallas 2014, orig. proceeding); *In re Galveston Cent. Appraisal Dist.*, 252 S.W.3d 904, 906 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding); *General Electric Co. v. Salinas*, 861 S.W.2d 20 (Tex. App.—Corpus Christi—Edinburg 1993, orig. proceeding). We review a trial court's discovery rulings, including orders prohibiting discovery, under an abuse of discretion standard. *In re A.J.L.*, 108 S.W.3d 414, 423 (Tex. App.—Fort Worth 2003, pet. denied); *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 787 (Tex. App.—Dallas 2002, pet. denied); *Helfand v. Coane*, 12 S.W.3d 152, 155 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *K.C. Roofing Co., Inc. v. Abundis*, 940 S.W.2d 375, 379 (Tex. App.—San Antonio 1997, writ denied). A trial court's order freezing discovery is generally an error. *New Talk, Inc. v. Sw. Bell Tel. Co.*, 520 S.W.3d 637, 651 (Tex. App.—Fort Worth 2017, no pet.); *Helfand*, 12 S.W.3d at 155; *K.C. Roofing*, 940 S.W.2d at 379. Nevertheless, even if the trial court abuses its discretion in

freezing discovery, the complaining party must still show harm. *New Talk, Inc.*, 520 S.W.3d at 637; *K.C. Roofing*, 940 S.W.2d at 379.

The Court, having examined and fully considered relator's petition for writ of mandamus, the response, the reply, and the applicable law, is of the opinion that Davila has not met his burden to obtain relief. See *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163–64 (Tex. 2015); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 812 (Tex. 2012); *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam); *Nussbaum v. Builders Bank*, 478 S.W.3d 104, 108–09 (Tex. App.—Fort Worth 2015, pet. denied). Accordingly, we lift the stay previously imposed in this case and we deny Davila's petition for writ of mandamus.

As a final matter, Easy Way has filed a motion to dismiss the petition for writ of mandamus and for sanctions under Texas Rule of Appellate Procedure 52.11. See TEX. R. APP. P. 52.11. Easy Way alleges that Davila's petition for writ of mandamus is "clearly groundless, procedurally defective, and replete with material misstatements of law and fact." We disagree with Easy Way's characterization of the petition for writ of mandamus and we deny its motion to dismiss and for sanctions.

All relief requested in this original proceeding is denied.

DORI CONTRERAS
Chief Justice

Delivered and filed the
28th day of May, 2020.